

# Cease and Desist/Cease or Resist? Civil Suits and Sexual Violence

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## Abstract

Within the last several years, there is evidence to suggest that there is a growing trend of men accused of sexual violence initiating civil legal action against their accusers along with anyone who attempts to hold them to account for their actions. This dissertation critically examines these lawsuits within a critical feminist socio-legal framework. I place these lawsuits within a larger social and historical context to explore the inherently gendered underpinnings of defamation law along with anti-feminist backlash to attempts to hold men accountable for sexual violence. The dissertation is based on interviews with seventeen people that I refer to as “silence breakers” who have been sued or threatened with legal action by men accused of sexual violence or organizations that have failed to respond to reports or disclosures of sexual violence. I use their narratives to examine the individual consequences of being sued or threatened with a lawsuit for speech relating to sexual violence. I also rely on media reports of lawsuits initiated by men accused of sexual violence and case law to demonstrate the scope of the issue which highlights both the individual and societal consequences of these lawsuits.

I argue that these lawsuits ought to be recognized as Strategic Lawsuits Against Public Participation (SLAPPs). I argue that these lawsuits are SLAPPs because even the threat of a lawsuit is enough to silence sexual violence discourse and discourage people from reporting sexual violence. I establish that sexual violence discourse is a matter of public interest and therefore all speech about sexual violence including reports and disclosures should be protected from silencing lawsuits. I argue that if these lawsuits continue, we risk witnessing the re-privatization of sexual violence which will disproportionately impact women because they are statistically more likely to experience sexual violence.

## **Dedication**

For the silence breakers, the silenced, and the silent

## Acknowledgements

First and foremost, I am indebted to the silence breakers who invited me into their lives. The stakes were high and I recognize the risk all of you took to speak to me. I appreciate all of you. I can only hope that this dissertation is able to achieve the change all of you envisioned when you agreed to speak to me.

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## Preface

“. . . [B]eing sued nonetheless felt to me like a form of violence, a way for one person to strike at another by miring them in legal process.” (Lau, 2001, p. 163)

In 2017, within a few weeks of each other, two women living in two different provinces, who did not know one another, told me that they were being sued for defamation by the men they had reported for sexual violence.<sup>1</sup> In both cases, the men were their superiors in the workplace. One woman reported the sexual violence to the police, the other to human resources. The reports resulted in both women being sued. They told me that being sued instilled in them so much fear that they started to self-censor to the point where they avoided talking about sexual violence at all, even in general terms. The fear of talking about what happened to them compounded the social isolation, shame, and trauma caused by the sexual violence they'd experienced. In addition, they were stressed about the significant financial burden of the lawsuit, and the possibility that they may be forced to pay the men who violated them thousands of dollars if unsuccessful at defending themselves against the lawsuit.

Both women were in the early stages of their respective careers, and had little financial security. Their status as professionals was compromised by both the reporting the sexual violence and the subsequent lawsuit. They both lost professional opportunities as others in their peer network either sided with the man who abused them or opted to not get involved, ceasing contact. One of the women lost her job while the other felt she was no longer welcome in her

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<sup>1</sup> Throughout this dissertation I use the World Health Organization's (2002) definition of sexual violence, which is “any sexual act, attempt to obtain a sexual act, any unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim in any setting, including but not limited to the home and work.” I use the term “sexual violence” because it is broad and encompasses a wider range of behaviour in comparison to terms such as “sexual assault” or “sexual harassment.” At times, I use those terms, for example, when citing legal discourse or statistics with narrow parameters.

workplace and eventually quit. The emotional distress of the situation coupled with the labour involved in putting together a defence made it challenging to look for new employment. The women told me about their experiences out of desperation: they were well aware that speaking about what happened could result in additional legal ramifications for them, but they also needed to give voice to what they had experienced, including the harm caused by the legal action taken against them.

These women's stories took me aback. I had by this point spent nearly a decade working as an advocate for women involved in the legal system, but I had no idea that it was possible to be sued for reporting sexual violence. Until that moment, I believed that by making a formal report of sexual violence, if you believed it to be true, you were protected from being sued. I had even encouraged women to make a formal report of sexual violence as a result of my own misunderstanding of the truth defence. Shortly after hearing these two shockingly similar stories, I asked Joanna Birenbaum, a civil lawyer specializing in sexual violence, if she was aware that men were suing the women who had reported them for sexual violence. She told me that she was currently representing a number of clients being sued for disclosing and reporting sexual violence.<sup>2</sup> In that moment, I recognized that there was a significant lack of awareness about these lawsuits within both the anti-violence community and feminist academic literature. This is when I decided to focus my dissertation on lawsuits against silence breakers.<sup>3</sup>

On October 29, 2018, the research became personal. That morning, I dropped off a hard copy of this dissertation's proposal to the Department of Sociology at York University. I then

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<sup>2</sup> I distinguish between those who *report* sexual violence and those who *disclose*. This distinction will be taken up in the Introduction.

<sup>3</sup> I use the term "silence breaker" throughout the dissertation to refer to both people who have experienced sexual violence and bystanders who have worked to disrupt the silence surrounding sexual violence. I will explore the use of this term in the Introduction.

went to listen to the lecture for the course in which I worked as a Teaching Assistant. As I waited for the course to begin, I received an unexpected phone call from Joanna Birenbaum. It was out of the ordinary for her to call me like that, and panic started to set in. I picked up the phone, worried. “Mandi,” Joanna said, “did you see [Christie] Blatchford’s column in the *National Post* today? You’re being sued by Steven Galloway.” Shocked by what I was hearing, I replied, “But, I haven’t been served. What did I even do?” I had never met Steven Galloway, an author and Creative Writing professor at the University of British Columbia (UBC). Joanna was heading into a meeting and had to get off the phone abruptly. I was left with many questions all racing through my mind at once. I went back into the classroom to let professor Amber Gazso know that I just found out I was being sued and had to figure out what I had done.

While it was shocking to be a named party, the lawsuit wasn’t completely unexpected and requires some contextualization. In November 2015, UBC made a public announcement that Galloway had been suspended pending an investigation into “serious allegations” (Canadian Press, 2015; Global News, 2015; Lederman, 2015). I was well aware that the allegations were for sexual violence, including rape and sexual harassment. The woman who’d reported Galloway had contacted me prior to doing so because she was aware that I had experience navigating university sexual assault policies and was looking for information about what to expect if she decided to report. When she first reached out to me in the summer of 2015, I encouraged her to make a formal report, falsely believing that a report to the university would be protected from a lawsuit. Following the investigation, UBC fired Galloway without severance pay citing a “breach of trust” (Sherlock, 2016). Galloway filed a grievance against UBC and was awarded \$167,000 in damages for statements by UBC that had violated his privacy rights. The arbitrator decided that said statements had caused him “irreparable reputational damage and financial loss”

(Dundas, 2018). On November 14, 2016, more than 80 writers from across Canada—including Margaret Atwood, Joseph Boyden, Madeleine Thien, and Michael Ondaatje—published an open letter on a website titled “UBC Accountable,” employing the accompanying Twitter hashtag, #UBCAccountable, to show their support for Galloway and condemning how he was treated by UBC (Lederman, 2016). Atwood also released a statement about why she signed the letter, comparing the Galloway investigation to the Salem Witch Trials (Kane, 2016). This series of events prompted widespread (and often hostile) debate on Twitter, where I contributed. I also wrote an op-ed about Atwood’s position (Gray, 2018); however, I used caution when tweeting about the case for two reasons. First and foremost, the woman who reported Galloway for sexual violence, referred to in the media as the Main Complainant (referred to in this dissertation as A.B.), was a friend of mine even prior to the report being made public. As such, I always made sure to choose my words carefully, not wanting to reveal any personal information about her as she never intended for the case to be in the media. Second, beginning the research for my dissertation proposal, I had learned how easy it is to initiate a defamation lawsuit against an individual, especially if the comments rely on second-hand information. These two considerations ensured that I always chose my words carefully when tweeting about the Galloway case and the #UBCAccountable hashtag.

In this moment, I had no idea what tweets of mine I was being sued for. I searched for the *National Post* article announcing the lawsuit against me and, as it turned out, twenty others as well. I was confused because I wasn’t asked for comment or even given warning that the article was being published. Blatchford had also used the lawsuit as justification to name A.B., despite A.B.’s desire to remain anonymous. I worried about A.B. and how she would handle the news that she had been publicly outed in national news. I wondered if the internet trolls who had been

viciously harassing me would now harass her in similar ways, such as seeking out her employer and sending letters demanding that she be fired. By now, I was used to being the target of digital vitriol, having gone through a high-profile sexual assault case that lasted from 2015 to 2017. After the lawsuit was announced by Blatchford, social media personality Jon Kay posted on Twitter that my being named in the lawsuit was just another indication that I was attracted to false allegations of sexual violence. I knew that A.B. would be subjected to similar attacks and worried as to what extent they would go to publicly humiliate her, and the emotional toll it would take.

Blatchford's article stated that I was being sued for allegedly tweeting "#galloway...rapists should be held accountable," and that I had posted a photo of myself at the opening night of A.B.'s solo art exhibit about campus sexual violence in New York City that past summer. I was shocked that I could even be sued for posting a photo of myself on Twitter. I was stunned that the *National Post* was able to publish this article without my comment or fact checking the tweet, which was taken grossly out of context and misrepresented. In fact, I was responding to a tweet Galloway himself had written about rape culture on campus. Blatchford also named one of my friends, anti-violence activist Glynnis Kirchmeier, as another defendant on the lawsuit for a single tweet she had written about the case. *Happy Birthday to Glynnis!* I thought then, remembering it was her birthday. I realized I should probably text her to see if she'd heard the news. As it happened, she had just arrived at work and had not yet looked at Twitter, so she was completely unaware of the lawsuit against us. After we got off the phone, I logged onto Twitter and scrolled to see if I could figure out what was happening. I was not sent a copy of the Statement of Claim but was surprised to learn that somehow strangers on the internet had already obtained it. It would take a few hours before I learned that I was being sued for

seven separate tweets. Since the lawsuit is ongoing, I cannot write what I am being sued for as it could be regarded by the courts as re-producing defamatory remarks. But to give you a broad description of the tweets, in addition to the photo, I am also being sued for posting a link to a fundraiser set up to support A.B. and help pay her legal fees; for my use of the #UBCAccountable and #Galloway hashtag; and for a tweet referencing the way the public has treated the complainants during and after the investigation into Galloway's conduct.

For weeks I couldn't sleep, waking up in the middle of the night in a state of panic, stressed about how I would pay for a lawyer—or even worse, if I was ordered to pay Galloway money I didn't have. I worried about how the lawsuit would impact my PhD research, especially after one lawyer I spoke to sidelined all of my concerns, telling me my research was of less importance than defending myself in this lawsuit. (Needless to say, I did not retain her.) I spoke to another lawyer who told me a defamation lawsuit is a gruesome battle, and to get ready to go to war. I was struggling to find a lawyer willing to represent me. I was not sure when, or if, I would be formally served with the legal notification of the lawsuit. I was set to receive an award at a fancy gala; a friend, who is a lawyer, told me Galloway might use such a public event as an opportunity to serve me, to humiliate me. I was on edge the entire night of the gala, waiting to see if someone would pop up from behind me brandishing a manila envelope.

In November 2018, after weeks of waiting and wondering if and when it would happen, I was formally served with the lawsuit. It was a typical Wednesday morning, and I had just arrived at the hallway outside the classroom where I teach. My students, all women, were standing outside the classroom waiting for the tutorial to begin. Among them was a man I had never seen before. He was quietly asking a couple of the students, “Can you point out Mandi Gray?” I knew what was about to happen, given the large envelope in his hands. “Are you here to serve me?” I

asked. “Are you Mandi Gray?” he responded as he handed me the envelope. My students were curious about the odd interaction and started asking what had happened. I explained that I was being sued, and that what they had just witnessed was me being served with the legal documents. Trying to make light of the situation, I asked one of the students to take a photo of me with the envelope so I could post it on social media—an attempt to signal to everyone who helped make this lawsuit happen that I would not be intimidated into silence. Years later, his lawyer would bring up this photo during cross-examination in an attempt to demonstrate that I did not take the lawsuit seriously.

I tried to not let this ongoing lawsuit impact the writing of my dissertation, but if I am being completely honest, I did self-censor as I wrote. This is not only because of the Galloway lawsuit but because of all the lawsuits I touch on in this dissertation. I worried, and continue to be fearful, about the possibility of another lawsuit that I know I could not financially or emotionally survive. I am also well aware of the professional ramifications of being a defendant in a lawsuit.

I have shared this personal story first and foremost because I want to share the lived realities of being sued. Secondly, I want to be fully transparent. In this dissertation, I do at times reference the Galloway lawsuit, and I want to be upfront that I have a vested interest in how it resolves. Knowing this information, and that I have attempted to leave myself out of the findings as much as possible so as to focus on the narratives of the research participants, it is up to the reader to interpret my analysis of the lawsuit, and in whatever way they see fit.

## Introduction

In October 2017, the hashtag #MeToo<sup>4</sup> brought sexual violence to the forefront of global discussion. The *New Yorker* and the *New York Times* printed numerous allegations of sexual violence against Hollywood mogul Harvey Weinstein (Feuer, 2020). Shortly after the allegations were made public, actress Alyssa Milano posted on social media encouraging other women to write “Me Too” if they had experienced sexual violence. In the following weeks, the hashtag was used more than 12 million times by people sharing their experiences of sexual violence and/or to bring attention to the pervasive issue of sexual violence globally (Brockes, 2018). Between October 16, 2017, and May 1, 2018, the #MeToo hashtag appeared an average of 61,911 times per day on Twitter (Anderson et al., 2018). The increase in digital disclosures of sexual violence also translated into an increase of 25% in reports of sexual assault to Canadian police departments (Statistics Canada, 2018). Sexual assault and rape crisis centres across Canada also reported seeing a significant increase in calls requesting services, many of them reporting two to five times more requests than in previous years (CBC News, 2018; Global News, 2018). While the movement was heralded as a sign of progress for women internationally, the people encouraged by the movement to come forward about experiencing sexual violence have also experienced backlash. One mechanism of this backlash is the use of defamation lawsuits to silence and intimidate those who come forward with allegations of sexual violence. Indeed, so common is this becoming that in 2020, the *New York Times* declared that defamation lawsuits were the new legal battleground to litigate sexual violence cases, stating “women and men on both sides of #MeToo are embracing the centuries-old tool of defamation lawsuits, opening an alternative battlefield for accusations of sexual misconduct” (Jacobs, 2020). According to the

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<sup>4</sup> In 2006, Tarana Burke coined the phrase “Me Too” on the now-defunct social media platform Myspace, in reference to her work with young women of colour who had experienced sexual violence (Harris, 2018).



*New York Times*, plaintiffs are not only using defamation law for the typical purpose of dissuading speech that results in reputational damage “but also as a tool to enlist the courts to endorse their version of disputed events” (Jacobs, 2020).

Since the beginning of the #MeToo movement, a number of public figures who have been accused of gendered violence have sued their accusers for defamation, including Hollywood producer Brett Ratner (Miller, 2017), Oxford professor Tariq Ramadan (Chrisafis, 2017), businessman Robert Herjavec (Bitette, 2017), CTV reporter Paul Bliss (Canadian Press, 2019a), author Steven Galloway (Theodore, 2018), poet Jeremy Dodds (Brean, 2018), writer Stephen Elliott (Jacobs, 2020), and pop star Justin Bieber (Thomas Reuters, 2020). There are also plenty of lesser-known cases moving through the legal system in Canada and the United States. The Time’s Up Legal Defense Fund, initiated following the #MeToo movement to support American women who have experienced workplace sexualized violence, has reported that 33 of the 193 cases they are supporting involve workers who came forward about sexual harassment in the workplace and were then sued for defamation (Jacobs, 2020).

This is not only an American problem. A number of Canadian cases have made the news in recent years. For example, after the #MeToo movement gained traction, Bridget Brown, a freelance producer who resides in Calgary, wrote a blog about her assault titled “#MeToo in Canadian Broadcasting,” but chose not to name the man responsible. As a result of this post, CTV investigated the allegations, which Brown participated in on the assumption that she remain anonymous (CBC News Calgary, 2018). While Brown agreed to participate anonymously in the investigation, the news outlet announced the suspension of Paul Bliss and publicly named Brown as the accuser. Bliss was later terminated from his position and subsequently initiated a 7.5 million-dollar lawsuit against CTV, Brown, and others not identified in the news story (Canadian

Press, 2019a). Such lawsuits are concerning, particularly because they signal to others who have experienced sexual violence that they may be sued if the man they accuse faces repercussions, as demonstrated by the lawsuits against Brown and many other women who will soon be introduced.

This dissertation shares the stories of seventeen people, who I refer to as “silence breakers,” who have been sued or threatened with legal action by men accused of sexual violence or organizations accused of failing to respond to reports or disclosures of sexual violence. I examine the emerging legal battle field of defamation law as a strategic maneuver for men accused of sexual violence. All of the lawsuits examined in this dissertation are for defamation. Defamation is a tort intended to compensate a person or corporation harmed by false statements that tarnish their reputation, dignity, property, or wealth (Osborne, 2015). In Canada, there is a low threshold for what constitutes a defamatory statement: as long as a communication “would cause the plaintiff to lose respect or esteem in the eyes of others,” that communication can be cause for a defamation lawsuit (Osborne, 2015, p. 427). Therefore, the law of defamation often works in favour of the plaintiff—the person who initiated the lawsuit—because it puts the onus on the defendant to legitimize their statements (Osborne, 2015, p.427).

In many ways, a defamation lawsuit is the perfect tool for men accused of sexual violence. Filing a lawsuit allows men accused of sexual violence to re-cast the narrative about responsibility and blame, and to present themselves as victims of false allegations. It is then up to the defendant to prove that the statements about sexual violence are true. Throughout this dissertation, I rely on Jennifer Freyd’s (1997) concept of “DARVO,” or Deny, Attack, and Reverse Victim and Offender to understand the motivation of initiating a defamation lawsuit. This concept captures the disingenuous ways that abusive men make use of legal mechanisms to

re-present themselves as victims while undermining the credibility of the women who have called them out for their abusive behaviour. Freyd argues that abusers will often threaten defamation lawsuits and make false accusations against the individual who confronted them to further situate themselves as the victims of an unfair attack. The abuser will do what they can to create the impression that they are the real victim, and that the victim or concerned observer is in fact the offender. The more actions that are taken to hold the offender accountable, the more victimhood the abuser will claim (Freyd, 1997). Civil litigation and the threat of lawsuit are used as mechanisms to deny and attack silence breakers while the men accused of sexual violence are able to shift the narrative away from allegations made against them, re-directing attention to their victimhood caused by perceived “false allegations”.

When someone is accused of defamation, the first thing most lawyers will advise is that they refrain from repeating the allegedly defamatory statements, and to refrain from speaking about the legal proceedings until they are concluded, a process which can take years. Abusive men can strategically wield a lawsuit as a tool of silencing. As demonstrated throughout this dissertation, even the threat of a lawsuit is enough to remove allegations of sexual violence from the public domain, chilling speech both at an individual level—detering those who have experienced sexual violence from speaking up—and at a systemic level by silencing media reports and public discourse on allegations and sexual violence more generally. For this reason, I argue that these lawsuits must be regarded as Strategic Lawsuits Against Public Participation (SLAPPs), a term coined by George Canan and Penelope Pring (1988) referring to someone who initiates a lawsuit to attempt “to use civil tort action to stifle political expression” (p. 506). SLAPPs are not necessarily initiated with the intention of testing a case at trial but, rather, to entangle the defendant in a long and expensive legal process while simultaneously keeping them

and others quiet about the issue (Sheldrick, 2014). At face value, these lawsuits look like ordinary civil claims, including: defamation, malicious prosecution, abuse of process, conspiracy, and business torts. However, SLAPPs are distinguished by their characterization as an attempt to stifle political criticism (Sheldrick, 2014). Growing concern about SLAPPs in Canada led to the provinces of Ontario, BC, and Québec passing legislation intended to discourage SLAPPs and allow the courts to dismiss suspected SLAPPs quicker (Canadian Civil Liberties Association, n.d.). In 2020, the Supreme Court of Canada (SCC) provided guidance to the lower courts in Ontario and BC about their interpretation of the legislation, which will be discussed in Chapter Five. To date, however, the “public interest” that is protected by the legislation makes no explicit reference to discourses on gendered violence. To date, only a handful of cases have dealt with gendered violence, therefore it is too soon to draw conclusions about the usefulness of the legislation for silence breakers; however, preliminary observations about the possibilities will be explored later in this dissertation.

I argue that lawsuits initiated by men accused of sexual violence are SLAPPs because, as I will demonstrate throughout this dissertation, even the threat of a lawsuit is enough to silence sexual violence discourse. I establish that sexual violence discourse is a matter of public interest and therefore all speech about sexual violence, including reports and disclosures, should be protected. In their work as lawyers in the United States, Johnson and Bonsignore (2018) have found that lawsuits are becoming “a common weapon for perpetrators to retaliate against survivors.” They worry that as lawsuits become more frequent, the possibility of litigation may deter future survivors from reporting sexual violence. Beyond deterring formal reporting, I argue that such lawsuits will also chill public discourse about sexual violence. Taken together, the chilling of public dialogue and a fear of reporting risk the re-privatization of sexual violence.

This chilling effect will disproportionately impact women, as they are statistically more likely to experience sexual violence, while protecting men, who are more likely to be perpetrators of sexual violence (Cotter & Savage, 2019). Ultimately, redressing gendered violence must outweigh the private reputational interests of men accused of sexual violence.

Since the 1980s, much of the Canadian feminist research on sexual violence has focused primarily on criminal legal responses to sexual violence (Comack & Balfour, 2004; Craig, 2018; H. Johnson, 2012, 2017; Smart, 1989) and workplace sexual harassment (Backhouse, 2012). More recently, there has been growing interest in campus sexual violence and post-secondary responses (and lack thereof) (Gray et al., 2019; Gray & Pin, 2017; Quinlan et al., 2017). This body of research has consistently demonstrated that the failure to respond to sexual violence is replicated across various social institutions, and negatively impacts people—statistically more likely to be women—who experience sexual violence. For example, women who report sexual violence at any of the above-named social institutions demonstrate the experience of having their reports dismissed or minimized. Alternately, a recent investigation by *Globe and Mail* reporter Robyn Doolittle found that police departments across Canada were dismissing sexual assault reports at far higher rates than any other crime (Doolittle, 2017). The myth of false sexual violence allegations as common occurrence has been better documented within the criminal legal system. I will demonstrate that this same deeply held belief is also what fuels the civil lawsuits I examine here.

#### *The Myth of False Allegations as Common Occurrence*

As the #MeToo movement gained traction, a loud anti-feminist backlash began to take over mainstream media with some arguing that fabricated allegations were unfairly targeting innocent men. For example, the counter-hashtag #HimToo rose to prominence after a woman tweeted that the #MeToo movement had resulted in her son no longer going on dates with

women alone “due to the current climate of false sexual accusations by radical feminists with an axe to grind” (North, 2018). The #HimToo hashtag re-circulated after Dr. Christine Blasey Ford came forward with allegations of sexual violence against then-US Supreme Court nominee Brett Kavanaugh (North, 2018). Conservative media pundits, politicians, and US President Donald Trump expressed concern that men’s lives were being unfairly destroyed by false allegations of sexual violence (North, 2018). Similar concerns about false allegations have also been raised in Canadian media over the last several years, in response to a number of high-profile cases of sexual violence (See: Blatchford, 2018; B. Kay, 2017; J. Kay, 2018). Such criticisms of the #MeToo movement draw on and perpetuate the harmful rape myth that false allegations are a common occurrence, and that addressing false allegations should take priority over addressing the pervasive issue of gendered violence.

A significant challenge in countering claims that false allegations are common is that there is no consistent definition for what constitutes a false allegation. According to Lisak (2010) the most comprehensive and accurate definition of a false allegation comes from the International Association of Chiefs of Police (IACP):

The determination that a report of sexual assault is false can be made only if the evidence establishes that no crime was committed or attempted. *This determination can be made only after a thorough investigation.* This should not be confused with an investigation that fails to prove a sexual assault occurred. In that case the investigation would be labeled unsubstantiated. *The determination that a report is false must be supported by evidence that the assault did not happen.* (IACP, 2005, pp. 12–13, italics in original)

Yet, despite the clarity in this definition, which helpfully distinguishes between a false accusation and the absence of evidence to substantiate a claim of sexual violence, in practice this

line is often blurred. It is not uncommon for media and popular discourses to conflate acquittals in the courts or cases unfounded by police with false allegations. This kind of reasoning assumes that when someone is acquitted, it means that the woman who reported deliberately made a false allegation of sexual violence. An acquittal cannot be conflated with a false allegation of sexual violence. Yet, as law professor and legal historian Constance Backhouse argues, this kind of logic is flawed by the assumption of a false equivalency:

Not guilty does not mean you are innocent. It means that the Crown could not prove it beyond a reasonable doubt and as we know in a sexist legal system, they are quite likely guilty but they cannot prove it to a jury and judge under a sexist interpretation of the *Criminal Code*. Here, to walk around and say “she lied.” It does not follow. It is not the same thing. [. . .] It seems to me that we should be careful about allowing [the accused] to say “I’m innocent.” (Interview with Constance Backhouse, 2019).

The popular conclusion that an acquittal on a charge of sexual assault is proof that women lie and not proof of the criminal justice system’s fundamentally sexist flaws becomes part of the self-perpetuating cycle that keeps the rape myth in currency. The corollary to this widespread myth is that men are the victims of women’s mendacity. By stressing women’s capacity for lying, accusations of sexual violence become more about men’s reputations being too easily destroyed and less about the bodily and sexual autonomy of women.

The belief that people frequently lie about sexual violence is deeply embedded within all facets of society. The frequency with which police dismiss claims of sexual assault recently came to the public’s attention after Robyn Doolittle’s (2017) investigation for the *Globe and Mail* found that police across the country are declaring reports of sexual assault as unfounded at higher rates than any other crime. The Canadian Centre for Justice Statistics Policing Services

Program states that an “incident is ‘unfounded’ if it has been determined that no violations of the law took place at that time or location” (2006, p. 27). Doolittle’s research found that nearly one in five reports (19.39%) of sexual assault are deemed unfounded in Canada. This is nearly double the unfounded rate for physical assault (10.84%) and dramatically higher than the rates for all other crimes (Doolittle, 2017). Doolittle also found that, when unfounded cases are considered part of the total count of sexual assault charges reported, only 34% of such reports result in charges being laid (Doolittle, 2017). This staggering rate of dismissal by police, acting as gatekeepers to the criminal legal system, is widely condemned by feminist researchers who suggest that police negligence and discriminatory attitudes about women result in a large number of cases being “wrongfully unfounded” (Crew, 2012, p. 214). Nonetheless, for anti-feminist critics, the high rate of “unfounding” offers “proof” that women make sexual violence allegations all too easily.

The systemic dismissal of reports of sexual assault alongside the deeply embedded myth that women frequently lie makes them especially vulnerable to being sued for defamation. Backhouse expanded on the connection between the long-standing assumption in society that women are prone to lying about sexual violence and the ease of initiating a defamation claim:

Every time a woman speaks about sexual coercion or sexual assault, the cultural response is women lie. I would say 99.99% that is the initial reaction when a woman speaks. Consequently, if you have a culture that is so at odds with reality. . . . To see almost a 100% pushback that “women are lying, you’re lying, women lie, women who speak about this lie.” If you latch this onto the ease of bringing a defamation action when we have a culture that believe all women lie—they have the wind at their back. Any woman who makes those comments about a man, can be labelled a liar, a defamation suit is just



automatic. A [defamation suit] is a knee jerk reaction in a culture that does not believe women. (Interview with Constance Backhouse, 2019)

Despite decades of feminist intervention and plenty of evidence to suggest otherwise, there is still a deeply entrenched belief that false sexual violence allegations are a serious concern impacting men.

Societal beliefs about women who experience sexual violence also discourage women from reporting. Researchers have found that the low reporting of sexual assault is in part attributed to the fear of being disbelieved (Bachman, 1998). The most recent findings by Statistics Canada showed that only 5% of women who reported experiencing sexual assault within the previous year reported it to police (Conroy & Savage, 2019). In comparison, 26% of women who were physically assaulted reported the assault to the police (Conroy & Savage, 2019). In addition to the fear of not being believed by police or other actors in the criminal justice system, cited reasons for not reporting include fear of retaliation, shame and embarrassment, and a belief that the experience was minor and therefore not worthy of reporting (Bachman, 1998). The general reticence of those who have experienced sexual violence to formally report to the police is, ironically, yet another reason that women become vulnerable to defamation lawsuits.

The decision not to report to the police becomes used as “evidence” that the sexual violence did not actually occur and that she must be lying. This is despite the fact that it is well known that there are numerous barriers to reporting to the police and a host of reasons why someone may choose to pursue another avenue of justice seeking. Sensing that they will be failed by the legal system, survivors of sexual violence are increasingly seeking informal means of justice instead (Powell, 2015). This can involve a host of activities including engaging in justice

that is transformative (brown, 2020; Mingus, 2019; Thom, 2019), restorative (Cameron, 2006; McGlynn et al., 2012), or sought through technologies such as social media (Powell, 2015). As will be demonstrated throughout this dissertation, many of the interviewees sought informal justice by using alternate means of disclosing their experiences of sexual violence. Some turned to alternate, informal means of communication after their formal report of sexual violence was dismissed or minimized by authorities; others were already well aware of the realities of the legal system for those who report sexual violence, and made active choices to avoid becoming entangled in what they saw as an inherently flawed process. But whatever their reasons, their use of alternate routes to justice is precisely what made them vulnerable to being sued. Indeed, even this act of agency is re-narrated in legal proceedings to shift the blame to women through the perpetuation of the myth that if sexual violence actually occurred they would have reported it to the police. And yet, as will be demonstrated in Chapter Four, reporting sexual assault to the police does not protect the silence breaker from being sued or threatened with a lawsuit. To date, this is an unexplored link in feminist legal and socio-legal critiques bridging the civil and criminal justice system treatment of sexual violence and highlighting women's vulnerability to the DARVO ethos in the legal system.

This dissertation illuminates the weaponization of lawsuits by men accused of abusive behaviours to punish and humiliate silence breakers while simultaneously attempting to vindicate themselves and their reputations. The research findings demonstrate a contradiction within the current socio-political movement that emerged alongside such high-profile sexual violence cases against Jian Ghomeshi, Harvey Weinstein, and Bill Cosby, which encouraged people to come forward and report incidents of sexual violence. A few years have passed since the beginning of the #MeToo movement, and the potential ramifications for reporting or disclosing sexual

violence are starting to come out within public discourse. This dissertation will contribute to a growing body of critical feminist scholarship that examines how social institutions such as the police, the courts, and universities contribute to the weaponization of rape myths, resulting in the punishing of silence breakers through legal action. I conclude by arguing that if nothing is done to stop the fear of litigation, which allows for legal actions to be taken against silence breakers, we risk witnessing the re-privatization of sexual violence.

### **A Note on Language**

In this dissertation, I distinguish between *reporting* and *disclosing* sexual violence to refer to the twin processes, introduced above, through which women communicate their experiences. When women attempted to register a complaint through the criminal justice system, principally by calling the police, or if they made use of formal reporting mechanisms at their workplace, I describe their actions as “reporting”. If, however, women decided not to issue a formal complaint, and turned instead to their own forms of communication, such as social media platforms, telling a trusted friend or family member about what happened or seeking support services such as counseling, I refer to their actions as “disclosing” sexual violence.

I use the term “silence breaker” to refer to a range of individuals entangled within the civil legal system including those who are sued for reporting or disclosing sexual violence but also to include those who were sued for acting as bystanders responding to abusive behaviour they had witnessed, and/or by supporting someone who had disclosed or reported sexual violence. Thus, what these participants have in common is not necessarily an experience of sexual violence but their decision to come forward with what they know or had witnessed, either to a variety of public authorities (such as employers, post-secondary institutions, or police) or via publicly accessible platforms such as social media or traditional media. Silence breaker,

therefore, is a more accurate and encompassing term to describe the group of people whose experiences are discussed here.

I am also careful about my use of the term “sexual violence.” While, statistically, a majority of adult sexual violence is perpetrated by men and against women and girls, this is not always the case (Turchik et al., 2016). Therefore, rather than regarding sexual violence within gender-specific terms, I attempt to use gender-inclusive language. Rather, sexual violence is rooted in hegemonic notions about masculinity and femininity (Turchik et al., 2016). The gendering of sexual violence will be explained in depth in the following chapter. I also acknowledge that women can be perpetrators of sexual violence and men can be victims, facts that have been marginalized within sexual violence activism and scholarship (Malinen, 2014; Turchik et al., 2016). Research has also identified how individuals with experiences that fall outside of the narrow male offender/female victim binary are often marginalized when accessing services and support following an experience of sexual violence (Malinen, 2014). Within the current research project, all but two of the plaintiffs who initiated or threatened legal action are cis-men and a majority of the silence breakers are cis-women; however, three are non-binary.

Since a majority of the plaintiffs in this study are cis-men<sup>5</sup>, I use he/him pronouns when describing them. When referencing silence breakers, generally, I use the pronouns they requested. One participant who uses they/them pronouns asked that I use she/her to avoid any possibility that they could be identified in the research findings.

Finally, I do not use the term “criminal justice system” instead using the term criminal legal system. This is an intentional decision to challenge the notion that justice can be achieved within a system of patriarchal and colonial laws. In cases of sexual violence, justice is rarely

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<sup>5</sup> The two cases of women – in both circumstances, they threatened legal action but never followed through.

found within the confines of the criminal law (See: Comack & Balfour, 2004; Craig, 2018; Doe, 2003; Lindberg et al., 2012; Odette, 2012).

## **Chapter Overview**

In Chapter One, I introduce readers to the conceptual framework of this project, along with the methodology and research methods used to conduct my research. In this chapter, I explore the political significance of women's participation in the public sphere with particular emphasis on "breaking the silence" of sexual violence. I then move into a literature review of the feminist scholarship exploring the relationship between gender and the law. I then explain the feminist methodology used to guide this project and the research methods for data collection.

Chapter Two provides readers with an overview of each step of a lawsuit, explaining the processes, language, and legal possibilities. In so doing, this chapter demonstrates the complexity of the civil legal system and, therefore, the complexity of responding to a lawsuit. More than simply listing the steps of a lawsuit from a procedural standpoint, I draw from narratives provided by the research participants, highlighting their interpretations of each step. This is done to demonstrate how a seemingly objective and neutral legal system can be weaponized to replicate abusive power dynamics between the two parties.

Chapter Three critically examines defamation law, the most commonly cited tort in lawsuits against silence breakers. Beginning with a historical overview of the evolution of the common law of defamation law, I illustrate the gendered underpinnings of defamation—particularly its genesis in the preservation of men's public reputations, which helps to set the social and legal context for contemporary lawsuits. The chapter ends by providing a brief description of the legal defences available to defendants in a defamation lawsuit, which also

shape the implications of being served or threatened with a civil suit for breaking the silence on gendered violence.

Chapters Four and Five substantiate this argument by turning directly to the experiences of silence breakers to demonstrate the range of harm that a lawsuit may generate. An unexpected finding of this study was that in addition to lawsuits, many silence breakers experienced other forms of institutional retaliation—this is the focus of Chapter Four. Here, I examine the most commonly cited forms of retaliation, namely workplace investigations into the conduct of silence breakers. Because this form of retaliatory action was most common among university faculty, this chapter explores the campus experience extensively. Overall, however, this chapter shows the significant impact of men’s ability to use legal and other institutional mechanisms to undermine the credibility of silence breakers while also inflicting various forms of punishment upon them.

Chapter Five examines the wide range of consequences faced by those being sued, beginning with the impact lawsuits take on the health and well-being of silence breakers. These health consequences are often exacerbated by the experience of being silenced or forced to self-censor due to fear of litigation or additional allegations of defamation. This chapter also explores the systemic consequences of such lawsuits, especially their potential to push sexual violence discourse out of the public sphere. Another example of the systemic silencing of sexual violence discourse examined here is media libel chill, referring to news outlets that decide to water down reports covering allegations of sexual violence or to refrain from publishing such stories for fear of litigation. The consequences of litigation are significant for both individual silence breakers and the larger public discourse on sexual violence.

Chapter Six draws this evidence on the broad harms of retaliatory lawsuits into conversation with literature about SLAPPs, to demonstrate why lawsuits against silence breakers should be classified as Strategic Lawsuits Against Public Participation. Here, I offer an analysis of the legal landscape of SLAPPs, which exist as an analogous, but not yet relevant, critique of retaliatory lawsuits that interfere with public interest speech. Interestingly, these suits have recently attracted parliamentary responses, as some provinces—notably Ontario and BC—have passed legislation intended to protect people from retaliatory lawsuits. The specific public interest in gendered violence, however, has been excluded from the rationales for such legislative enactments. In this chapter, I show how the court’s interpretation of new legislation must recognize sexual violence as a legitimate public interest issue. I argue that if sexual violence discourse is not protected and silence breakers become fearful of speaking about sexual violence due to litigation, we risk witnessing the re-privatization of sexual violence.

In the Conclusion, I re-examine the central arguments that have guided this dissertation: that lawsuits against silence breakers must be regarded as SLAPPs that potentially hinder sexual violence discourse; that systemic failure to respond to disclosures and reports of sexual violence make silence breakers vulnerable to defamation litigation; that if silence breakers are not protected, there is a risk that sexual violence discourse will be re-privatized; and how such lawsuits recreate abusive power dynamics between a man accused of sexual violence and the silence breaker(s) accusing him. I also reconsider the limitations of the study and offer suggestions for areas of future research to broaden our understanding of retaliatory lawsuits against silence breakers. I conclude by offering a number of recommendations to better protect silence breakers from lawsuits by men accused of sexual violence.

## Chapter One: Conceptual and Methodological Framework

This chapter presents the conceptual framework, methodology, and research design of this dissertation, which employs a feminist theoretical and methodological framework to examine the gendered underpinnings of defamation lawsuits against silence breakers. Such analysis is done to reveal the constructions of masculinity and femininity that exist within both institutional responses to sexual violence and also the common law of defamation. I begin this chapter by examining the significance of recent social movements such as #MeToo within the larger historical context of the public/private divide. I then present a brief literature review to explain the law and what Carol Smart (1992) refers to as a “gendering strategy.” This section explains how the production of feminine and masculine legal subjects shapes the foundation of law and its application. I use sexual assault legal reforms in Canada as a site of analysis to demonstrate the distinct shifts in how the courts have been influenced by feminist analyses of gender and sexual violence. In the final section, I provide an overview discussion of the feminist methodological framework employed in conducting this research. I conclude this chapter with a description of the research methods used, and an introduction to the participants in this study.

### *Breaking the Silence on Sexual Violence*

To acknowledge the significance of the #MeToo movement, it must first be placed within a larger social and historical context, and, specifically, the broader division that exists between the public and private spheres. Since the Victorian era, women have largely been excluded from the public sphere, a space most often reserved for educated, white, propertied, middle-aged men (Conaghan, 2013; Fraser, 1990). It was argued that for society to function, women must be confined to the private sphere while men occupied the public realm (even if this division was a fiction for working class women and many women of colour) (Fraser, 1990). The public/private divide excluded particular issues and interests from public debate by placing them within the



private realm, which was regarded as being beyond the reach of state intervention (Conaghan, 2013; Fraser, 1990). Conaghan argued that the public/private dichotomy within law contributed not only to patriarchal power within the family but also to the construction of gender as two oppositional forces, with masculinity and femininity existing at opposite ends of a strict binary.

In the Global North, second-wave feminists of the late 1960s and 1970s fought to challenge the public/private dichotomy and, germane to my purposes here, demanded that the state intervene in matters of gendered violence (Fraser, 1990). A central metaphor of early feminists that continues today is the notion of “breaking the silence,” to make the experience of sexual violence known in both the private and public realms (Alcoff & Gray, 1993). The feminist movement also provided terminology and language—such as date rape, sexual harassment, and sexism—for women to draw on when speaking about their lived realities (Alcoff & Gray, 1993; Backhouse, 2015; Fraser, 1990).

Discussions about sexual violence always in one way or another reference silence: why women remain silent about sexual violence; the ways women are systemically silenced (for example, through institutions like the police denying or minimizing reports of sexual violence); or the tactics abusive men use to ensure that their victims remain silent. Delaet and Mills noted that “a pattern of personal and political silence in response to sexual violence is evident in diverse societies across the globe. Silence shapes the reactions of survivors as well as the institutional responses of state and non-state actors” (2018, p. 497). Indeed, more generally, silence has long been considered a feature of femininity, “a trope for oppression, passivity, emptiness, stupidity or obedience” (Glenn, 2004, p. 2). For women to speak about sexual violence is to challenge existing oppressive, patriarchal power structures. As a result, speaking about sexual violence has become a universal tactic of feminist resistance as silencing is the

“universal tactic of perpetrators, imposed on victims of this crime unlike any other” (Martin-Alcoff, 2018). bell hooks (1989) stressed the importance of silence breaking:

[M]oving from silence into speech is for the oppressed, the colonized, the exploited, and those who stand and struggle side-by-side, a gesture of defiance that heals, that makes new life and new growth possible. It is that act of speech, of “talking back,” that is no mere gesture of empty words, that is the expression of our movement from object to subject—the liberated voice. (p. 9)

The #MeToo movement ignited a renewed demand to break the silence on sexual violence. Following the viral hashtag, public discussion about sexual violence occurred on a global scale, largely attributed to social media, and became impossible to ignore. In the midst of the #MeToo movement, *Time* magazine named “The Silence Breakers”—from well-known movie stars and community organizers to hotel workers and office staff—as the 2017 “Person of the Year” (Zacharek et al., 2017). This issue of *Time* symbolized the historic significance of the #MeToo movement, noting the sheer volume of disclosures of sexual violence and numerous political and legal actions that were being initiated internationally by those who had experienced sexual violence. The issue also recognized the intertwining of silence and sexual violence that works to effectively disempower those who experience violence while protecting perpetrators of sexual violence. Edward Felsenthal, editor-in-chief of *Time*, wrote that he chose the silence breakers as person of the year because of the incredible significance of “giving voice to open secrets, for moving whisper networks onto social networks, for pushing us all to stop accepting the unacceptable” (Zacharek et al., 2017). But as sexual violence discourse entered the public realm to an unprecedented degree, anti-feminist men looked for ways to silence and push the allegations out of the public sphere and back into obscurity. One silencing strategy, as

documented throughout this dissertation, is the use of defamation lawsuits. The following section moves into the key concepts of this dissertation, beginning with how I conceptualize both gender and the relationship between gender and the law from a feminist theoretical framework.

## **Conceptualizing Gender**

This section begins by examining a seemingly basic question: What is gender? The answer is not quite so simple as gender is fluid and often contested. For example, the conceptualization of gender and its relationship to sex has shifted and grown over the last 30 years (Butler, 2006; Connell, 1987; Connell & Messerschmidt, 2005; Messerschmidt, 2018; C. West & Zimmerman, 1987). Early theorizations of gender argued that sex was ascribed by biology via anatomy, hormones, and physiology, whereas gender was achieved and constructed through social, psychological, and cultural means (C. West & Zimmerman, 1987). Therefore, “sex” was used to signal a natural occurrence while “gender” “is often characterized in disciplinary terms, that is a way in which ‘men’ and ‘women’ are brought into being discursively,” and is argued to be socially and culturally constructed and imposed upon a sexed body (Conaghan, 2013, p. 18). Critical feminist scholars have rejected the argument that there is a rigid distinction between sex being “natural” and gender being a mere a social construct (Butler, 2006; C. West & Zimmerman, 1987). These scholars have argued that the assumption that sex is responsible for the social production of gender is incorrect, rather one’s sex actually has no bearing on one’s gender (Butler, 1990; West & Zimmerman, 1987). Butler (1990) argued that the sexed body is socially constructed by gender. While we may wish to associate masculine/masculinity and feminine/femininity as being indicators of sexual difference, there is no necessary correlation between gender “performativity” and sex (Conaghan, 2013). Identity is an effect of repeated gender performativity that reconstitutes an illusion of stable, gendered, and

sexed bodies (Butler, 1993, p. 314). From there, we can recognize that both sex and gender are “unstable and subject to change instead of invariable end products of socialization” (Butler, 1994). Therefore, gender is a product of social and cultural institutions and practices, which change over time and are subject to challenge and negotiation (Conaghan, 2013, p. 17).

Gender is a feature of social ordering with higher value placed on masculinity than on femininity (Connell, 1987). Hegemonic masculinity is at the top of the hierarchy as it requires “all other men to position themselves in relation to it, and it ideologically legitimated the global subordination of women to men” (Connell & Messerschmidt, 2005, p. 832). Masculinity and femininity are produced together in the process of creating a gendered order (Connell, 1998). The literature on hegemonic masculinity provides a theoretical framework for understanding male violence, arguing that violence by men is part of a collective privilege rather than an individual aberration. As mentioned previously, like all manifestations of gender performativity, while hegemonic masculinity dictates acceptable masculine traits as being desirable, what constitutes the hegemonic position can always be contested and challenged over time. In Chapter Three, I will return to the discussion of masculinity and how defamation law reifies and protects masculinity as a form of reputational property that must be preserved.

Throughout this dissertation, I use gender as a conceptual tool for analysis as opposed to a marker of individual identity. I am more interested in what West and Zimmerman (1987) have referred to as “doing” gender as a set of complex social interactions that result in expressions of masculinity and femininity. Social institutions such as the state are not gender neutral, as they may appear, but are in actuality gendered in precise and specific ways (Connell, 1990, 1998). In the following section, I examine how law is a gendered social institution.

## **Law as a Gendering Strategy**

The “Official Version of Law” claims the law is “an impartial, neutral and objective system for resolving social conflict” (Naffine, 1990, p. 24). Ultimately, the law “is held to be dispassionate, predictable, objective, impartial—and above all—*just* in its search for the truth” (Comack & Balfour, 2004, p. 23). The Official Version of Law provides the illusion of gender neutrality. Liberal feminists have similarly reified this position by arguing that women’s inequality was merely an “accident” of history as a result of unfair assumptions about women’s biology and not male malevolence or conspiracy, as argued by radical feminists (Chunn & Lacombe, 2000, p. 4). Feminist scholars have cautioned that it is far too simplistic to simply state that the law is male or masculine, or that the law is sexist (Conaghan, 2013; Smart, 1992). In turn, feminist scholars have spent decades theorizing about how law brings gender into being, and thus how gender shapes law (Chunn & Lacombe, 2000; Comack & Balfour, 2004; Conaghan, 2013; Naffine, 1990; Smart, 1989, 1992). In this dissertation, I examine law, specifically defamation law, as what Smart (1992) has referred to as a gendering strategy.

Of course, the law *is* sexist and, to a degree, male; however, the liberal feminist argument suggests that the problem could be easily corrected by ensuring that all legal subjects are treated equally (Smart, 1992). But, to treat all legal subjects equally would mean an eradication of gender altogether, and, as many feminists have argued, the desired outcome of feminism is not some form of androgyny (Smart, 1992, p. 32). Similarly, the relationship between gender and the law cannot be theorized solely in terms of female subordination or through the binary dimensions of masculine/feminine (Conaghan, 2013; Smart, 1992). Rather than focusing on this binary, scholars suggest that we examine the law as being gendered (Chunn & Lacombe, 2000; Conaghan, 2013; Smart, 1992). This is because the law is not universally beneficial to *all* men—

for example, men who are poor, queer, racialized, disabled, or marginalized in any other way are often disadvantaged in law and legal proceedings (See: Davis, 1983; Razack, 1998).

By analyzing the law as gendered, we are able to identify the powerful ways in which law informs gender and how law produces fixed gender identities (Smart, 1992).<sup>6</sup> Conaghan (2013) argues that the relationship between gender and law is contingent rather than necessary or absolute, but maintains that “gender is deeply woven into the fabric of law as it is understood and practiced in modern Western cultures” (p. 245). The following section examines the gendered terrain of sexual assault law.

### *Sexual Assault and the Law*

Criminal sexual assault law has offered a rich site for just explorations of the relationship between gender and the law, and feminist scholars have spent significant time debating the specific relationship between gender, sexual violence, and legal remedy. This section provides an overview of the key developments in Canadian criminal sexual assault law, and how feminist conceptualizations of gendered power relations have shaped the law and legal decision making over the last several decades. I provide a brief overview of the key debates and criticisms of both the law reform and feminist legal advocacy.

Until the 1980s, the *Criminal Code* and the courts understood rape in essentialist terms. Legal decisions in cases of rape between adults “revealed the view that rape has been perpetrated by men cursed with a natural sex drive gone awry or with an uncontrollable or abnormal lust” (Craig, 2012, p. 62). Since the early 1980s, broad sweeping changes to the *Criminal Code*, along with a number of decisions at the Supreme Court of Canada (SCC), have demonstrated a shift

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<sup>6</sup> This is not to suggest that the law is not structured by other forces, nor am I suggesting that gender is the most important site of analysis. For readings on the creation of racialized subjects in Canadian law see: Chunn & Chan, 2014; Davis, 1983; Maynard, 2017; Monture-Angus, 1999; Razack, 1998, 2002, 2007. For readings on the relationship between class and the law see: Comack, 1999; Gavigan, 1999.

away from an essentialist understanding of sexual violence and toward a more constructivist understanding (Craig, 2012). The broad changes to the *Criminal Code* were intended to dispel rape myths commonly found within the law. For example, before 1983, there were two distinguishable crimes of sexual violence in the *Criminal Code* depending on whether the victim was male or female (Randall, 2011). The new sexual assault laws allowed for the prosecution of a broad range of offences beyond penile-vaginal penetration and made the crime gender neutral, meaning that both men and women could be charged with sexual assault (Comack & Balfour, 2004; Johnson, 2012). The new law also made it possible the state to charge husbands with sexual assault, which was previously prohibited (Randall, 2011). This change challenged the assumption that wives gave permanent consent to sex through the marriage contract. It also recognized the public interest in violence that occurred within the home (Randall, 2011).

We have witnessed a distinct shift at the SCC, from protecting sexual propriety to promoting sexual integrity within a constructivist framework (Craig, 2012). More specifically, the Court now recognizes that sexual violence should be discussed as an act of violence and not sex. Moreover, sexual violence is an act of systemic gendered violence most frequently committed by men against women (Craig, 2012). For example, Justice L'Heureux-Dube, in the *Ewanchuk* (1999) decision, was "hard hitting in her acknowledgement of criminal justice system failures in relation to crimes of sexual assault and the fact that legal decision making about sexual assault law has too often been shaped by sexist biases and myths" (Randall, 2011, p. 9). Other SCC decisions have made similar links. For example, in *Osolin* (1993), Justice Cory acknowledged that sexual assault is different from other assaults and is gendered because "it is an assault upon human dignity and continues a denial of any concept of equality for women" (as cited in Randall, 2011, p. 9).

Parliament also implemented a number of legal protections, referred to as “rape shield laws”, aimed at protecting the privacy of complainants in criminal sexual assault trials. The first such protection afforded by the legislation was to limit the ability of defence lawyers to ask about a complainant’s sexual history in a sexual assault trial (Comack & Balfour, 2004). This protection was intended to protect the privacy of the complainant and to also attempt to dispel the rape myth that “if yes to one, then yes to all,” which asserts that a previous sexual act is consent to all future sexual acts (Comack & Balfour, 2004, p. 111). The other rape shield provision was the implementation of the publication ban restricting public disclosure surrounding the identity of the complainant (Comack & Balfour, 2004). Following the limitations set against the introduction of a complainant’s sexual history, feminist legal scholars found that defence lawyers increasingly introduced complainants’ private records, such as counselling or psychiatric sessions, into evidence during sexual assault trials to attempt to discredit and humiliate them (Busby, 1997). Since the complainant and the accused are often known to one another in cases of sexual assault, the accused often has intimate knowledge about the complainant’s life and the existence of records that may or may not contain deeply private information about her (Busby, 1997). In response to feminist outcry over this legal loophole, legislation was passed in 1997 that limited the defence’s use of a complainant’s third-party records as evidence (Comack & Balfour, 2004). It was believed that such legislative changes would encourage women to report sexual assault (Comack & Balfour, 2004).

Collectively, the various amendments to sexual assault law in Canada have established an affirmative consent framework, meaning that, on paper, Canada has one of the most progressive sexual assault laws in the world (Gotell, 2015; Randall, 2011). Despite these sweeping changes,



feminist scholars have long demonstrated that, in practice, the reforms have done little to protect a majority of women who report sexual assault:

The law reform of the seventies and eighties accomplished precious little when it came to the vast majority of rape cases: those involving non-strangers, the men a woman knows, dates, works with, meets at a bar and drives home with; the man who uses fists; white men from good families, or Black men who rape Black women. These are the cases that continue to be downgraded or dismissed by the many prosecutors if the victims even report them—and most of them don't, because they understand, better than lawyers and professional feminists, that the law doesn't see their victimization as a real rape. (Estrich, 1992)

At the heart of the persistent failures of the criminal legal system to adequately address sexual violence are discriminatory rape myths that continue to shape legal processes and decision making (Craig, 2018; Doe, 2003, 2017; Gray, 2016b; Koshan & Gotell, 2020). Due to the systemic issues within the criminal legal system, feminist scholars and advocates have looked for alternatives both within and beyond the law. One possibility explored primarily by legal scholars and feminist lawyers is that of civil litigation as a potential alternative to reporting to the police and enduring a criminal sexual assault trial.

#### *Tort Remedy for Gendered Harm*

Given the long-standing problems and documented problems of the criminal legal systems response to gendered violence, a small but growing body of feminist scholars and lawyers have, since the early feminist movement, theorized about the possibilities of tort remedies for survivors of sexualized violence (Ballou, 1981; Bender, 1993; Chamallas, 2018; Crew, 2012; Feldthusen, 1994; Godden, 2011; Godden-Rasul, 2015; Sutherland, 1993; West,

1992; Wriggins, 2010). Some feminist scholars have argued that civil litigation may be beneficial to survivors of sexual violence for a number of reasons: in a civil suit, both parties are regarded as equal and therefore have more agency in comparison to a criminal trial (Bender, 1993; Chamallas, 2018; Godden, 2011); if the case goes to trial, the burden of proof is a balance of probabilities in comparison to the beyond a reasonable doubt requirement in a criminal trial (Chamallas, 2018; Godden, 2011); and the survivors are able to recover damages for physical and emotional harm, in addition to pecuniary losses (Bender, 1993). American tort scholar Martha Chamallas (2018) predicted that the #MeToo movement will result in a significant breakthrough in tort law as more women are encouraged to file civil suits for sexual violence. Chamallas' prediction may also be true in the Canadian context as well. Within the last several years, there have been a number of reports in the media of survivors initiating civil suits against individual men (Gowriluk, 2020; MacIvor & Ryan, 2020; Pedro, 2020; Penner, 2020; Sawa & Barghout, 2020; Schmunk, 2020; Sharkey, 2019) as well as institutions across Canada, including: Police services (CBC News, 2017; Draus, 2020; Grant, 2020; Uguen-Csenge, 2020), the Canadian Hockey League (Kaplan, 2020), the military (Canadian Press, 2019b), child welfare organizations (Boynton & Bennett, 2020; CBC News Nfld & Labrador, 2019), and religious institutions (F. Campbell, 2020; Condon & Mustain, 2019; Harris, 2020; Molnar, 2020).

While legal scholars and lawyers are optimistic about the possibilities of there being legal remedies within civil law for survivors, they have also identified potential barriers and concerns. While the plaintiff has more agency within the civil legal system, it also places more responsibility upon the individual survivor to prepare their case (Wemmers, 2017). Litigation is expensive and there is no guarantee the plaintiff will recover the costs, even if she wins.

Moreover, the usual favorable costs award only covers a portion of the legal fees (Godden, 2011; Wemmers, 2017). Although the plaintiff may receive recognition of the wrong that has been done, she also risks the public denial of her experience (Godden, 2011). Finally, as will be discussed later, feminist legal scholars have long demonstrated that the law is deeply biased toward men and often fails to recognize gendered harms as legitimate (Chamallas, 1998, 2018; Conaghan, 2003).

Another factor that will be explored later in this dissertation is how the legal protections afforded to complainants in a criminal trial are not available to the same extent in a civil lawsuit—for example, there are fewer limitations on the records a plaintiff must provide to a defendant (Godden, 2011). The limitations of civil legal action mean that the risks of initiating a civil suit must be carefully weighed, and that no action can be considered a straightforward undertaking. The examination of lawsuits initiated by people who have experienced sexual violence is beyond the scope of the present study; however, the seemingly increasing occurrences of lawsuits initiated by both accused and accuser highlights the importance of the present study.

In this dissertation, I nonetheless draw on this emerging trend in feminist legal scholarship to provide a critical analysis of the increasing use of civil law, specifically the tort of defamation, in the broader context of an expansion of public interest speech on sexual violence. Taken together, the established body of literature examining both the gendered dimensions of criminal sexual assault law and the emergent possibilities of remediating gendered injuries through tort law assists in situating the current project within a feminist framework that seeks to examine the gendered underpinnings of the law both in its substantive content and in practice. To date, there have been minimal explorations into how sexual violence is dealt with in other areas

of law, specifically focusing on lawsuits against silence breakers for disclosing or reporting sexual violence. This dissertation seeks to begin to fill this gap by examining how gender has shaped the creation and ongoing use of defamation law, and by interrogating how the use of tort law by men accused of sexual violence produces, and reproduces, gendered hierarchies in ways that are cause for alarm.

### **Methodology and Epistemological Assumptions**

In light of the above, this dissertation's research was guided by three central research questions:

1. What are the individual and social consequences of lawsuits against silence breakers?
2. How do these lawsuits contribute to the re-privatization of sexual violence and chill public sexual violence discourse?
3. Can lawsuits against silence breakers be theorized as a Strategic Lawsuit Against Public Participation (SLAPP)?

To answer the research questions, I rely upon a feminist sociological methodological foundation. From this perspective, "the heart of feminist methodology is a critique that views the apparatus of knowledge production as one site that has constructed and sustained women's oppression" (DeVault, 1999, p. 30). With that being said, there is no universal feminist theoretical and epistemological position, and therefore the epistemological assumptions presented within this dissertation must be clearly stated. My epistemological approach is influenced by two distinct but complimentary bodies of literature. The first is the literature on feminist standpoint, most notably articulated by Canadian sociologist Dorothy Smith. The second is the work of philosopher Michel Foucault. Both Foucault and Smith provided theoretical tools to conceptualize and identify the relationship between knowledge and power

(Weir & Mykhalovskiy, 2010).<sup>7</sup> In the following section, I will introduce feminist standpoint before moving into a brief overview of the feminist interpretation of Foucault for the purposes of examining the power of the law.

### *Feminist Standpoint Theory*

Feminist standpoint is interested in examining the relationship between knowledge and power while also giving voice to those who have been marginalized from knowledge production (DeVault, 1999; Ramazanoğlu & Holland, 2002; D.E. Smith, 1999, 2005). A feminist standpoint rests on the assumption that politics, theory, and epistemology cannot be separated from one another (Ramazanoğlu & Holland, 2002). Feminist standpoint is an epistemological approach for a number of reasons: it shapes how people think about gender, it provides the conceptual tools to identify how people know what they know about gender, and it makes statements about gendered power relations (Ramazanoğlu & Holland, 2002).

Feminist standpoint, beginning with the experiences of individuals, allows them space to voice their lived realities, which allows the researcher to untangle the everyday experiences that shape people's lives, revealing the power relations at play (D.E. Smith, 1997, 1999). The women's movement largely adopted the methodology of beginning from the experiences of women, which allowed them to "unearth the tacit underpinnings of gender" (D.E. Smith, 1997, p. 395). As a result, the women's movement often made and continues to make universalizing political statements about women's experiences. Dorothy Smith (1997) has been critical of such universal claims, arguing that this approach moves from "how women participate in social relations to claims of knowledge at the level of a universalizing discourse" (p. 395). Smith has cautioned that we must state the bounds of knowledge as opposed to making universalizing

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<sup>7</sup> I acknowledge there are irreconcilable theoretical divergences between Dorothy Smith and Michel Foucault. These debates are beyond the scope of this dissertation but have been addressed by other scholars. See: Eila Satka & Skehill, 2012; Mykhalovskiy & Weir, 2012.

claims. Smith has argued that women do not have any epistemological privilege. Rather, she has focused on beginning with the everyday experiences of people, allowing for what she refers to as “ruling relations” to become visible. Ruling relations are not always readily visible within a particular local setting, nor can they be reduced to relations of dominance or hegemony, whereby ruling is done by the powerful (D.E. Smith, 1999). Instead, ruling relations link and coordinate the activities of people in ways that are not always blatantly obvious or related, and they are coordinated by institutional processes.<sup>8</sup>

Following Smith, I begin with the everyday experiences of silence breakers. Their experiences enable me to identify the numerous ruling relations that structure their experiences, both those that are visible to them and those that are not (such as the androcentric history of defamation law). From there, I am able to make systemic linkages between institutional responses and the failure to respond to sexual violence and defamation law, as well as the numerous barriers that silence breakers face when attempting to seek justice following an experience of sexual violence.

In this study, I am also interested in examining how law produces power/knowledge relationships and truth claims. The relationship between law and gender has been explored above—my focus here is specifically on how I theorize power from a Foucauldian feminist reading. Foucault argued that power is productive in that “it produces reality; it produces domains of objects and rituals of truth” (Foucault, 1977, p. 194); however, Foucault tended not to theorize law as a significant realm in his analysis of truth, power, and knowledge (Smart 1989). In response, Carol Smart cautioned that the power of the law cannot be ignored or minimized, especially within women’s lives as they are routinely regulated by laws, policies, and

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<sup>8</sup> While my sociological perspective is heavily inspired by Dorothy Smith’s (2005) institutional ethnography, this study is not an institutional ethnography.

legislation that govern their personal safety and reproductive rights. For Smart, Foucault's argument that old forms of sovereign power, in which he includes the law, are diminishing is not convincing. Instead, Smart has argued that the "law may be extending its influence" (1989, p. 8). This is especially apparent if one examines the laws that regulate women's lives and bodies, including reproductive rights and legislation, sexual assault laws, and child custody decisions.

Like Smart, I recognize the limitations of Foucault's disregard for the power of law while recognizing that his work provides useful theoretical tools for uncovering the linkages between truth, power, and knowledge. The law has power, not only in its ability for material consequences through judgment but also in its ability to disqualify other knowledges and experiences. Smart (1989) argued that the legal apparatus disqualifies knowledge rooted in feminist thought. I am interested in examining the power of law to not only produce truth but also regulate women's speech about their own truths of sexual violence. In the following section, I will introduce the research methods used to answer the research questions presented above, beginning with a brief overview of how qualitative research methods are beneficial to this project.

### **Research Methods: Qualitative Methods**

Much like there is no uniform feminist theoretical approach, neither is there a singular feminist research method. Qualitative research provides a "detailed description and analysis of the quality, or the substance of the human experience" (Marvasti, 2004, p. 7). Qualitative research is fluid, allowing a project to shift and changes as it develops (Marvasti, 2004). Another important facet of qualitative research, which is consistent with the theoretical framework identified above—particularly among feminist scholars—is the need for researchers to remain reflexive in their position as scholars and in their role in knowledge production (DeVault, 1999;

Ribbens, 2000). Feminist qualitative research must continue to engage in reflexivity to identify assumptions within the knowledge we are producing and the audience we are producing it for (Ribbens, 2000). In this section, I will discuss the fluidity of this project and offer a brief overview of my own reflexivity in my description of the research methods used to answer the research questions. This project relied on a number of qualitative research methods, which I also discuss.

Before conducting interviews, I used Factiva through the York University library to conduct an extensive review of news coverage on lawsuits initiated by men accused of sexual violence in the United States and Canada between January 2015 and January 2019. I used the search terms “#MeToo and Defamation” and “sexual assault and defamation.” I excluded all articles that were about women suing men who had sexually violated them. I retrieved a total of 204 news articles representing 93 distinct defamation lawsuits from the United States and Canada. I sorted the articles thematically into broad categories depending on the actors involved in the case: politicians, public figures and celebrities, university members (including faculty and students), and intimate partners (who are not celebrities or public figures). I used the information in the news articles to identify court cases and potential research participants. Collecting these data confirmed that there had been an upsurge in media reports of defamation lawsuits after the explosion of the #MeToo movement in October 2017. Only 32 of the 204 reported cases occurred prior to the #MeToo movement, with the rest appearing largely in 2018 and 2019. While it is not possible to draw a direct line of causality between #MeToo and the sudden surge in cases, this evidence strongly suggests that the increased visibility of and discussions about sexual violence in the public sphere have led to a simultaneous increase in men’s interest in defending their reputations from public opprobrium.



In February 2019, I started to recruit research participants for interviews using a number of recruitment methods. I utilized the data collected from the media stories to identify lawyers and other advocates in the anti-violence movement who had worked on these types of cases or provided commentary on them in the news. Most of the advocates I contacted participated in the study. Two lawyers had each only represented one client in a defamation case for reporting sexual violence and wanted their client's explicit consent before participating in the study; ultimately, neither of these lawyers participated. Most of the advocates I interviewed are Canadian, the majority of them practicing in Ontario and one in BC. Three of the lawyers are American. The American lawyers I interviewed have done significant advocacy work in their home jurisdictions to address the issue of retaliatory lawsuits against survivors of sexual violence across the United States. All except one of the advocates I interviewed were women.

To ensure the participation of women with direct experience being sued or threatened with a lawsuit, I sent a letter to lawyers and anti-violence service organizations explaining the study, along with a poster for them to share within their networks, to recruit additional lawyers as well as individuals who have been sued for defamation. (See: Appendix A for all study recruitment materials). This approach was not successful—I did not recruit any research participants this way. I also contacted a number of women identified in the news articles I had reviewed, all of whom had been sued. None of these women responded to my request for an interview either. This initial lack of response was not surprising as I suspect many of the women would be suspicious of speaking to a stranger or fearful that talking about what happened may lead to additional allegations of defamation. It is also possible, if not probable, that they may have wanted to simply move on with their lives and not re-visit traumatic events, and/or they

signed a restrictive non-disclosure agreement<sup>9</sup> that would prohibit them from speaking about the allegations or the lawsuit.

To expand the reach of my recruitment efforts, I also posted my project on my personal Facebook, Twitter, and Instagram pages/accounts. In addition, I drew on my own networks, developed through years of anti-violence activism, which ultimately proved to be the most successful strategy and yielded the vast majority of my interview participants.<sup>10</sup> I suspect that my own history as someone who has experienced sexual violence, which has been widely reported in the media, may have convinced some of the participants to connect with me. Additionally, I assume that because I have been sued, which also has been reported in the media and about which I have spoken publicly, helped establish a degree of trust among the participants—they understood that I was aware of the high stakes of a lawsuit.

During these initial recruitment efforts, I sought out research participants who had been threatened with legal action and those who'd had legal action taken against them. After interviewing four people who'd been threatened with legal action and having reached data saturation for this grouping, I decided to focus my efforts on recruiting participants who'd had legal action taken against them. I sought permission from the Research Ethics Board to revise the recruitment materials to exclude participants who'd been threatened with a lawsuit, which was granted (See: Appendix A).

As a result of these various efforts, I was able to recruit 33 participants. Of these, 19 had been sued or threatened with legal action by a man accused of sexual violence, and two had been

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<sup>9</sup> Non-disclosure agreements, also referred to as gag orders or confidentiality agreements, are examined in Chapter Four.

<sup>10</sup> Prior to beginning the study, I would consider two of the silence breakers friends, one a colleague within the violence against women sector, and one an acquaintance. The remaining research participants I was introduced to through conducting this study.

threatened by institutions accused of failing to respond to sexual violence (See: Table 2). I decided to exclude two participants because they were American, and because neither had been formally served with a lawsuit, thus I analyzed 17 transcripts from people who had been sued or threatened with a lawsuit. I interviewed five private bar lawyers (three of whom specialize in sexual abuse claims and two in defamation law), four lawyers employed by community-based organizations, two law professors, one current executive director of a violence-against-women organization, and two former executive directors of women's organizations for a total of 14 interviews. All of these participants have in some capacity advocated for or supported a silence breaker facing legal action.

#### *Interview Methods*

Interviewing was the primary method of this study. Reinharz and Davidman (1992) wrote that:

[I]nterviewing offers researchers access to people's ideas, thoughts, and memories in their own words, rather than in the words of the researcher. This asset is particularly important for the study of women because this way of learning from women is an antidote to centuries of ignoring women's ideas altogether or having men speak for women. (p. 19)

The interviews were inspired by Dorothy Smith's (2005) institutional ethnography, beginning with the everyday practices of people to examine how their everyday activities are coordinated by external ruling relations. With this in mind, I created two sets of interview questions to guide the interviews: one for participants who were sued and another for lawyers and advocates. For example, in the context of this study, I asked silence breakers about the actions they took that led to legal action being taken or threatened against them, and the actions that followed the lawsuit or legal threat. When I interviewed lawyers, I was not interested in what the law had to say about

defamation but, rather, how their role as a legal practitioner helps guide the decision-making process of a silence breaker navigating the legal system. (See: Appendix B for interview guides).

Most of the interviews were done over the phone or Skype. This was because the research participants resided all over the world, although where a participant was living did not necessarily correlate to where the lawsuit against them had been initiated. For example, I interviewed two women who live outside of the country—one in Australia and one in the United States—but both had been sued in Canada, while another participant who now lives in Canada was sued in France.

Six of the interviews, all of whom lived in Toronto, were done in person; three of these research participants were silence breakers. Three of these interviews were conducted at a private room at the Toronto Public Library; one was with a lawyer who spoke to me at her law office; and another interview with a lawyer was conducted at a coffee shop. I also conducted one interview in Ottawa at the research participant's home.

Of the 14 advocate interviews, one had represented both men who have sued women because they accused them of sexual violence and women who have been sued for disclosing sexual violence. The rest had acted exclusively for women being sued by men. This skewing reflects a primary focus of the study, which is to explore how the defendants experience these lawsuits rather than the interests of the men who initiate such suits. Table 1 on the following page provides an overview of the advocates interviewed.

Table 1. Interview Participants: Advocates

Name	Role	Location
<b>1. Shila</b>	Lawyer—not-for-profit	Ontario
<b>2. Alice</b>	Lawyer—not-for-profit	USA
<b>3. Darlene</b>	Lawyer—private practice	Ontario
<b>4. Brad</b>	Lawyer—private practice	USA
<b>5. Carmen</b>	Lawyer—private practice	Ontario
<b>6. Janet</b>	Lawyer—private practice	British Columbia
<b>7. Cassie</b>	Lawyer—not-for-profit	Ontario
<b>8. Mariam</b>	Lawyer—not-for-profit	Ontario
<b>9. Jessica</b>	Lawyer—private practice	Ontario
<b>10. Sharon</b>	Law professor	USA
<b>11. Constance Backhouse*</b>	Law professor	Ontario
<b>12. Dana</b>	Not-for-profit	British Columbia
<b>13. Sarah</b>	Not-for-profit	Ontario
<b>14. Abbey</b>	Not-for-profit	Ontario

Table 2, below, presents an overview of the research participants who were sued or threatened with legal action. The table provides context for the legal action and the status of said legal action at the time of the interview.

**TABLE 2 Interview Participants: Silence Breakers**

Name <sup>11</sup>	Role <sup>12</sup>	Statement <sup>13</sup>	Lawsuit Status <sup>14</sup>	Other Action <sup>15</sup>
1. Ali	Bystander <sup>16</sup>	Email	Withdrawn by plaintiff	Workplace investigation
2. Bonnie Robichaud*	Victim	Workplace	Abandoned by plaintiff	Workplace reprisals
3. Brenda	Bystander	Workplace reference	Lost at trial	Workplace investigation
4. Catherine	Victim	Social media	Resolved—settlement	Police questioning
5. Camila	Victim	Traditional media	Legal limbo <sup>17</sup>	No
6. Charlene	Bystander	N/A	Resolved by workplace settlement	Workplace investigation
7. Elizabeth	Victim	Police and university	Legal limbo	No
8. Gina	Bystander	Social media	Cease & desist—no action	Workplace investigation
9. Kristen	Victim	Police, workplace, social media	Cease & desist—no follow-up	Workplace investigation
10. Laura	Victim	Workplace, social media	Demand letter & failed settlement meeting—no further action	Police questioning
11. Lynn	Victim	Police	Trial concluded	Criminal charges
12. Marilou McPhedran*	Academic	Traditional media	Withdrawn before trial	No
13. Morgan	Victim	Social media	Cease & desist—no action	Police questioning
14. Meg	Activist	N/A	Threatened by university president—no action	No
15. Olivia	Journalist	Traditional media	Lawsuit withdrawn. Olivia continued with a countersuit and lost at trial.	RCMP created security profile (obtained during the trial)
16. Tamara	Victim	Landlord tenant board	Won countersuit on appeal	No
17. Wanda	Activist	Social media	Ongoing	No

<sup>11</sup> All names are pseudonyms unless marked by a \*. The rationale for declining the pseudonym is explained below.

<sup>12</sup> The role refers to the role of the individual to the allegations of sexual violence. Bystander refers to individuals who received a sexual violence disclosure and assisted the individual or acted to hold the perpetrator accountable. While some of the bystanders would also fall into other categories such as “Academic” or “Activist,” the steps they took that resulted in the lawsuit or the threat of a lawsuit were, as an active bystander, to support those who were victimized as opposed to their academic work, for example.

<sup>13</sup> Statement refers to where the allegedly defamatory statement was made. For some of the participants, this refers to the report they made to the university, their workplace, or to the police. I have distinguished between traditional media, referring to media publications, and social media, which includes sites such as Twitter, Instagram, and Facebook.

<sup>14</sup> Lawsuit status refers to the status of the lawsuit at the time of the interview.

<sup>15</sup> Additional disciplinary action refers to other forms of institutional retaliation the research participant was subjected to that were connected to the lawsuit. Most frequently, they were subjected to a workplace investigation. This will be explored in more detail in Chapter Four.

<sup>16</sup> The distinction between the “role” of bystander” and “victim” reflects the fact that not all the interview participants were the direct survivors of the sexual violence at the heart of the lawsuit they faced

<sup>17</sup> Legal limbo is explained in Chapter Four.

Most of the interviews with silence breakers were approximately one hour long. The interviews with lawyers were typically shorter, averaging about 30 minutes. All of the interviews were recorded and transcribed in full. I used NVivo software to organize and analyze the interview transcripts. In my analysis, I also incorporated elements of a grounded theory methodology, which begins with raw data to identify theoretical constructs, such as concepts and themes (Corbin & Strauss, 2008). After each interview was transcribed, I read each transcript in full to make preliminary observations—for example, highlighting elements of the interview that I thought were surprising or interesting, or specific quotes that echoed something said by another research participant. Following a grounded theory methodology for coding, I identified common words, themes, ideas, and experiences from the interview transcripts (Corbin & Strauss, 2008). Once all interviews were completed, I read them together to ensure that I did not miss any key concepts or themes. The themes I used to organize the data include: health consequences, campus, workplace, silence, the criminal legal system, retaliation, and access to justice.

A majority of the interviewees are referred to in this dissertation by a pseudonym. Three of the participants specifically asked that they not be referred to by pseudonym: Constance Backhouse, Senator Marilou McPhedran, and Bonnie Robichaud. Backhouse specifically asked that her name be used because she felt that having names attached to documents is important for the preservation of historical information. McPhedran and Robichaud voluntarily waived anonymity because both their legal cases had already been widely publicized and had concluded many years ago. Given the potential threat of litigation, all other participants have been anonymized. Some of the participants asked that they not be told what pseudonym I assigned them in the dissertation in order to protect themselves from potential further harassment and abuse. Acknowledging that I run the risk of identifying participants if I provide too much

context, I also use broad terms to describe the situations and their locations. For example, I use broad geographical boundaries, such as “Eastern Canada” or “Ontario,” to describe where a particular silence breaker resides; similarly, I do not provide specific information about their professions, referring instead to terms like “professionally employed” in order to provide as much protection from identification as possible. The one exception to this rule occurs when I discuss university faculty who have been sued for reporting sexual violence. The sheer number of faculty members I interviewed means that identifying this particular profession will not identify any individual participant (see the discussion of common themes above). I similarly anonymized the men who initiated legal action to protect both the research participant and myself from legal repercussions. As will be demonstrated throughout this dissertation, when someone is even suspected of silence breaking, she can become the target of ongoing retaliation and harassment. For this reason, I wanted the narratives to remain as unidentifiable as possible.

### **Study Limitations**

A major limitation of this study that I wish to acknowledge upfront is that, for the reasons just described, there is a lack of analysis regarding identity factors for both silence breakers and plaintiffs. These factors include race, class, sexuality, gender identity, and disability. While regrettable, this omission was an intentional decision due to the small sample size. I worried that providing identifying features of participants could help others identify them, including men who’d initiated retaliatory legal actions. For example, one participant spoke about how her disability made her vulnerable to sexual violence, which in turn shaped her experience being sued. Were I to provide specific details about the sexual violence she endured or the setting in which it occurred, those details would undoubtedly identify her—the case received significant media attention—putting her at risk of additional litigation or legal threats. Similarly, two participants involved in the same legal action spoke extensively about how both the allegations



of sexual violence and the media reporting on the lawsuit were structured by racialization and racism. Given that this particular case also received significant media attention, and because one of the interview participants remains fearful of the potential for additional litigation, I similarly had to make the difficult decision to eliminate the role of race and racism out of fear of either identifying the man accused of sexual violence and/or the research participants. Nonetheless, I would like to note that the research participants in this study occupy a diverse group spanning a wide range of ages, level of education, professional occupations, geographical locations, sexual preferences, abilities, race, and gender identities.

I also do not use any identifiers for the men who initiated lawsuits. The only generalization among the plaintiffs is that they are all, but for two exceptions, cis-men. In both of these exceptions, the legal threats were initiated by women who were accused of not doing enough in their public facing roles to support people who had experienced sexual violence. One of these women publicly supported a public figure facing multiple accusations of sexual violence. One of the research participants had asked this woman to re-consider her public support for the accused man and was threatened with legal action as a result. The other woman was in a senior leadership role at a university. The research participant was an active anti-violence activist on campus who demanded that campus administrators do more to ensure that people who experienced sexual violence had access to necessary services on campus. The senior administrator threatened to sue the activist for defamation. Overall, the plaintiffs also occupy a range of professional designations, ages, and racial identities. For these reasons, I focus on gender as the central analytical framework for the current study. I take full accountability for this analytical shortcoming and hope that future research on lawsuits against silence breakers can fill in this important analytical gap.

## **Conclusion**

This chapter laid out the conceptual framework, methodology, and research design of this dissertation. I began by situating the findings in a unique social context that has resulted from years of feminist activists and advocates pushing the issue of sexualized violence into the public sphere. It is the labour of these feminist advocates and activists that has provided the language and analysis that allowed for the #MeToo movement to explode in October 2017, resulting in widespread public discourse about sexual violence—or as feminists have long referred to it, “breaking the silence” on sexual violence (Alcoff & Gray, 1993). As disclosures and reports started to emerge, abusive men and institutions similarly looked for strategies to push the allegations out of the public sphere and back into the private sphere. This dissertation examines one such strategy: defamation lawsuits. The following chapters lay out the contours of such lawsuits to show the complex steps involved in these legal actions (Chapter Two), and to illustrate the specifically gendered terrain on which defamation suits operate (Chapter Three). The highly gendered processes of civil law generally, and defamation law in particular, are precisely what render silence breakers so vulnerable to defamation lawsuits.

## **Chapter Two: A Sociological Introduction to Civil Procedure**

This chapter provides a comprehensive overview of each step involved in a civil proceeding. The specifics of civil procedure are not central to this study; however, outlining each step is helpful in demonstrating the complexity of the civil legal system. This Chapter provides critical insight into the difficulty of navigating this system, and incorporates a feminist analysis of the description of civil procedure to demonstrate how unequal power dynamics and discriminatory stereotypes about sexual violence can shape the legal process. The intention of this chapter is to demonstrate how an ostensibly objective system with the stated purpose of uncovering truth can be used to exacerbate abusive power dynamics. Each step of the legal process can be strategically used to position the plaintiff as the true “victim” of reckless and false allegations of sexual violence.

In Canada, each province has its own rules of civil procedure, but in most substantive respects, they are fairly similar (Osler, Hoskin, & Harcourt LLP, 2018). This chapter relies on the Ontario *Rules of Civil Procedure* (R.R.O, 1990, Reg. 194) only because I am based in Ontario, which also has the largest population in Canada. This chapter also introduces a number of research participants with vastly different experiences in navigating the legal system. Their narratives are woven into this chapter.

### **Cease and Desist Letters**

It is an undisputed fact that retaining a lawyer is expensive. For most Canadians, initiating a lawsuit is not financially viable, especially in cases where there isn't likely to be a big financial settlement (Semple, 2016). A more affordable alternative can be retaining a lawyer to send a demand letter to a silence breaker. The cease and desist letter alerts the silence breaker that their actions are being monitored by the man accused of sexual violence, and threatens further legal action if the impugned activities persist. Receiving a legal letter can sometimes be

enough to intimidate silence breakers back into silence. The letter also alerts a silence breaker that their actions are being monitored by the man accused of sexual violence. Three of the research participants received a formal letter from a plaintiff's lawyer demanding a range of actions be taken by the silence breaker. These demands included: that the silence breaker refrain from making any further statements about the violence; that any social media posts about the violence be removed; and/or that the silence breaker issues a public apology for making said allegations, along with a retraction of the claims. The demand letter often states that if the silence breaker does not comply with the request(s), the man accused of sexual violence will proceed with legal action. In reality, however, the demand letter is most often nothing more than a threat with no intention to follow through, especially for men without the necessary financial resources to proceed with a defamation lawsuit. Of the three silence breakers who received a demand letter, none of the abusive men actually followed through by filing a lawsuit.

Research participant, Morgan, had an experience that is emblematic of the research participants who received demand letters. Morgan was in a long-term relationship with a man who routinely sexually, physically, and emotionally abused them during the relationship. Morgan and their ex-partner were both part of a subculture and community that was explicitly anti-police. Morgan therefore attempted to seek justice outside of the legal system by warning others in their community about their ex-partner's pattern of violent behaviour. Morgan notified their friends, revealing to them what had happened in the relationship, and wrote a vague post on social media outlining their experience of being abused. Shortly after posting on social media, late one Friday afternoon, Morgan received an unexpected email from a lawyer representing their abusive former partner. The subject line of the email read "C.D. v. [Morgan]" which Morgan described as intimidating "right off the bat" (Interview with Morgan, 2019). The letter alleged that Morgan

had contacted their abuser's employer, resulting in him losing his job. Morgan told me that they never did this, yet the lawyer demanded that Morgan be held accountable for the loss of their former partner's job. The demand letter read as follows:

We have been retained by C.D.. We are advised by our client that you have been making defamatory statements about our client in a variety of social media and other settings.

Your statements have clearly impugned his character and are unquestionably false. We also understand that directly or indirectly you have communicated the same statements impugning his character to [his former boss] from [company]. Unfortunately, C.D.'s former employer has seen fit to terminate him entirely as a result of those statements. He has suffered significant harm and damage as a result of your unlawful conduct.

Consequently, we have now been retained to enforce his rights without delay unless his requirements are met. They are as follows: a) you provide him with a complete written apology, the apology is to be transmitted to him by email with a CC to my attention; Your email will include an undertaking not to conduct yourself in this manner at any point in the future, and b) that you will send an email to this company that you understand they had received unfavorable information concerning him and that you are originating the source of that information. The information in question was the product of a misunderstanding and did not reflect your actual opinions about [name], you apologized to [name] and you now apologize to this company for the misunderstanding and you would have no objection to this company re-employing C.D., if so inclined; you'll provide C.D. and me by email with a blind cc of your copy to the company. Please be advised that unless these steps are taken by noon on Monday, legal proceedings will be commenced against you immediately thereafter for the damages caused to C.D.,

including with reference to his loss of employment without further notice except as required by law. In this circumstance we will be seeking punitive damages against you as well. Govern yourself accordingly, yours very truly [lawyer name]. (Interview with Morgan, 2019, emphasis added)

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 with the demands outlined in the letter by Monday at noon. This gave Morgan limited time to decide what action to take and/or to seek out legal advice.

Morgan began by researching the lawyer who sent the letter. A Google search found that the lawyer was a well-regarded senior lawyer at a large Toronto law firm. After doing some additional online research, Morgan was able make a connection between the lawyer and their ex-partner:

. . . [A]fter a bit more Googling, I realized [his lawyer] is on the same sport team as [C.D.]. 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? Like he’s like, “yeah, I would love to help intimidate your abused ex-girlfriend.” Like, classic hockey player shit. (Interview with Morgan, 2019)

Morgan did not have the resources to defend a lawsuit, and knew that their abuser was aware of this, too. Morgan understood his actions not only as a form of intimidation but also a product of a particular kind of masculine “bro culture” intended to bully Morgan into silence.

Luckily, like their abuser, Morgan was also able to rely upon their social network to respond to the legal threat. Morgan was employed in a job that provided services to a number of law firms. Morgan asked one of the lawyers with whom they had developed a working

relationship about how to respond to the letter, and to assess the risk of their abusive ex following through with a lawsuit if they did not comply with the demands outlined in the letter. The lawyer volunteered to write a response to the lawyer who sent the letter indicating that Morgan would not comply with his demands. After the letter was sent, Morgan never heard from their former partner again—they suspect that their ex-partner used his social connection with a lawyer to attempt to intimidate Morgan, but without the resources to actually follow through with a lawsuit:

. . . [Y]ou 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 C.D. changes to a shitty affordable lawyer or [he] just gives up. And I’m guessing he knew that. I think he relied and waged too heavily on his intimidation. (Interview with Morgan, 2019)

Although he never followed through, Morgan still felt that the threat of legal action was an abusive control tactic:

[The demand 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 (Interview with Morgan, 2019)

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

## Commencement of 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 in question being made or published (*Limitations Act*, 2002, S.O. 2002, c.24, Schedule B, 4).<sup>18</sup> 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 (R.R.O. 1990, Reg 194, s.16). 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 the defendant(s) and, even if the case proceeds no further, exact a significant toll. For example, research participant Catherine, a woman of colour who resides in a large Canadian city, noted how 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, I don’t work Fridays. My co-workers 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

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<sup>18</sup> The exception is if libel was published by a newsroom or a broadcaster, in which case the action must be initiated within three months “after the libel has come to the knowledge of the person defamed” (R.S.O. 1990, 6).



did not react positively and was, unfortunately, very unsupportive. So, I was sort of on my own to find help to just navigate this at all. (Interview with Catherine, 2019)

Catherine and another person she knew were being sued by a man who had entered into a peace bond<sup>19</sup> with another woman as a result of sexual violence allegations. Catherine, the other defendant, and the woman who entered into the peace bond were part of a small community. It later became apparent that multiple men within the community were routinely sexually violating the women and gender non-conforming people of the community. After the man entered into a peace bond and Catherine realized that he had victimized multiple people, she posted about it on social media, including a detailed summary of his sexual violence along with the details regarding the peace bond. Catherine said she did this in an effort to potentially protect others in the community who may not have been aware of the ongoing routine abuse. In response, the man named in the post sued her for defamation:

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, non-men 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 23 or 24, 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. (Interview with Catherine, 2019)

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<sup>19</sup> A peace bond is a protection order made by a court under section 810 of the *Criminal Code* (Department of Justice, 2017a).

While Catherine was aware that she might face legal action for the posts she made, she told me that she was naïve about how the legal system works in practice. She came into the legal process expecting the courts to readily recognize the lawsuit as a retaliatory attack on her and others in the community, and was devastated when confronted by the reality of the legal response to allegations of defamation:

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 just matter of factly 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. (Interview with Catherine, 2019)

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 a number of students 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 religious 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.

(Interview with Ali, 2019)

While it was indeed a flimsy case and would eventually be abandoned, Ali still needed to retain legal counsel in order 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.<sup>20</sup> I will return to the individual consequences of being sued in Chapter Four.

After being served, a number of options are available to the defendant. They can 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; and/or start a third party claim against someone who is not a party to the action (Ontario Ministry of the Attorney General, n.d.b). If the defendant chooses to respond, the defence must be filed within 20 days of being served if living in Ontario, or within 40 days if they live outside the province (R.R.O. 1990, Reg 194, sec.18.01(a)(b)). If the defendant does not file a defence, the plaintiff will be able to request

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<sup>20</sup> Ali was served before a major religious holiday while Catherine and Morgan were both served on a Friday afternoon. This tactic is not unusual—other research participants reported receiving legal notices late on a Friday evening, and another right before the Christmas holidays began. While this may simply be a coincidence, lawyers have shared with me that this is sometimes done intentionally by plaintiffs and their lawyers to make it difficult for the defendant to connect with a lawyer, and/or simply ruining their holiday or plans they may have.

a default judgment from the court (R.R.O. 1990, Reg 194). If the defendant has been noted in default because they have not responded to the claim, they are deemed to admit 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, 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 (RRO 1990, Reg 194).

It is impossible to determine the outcome of lawsuits in Canada since the statistics collected on civil cases in Canada are limited each year to the number of cases initiated, the number of active cases, and the number of dispositions (Statistics Canada, 2020). There is no information on cases that are either settled after the statement of claim or those that simply do not progress within the legal system. The absence of such quantitative data makes the experimental data of qualitative interviews more important. As the few examples cited here demonstrate, what is clear is that the act of serving someone with a lawsuit is often perceived by the defendants as a form of intimidation, humiliation, and retaliation.

### **Retaining Legal Counsel**

Every silence breaker served with legal action in turn sought legal information or legal advice.<sup>21</sup> Among them, the experience of retaining legal counsel differed substantially. 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 themselves for any possible legal action that might be taken against them. One research participant, contacted a law professor at their university who specializes in

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<sup>21</sup> Legal information is more general and provides an explanation of the law, the legal system, or legal terminology. Legal advice refers to advice from a lawyer or paralegal about a specific legal problem.

defamation law under the guise that she planned to write a fictional story about defamation.

Other research participants, like Ali and Catherine, did not seek legal advice until after they had received the civil claim against them.

For some of the research participants, retaining legal counsel was a challenging experience; others, however, had a much easier time. Research has found 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 (Lai, 1998; York Cornwell et al., 2017). As demonstrated by Morgan’s case, participants with access to contact resources were able to navigate the initial legal threat by having access to expert informants who could, at the very least, explain the processes and legal implications involved, and/or help to initiate a response to the legal threat or claim.

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

In contrast, participants with less social capital did not have similar social networks to rely upon for assistance, making the initial legal threat much more intimidating. Catherine, who had far less social capital in comparison to some of the other research participants, received pro bono representation by chance. After being served, she went to a local not-for-profit legal help clinic to seek legal information about filing a defence. The volunteer lawyer assigned to help

Catherine was struck by the case and called her a few days later, offering to represent her without pay:

I went to [not-for-profit organization], 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. (Interview with Catherine, 2019)

This compassion and diligence on the part of Catherine’s legal clinic lawyers was not the norm, however. More usually, not-for-profit organizations and free legal clinics are only able to provide minimal, if any, support to silence breakers. I interviewed two lawyers who work in not-for-profit legal clinics, both of whom told me that publicly funded legal clinics simply do not have the resources to provide legal representation for lawsuits against silence breakers. Again, this is attributed to the complexity and expertise required in providing legal representation in a defamation lawsuit, as well as how resource-intensive these cases are if they proceed to trial. Shila, a lawyer working for a legal clinic that provides services to women who have experienced violence, explained why the organization cannot provide legal representation to women being sued:

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. (Interview with Shila, not-for-profit lawyer, 2019)

The lack of access to legal counsel was a common experience of some of the participants. For example, Elizabeth was an undergraduate student and single parent who had recently left an abusive marriage. While completing her undergraduate degree, one of her professors sexually assaulted her. She reported the sexual assault to both the police and the university. The police did not lay charges, but the university did decide to fire the professor. 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 one on her own in the small Canadian city where she resides, where, compared to any major city, there were very few lawyers with expertise in defamation law. Elizabeth contacted a number of lawyers, none of whom wanted to take her case. Reflecting on this experience, she explained that “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” (Interview with Elizabeth, 2019). This refusal may be attributed to the fact that defamation lawsuits are notoriously complex and time consuming. Furthermore, even if Elizabeth won, it is not guaranteed her legal bills would be covered (Godden, 2011; Wemmers, 2017).<sup>22</sup> Elizabeth ended up retaining a junior lawyer who didn’t have the professional expertise she was hoping for, resulting in frustration and desperation: “[F]irst 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” (Interview with Elizabeth, 2019).

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<sup>22</sup> All Canadian jurisdictions follow the “loser pays” rule meaning that the person who loses is required to pay the fees and costs of the winning party. With that being said, the amount is determined by the court and the full amount will never be awarded (See: H.P. Glenn, n.d.). Furthermore, even if costs are awarded, there may be difficulties in retrieving the money.

A number of the private bar lawyers I interviewed also acknowledged the challenges involved in retaining legal counsel. Some talked about what 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 assess that they can recoup costs. This requires there to be significant damages and/or an institution involved, so they can counterclaim for damages relating to the sexual violence and ensure they are paid for their services:

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 [pause] really a groping case just because it is not financially viable. (Interview with Janet, lawyer, 2019).

I'm going to say no [to a case] because there's no criminal conviction and the defendant can say I didn't do it, and then you're into three to five years of long expensive litigation at the end of which there is a risky trial. Right? Or, you have a defendant where you can prove it happened, but you don't necessarily have institutional liability. And you don't have a person who can pay. I look at all of that, at the outset. Before I take the case. 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 (Interview with Darlene, lawyer, 2019).



Janet and Darlene confirm the challenges that Elizabeth, and many others like her, face when attempting to retain legal counsel to represent them.

Overall, social capital and resource contacts significantly impacted the research participants' ability to retain legal counsel. I found that research participants who had a social connection to a lawyer were far more likely to have legal representation, even if the case is not financially lucrative for the lawyer. Nonetheless, this is also not to suggest that those with social capital were able to retain legal counsel with ease. For many of the research participants, the financial burden of the lawsuit, even for those with social capital and permanent full-time work, caused economic hardship and they struggled to pay their legal bills. I will return to the discussion of the financial barriers of a lawsuit later in this chapter.

## **Discovery**

After the written pleadings have been completed, 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 (Walker & Sossin, 2010, p. 169). Discovery has two phases: document exchange and oral discovery (Walker & Sossin, 2010). In most common law countries, it is only required for parties to disclose the documents requested from opposing parties, or "documents on which the party intends to rely" (Walker & Sossin, 2010, p. 170). The discovery rules in Canada are unique in comparison to other common law legal systems because they "provide for broad unilateral disclosure of documents" (Walker & Sossin, 2010, p. 170). 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<sup>23</sup> is claimed in respect of the document” (R.R.O. 1990, 30.02). A document can include a wide range of materials including: recordings, videotape, film, photographs, charts, graphs, maps, plans, surveys, accounts, and any electronic data (R.R.O. 1990, 30.01[a]).

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 present location (Walker & Sossin, 2010, p. 171). 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 (Walker & Sossin, 2010, p. 171). After this step is completed, each party must provide the other party with all of the non-privileged documents (Walker & Sossin, 2010).

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 also stand the greatest chance of victory. There may be benefits to a broad scope of discovery, 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 (BC Justice Review Task Force, 2006, p. 25). The Justice Review Task Force (2006) found:

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

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<sup>23</sup> Privilege refers to the protection of particular communications, specifically those that are protected and are shared for a social or moral reason (Osborne, 2015). The following chapter provides a more in-depth explanation of the legal concept and significance of privilege in defamation lawsuits against silence breakers.

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. (p. 25)

If either party is not satisfied with the documents provided, they can request further disclosure or information about the documents. A party may also bring forth a motion asking for the court to require this information if the opposing party is not forthcoming (Walker & Sossin, 2010). If either party destroys any documents or fails to comply, this may be regarded as contempt of court (Walker & Sossin, 2010). At a minimum, if documents are lost or destroyed, a court may draw an adverse inference that the party was trying to hide information. The range of documents disclosed in this phase is often far broader than what will be provided to the court at trial (Walker & Sossin, 2010). Beyond worries of a “document avalanche” being produced by the discovery process, there are unique concerns relating to document disclosure in cases that deal with allegations of sexual violence.

In cases of sexual violence, discovery is unique in comparison to other types of civil cases, such as a business dispute or a standard defamation 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. Through the discovery process, the plaintiff can use the legal system to access these records. While it may be seemingly necessary to “prove his case,” and to some extent is reasonable, the broad scope of the discovery process also allows him intimate access to her private life, to the point of being an erasure of their autonomy. From the perspective of the law, the two parties are regarded as two opponents on a level playing field with equal access to resources. To prove her case to the satisfaction of the court, she is required to give up significant details of her private life. This is particularly true

if she decides to counter-claim for the sexual assault. One lawyer explained the potential consequences of initiating a counter-claim:

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. (Interview with Jessica, lawyer, 2019)

As Jessica notes, there is a fundamental imbalance of power in this process. Although, from the perspective of the law, the two parties are opponents on a level playing field with equal access to resources, the “avalanche” of private records and the consequent intrusions on privacy can be particularly disturbing in light of the abusive relationship that already exists between parties in a sexual violence suit. Even if the silence breaker decides not to counter-sue for damages relating to the sexual violence, she will likely still be required to provide records such as personal emails and text messages.

Scholars have spent very little time examining the psychological or emotional impact of discovery in civil law, but parallels to the discovery process in the civil legal system can be made to the third-party and sexual history requests in criminal sexual assault trials, which feminist academics have understandably focused their attention (Busby, 1997; Comack & Balfour, 2004; Craig, 2018; Gotell, 2006), as well as document production in family law cases that involve violence (Ward, 2016). This work demonstrates the deeply invasive nature of such requests. While the expectation of privacy differs between 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 to the sexual assault and subsequent legal processes (Gotell, 2006). Private documents are used to render the woman who reported or disclosed sexual violence as “crazy,” “unstable,” and/or prone to lying (Gotell, 2006). Over a decade ago, Lise Gottell (2006) cautioned that the potential for records requests in criminal legal trials could potentially result in the re-privatizing of sexual violence:

If feminists broke the silence around sexualized violence in the last part of the twentieth-century, we could say that in 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. (p. 774)

I raise similar concerns about the 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. As mentioned previously, discovery is broad in scope, meaning that many private correspondences and records may be disclosed to the plaintiff. While it is true that he will also be required to disclose his own correspondences 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 any communications can end up in the hands of their abuser and his lawyer.

### **Examination for Discovery**

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 defendant and plaintiff, and

potentially any witnesses who may be called at trial (R.R.O, 1990, Reg 194, s.31.02[2]). 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 court room 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. (Interview with Constance Backhouse, law professor, 2019)

Lundquist and Flagal (1981, p. 6) flagged the concerns raised by Backhouse nearly 40 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.” Shila, another lawyer I interviewed, spoke about the specific 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. (Interview with Shila, 2019)

As Shila's comments indicate, the private nature of civil suits, where the discovery and examination processes are not monitored by a judge and are unprotected by legislation, mean that discovery can be a very challenging stage for silence breakers, who 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, however, these are difficult dynamics to get at as the processes are confidential, and there is very 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.<sup>24</sup>

In 1991, McPhedran, a human rights lawyer, chaired the Independent Action Task Force on Sexual Abuse of Patients commissioned by the College of Physicians and Surgeons of Ontario (CPSO) after an exposé of CPSO 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 then 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 and not just physicians and the subsequent institutional processes covered by the law (Priest, 2000). 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, entitled *What about*

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<sup>24</sup> I was only able to access this transcript because McPhedran donated all of the lawsuit materials, including the discovery transcript, to the Clara Thomas Archives at York University.

*accountability to the patient?* McPhedran also published a 1,000-word opinion piece about doctors who sexually abuse their patients in the *Globe and Mail*, summarizing the findings of the task force (McPhedran, 2001). In the article, McPhedran (2001) 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 in the courts and the OMA had acted as an intervenor to argue that the revocation of his medical licence was a breach of his *Charter* rights. In her opinion piece, McPhedran (2001) argued that the OMA should not have intervened in this case, and should instead funnel their 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 the gendered nature of questioning relating to women's sexuality and credibility. Although McPhedran was a highly regarded professor and lawyer, with a noted history of respected leadership in the area of sexual violence, the lawyer for the OMA was more interested in questioning her about her marital status and her attitudes toward various sexual scenarios. The transcript of her examination reflects a number of gendered stereotypes that were used in an attempt to discredit her role as an expert on sexual violence. For example, the OMA lawyer, Hansel J.B.A. Dickie (QC), started the oral discovery by asking to see her curriculum vitae, but then quickly shifted to asking about her marital status (January 8, 2003, p. 1). Dickie returned to inquiring about the marital status of the other experts appointed to the Task Force later in the oral examination:

**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. (p. 36)

Dickie sexualized McPhedran throughout the discovery process. Dickie put forward a number of hypothetical situations of sexual activity between doctor and patient, and showed an inclination to placing 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 duration of 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? (pp. 59–60)

These exchanges are emblematic of the approach taken by the plaintiff throughout the oral discovery process, in which there were few questions directly relating 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. When I interviewed McPhedran, she reflected on the oral discovery:

It was ugly. Two things happened in the midst of one of the discovery sessions. I went into the women’s washroom at the break. The court reporter who was keeping the transcripts was in the women’s washroom and was standing at the sink, and I walked in as she was washing her hands. I used the toilet. She was still washing her hands. I said to her, “Are you okay? Did you get something on your hands?” She turned to me at the sink, still washing her hands. “I feel so soiled by what I had to hear in there. I can’t stand how he is treating you,” as she is washing her hands. I said to her, “I really—thank you for that. He is being a pig. He is totally being a pig. He is being a pig because the OMA wants him to be a pig. This is the strategy. Any woman who is affected by this. Obviously, you can’t hear what you have heard as a woman and not be affected by it, we can’t let them win. We can’t let them win and I can handle it. I know exactly why he is doing it. I know exactly what kind of human being this is. I can handle it. Don’t give up on this. Come back with us. Stay with us. You are going to be okay. I am going to be

okay.” We went back in. He got even worse, the lawyer for the OMA. My lawyer called a recess. Brian MacLeod Rogers, extraordinarily decent human being, says, “I can’t stand this. I can’t stand this.” Because I have told him, “Brian, I don’t want you to object. I want you to let this all go on the record. I want the OMA and the OMA lawyer exposed. I don’t want you to object.” (Interview with Marilou McPhedran, 2019)

The discovery transcript reveals the sexist and discriminatory questions that silence breakers are often subjected to. Shocking as the transcript is, it is also worth noting that McPhedran was fortunate to enjoy a number of 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 to (which may explain why she chose to allow 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 noted by Shila, 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. Research participant Laura highlights her experience of being questioned by the plaintiff’s lawyer:

The lawyer pretty much aggressively crossed 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. (Interview with Laura, 2019)

The entire legal process had a profound impact on Laura’s emotional well-being: “I was pretty shaken up after that. I was really re-traumatized by being forced into the meeting like that, with the perpetrator, like that, staring me down” (Interview with Laura, 2019). Laura found it

particularly difficult because the man who had assaulted her was her former boss, and the employer was working to protect the reputation of the man who sexually assaulted her:

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 what these people could be capable of that. Or, if they even knew how harmful it was, what they were doing. (Interview with Laura, 2019)

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 of the courtroom. The interview data is, however, able to show how discriminatory stereotypes about people who experience sexual violence are also found in the civil legal system. As highlighted by the interview participants in this section, the discovery process can be used for abusive men to legally gain access to private records, which can be a site of re-victimization for those who have experienced sexual violence.

### **Mediation**

Some Canadian jurisdictions require mandatory mediation within a set time after the deadline for filing of the statement of defence (Osler, Hoskin & Harcourt LLP, 2018, p. 9). In Ontario, there is mandatory mediation for non-family law actions in Toronto, Ottawa, and Windsor (R.R.O, 1990, 24.1). The intention of mandatory mediation is to “give parties an opportunity to discuss the issues in dispute. With the assistance of a trained mediator, the parties explore settlement options and may be able to avoid the pretrial and trial process” (Ontario Ministry of the Attorney General, n.d.c). If mediation is unsuccessful and the parties are not able to come to a mutual agreement, the parties are required to attend a pre-trial conference before a

judge or court officer to attempt to settle the case or to narrow the issues that will be presented at trial (Ontario Ministry of the Attorney General, n.d.b).

There are financial motivations to settle before a trial. The 2019 Canadian legal fees survey found that most lawyers bill hourly, and the average fee for a lawyer with two to five years of experience is \$253.00 an hour, which increases to \$378.00 an hour for a lawyer with 11 to 20 years of experience (Bruineman, 2019). Rates vary by province and jurisdiction. For example, rates for lawyers in Toronto may well be significantly higher. These fees prove to be a significant barrier to successfully defending a lawsuit. A number of participants noted that, if they had been financially able to take their cases to trial, they would have:

I would have needed 20 or 30 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? (Interview with Laura, 2019)<sup>25</sup>

Money, however, is not the only barrier to going to court. For other participants, the prospect of a trial would contribute to their re-victimization. Similarly, the plaintiff may also wish to settle before trial to avoid the possibility of unflattering information circulating about the allegations.

A vast majority of the cases in this study did not proceed beyond mediation, either because the parties were able to reach a mutual agreement or because the plaintiff withdrew the lawsuit before reaching this stage. While 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:

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<sup>25</sup> I connected with Laura once the dissertation was complete to verify accuracy of the quotes. Laura laughed when I read this quote to her because she felt at the time I interviewed her she was naïve about the costs of retaining legal counsel. After she spoke to me, she received quotes from lawyers for the case estimating it would cost \$100,000 to \$200,000. This quote aligns with the quote I was given for the defamation claim against me (\$200,000 CAD).

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. (Interview with Ali, 2019)

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

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.” (Interview with Marilou McPhedran, 2019)

McPhedran said that although agreeing to walk away from the lawsuit was heartbreaking, and she was completely distraught by the loss of opportunity to vindicate herself and reveal what the OMA was hiding, she would have been completely bankrupted by the trial if she’d 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 first born 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. Yes, we will lose our home if I lose the case.”

McPhedran’s case, however, is fairly emblematic in that overall very few lawsuits make it to trial.

## **Trial**

As demonstrated throughout this chapter, a significant number of steps are required before a case can go to trial. In addition, 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 (Osborne, 2015). Further, there may be some details of the case that both parties would not want made public.

Almost all civil cases in Canada are tried by a judge alone who determines a case on a balance of probabilities (Osler, Hoskin, & Harcourt LLP, 2018). If the defendant is found not liable, the judge will dismiss the case. If the defendant is found liable, however, a judge will take the following into consideration before deciding what the damages will be: the remedy that the plaintiff has requested, the facts of the case, and compensation for the plaintiff (Department of Justice, 2017b). In Canada, typically, the party who loses a civil proceeding or motion has to make a significant contribution to the winning party's costs (Osler, Hoskin, & Harcourt, LLP, 2018). A number of factors are taken into consideration when making a judgement about costs:

The amount claimed and the amount recovered in the proceeding; the relative success of each party; how complicated the proceeding was; if the proceeding raises important issues; the conduct of a party that unnecessarily increased or decreased the time to hear the proceedings; if a step in the proceeding was taken out of spite, unnecessarily, improperly, negligently, through excessive caution or by mistake; if a party denied or refused anything that should have been admitted; if a party started two proceedings when one would have been sufficient or increased costs by refusing to help parties on the same side; the experience, rates and hours spent by the lawyer the party entitled to costs; the amount that an unsuccessful party could reasonably be expected to pay; and any other matter relevant to the question of costs. There can also be special cost consequences



where a party fails to accept an offer to settle. (Osler, Hoskin, & Harcourt LLP, 2018, p. 11)

As mentioned previously, very few civil cases make it to trial. Overall, only two of the silence breakers I interviewed had their cases go to trial.

## **The Publication Ban**

A concern raised by some of the research participants was that the lawsuit against them allowed for them to be named in the media, and by the plaintiff on social media. For example, one participant made what she thought was a confidential report to the police and the university she attended regarding a professor who had sexually assaulted her, only to then have her name and the details of the sexual assault published in the national media after the accused professor decided to sue her. Her name remains linked to the case on the internet. In contrast, in a criminal sexual assault trial, sexual assault complainants are most often protected by a publication ban, meaning that any information that could identify the complainant or a witness cannot be published or broadcast under s.486.4 of the *Criminal Code*. The publication ban remains in effect regardless of the outcome of the case (Taylor, 2017).<sup>26</sup>

In the late 1980s, the publication ban was challenged as being unconstitutional because it violated the freedom of the press, as protected under section two of the *Charter (Canadian Newspapers Co. v. Canada [Attorney General], 1988)*. The SCC 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” (*Canadian Newspapers Co. v. Canada [Attorney General], 1988, para 15*).<sup>27</sup> The Supreme Court Justices

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<sup>26</sup> The complainant is able to apply to the courts to have the publication ban rescinded. There is no guarantee that the court would rescind the publication ban (Taylor, 2017).

<sup>27</sup> For an in-depth critical discussion on the publication ban, see: Doe, 2009; Taylor, 2017.

reasoned that protecting the identities of those who report sexual assault would encourage reporting and in turn deter further sexual violence (*Canadian Newspapers Co. v. Canada* [Attorney General], 1988). 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 (Craig, 2012; Doe, 2009), it 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.<sup>28</sup> 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 two separate Canadian defamation lawsuits. In both instances, the defendants (A.B., and Jane Doe) were being sued for defamation after they reported a faculty member to their respective post-secondary institutions for sexual assault (*Galloway v. A.B.*, 2019; *Stuart v. Jane Doe*, 2019). In both cases, the courts found in favour of privacy, and granted the requested publication ban.

There are striking similarities between the two cases. As a result of their 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 their respective post-secondary institutions. One of the women, a professional artist, referred to as A.B., had a public art exhibition in New York City about the experience of reporting sexual violence to campus administrators (*Galloway v. A.B.*, 2019). Jane Doe made a

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<sup>28</sup> The complainant is able to apply to the courts to have the publication ban rescinded. There is no guarantee that the court would rescind the publication ban (Taylor, 2017).

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 (Hong, 2018). Neither the men accused nor the institutions were named by either 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 respective post-secondary institutions and remained silent until the investigations were completed. They engaged in the public sphere without specifically identifying their abusers or the post-secondary institutions that were involved. Yet, they were still sued for defamation by the men involved, who sought to rehabilitate their professional reputations through legal means, and, arguably, to punish the women who caused them reputational harm.

Since neither of the men in their respective lawsuits consented to the defendant’s requests for a publication ban, the women were required to make an argument to the court about the need to have their identities protected.<sup>29</sup> In both decisions, the courts note 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 requested publication bans. The decisions were largely attributed to the fact that the women were relatively unknown in the public sphere in relation to their respective legal proceedings (*Stuart v. Jane Doe*, 2019, para 33). In the *Galloway* (2019) decision, Justice Marzari noted in her ruling that a key reason to grant the publication ban was because A.B. was very selective in who she disclosed the sexual violence to (para 11). Justice Marzari 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” (*Galloway v. A.B.*, 2019, para 11). In this decision, Justice

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<sup>29</sup> To take this additional step of requesting a motion for a publication ban adds to the financial burden. The national average for legal fees for a motion range between \$5,000–\$10,000 (Bruineman, 2019).

Marzari constructs the “good victim” as one who protects the identity of the accused and minimizes the number of disclosures about the violence she experienced to only those within her close social circle. The judge in *Stuart v. Doe* (2019) relied heavily upon the decision in *Galloway* in the decision to grant Jane Doe a publication ban.

These decisions suggest that publication bans in civil trials will be reserved only for women who rely upon the formal investigative process, regardless of how problematic, slow, or discriminatory it may be. Further, it seems that publication bans on proceedings will only be available to women who are able to demonstrate that they are compliant and “good” victims.<sup>30</sup> There is an expectation that women will remain quiet to keep their identities hidden, and in turn, keep his identity a secret as well. I take up the linkage between the idealization of women’s modesty and the history of defamation law in the following Chapter. Here, it suffices to say that the 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.

## **Conclusion**

Through an overview of the procedural and practical steps involved in a lawsuit, this chapter has demonstrated the challenges in navigating the civil legal system from the perspectives of people who have been sued or threatened with a lawsuit. The legal textbooks I consulted presented the civil legal system as a linear process, but, as many of the research participants explained, this is often not the case. Unsurprising, the available legal textbooks are

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<sup>30</sup> This is not to suggest that Galloway and his supporters have not attempted to disrupt A.B. as a “good victim” in legal documents, in the media, and on social media. Galloway has strategically framed A.B. as a “jilted lover” following a failed “affair.” His Notice of Civil Claim and public statements frequently reference the fact that A.B. is older than him to demonstrate there was no power imbalance between the two of them.

written from the perspective that the law is a neutral and objective arbiter, and fail to account for how power dynamics between parties can shape legal proceedings, such as the documentary and oral discovery processes. The narratives of research participants demonstrate how power dynamics between plaintiff and defendant can be used strategically. Abusive men can use the process to mimic abusive dynamics, trying to intimidate and silence both their victims and those who supported them even before formal proceedings begin. The absence of scaffolded protections available to complainants in criminal sexual assault trials—such as the automatic availability of publication bans and the *Criminal Code* rules which limit access to private records and questioning on sexual reputation and sexual history—means that silence breakers are often subjected to private legal action where they are left vulnerable to humiliation, shaming, and re-victimization. Overall, both the ongoing presence of differential power dynamics between plaintiff and defendant and the calculated use of rape myths allow for abusive men to strategically use the civil legal system as a means to foster abusive power dynamics under the guise of “truth” seeking and the redemption of their tarnished reputations. The following chapter examines the legal construction of reputation as gendered.

### Chapter Three: The Gender of Defamation Law

Reputation is considered so important that an entire body of law—defamation law—exists solely for the purpose of protecting people from reputational harm. In 1929, prominent English tort scholar Sir Frederick Pollock (1929, p. 242) wrote that “reputation and honour are no less precious to good men than bodily safety and freedom. In some cases, they may be dearer than life itself.” (as cited in Rolph, 2008, p. 6). Such sentiments about the importance of reputation remain intact, as demonstrated by more recent legal decisions. To date, the most in-depth explanation of the importance of reputation by the SCC is in the defamation case *Hill v. Church of Scientology of Toronto* (1995). The SCC emphasized the importance of a “good reputation” as being “closely related to the innate worthiness and dignity of the individual” (para. 107).<sup>31</sup> The importance of men’s reputation is found not only in defamation law but also in criminal law. For example, Gillian Balfour (2002) tracked criminal cases in Manitoba where men were charged with violent offences, finding that criminal courts tend to treat male violence, especially when enacted by white men, as a reasonable and normal response to perceived threats to their reputation (See, too, Comack & Balfour, 2004, Chapter Two). Yet, despite the certainty justices in the common law tradition have placed on reputation as a fundamental quality of democratic society, the common law has not attempted to define what constitutes a “good” reputation (Post, 1986). The concept of reputation is arguably more of a sociological concept than a legal one, as reputation is intangible and is interconnected with an individual’s sense of worth (Skolnick, 1986). Reputation is also experienced through interpersonal relationships. For example, once

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<sup>31</sup> The Church of Scientology claimed that Hill, a Crown Attorney, misled a judge and breached a court order sealing documents that belonged to the Church of Scientology. The case went to the SCC to assess whether the common law tort of defamation was inconsistent with the Charter 2(b) right of freedom of expression. The SCC decided that the law is an appropriate balance between competing interests of reputation and freedom of expression (*Hill v. Church of Scientology*, 1995)

someone has experienced reputational damage, they may experience varying degrees of societal exclusion (Skolnick, 1986). Defamation itself is also a social concept because for a statement to be actionable it must be communicated to a third party requiring social interaction (Heymann, 2011).

This chapter explores the world of defamation, both as a legal construction and as a normalizing discourse of gender and reputation. I begin the chapter with a brief literature review of the sociological underpinnings of defamation law and, in turn, reputation. The discussion shifts into an analysis of reputation as a gendered concept, specifically comparing the construction of men's reputation with women's reputation, which is often intertwined with women's sexuality. The chapter then shifts to a summary of Canadian defamation law and the legal defences available to people who are sued for defamation. I will then move into a discussion about the limitations of available defences for silence breakers.

### **A Socio-Legal Analysis of Defamation Law**

By the 16<sup>th</sup> century, common law action for defamation became common place (*Hill v. Church of Scientology of Toronto*, 1995, para. 113). The common law of defamation was created to reduce the reliance on the duel “as a method for vindication of reputation,” as it was “regarded by the monarchy as being particularly dangerous to the stability of the State” (Danay, 2010, p. 23). The link between violence and defending male honour continues to characterize the law to this day. In *Hill*, Cory J. wrote: “Though the law of defamation no longer serves as a bulwark against the duel and blood feud, the protection of reputation remains of vital importance” (para. 117). Despite the law's insistence that men should be able to protect their reputations, since the early twentieth century, legal scholars have criticized the common law of defamation for being “old and out of date, moss covered with age” (Courtney, 1902, p. 552, as cited in Danay, 2010, p.

3), “absurd in theory and very often mischievous in its practical operation” (Veeder, 1903, p. 546, as cited in Danay, 2010, p. 3), and “infected with the foolish conceits, absurd paradoxes, superstition, and artificial reasoning of a semi-barbarous age” (Courtney, 1902, p. 552, as cited in Danay, 2010, p. 3). Yet, despite the longstanding criticism of defamation, alongside significant shifts in societal views about the importance of expression and speech, along with radical changes in communications technologies, the tort of defamation has changed very little over the centuries (Young, 2017, p. 593).

Under common law, there are two categories of defamation—slander and libel. Each constitutes a distinct legal category governed by different legal regimes: slander refers to oral communication, while libel refers to written communications (Danay, 2010; Osborne, 2015). For slander cases, the rules are more heavily tilted in favour of the defendants (Danay, 2010). For a successful slander case, the plaintiff is required to prove that they have suffered pecuniary damages, meaning that there is a quantifiable monetary amount attached to the damages cited for the claim to be actionable (Danay, 2010). There are certain exceptions to the obligation to prove pecuniary damages—one can claim slander, *per se*, when seeking redress from: words disparaging the reputation of the plaintiff in their trade or profession; words imputing the commission of a criminal offence; words imputing to a “loathsome or contagious disease”; and, in the one instance specifically reserved for women (and discussed below), imputing “unchastity” (Danay, 2010, p. 19).

In comparison to slander, the rules of libel are tilted in favour of the plaintiff. Libel is a strict liability tort, meaning that the plaintiff does not have to prove there was negligence or an intention to cause harm (Young, 2017).<sup>32</sup> The plaintiff only needs to demonstrate that the printed

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<sup>32</sup> There is some exception to strict liability under the latest defence of responsible communications, which is grounded in a lack of fault (Young, 2017).



words could be read as defamatory, refer to the plaintiff, and have been published to at least one third party (Danay, 2010). Under libel law, there is no burden for the plaintiff to demonstrate that the statement is untrue or that the defendant was at fault for publishing the allegedly defamatory words (Danay, 2010). Further, the plaintiff does not have to demonstrate that they suffered any loss in order to collect damages because the damage to their reputation is presumed (Danay, 2010, p. 19). Libel cases are far more common in Canadian courts than slander cases (Young, 2017). Overall, the courts have had a long standing interest in preserving reputation.

### **The Preservation of Reputation**

Legal scholar Jerome Skolnick (1986) wrote that “defamation is a distinctively sociological tort” because at its core it is about the protection of an “individual’s projection of self in a society” (Skolnick, 1986, p. 677). Reputation is highly relational, involving, three relational acts:

an act of attribution in which someone attaches an (evaluative) quality to someone else;  
an act of sharing, in which this attribution is communicated to others; and an act of perception in which this attribution is recognized and understood by a receiver (Giardini & Wittek, 2019, p. 1).

Reputation is also unique because while someone has control over many of the factors of their reputation, including their actions and other biographical information (for example where they went to school, their professional designation, etc.), ultimately the reputational assessment is done by others (Heymann, 2011). Reputation cannot exist without another person, or a community, to form a judgment about an individual that in turn guides future interactions between said individual and others (Heymann, 2011). Reputation is not a tangible object but can

have serious implications for many aspects of a person's life, ranging from economic opportunities to social networking and even romantic relationships (Heymann, 2011).

The ethereal attributes of reputation are given material effect through laws designed to mitigate against reputational harm. For example, in *Hill v. Church of Scientology of Toronto* (1995), the SCC extensively examined the importance of a "good reputation." Justice Cory, writing for the majority, wrote:

. . . to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation. (*Hill v. Church of Scientology of Toronto*, 1995, para. 107)

Cory J. established that while reputation is not explicitly mentioned in the *Charter*:

. . . the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society. (*Hill v. Church of Scientology of Toronto*, 1995, para. 120)

The fundamental role of reputation is a core value that the SCC continues to take seriously. In November 2019, Joanna Birenbaum, a Toronto lawyer specializing in sexual violence litigation, made submissions for the Barbra Schlifer Commemorative Clinic as an intervenor at the SCC to urge the courts to protect women from retaliatory lawsuits for reporting sexual violence. As Birenbaum began her submissions, Justice Rowe interrupted her to ask about men whose reputations would be damaged by false allegations of sexual violence:

**Birenbaum:** Justices, the Schlifer Clinic intervenes in this appeal because survivors of sexual violence across Canada should not have to think about whether or not they have the emotional and financial capacity to withstand a lawsuit before they report to the police, or their employer or their school, or before they reach out for help from trusted persons in their lives. Lawsuits against women who disclose sexual violence, they are not a hypothetical problem, they are not an anticipated problem . . . .

**Rowe:** What about if the allegation is 100% false? What happens to the person who is accused?

**Birenbaum:** We need to take a step back. We do not have a social problem, systemic social crisis of false reports.

**Rowe:** It's a problem for the person's reputation who is now destroyed.

**Birenbaum:** . . . Disclosures of sexual violence ought to be given significant weight, because, your honours, the crisis of violence against women in this country can only be addressed, or at least in part, by individual women coming forward and disclosing and reporting. It is on the backs of individual women that this social crisis can be addressed. [ . . . ] The overwhelming majority of disclosures of sexual violence are true.

**Rowe:** What about the one's that aren't?

Justice Rowe's interruptions made it clear that, when it comes to sexual violence, his primary concern is the reputation of men who are falsely accused. Despite Birenbaum's assurances that false accusations are a "rarity," and her attempt to have the Court consider the social, public, and indeed legal implications of silencing speech related to systemic gendered violence, Justice Rowe appeared to be more concerned about the potential damage to individual men's reputations.

Inherent in the urgent defenses of men's reputations from both Justice Cory and Justice Rowe is the belief that reputation is at once a vitally important entity that must be protected and also something easily endangered. Despite the certainty, however, reputation is historically and socially contingent (Skolnick, 1986). For this reason, it is worth examining the history of reputation as it has been understood by the courts over time.

Robert Post (1986) identified three key concepts of reputation in defamation law that highlight how the conceptualization of reputation has manifested in the legal terrain: reputation as property, reputation as honour,<sup>33</sup> and reputation as dignity. Post (1986) acknowledged that while these three are not the only possible concepts of reputation, they had the "most important impact on the development of the common law of defamation" (p. 693). For the purposes of this study, reputation as property and reputation as dignity are highly useful concepts for further developing a theoretical framework to understand men's reputation and lawsuits against silence breakers. Reputation as honour was the prevalent perspective in pre-Industrial England during the formative years of defamation law. Reputation as honour refers to the social position of the individual (Post, 1986). In modern times, however, the idea of 'honour' appears as something of an anachronism, fading from view in favour of reputation as property and as dignity. For this reason, this section focuses on the property and honour dimensions of "reputation", which have travelled into the contemporary legal arena more smoothly.

*Reputation as property* views character as a form of "capital," and "presupposes that individuals are connected to each other through the institution of the market" (Post, 1986, p. 695). Reputation shares many characteristics with other things that we consider property; reputation has economic value that is derived from the market and is the basis for compensation

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<sup>33</sup> Reputation as honour was the prevalent perspective in pre-Industrial Revolution England during the formative years of defamation law. Reputation as honour refers to the social position of the individual (Post, 1986).

(Heymann, 2011). For example, a lawyer with a good reputation can charge higher fees than a lawyer with a poor reputation (Heymann, 2011). The ontological status of reputation as property is not created until it reaches the economic or intellectual marketplace (Heymann, 2011). The fact that reputation cannot exist without the judgment of others marks a significant difference from other traditional forms of property, which are often tangible items (Heymann, 2011). The concept of reputation as property is so deeply embedded in defamation law that a 19th century legal scholar concluded that “the protection is to the property, and not to the reputation. . . . Pecuniary loss to the plaintiff is the gist of the actions for slander or libel” (Townshend, 1877, as cited in Post, 1986, p. 696). It is believed that a person can build their reputation through their labour. Post writes that “it is this concept of reputation that underlies our image of the merchant who works hard to become known as creditworthy or of the carpenter who strives to achieve a name for quality workmanship” (1986, p. 693). In this conceptualization, the good name one builds for himself is tied to one’s ability to successfully navigate a competitive market. If another person undermines one’s ability to compete in the market by carelessly or maliciously broadcasting false information about them, it becomes a legal harm. It follows that monetary compensation is an appropriate remedy for this kind of reputational damage.

In many of the civil cases I reviewed, the plaintiff cited economic consequences as a result of a loss of employment or job opportunities following allegations of sexual violence. (For example, *Caron v. A*, 2015; *Galloway v. A.B.*, 2019). Some plaintiffs evaluated their reputations as having experienced so much damage from the allegations of gendered violence that they sought millions of dollars in damages (For example, *Rizvee v. Newman*, 2017). Post’s (1986) conceptual category of *reputation as property* helps to understand the ties to the economic

evaluation of reputation; however, not all reputational damage is instrumentally tied to the market.

*Reputation as dignity* refers to a relationship between the public and private aspects of reputation (Post, 1986, p. 707). Reputation as dignity differs from reputation as property because “dignity is not the result of individual achievement and its value cannot be measured in the marketplace. It is instead ‘essential’ and intrinsic in ‘every human being’” (Post, 1986, p. 712). From this perspective, “the law of defamation can be conceived as a method by which society polices breaches of its rules of deference and demeanor thereby protecting the dignity of its members” (Post, 1986, p. 710). Therefore, defamation law has a dual function of protecting an individual’s dignity and enforcing society’s interest in maintaining civility (Post, 1986). When cases involve the loss of dignity, it is not necessarily about a monetary award because dignity cannot be restored through money (Post, 1986). Rather, if the courts are able to establish that the statements were in fact untrue and thus defamatory, an individual’s concept of their own self-worth may be restored and their exclusion from their respective community may be reversed (Post, 1986).

Reputation as dignity has been recognized by the SCC. In *R v. Lucas* (1998), the Court considered the appeal of Mr. and Mrs. Lucas, who had been convicted of criminal defamation for picketing outside a police station, holding placards that specifically named a police officer and which falsely accused him of knowingly placing a child in danger of sexual abuse. The SCC agreed with the trial judge that the defendants “should have known that the statements on their placards were false,” and the majority justices held that “[t]he protection of an individual’s reputation from wilful and false attack recognizes both the innate dignity of the individual and the integral link between reputation and the fruitful participation of an individual in Canadian

society” (*R v. Lucas*, 1998, para. 48). As this case illustrates, and as confirmed by Post, the defence of reputation is about more than simply restoring economic loss; defamation is also about the restoration of one’s dignity.

Unlike pecuniary damage to one’s market evaluation, the dignity aspects of reputation are somewhat ineffable; dignity is something inherent to us all and is clearly important, yet it is also seemingly fragile. Its vagueness notwithstanding, courts seem confident that they will know harm to dignity when they see it. As Justice Goodman stated in a civil defamation case involving a disclosure of childhood sexual abuse by two sisters,

I agree with the plaintiff’s final submission in that a good reputation is closely related to innate worthiness and dignity of the individual. False allegations can also very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former luster. (*Vanderkooy v. Vanderkooy*, 2013, para. 215)

In this presentation, it is the loss of dignity and “good reputation” that seems easier to identify; reputation may be better judged in its absence. From this perspective, the appropriate remedy is to return “luster” to a person “tarnished” by defamation. A defamation lawyer I interviewed, who has represented both plaintiffs and defendants in defamation claims following sexual violence allegations, noted that for some of the men she has represented, the purpose of the lawsuit is not necessarily seeking monetary damages but rather *vindication* from the courts, to restore their reputation in the community:

. . . [V]indication . . . sometimes . . . really is the key motivation for plaintiff in defamation matters because they want the piece of paper; a judge saying this was defamatory. . . . Often, it’s not about the money at all, they want that vindication. (Interview with Carmen, Lawyer, 2019).

The time and money required to proceed with a lawsuit, along with the low likelihood of receiving a large monetary award, suggests that plaintiffs have non-monetary motivations for initiating legal action against silence breakers. For example, in *Whitfield v. Whitfield* (2016), Bryan Whitfield was only awarded \$5,000 in damages. His “win”, therefore, signalled something else: the vindication of his reputation. While Post’s exploration of the key characteristics of reputation as property and dignity is helpful in teasing out its various relational and legal qualities, the typologies fail to take into consideration the specifically gendered nature of defamation law, which I will examine in the following section.

### **Defamation Law and Women’s Reputations**

Post’s exploration of the key characteristics of reputation as property and dignity is clearly helpful in teasing out its various relational and legal qualities, and goes a long way to contextualizing the contemporary defamation suits under study here. But his typologies focus on *male* reputation and its legal manifestations, even as he presents these conceptualizations as if they are gender-neutral. There exists only a small body of literature that has examined women’s uses of defamation law. The research has found that women have historically used, and continue to use, defamation law for vastly different purposes than men (Borden, 1997, 1998; King, 1995; Pruitt, 2003, 2004), and that the mobilizations of reputation as either property or dignity do not apply so easily to women (Borden 1997). In particular, historically, women have only had access to defamation protections when their *sexual* behaviour or character has been publicly impugned. Historically, women, unlike men, have most often attempted to protect their reputation from degrading comments about their sexuality. For this reason, Borden (1997) argued that women’s experiences of defamation law do not fit into Post’s (1986) typologies of defamation. This section highlights women’s unique experiences with defamation law, which is intertwined with



stereotypes about women's sexuality. While the types of cases and courts' responses have shifted dramatically over time, these cases reveal that discriminatory societal assumptions about women's sexuality are still embedded within defamation law.

From the late 19th century to the early 20th, when women did sue for defamation, it was rarely for anything other than sexual slander—referring to a verbal accusation that a woman had engaged in behaviours such as adultery, sex work, pre-marital sex, or other sexually deviant activities (Borden, 1997; Krzanich, 2011; Pruitt, 2003). Diane Borden (1997, 1998) examined defamation cases decided in the United States between 1897–1906 and 1967–1976, two distinct periods of the women's rights movement when women were beginning to enter the public sphere in greater numbers. Borden found that although women acted as plaintiffs in only 21.9% of slander cases over these two periods, they were often successful, although the courts awarded women damages of much lower amounts than what they awarded men (Borden, 1997). Between 1897–1906, male plaintiffs received damages amounting to more than double of what was awarded to women plaintiffs (Borden, 1997). By 1897–1976 this disparity had increased, with men being awarded more than eight times the average amount of damages that the courts awarded to women plaintiffs (Borden, 1997). In the later period of the study, women continued to be successful in actions relating to damages to their personal reputations but were unsuccessful in 80% of the actions brought forward for damages to their professional reputations (Borden, 1997). These findings are telling, illustrating how the courts have historically regarded men's reputations as holding more economic value. Borden argued that the court response to women's claims of defamation reinforced the cultural stereotypes about women's virtue and domesticity.

Straightforward sexual slander cases alleging “unchastity” started to taper off in the 1960s. Claims of defamation by women shifted into cases defined by what Pruitt (2004) has called “new chastity,” defined as an attempt, often by media outlets, to ridicule, degrade, and humiliate women in relation to their sexuality, often taking the form of parody or ridiculing her “in relation to her sexual personhood” (pp. 470–471). An American example of a “new chastity” is when Kimberli Jayne Pring, a former Miss Wyoming, initiated a lawsuit against a publication for publishing a sexually graphic parody story about her (Pruitt, 2004). In another case, a woman sued a pornographic television show for using unauthorized videos of her juxtaposed with graphic sexual imagery (Pruitt, 2004).<sup>34</sup> Pruitt (2004) draws links to Borden’s (1997) findings, noting that both traditional chastity cases and new chastity cases reinforce women’s association with the private sphere, and more specifically sexual propriety. These cases differed from previous generations because the matter was not about her chastity but her public degradation. Unlike in the past, where courts tended to take a paternalistic role to protect a woman’s virtue, to ensure she was able to participate in the nuclear family, Pruitt (2004) found that new chastity cases are rarely successful, and that the courts are far more concerned about the preservation of free speech over women’s reputations.

In Canada, there is far less research on defamation law and its relationship with gender. I was only able to find one study on the gendered implications of defamation law in Canada focusing specifically on criminal libel (Taylor & Pritchard, 2018).<sup>35</sup> While the focus of the

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<sup>34</sup> “New chastity” cases are seldom successful in the United States because they are ruled to be a matter of personal opinion protected by the First Amendment (Pruitt, 2004). Unfortunately, to date, there is no similar research examining women’s defamation claims in the Canadian context.

<sup>35</sup> Criminal libel has a long history in Canada, and the original *Criminal Code* definition of criminal libel has remained relatively unchanged since 1912 (Taylor & Pritchard, 2018). By contrast, the number of US states with criminal libel laws has been steadily declining since the 1960s, and the offence was struck down by the United Kingdom and several former British colonies (Taylor & Pritchard, 2018). While criminal libel is not the focus of the current study, it is an area of law that awaits further research.

present study is not criminal libel, Taylor and Pritchard's (2018) research found that while criminal libel prosecutions may have been rare before the widespread adoption of the internet, they were able to identify approximately 400 criminal libel cases in Canada since the beginning of the 21st century (Taylor & Pritchard, 2018). The sheer number of recent prosecutions indicate that criminal libel is occurring much more frequently than is typically assumed by the legal community (Taylor & Pritchard, 2018).

The increase in criminal libel cases in Canada is decidedly gendered. Taylor and Pritchard found that the dramatic upswing in these cases is largely due to the increase in online slut shaming, defined as the digital shaming of individuals for their (perceived or actual) sexual behaviour (Webb, 2015). Women who are victimized by this form of harassment may opt to report the experience to the police as opposed to launching civil legal proceedings—the high cost of private litigation means that, for some, pressing for charges of criminal libel makes more sense when the damages amount to something other than loss of income or wealth (Taylor & Pritchard, 2018).<sup>36</sup> Taylor and Pritchard categorized these cases by drawing on Post's typology of *reputation as dignity* as the allegations of sexual misconduct are often so socially unacceptable that the individual experiences a loss of self-worth that cannot be evaluated in monetary terms. These findings also align with Pruitt's characterization of new chastity cases as online hate statements attempting to degrade and humiliate women in relation to their sexuality. At the same time, like traditional chastity cases, the public degradation of women's sexuality reinforces women's association with the private sphere (Pruitt, 2004). Taylor and Pritchard's

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<sup>36</sup> Although beyond the scope of this study, another interesting finding from their research was that a number of the defamation charges were in relation to public protest or criticism of police about sexual violence or allegations of police engaging in sexual violence. In addition, a number of the cases where charges were laid involved citizens being charged for calling women police officers derogatory and gendered names such as "fat cow," "bitch," and "fucking sow" (Taylor & Pritchard, 2018, pp. 255–256). I do not believe that police officers should criminalize people for such statements, but I do think the gendered language targeting women police officers supports my argument that women are often subjected to gendered reputational damage relating to their gender and/or sexuality.

findings have suggested that defamation continues to be a gendered legal category, with different meanings and significance for women and men.

Although there is no centralized database used to track lawsuits, there is reason to believe, via recent media reports, that American women have begun initiating lawsuits against men for another gendered iteration of reputational harm. After the #MeToo movement gained popularity, many public figures accused of sexual violence publicly called their accusers “liars” (Jacobs, 2020; Pauly, 2020). In turn, the silence breakers have sued the accused men for discounting their stories of sexual violence (Jacobs, 2020; Pauly, 2020). The silence breakers strategically chose a defamation suit because of the statute of limitations in the United States, which prevents the pursuit of other legal options<sup>37</sup> (Jacobs, 2020). The list of men currently being sued for calling their accusers liars includes Donald Trump, Bill Cosby, Harvey Weinstein, and Roy Moore (Jacobs, 2020). At this time, there is not enough data to suggest that these lawsuits are widespread, but it is worth recognizing as a mechanism of resistance against attempts by men accused of sexual violence to diminish women’s reputations in the public sphere, even as charges of defamation may also be wielded against women who speak out about abusive men. The historical context of defamation demonstrates that the term has different meanings for men and women, such that men’s reputation, as property and a source of dignity is accorded a place in men’s fundamental rights, while, for women, it has been and continues to be, a way to police or protect their sexual integrity. In particular, the specifically androcentric assumptions that are built into defamation law go a long way to explaining its appeal as a

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<sup>37</sup> It is hypothesized that such lawsuits may not be as common in Canada because very few provinces have a statute of limitations for civil suits that include allegations of sexual violence.

mechanism for those men who feel wounded and victimized by being accused of sexual violence.<sup>38</sup>

### **Canadian Defamation Law and Available Defences**

As discussed thus far, defamation law is a profoundly gendered legal category, one centered around normative definition of masculinity and femininity, and the social value of a “good” reputation. Not surprisingly, perhaps, these masculinist assumptions also permeate the process of defending against a defamation lawsuit. This section provides a cursory overview of the defences available to those being sued for defamation, focusing especially on the defences most commonly used by silence breakers. As established in Chapter Two, even some of the more seemingly neutral aspects of the law have gendered implications.

In Canada, a defendant to a defamation suit may rely on a variety of defences, including: truth or justification, privilege, fair comment on a matter of public interest, responsible communication on a matter of public interest,<sup>39</sup> reportage,<sup>40</sup> and consent<sup>41</sup> (Osborne, 2015). This section will provide an in-depth overview of the defences of truth, qualified privilege, and fair comment as these are the most common defences used by silence breakers. The overview of each will demonstrate the complexity of defamation defences, which can make it challenging for silence breakers to navigate silence breaking in a way that may protect them from litigation or,

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<sup>38</sup> While these cases remain before the courts, it will be fascinating to see how the courts weigh the need to protect women’s reputational damage after speaking publicly about having experienced sexual violence. “Liar” defamation lawsuits may also be a site for future feminist legal and socio-legal research.

<sup>39</sup> Responsible communication on a matter of public interest was established by the SCC in *Grant v. TorStar Corp* (2009). For this defence to be successful, the defendant is required to demonstrate the degree of diligence and responsibility exercised in the investigation, writing, and fact checking of the story (Osborne, 2015).

<sup>40</sup> Reportage was also clarified in *Grant v. TorStar Corp* (2009). The SCC has established that every time a statement is published is a new cause of action, meaning that a defendant simply repeating statements made by a third party is not a defence (Osborne, 2015).

<sup>41</sup> The defence of consent refers to unusual circumstances whereby the plaintiff consented to the publication of defamatory statements (Osborne, 2015).

alternatively, why some silence breakers may assume they are protected from litigation. The complexity of these defences also demonstrates why legal representation with expertise in defamation law is crucial for silence breakers.<sup>42</sup>

### **Truth and the option to countersue**

Truth is a complete defence to liability in defamation. If the defendant is going to use truth as a defence, they must prove, on a balance of probabilities, that the contested statement is true (Osborne, 2015). The reason for this defence is that “defamation protects the plaintiff’s reputation, and if the plaintiff’s reputation is damaged by truth, it is a reputation that is unwarranted and unworthy of protection by the law of defamation” (Osborne, 2015, p. 437). Many of the lawyers I interviewed said that if this defence was pursued by the defendant, they would likely suggest their client also countersue for sexual violence. Some of the lawyers noted that at times a countersuit was done strategically. Darlene said a countersuit is a common strategy she uses: “I counter claim for the damages and that shuts [the plaintiff] down. Now I haven’t had any where they’ve paid me. It’s just been a tactic to get rid of the defamation thing” (Interview with Darlene, lawyer, 2019). Another lawyer I spoke to cautioned that there is some risk involved in using truth as a defence, as well as with countersuing. Specifically, as Janet explained, using this strategy means that it’s up to the defendant to prove that what they said happened to them was true to the court’s satisfaction (Interview with Janet, lawyer, 2019). As discussed in the previous chapter, the discovery process may require the silence breaker to have

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<sup>42</sup> Every province and territory in Canada has its own defamation act, and there are some differences between the provinces. For example, Alberta, Manitoba, New Brunswick, Nova Scotia, and Prince Edward Island have abandoned the distinction between libel and slander (Osborne, 2015). Provinces that have maintained this distinction, however, have made some adjustments to the traditional meaning of libel to reflect new technologies (Osborne, 2015). For example, the *Ontario Libel and Slander Act* now includes television and radio broadcasts as well as print media as being sites of potential libel (Osborne, 2015).

intimate details of her private life examined. A lawyer, Darlene, cautioned that this is particularly true if the silence breaker wants to countersue:

As a complainant in a criminal case you do have some privacy rights. The defendant has to demonstrate that your therapy records are necessary or required for them to make a full answer in defense. In a civil case, you're asking for money. I'm sorry, then you have no more right to privacy. That's just how it is. If you are asking the court to give you money for the pain and suffering you've experienced, you are on a level playing field. You have no protection. You chose to come here and do this. You're going to have to open up the books on your emotional wellbeing. Before, during, and after.

As Darlene and Janet point out, the bulk of the risk involved in drawing on the defense of truth, as well as launching a countersuit, is borne by silence breakers; however, lawsuits can also be risky for the plaintiff—perhaps ironically, their reputation may be further damaged if the court accepts the defence of truth:

. . . oftentimes there will be a defence of truth which means if it goes to trial much of the evidence with the trial is going to focus on, did you do what the defendant said you did? And if there's any possibility that this might have to occurred, the plaintiff has to be willing to put all of that evidence out there and be cross-examined on it. . . . Imagine what the impact might be if you lose because the judge finds the allegations are true.

(Interview with Carmen, lawyer, 2019)

While the lawyers saw strategic value in the defence of truth, including initiating a countersuit, the silence breakers interviewed for this project did not share their enthusiasm, citing the enormous psychological and emotional harms the process could potentially inflict upon them. I asked a number of the research participants about the possibility of countersuing the plaintiff

for the violence they'd endured. Two said they were hesitant, fearing that it could be potentially fatal for them, that going to court may push them to suicide:

There are days that I want to [countersue], then there are days when I'm like I cannot have . . . you know [pause] descriptions of things in the media, I just don't. You hear these stories about women who are forced to watch the video, or they held up the clothing. I just thought I don't know if I can handle that. I have been so close to suicide so many different times. I'm not sure I'm actually built to withstand the media shit show that will ensue if I sue him. Deep down I want to, but at the same time, I don't know if I have it in me. As much as I'd love to, but I just don't know if I'd survive it. (Interview with Elizabeth, 2019).

Catherine had similar fears:

If I had to go to trial with the Superior Court [civil] case, me accusing this person of rape. I was like this might be the thing that kills me. If I go through the trial and he is found innocent, I will kill myself. (Interview with Catherine, 2019)

Despite these profound fears, Catherine ended up threatening the plaintiff with a countersuit after a series of unsuccessful settlement discussions. The threat of the countersuit was, in this case, an effective strategy that led to a settlement agreement between the two parties. Notwithstanding this positive outcome, to prove the allegations of sexual violence are true, women must open up the most private details of their lives to a plaintiff, an experience that can be deeply humiliating and psychologically damaging, making “truth” a difficult defence to access for many silence breakers who find themselves in this situation.

In the course of conducting this research, I learned that some of the research participants had misconceptions about truth as a defence to defamation before they were sued. Research



participants who were aware that truth was a defence assumed that if they were telling the truth, especially if they reported to the police, they were safe from legal action. Research participant Elizabeth articulated the misunderstanding about truth as a defence:

So even if you can prove your truth, and you have video, pictures, witnesses, whatever it is that you need to prove your truth, you still have to go to court and present all that and still have the burden of that lawsuit. I think a lot of people don't understand. They think that they can't even file [a defamation lawsuit] in the first place if you've told the truth but that's not how it works. (Interview with Elizabeth, 2019)

Elizabeth's quote highlights the reality that even if someone is telling the truth, if a statement of claim is filed, the defendant still has to go to court and defend herself. Elizabeth also highlights a common misconception that I frequently encounter—the assumption that a formal report of sexual violence is protected from legal retaliation. The following section introduces the legal concept of privilege and examines what types of communications are protected from legal action, and demonstrates that formal reports are not necessarily legally protected from a defamation lawsuit.

### **Privilege**

Privilege is another commonly used legal defence in defamation cases against silence breakers. The defence of privilege refers to communication between individuals that are given precedence over the protection of an individual's reputation (Osborne, 2015). For example, once someone has retained legal counsel, their communications with their lawyer are privileged and cannot be subjected to litigation. Privilege allows for clients to have open communication with their lawyer about their case. The intention of this defence is to ensure that some communications, specifically those that are shared for a social or moral reason, are excluded from public scrutiny in court (Osborne, 2015). There are two types of privilege: absolute and

qualified (Osborne, 2015). Absolute privilege is narrowly defined. In contrast, qualified privilege, the defence more likely to apply to expression about sexual violence, is far more difficult to establish because the parameters and scope of protection are not clearly defined. In this section, I will demonstrate that recent case law suggests that very few communications about sexual violence are protected by the defences of absolute or qualified privilege. I argue these legal decisions will have significant implications for future silence breakers.

### **Absolute Privilege**

Absolute privilege provides complete immunity from liability for defamation, even if the statement is made with malice. Absolute privilege is narrow and limited to parliamentary proceedings and submissions in provincial legislatures, judicial proceedings, and statements made between legal counsel and their clients (Osborne, 2015). The importance of absolute privilege may be self-evident, the rationale being that some forms of communication are so necessary to the functioning of society that they be protected from litigation.

In *Caron v. A* (2015) the BC Court of Appeal ruled that reports of sexual assault to the police are not protected by absolute privilege. In November 2012, a youth referred to as “A” by the court reported to the Royal Canadian Mounted Police (RCMP) that Simon Caron had raped her (*Caron v. A*, 2015). Caron provided work records, credit card statements, and school attendance records to the RCMP to show that he was in Alberta at the time “A” claimed the rape occurred. The RCMP dropped the charges laid against Caron. Caron subsequently filed a defamation lawsuit against A for reporting to the police, and for telling people she chose to have the charges dropped. In the statement of claim, Caron cited a number of consequences that resulted from A telling people that he had been charged and that she had dropped the charges, including his vehicle being vandalized and his friends being threatened (Cadieux-Shaw, 2015).

Caron also experienced depression as a result of the charges, for which he sought treatment and that, in turn, impacted his work opportunities (Cadieux-Shaw, 2015).

A applied to dismiss Caron's claim, arguing that her disclosure to the RCMP should be protected by absolute privilege (*Caron v. A*, 2015). Citing public policy research, she argued that failing to protect reports to the police through the framework of absolute privilege would have a chilling effect on future victims' ability or willingness to report their abuse to the appropriate authorities. The BC Court of Appeal rejected these arguments, citing case law that stipulates that absolute privilege is only available to protect complaints made to a quasi-judicial body (*Caron v. A*, 2015, para. 22). Since the police only investigate claims and do not adjudicate them—that is, they do not exercise quasi-judicial or administrative functions—the Court of Appeal ruled that the report falls outside the intended provisions of absolute privilege and, therefore, reports made to police are not entitled to these protections (*Caron v. A*, 2015, para. 22). In light of the Court's ruling, it would fall to parliaments to enact legislation to expand the definition of absolute privilege to include reports to the police, something that has yet to occur. This does not mean that there are no protections for police reports. Canadian defendants who report to the police who are then sued for defamation for their report can make the argument that their report is protected by the defence of qualified privilege.

### **Qualified Privilege**

In comparison to absolute privilege, qualified privilege is more difficult to define because qualified privilege can potentially apply to a wide range of situations (Osborne, 2015). To claim the protection of qualified privilege, a defendant must satisfy the court that there is a compelling policy reason to permit defamatory statements to be made at the expense of the plaintiff's reputation (Osborne, 2015). As demonstrated in *Hill v. Scientology* (1995) the courts take reputational damage very seriously and, therefore, the determination of qualified privilege is not

taken lightly by the courts (Osborne, 2015). Deciding when a communication is protected by qualified privilege is done on a case-by-case basis to determine whether there was a social or moral duty to share information (Osborne, 2015). As an example of information that may be protected, Osborne (2015) provides an exploration of a parent telling their adult child that the person they are going to marry has engaged in some sort of shameful behaviour. Here, it might reasonably be argued that the parent has a moral duty to protect a family member who has a legitimate interest in receiving the information, regardless of the reputational harm it may cause to the object of the communication. At the same time, the defence of qualified privilege would not extend to a distant friend of the parent who said the same things, because they would not be able to demonstrate that they had a duty or interest in sharing the information. Moreover, the courts would need to consider the specific moral and social obligation of the speaker: the defendant cannot claim qualified privilege if the impugned statements are made with reckless disregard to the truth, or if there is any evidence of malice in making the statements (Osborne, 2015). As this example demonstrates, the specific circumstances in which communications will fall under the protections of qualified privilege is based on broad principles that allow judges to weigh assessments of social obligations against the social interest in protecting reputation. Thus, qualified privilege is a discretionary defence. The courts have further ruled that news media outlets are not universally protected by qualified privilege because the media do not have an a priori moral or social duty to report on matters of public interest (Osborne, 2015).

Qualified privilege is a commonly used defence among people who are sued following a disclosure or report of sexual violence. As mentioned previously, the courts are selective about when a communication is protected by qualified privilege. An example of a case where a communication was accepted by the courts as being protected by qualified privilege is the

decision in *Franchuk v. Schick* (2014). The plaintiff, Mike Franchuk, was the director of an association where Mary Schick was employed as the sole administrator. Schick wrote a confidential letter to the president of the association stating that Franchuk had sexually harassed her in her office. The letter included direct quotes she attributed to Franchuk. Franchuk sued Schick, alleging that the letter was defamatory and false, and that he suffered damages (para. 3). Schick relied on the defence of truth and qualified privilege. The decision also demonstrates the challenges of truth as a defence. The decision notes that the sexual harassment as agreed by both parties relies on the narratives of the two individuals involved because there were no witnesses—the one other employee in the office was not present when the alleged sexual harassment occurred. Schick provided diary entries that she wrote about the incident, but the court ultimately ruled that “Although the defendant may have written about the alleged incident in her daily diary, that does not make them necessarily true, or even more reliable” (para. 20). Further, the decision noted that the other employee in the office had testified that she noticed nothing unusual that afternoon in respect to the interactions between the plaintiff and the defendant (para. 20). Therefore, the court could only rely upon the defence of qualified privilege, which was ultimately accepted because she had an interest in making her complaint in writing to the president of the association, who had an interest or duty to receive the letter—an essential element of qualified privilege (para. 28). Furthermore, the president limited the circulation of the letter to only other board members (para. 29). Therefore, the allegedly defamatory remarks were not widely circulated, thereby protecting the reputation of the plaintiff.

In contrast, the decision in *Whitfield v. Whitfield* (2016) draws the boundaries of qualified privilege regarding disclosures of sexual violence. *Whitfield* (2016) established that qualified privilege can be a defence if the defendant discloses sexual violence to certain family members.

The decision also highlights the limitations of qualified privilege by stating that the defence could not be extended to a communication with the defendant's childhood friend. Agnes Whitfield sued her brother, Bryan Whitfield, for childhood sexual and physical abuse. He countersued for defamation because she sent emails, letters, and postcards to lawyers, former friends, and family members explicitly discussing the abuse. After a 24-day trial spread out over the course of a year, Agnes Whitfield was awarded \$354,200 in damages plus costs (*Whitfield v. Whitfield*, 2014). Bryan Whitfield successfully appealed the decision, challenging the credibility and reliability of an expert witness and challenging Agnes' defence of qualified privilege for the numerous communications she'd had about the abuse (*Whitfield v. Whitfield*, 2016). The Ontario Court of Appeal ruled that the trial judge had erred on the question of reliance on an expert witness. More germanely, the Court of Appeal decided that the trial judge erred by applying qualified privilege to all of Agnes Whitfield's communications with third parties alleging various forms of abuse.

The Court of Appeal accepted Agnes' defence of qualified privilege for the communications to legal counsel and family but stated that her communications with a high school friend could not be protected by qualified privilege. Because Agnes had not been in contact with her old schoolmate for over 30 years, the judge ruled that there was "no duty or interest on the part of the respondent's former high school friend to receive the respondent's communications. In these circumstances, there was no legitimate interest to be protected by the statements" (*Whitfield v. Whitfield*, 2016, para. 78). Further, Agnes Whitfield did not testify as to why she copied her friend on the emails, nor was there any evidence to suggest she was seeking advice or support from the friend (*Whitfield v. Whitfield*, 2016, para. 78). In conclusion, the Ontario Court of Appeal ordered Agnes Whitfield to pay \$5,000.00 to her brother for including

her childhood friend on the email statements, and \$50,000.00 for the cost of the appeal (*Whitfield v. Whitfield*, 2016, ONCA 581).<sup>43</sup>

### **Fair comment**

Fair comment is most likely to be used by silence breakers who've been sued for repeating allegations of sexual violence in order to support women who disclosed to them or commented publicly on an allegation of sexual violence. For example, research participant Wanda, who is currently in the midst of a lawsuit, mounted the defence of fair comment. Wanda is being sued by a man accused of sexual assault. The accusations were widely publicized in the media. When the allegations were made public, Wanda tweeted about the case. She had never met the accused and had no connection to him.

The defence of fair comment on a matter of public interest is intended to restore the balance between free speech and the preservation of reputation. For this defence, there is an important distinction between commentary or opinions and factual statements (Osborne, 2015). Osborne (2015) provided the following example to make the distinction: "To say that X is immoral is a statement of fact that must be justified. To describe accurately X's conduct and declare it to be immoral is opinion or commentary" (p. 439). It is crucial that the reader or listener is aware that the statement is the subjective opinion of the defendant (Osborne, 2015, p. 439). Differentiating between what constitutes commentary or opinion and a factual statement can be a challenging task. Duke (2016, p.88-89) outlines the five elements for the courts to consider for the defence of fair comment:

1. Comment must be on a matter of public interest.
2. The comment must be based on fact.

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<sup>43</sup> It is also important to note the power differential here as Bryan Whitfield was represented by a prominent Toronto legal counsel while Agnes Whitfield was self-represented.

3. The comment, though it can include inferences of fact, must be recognizable as comment.
4. The comment must satisfy the following objective test: Could any person honestly express that opinion on the proved facts?
5. Even if the comment satisfies the objective test, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

The concept of fair comment is intended to allow a great deal of latitude for harsh criticism, to ensure that people are not deterred from participating in the public sphere (Osborne, 2015). The court must also determine that the comment was fair, meaning “the comment was one an honest person could make on the proven facts, however prejudiced, obstinate, or exaggerated his [sic] views may be” (Osborne, 2015, p. 440). Finally, the defence of fair comment does not apply if the plaintiff is able to establish that the comments were made with malice (Osborne, 2015).

Lawyer Katie Duke (2016) examined defamation lawsuits initiated by people accused of being “racist” most often by anti-racist advocates. Duke identified a number of limitations inherent to the defence of fair comment. The first is the requirement that there be factual basis for the comment, which has been applied by the courts in a manner that artificially limits the availability of the defence. The SCC has stated that the facts used to form an opinion must be sufficiently stated or otherwise known to the audience in order to permit the audience to come to its own conclusion as to the validity of the opinion (WIC Radio note 34 at para. 31, as cited in Duke, 2016, p.89). Therefore, to successfully use the defence, it is expected that all statements either explicitly reference their sources or state that the commentary is their opinion, to allow the receiver of the information to draw their own conclusions. Such an expectation fails to take into consideration how people typically communicate, particularly in settings or on platforms such as



social media or in a blog post (Duke, 2016). In *Mainstream Canada v. Staniford* (2013), Don Staniford, an anti-salmon-farming activist, was sued for publishing a number of statements on his website comparing salmon farming to the tobacco industry. The court ruled that Staniford was liable because while many of the supporting sources were available on his website, they were not explicitly referenced or hyperlinked (Duke, 2016). The trial judge ruled that while a “determined reader” could have located the factual basis for his comments, Staniford was found liable because the “non-determined readers” would not be “in a position to evaluate Mr. Staniford’s comments” (*Mainstream v. Staniford*, 2013, para. 43, as cited in Duke, 2016, p. 90). As Duke argues, these links between the “truth” and “fair comment” create an unrealistic expectation on those who wish to voice a critical opinion.

The other limitation of the fair comment defence identified by Duke “is the requirement that the comment meet the objective test of whether ‘any person’ could ‘honestly express that opinion on the proved facts’” (*Grant v. Torstar Corp*, 2009, para. 31, as cited in Duke, 2016, p. 90). Specifically examining cases involving allegations of racism, Duke raised concerns about how the defendant’s perspectives on and experiences of racism may be at odds with that of dominant culture’s beliefs about racism. The concerns raised by Duke are also relevant in lawsuits against silence breakers.

Fair comment is most likely to be used by silence breakers who are commenting on allegations of sexual violence or responding to a news media report of sexual violence. As has been demonstrated previously, establishing truth of sexual violence allegations can be challenging given the nature of sexual violence. Many issues emerge with the expectation that “any person” would come to the same conclusion for similar reasons that Duke (2016) identified when discussing defamation allegations related to issues of racism. Similarly, when the

defamation is regarding allegations of sexual violence, as has been established throughout this dissertation, both the courts and the general public often make discriminatory and incorrect assumptions about people who disclose or report sexual violence.

### **Apology and Retraction**

In common law, an apology and retraction are a mitigating factor in the awarding of damages (Osborne, 2015). A number of the provincial and territorial defamation acts have codified the apology. For example, in Ontario, the defendant is able to submit into evidence that they made or offered a written apology to the plaintiff before the commencement of legal action, or if the action was commenced before the defendant had the ability to apologize, that they did so as soon as they had the opportunity in order to mitigate the damages (R.S.O. 1990, c. L.12, s.20). Some of the research participants noted that the plaintiff in their cases offered to cease further legal action if they agreed to publicly retract their statement or make a public apology. None of the people I spoke to were willing to do this to avoid litigation. I spoke to a journalist who indicated that she was aware of two women who had been so threatened by litigation that they publicly retracted their statements alleging abuse by former partners (Personal Communication, 2019)<sup>44</sup>. I tried to interview these women to better understand their decision-making process and why they decided to publicly retract their statements, but neither responded to my interview requests. I share this anecdote because I think it is important to recognize that the threat of litigation can push women to publicly retract their statements of violence, which can have monumental consequences both for the individual women but also on a larger scale, perpetuating

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<sup>44</sup> I e-mailed this journalist for an interview because she had been sued after she said that a colleague in the news industry had sexually harassed her. Since she was hoping to settle the lawsuit, she declined the interview request. However, she provided me the names of two women who had also been sued or threatened with a lawsuit that she was aware of who had publicly retracted their statements. I have elected to remove the name of the journalist because I was in contact with her during my recruitment efforts and I want to protect her from the potential of additional legal retaliation.

the myth that women often make false claims of violence when in reality they are simply avoiding litigation.

## **Conclusion**

In this chapter, I traced the social and legal history of defamation in common law to uncover the androcentricity of defamation law. Defamation law has been designed with men's reputation in mind and, historically, limited women's "reputation" to their sexual integrity and modesty. Not surprisingly, then, men's reputation has been protected far longer and more vigorously by the law than violations of women's sexual autonomy. A critical examination of the sociological concept of reputation contextualizes the significant weight the courts place on the sanctity of individual men's reputation. The courts and the general public still remain concerned with false allegations of sexual violence as a site of reputational damage that men uniquely experience, despite significant empirical evidence demonstrating that false allegations are statistically uncommon (Lisak et al., 2010).

As allegations of sexual violence are at the core of these lawsuits, the defamation proceedings resemble a criminal sexual assault trial more than a typical defamation legal proceeding. But, in comparison to a criminal sexual assault trial, the silence breaker has far fewer legal protections. Ultimately, the legal defences to defamation offer limited legal protection for silence breakers and tend to prioritize men's reputation over women's ability to express themselves safely. This is one reason research participants were fearful of having the case proceed to trial. In addition to the invasive nature of the legal proceedings, many of the research participants were aware that the legal proceedings would be shaped by stereotypes about people who report sexual violence.

Post's (1986) concepts of (men's) reputation as property and reputation as dignity are useful in understanding what is at stake in these cases. First and foremost, in contemporary

society, the identification of reputation as a form of property illustrates why pecuniary damages are usually sought, on the assumption that reputational damage negatively impacts men's ability to participate in the market (Post, 1986). As my research revealed, however, financial loss tells only part of the story: in many cases, the plaintiffs were also seeking vindication from the court on the grounds they were wrongfully accused of sexual violence. For this reason, Post's (1986) concept of reputation as dignity is also highly relevant because the men are also seeking redemption from the courts that will allow them to re-enter social spaces from which they may have been excluded as a result of the sexual violence allegations made against them. At the same time, it is worth noting that the lawsuit will not always vindicate his reputation, and there are risks to men who pursue this legal route. As one defamation lawyer I spoke to pointed out, the court may accept the version of events presented by the silence breaker (Interview with Carmen, 2019). Further, the lawsuit may also bring more public attention to the allegations than if he had not pursued legal action. While the lawsuit is harmful for the silence breaker regardless, it does not always necessarily mean a strategic lawsuit will be able to redeem his reputation in the eyes of others. In fact, it can potentially cause further damage to his reputation. This insight necessitates additional queries into the motivations for such suits. As I will argue in the chapters to follow, the allure of legal action for men accused of sexual violence includes its punitive effects on the silence breaker in ways that mimic the abusive dynamics that ground the allegations in the first place. In this sense, Freyd's concept of DARVO –the reversal of victimization and the abusive use of courts – proves to be enormously significant.

## Chapter Four: Multi-System Retaliation

The focus of this chapter is to examine how abusive men can weaponize numerous institutional complaint mechanisms and rely on others to assist them in retaliating against silence breakers.<sup>45</sup> A significant finding from the study was the fact that many of the silence breakers were forced to defend themselves against numerous institutional complaints initiated by the man accused of sexual violence. As mentioned in the introduction, the concept of DARVO (Deny, Attack, Reverse Victim and Offender), coined by psychologist Jennifer Freyd (1997), is a useful framework for contextualizing the patterns of behaviour under examination in this dissertation. According to Freyd, DARVO involves using bullying and personal attacks as a means to discredit and terrorize anyone who attempts to hold an abuser accountable for his abusive behaviour (Freyd, 1997). The abuser will then create the illusion that they are the “true victims” of an unfair attack (Freyd, 1997). Freyd (1997) specifically identified defamation lawsuits as one way for abusive men to initiate an attack on a silence breaker. The concept of DARVO provides a conceptual framework to better understand the intention of men who initiate multiple complaints across institutions in order to deny, attack, and put their victims on the defensive by framing themselves as having experienced harassment and unfair treatment (Freyd, 1997). Silence breakers are then forced to defend themselves, often with little or no support, against multiple institutional processes while simultaneously having their experiences of victimization vigorously (and sometimes publicly) denied.

The research participants in my study confirmed Freyd’s analysis, often finding themselves subject to multiple attacks by the men who had abused them. For example, silence breakers who’ve experienced workplace sexual violence were often subjected to workplace

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<sup>45</sup> Bystander refers to individuals who received a sexual violence disclosure and assisted the individual or acted to hold the perpetrator accountable.

complaints by the man who abused them, alleging that they were the ones being harassed by the silence breaker's false allegations. In other circumstances, the silence breaker sought a non-legal remedy for the sexual violence they encountered, such as a transformative justice response, and the abusive man responded by initiating a police investigation of her behaviour, often citing criminal harassment.<sup>46</sup> The silence breakers' behaviours and activities then become the central focus, shifting the issue from his abusive behaviour to her response to his actions.

### **Legal Limbo**

Two of the research participants, Elizabeth and Camila, both used the term "limbo" to describe their respective situations. For this reason, I refer to this space as "legal limbo," because this uncertain legal space caused them significant emotional distress as they were left unable to defend themselves against the allegations being made by the plaintiff. Elizabeth was sexually assaulted by a professor, who she reported to both the university and the police. The police did not lay charges, but the university let him go after the allegations were made public. Camila, a queer person of colour, was sexually assaulted by a former partner, who was also a well-known figure in her professional industry. A Canadian media outlet was doing an investigative report on sexual violence within said industry and the story included a number of interviews with various women, including Camila, about the man who had abused her and other women in the same industry. Camila said that someone notified her former partner's employer about the story and he was forced to resign before it was published. In both situations, the men quickly filed lawsuits

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<sup>46</sup> As demonstrated in Table 2, three of the research participants used numerous forums to disclose or report sexual violence, they cited their numerous actions as a direct result of institutional bodies such as the police or the university failing to take appropriate action. This is qualitatively different than the actions the men took because the silence breakers were attempting to make a formal report but the institutions involved failed to take adequate steps to resolve the complaint or refused to investigate at all. In contrast, men used multiple systems as a means of retaliation.

against their respective institutions as well as the women involved, to counter the allegations made against them.

Both men claimed that their reputations were unfairly tarnished by false allegations. Since both men were public figures, there was media interest in their stories; the media reported on the lawsuits after they'd been filed, which is how both Elizabeth and Camila found out about the legal action taken against them. The media reported on the claims made in each lawsuit, about the allegations of sexual violence, from the perspective of the two men. The silence breakers were unable to defend themselves as they were never served, meaning that the legal action against them had not truly begun. As discussed in Chapter Two, for a lawsuit to officially commence, the plaintiff must serve written notice to the defendant(s)—without being served, a defendant or defendants cannot file a defence. In Ontario, the *Rules of Civil Procedure* state that the plaintiff should serve the defendant with the statement of claim within six months (Rule 14.08[2]). But this is not always the case, and the court will make exceptions to this to ensure access to justice. For example, Elizabeth's lawyer warned her that the timelines imposed by the rules of civil procedure don't automatically mean the lawsuit will be thrown out by the court or that the lawsuit has been abandoned. The lawyer told Elizabeth that only after five years of inaction could she go to the court and ask for the lawsuit to be withdrawn. Camila received similar legal information indicating that the plaintiff may be able to commence litigation at a later date but would have to justify the delay to the court.

While the men served the institutions that investigated the claims of sexual violence, they chose not to serve the women. I hypothesize that this was done strategically, to ensure the silence breakers were excluded from settlement discussions with both institutions and would also be unable to defend themselves, either in court or in the media. It is assumed that the men provided

copies of the lawsuit to the media shortly after it was filed as outlets immediately began reporting on the lawsuit, asserting that the men were targeted by false allegations. Elizabeth only found out about the lawsuit alongside the rest of the world when it was published in a national media outlet. Camila also learned of the lawsuit via the media but had been warned that it was coming. The media assisted the men in their attempts to publicly redeem themselves, helping to shift the narrative away from allegations of sexual assault to the idea that they had been unfairly targeted by false allegations. Camila and Elizabeth felt that the media aided the men by punishing those they'd hurt. For example, a national newspaper columnist known to target survivors of sexual violence publicly identified Elizabeth and called her a liar. Elizabeth was put in a difficult position in that, as she has not been served, if she does decide to publicly defend herself she risks having additional claims of defamation being added to the lawsuit, if or when the plaintiff opted to serve her. Elizabeth is angry that she will likely never have the chance to publicly defend herself or prove the truth of what happened:

I'm in a limbo, for years, waiting for him to [serve the documents]. I'm angry, so I'll put it this way, shit or get off the pot. But my hands are tied. I feel like I am chained to this asshole for the next number of years because I can't do anything. I can't push it through the system. I can't advance it on my own. He has to take the action and as long as he's got that hanging over my head, I'm stuck. Horrible. It's a silencing tactic and it's a control tactic. He knows damn well that he's got me. He's got a noose around my neck. So, I can't even tell my truth because we can't even get into court. He served other people and went after money from other people. From what I understand, got some from one of the parties. But [he] has left me hanging. Never served me and never dragged me into court. (Interview with Elizabeth, 2019)



Elizabeth noted the difficulty in moving forward with her life while also having the legal case hanging over her. She does not know if or when she will be served as she waits out the five-year period before she can ask the courts to dismiss the lawsuit.

Camila also found herself in legal limbo. She spoke about how the experience has made her more vigilant about who she can talk to about what happened, and how she has had to censor herself online. Camila explained how this legal dilemma has impaired her ability to address and recover from the abusive relationship:

I'm still in limbo and then I had to be hyper-careful all the time. I don't know if that will have an end. It just extends the whole process. It keeps this going. Every time there is another [news] article, it's still out there. It's still there. I'm pretty stalled in the healing process. It's just that it's stuck. I can't really move past it because I can't do anything about it. (Interview with Camila, 2019)

As Elizabeth and Camila's experiences demonstrate, the mere possibility of a lawsuit can have a damaging and chilling effect on silence breakers. Both women saw no option but to withdraw from participating in the public sphere in general, which in turn has negatively impacted their personal and professional lives. For example, when Elizabeth started a new job, she was asked to be the media spokesperson for the organization. She declined this opportunity because she was worried that associating her name with her new employer could cause reputational damage to the employer, given that her name had been widely publicized when the lawsuit was initiated.

At the end of our interview, Elizabeth told me that she had given up trying to reclaim her life in the small city in Eastern Canada where she was assaulted. She told me she was waiting for her children to reach a certain age so she could leave and start a new life in a new city. In the

interview, she talked about the significant cost of being sexually assaulted and being left in legal limbo:

When I leave [Canadian city], I am the name I am now and when I land at the new place I start as something new. I think that process, I need that process, and I can leave this [here]. You were talking about costs. And I say I'm losing my life, I'm losing my name, my identity, my everything. I'm literally changing who I am. Deep down I'm not, but you know what I mean. I feel like that's been stolen from me. I'll never be that . . . I'll never get to be that person again. (Interview with Elizabeth, 2019)

Legal limbo had a tremendous impact on both Camila and Elizabeth. One of the most damaging aspects of it was that the men filed their lawsuits with the court, allowing the media to report on the chronology of events from the perspective of the plaintiff. The filing of the lawsuit shifted the public discourse away from the allegations of sexual violence and onto the idea that these men had been unfairly targeted by vengeful women. In Elizabeth's case, the filing of the lawsuit resulted in a national media outlet publicly naming her. The women were left unable to publicly defend themselves without risking further allegations of defamation should the men ever decide to pursue their lawsuits. Both women consciously decided to avoid any public discussions about sexual violence, even in broad and general terms. Even more disturbing is the fact that both women made the decision to avoid participation in the public sphere out of fear of further retaliation, demonstrating the chilling effect of such legal action.

### **Workplace Retaliation**

The #MeToo movement illuminated the lacklustre response to sexual violence in workplaces globally. The dominant discourse perpetuated by workplaces is that sexual harassment is not tolerated and offenders are held accountable (Greedy, 2020; Saha, 2020;

Weikle, 2020). I spoke to a number of silence breakers who reported workplace sexual violence just prior to the #MeToo movement, and one research participant who was inspired by the movement to report that a co-worker had sexually assaulted her. The interviews revealed that the women faced a different reality than the one embedded in the early discourse associated with the #MeToo movement—namely, that workplace sexual violence is no longer tolerated. Rather than women benefitting from a new sense of empowerment and promises that “Time’s Up” for workplace sexual harassment, when these research participants reported workplace sexual violence they found that their employers actively facilitated retaliation against them in a number of ways including: investigating silence breakers instead of men accused of sexual violence; denying silence breakers promotions; levying disciplinary action against silence breakers; and firing the silence breakers (Tucker & Mondino, 2020). An analysis of the 3,317 requests for legal assistance from the TIME’S UP Legal Defense Fund, created to assist American women who had experienced workplace sexual harassment, found that 72% of respondents who’d experienced workplace sexual harassment had also faced some form of retaliation including being sued for defamation, termination, and denial of promotions (Tucker & Mondino, 2020, p.4).

Retaliation against silence breakers in the workplace certainly isn’t a new tactic. In 1978, Bonnie Robichaud was hired to work as a cleaner for the Department of National Defence (DND) in North Bay, Ontario. Robichaud, a mother of five with a high school education, was ecstatic about the job opportunity because it paid well and was unionized (Interview with Bonnie Robichaud, 2019). Robichaud was promoted to supervisor. She told me in our interview that the first four months were really tough as there were only a handful of women working for the DND at the time. Four months into the job, her boss started to sexually harass her. It was the early

1980s and Robichaud didn't have the language for what was happening to her as the larger public discourse on sexual harassment in Canada was still in its infancy. Robichaud knew that she couldn't lose this job as there weren't any other options in North Bay that paid as well as the DND and her family relied on her income. Robichaud then filed a complaint against her boss for the sexual harassment. The employer and the union were reluctant to get involved, leading Robichaud to take legal action against the DND. The legal action prompted the man Robichaud had reported for sexual harassment to sue her for defamation.

The lawsuit against Robichaud is lesser known in comparison to her legal case against the DND.<sup>47</sup> I only learned of the lawsuit in a footnote of a journal article on sexual harassment in Canada (Backhouse, 2012). I interviewed Robichaud to see what might be learned from her early experiences navigating the legal system as a plaintiff filing against her workplace for sexual harassment, and as a defendant in a lawsuit initiated by the man who harassed her. Robichaud told me that the lawsuit against her sought \$30,000 in damages. More than the money, Robichaud felt this was a clear attempt to retaliate against her for the allegations she had made (Interview with Bonnie Robichaud, 2019).

The lawsuit proceeded to discovery. It was then put on hold because Robichaud sought leave to appeal the decision from her case against the DND to the SCC. As a result of her appeal to the SCC, she faced additional workplace retaliation. Soon after Robichaud was granted leave to appeal her case before the SCC she was put on administrative leave by the DND for a number of weeks (Interview with Bonnie Robichaud, 2019). Robichaud was once again forced to defend herself and had to appeal the decision to put her on administrative leave through a workplace

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<sup>47</sup> *Robichaud v. Canada (Treasury Board)* (1987) is considered a landmark case because the Supreme Court of Canada held that employers are responsible for all acts of their employees in the course of employment including any discriminatory acts by employees such as sexual harassment.

grievance. The grievance was successful and she was able to return to work. Robichaud said being at work was difficult because her colleagues and management often treated her poorly:

[DND] want me out of the workplace really bad but they have no legal way to fire me because I keep showing up to work. I think it was just as hard on them as it was on me, in retrospect. They don't talk to me really, except to be unkind. (Interview with Bonnie Robichaud, 2019)

The man who sexually harassed Robichaud was still working at the DND at that time, despite the DND agreeing to terminate him in a legal agreement with Robichaud. He was eventually fired, but it wasn't until years into Robichaud's legal battle.

Robichaud's is one of the earliest lawsuits against a Canadian silence breaker I was able to find.<sup>48</sup> Ultimately, Robichaud's legal action at the SCC was successful. In 1987, the SCC ruled that the workplace is vicariously liable for discriminatory actions by its employees, including sexual harassment (*Robichaud v. Canada* [Treasury Board], 1987). While this ruling was a victory, it was Robichaud who was subjected to ongoing retaliation at work, from both the man who'd harassed her and management, as she navigated the legal system. Paradoxically, the Robichaud case may also have emboldened the man who sexually harassed her to take his own legal action against her. After her victory at the SCC, the lawsuit disappeared and she continued working at the DND for the remainder of her career (Interview with Bonnie Robichaud, 2019).

Decades later, workplace sexual violence is obviously still a problem for women worldwide. Research participants Laura and Lynn both lost their jobs as a result of being sexually assaulted by their bosses. There are a number of similarities between the two women. Laura was working for a humanitarian organization based in the United Kingdom but worked

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<sup>48</sup> I interviewed Constance Backhouse about the lawsuit and she reminded me that it is entirely possible that these lawsuits have a long history but that it would be difficult to trace due to how legal records are archived.

from her home in Canada. Lynn was working in France as an apprentice artist. Both women were sexually assaulted by their bosses and reported the abuse. Although Laura was based in Canada, her boss sexually harassed her and sexually assaulted her when they were on a work trip together in the United States. Laura reported the assault to her workplace human resources office and Lynn reported to the police. Both women were subsequently fired and were also subjected to ongoing retaliation from their bosses. Lynn eventually returned to Canada where the retaliation continued.

Laura's employer terminated her contract an hour after she reported that the CEO of the organization she was working for had sexually harassed and assaulted her. Laura was angry about what happened and decided to go public by releasing an open letter on social media detailing what had happened to her at the organization. She also filed a complaint at the employment tribunal in the UK for the sexual violence and wrongful dismissal. Although Laura was no longer an employee at this point, the workplace actively retaliated against her, utilizing a number of different tactics such as calling the local police to report her for extortion as well as initiating a lawsuit against her in the Canadian province where she was from. The sexual assault resulted in a domino effect. Laura lost her job, then her housing. Even though she was now unemployed and without housing, the retaliation continued:

[The organization] basically received [the formal complaint] and within a week threatened me with a defamation suit in [Canadian province] where I am, as a way of retaliation basically. . . . [The organization] had a [Canadian] lawyer in [province] they hired in [Canadian city] call me and so I talked to him and said like, "I'm in crisis just now, I just lost my house two weeks before this," which they knew. So, they knew that I was in a very precarious financial situation and emotionally was not in a super good

place. So, I told the lawyer “I’m in crisis so I don’t want to talk to you, leave me alone,” kind of thing. I was like, why are they even hiring a [Canadian] lawyer . . . because my claim is in the UK. (Interview with Laura, 2019)

At the time of the interview, while the legal threat did not lead to legal action being taken in Canada, the threat still had a significant impact on Laura’s well-being in that it not only caused emotional distress but also a loss of income, which in turn led to her losing her housing. I will return to Laura’s narrative later in this chapter as the retaliation by the man she reported for sexual abuse did not end with the legal threat.

Lynn also experienced workplace sexual violence and subsequent retaliation. The man who owned the business where Lynn was apprenticing regularly degraded her at work by calling her “stupid” and a “bitch” (Interview with Lynn, 2019). Lynn’s boss would also regularly tell her she was fired then change his mind. One day he told her she was fired unless she agreed to have sex with him immediately. Lynn complied with his demand out of fear of losing her job. She was vulnerable to the abuse as she was working under the table—her working visa had expired. Lynn’s boss continued to routinely sexually assault her. Lynn said that the stress of going to work was so significant that her hair started falling out.

One day at work, Lynn’s boss requested that she complete a task in the shop. She replied that she would do it after she finished what she was doing. He responded by telling her she was fired. At this point, Lynn was so fed up with the abuse that she reported him to the police for rape and illegal employment practices. He faced criminal charges, which were prosecuted by the courts separately from any illegal employment practices. He was found not guilty of raping Lynn, a decision that was upheld on appeal. Unlike Canadian law, which defines rape by a lack

of consent, French criminal law only recognizes the offense of rape if there is evidence of force, the threat of force, or coercion (Amnesty International, 2018).

By the time the criminal charges against her boss made it to court, Lynn had returned to Canada. Lynn was notified by her lawyer that the French court upheld the not-guilty verdict. Lynn attributes the not guilty verdict to the fact that she was denied a translator and was required to testify in French, which is her second language. She also pointed to the wielding of rape myths throughout the police investigation and subsequent criminal trial. Shortly after being notified of the final court decision, she received a notice from the Canadian government informing her that she was facing a lawsuit and criminal charges for making false rape allegations in France. Lynn explains:

I received the documents, actually the Canadian government brokered the documents on behalf of France, they have an agreement that anyone who is accused of a crime and is in Canada and Canada offers to come after those criminals, you know. I am receiving those documents, couriered by the Canadian government. I started calling the Canadian government, “Do you realize what you sent me? You are allowing a person who sexually assaulted me to come after me in Canada. There is nothing you are doing? I’m a fucking victim of sexual assault and now I am being accused of false accusations. This is insane that you are even delivering me these documents.” They are like, “We’re sorry—there is nothing we can do. I understand, why don’t you call this or this victim association, a list of numbers?” I just felt like I was drowning. There is no help at all and my government is helping the French government. I was trying to read through it, I had a friend come over, she is in law school but she is Anglophone as well and in first year at the time. She was trying to help me make sense of it. But I kept looking at it, like, you are being sued for



18,000 euros that's what the lawyer is asking for and the maximum penalty for false accusations is about \$100,000 Canadian dollars and five years in prison. (Interview with Lynn, 2019)

In France, the law states that falsely accusing someone of gendered violence constitutes a criminal offence (United Nations Women, 2012). The United Nations' *Handbook for Legislation on Violence Against Women* (2012) and Amnesty International (2018) identify these provisions as discriminatory and warn that they can be abused by a man accused of sexual violence to retaliate, as is what happened to Lynn.

When Lynn reported to the police, she was unaware of his ability to pursue criminal and civil charges against her after he was found not guilty. Lynn had to navigate a number of practical problems to respond to both the criminal charges and the lawsuit. First, there was a language barrier, which made the process incredibly challenging because all of the legal documents were in French. Secondly, she was geographically removed from the legal proceedings—they were happening in France and she was in Canada. She also had to learn about the French legal system, which is vastly different than the legal system in English-speaking Canada. For example, while Lynn had a French lawyer, in the French system, the lawyer does not collect evidence or witness statements. As a result, Lynn had to limit the paid work she could do in order to work on her defence.

One of the most challenging aspects of defending herself was that she had to find character witnesses, many of whom resided in France. Since it had been years since Lynn had worked in France, she had not recently spoken to many of the people she needed to contact as witnesses: "I had to get ten-character witness statements then get them to fill out this statement that basically says that I am not a liar" (Interview with Lynn, 2019). Lynn said finding people

willing to do the character assessment was challenging because “on the document you have to— as your friend, your friend has to copy a statement, ‘I will be punished by one year of prison and \$15,000 euros of the fine if my testimony is falsified in any way’” (Interview with Lynn, 2019). Lynn told me that she received a range of reactions from the people she contacted. Some told her that they supported her but didn’t want to get involved; others said they would write the character witness but would then disappear; others still responded by calling her a “liar” and a “slut” (Interview with Lynn, 2019).

The case went to trial and the court acquitted Lynn on the charge of making false allegations, both criminally and civilly. In total, Lynn spent seven years in the legal system as a victim and then as an accused. Lynn told me that she still regrets reporting to the police as she continues to deal with the aftermath of her experience in the legal system:

I [was] looking at going to jail for reporting a sexual assault. You can’t explain how huge your regret is for reporting. . . . How much regret you can be filled with for doing what you have been told is right. For defending yourself as a victim. Trying to stick up for people. For yourself. Then like oh my god! I should have kept my fucking mouth shut. I shouldn’t have engaged the legal system at all. I would be much happier and I would have back seven years of my life. I am trying not to bawl. (Interview with Lynn, 2019)

Lynn felt betrayed by the Canadian government because they didn’t do more to help her to fight the charges, and also by the French government for allowing abusive men to easily press charges against women who report sexual violence. She also felt betrayed by her colleagues who refused to act as character witnesses for her. Overall, the experience left Lynn fearful to speak about what happened to her because although she was acquitted, so was the man who had assaulted her. While it has been a number of years since the decision, Lynn is still worried that

he will continue to retaliate against her. While Lynn's experience of criminalization is the most serious among the research participants, it is not necessarily unique. Later in this chapter I will return to the experiences of other research participants who were also reported to the police by the men who sexually violated them.

The narratives of Bonnie, Laura, and Lynn demonstrate retaliation specific to workplace sexual violence. There are a number of striking similarities between these women. For one, they were all in junior positions in comparison to the men who sexually violated them. This finding is consistent with a recent study that found that 56% of survivors of workplace sexual harassment were "harassed by someone they reported to at work, including a supervisor, superior, owner or top executive" (Tucker & Mondino, 2020, p. 5). The most common form of retaliation was being fired (36%), followed by receiving a poor performance evaluation and increased scrutiny of their work performance (19%) (Tucker & Mondino, 2020, p.4). This section demonstrated that sexual violence in the workplace continues to be an issue despite decades of feminist activism to bring awareness to the issue and legislative reforms that have attempted to protect women from sexual violence in the workplace. One specific workplace identified in the research is post-secondary institutions, which have a unique social context as well as numerous quasi-legal institutional mechanisms that abusive men can use to retaliate.

### **Campus Sexual Violence: Abuse of Complaint Processes**

The experiences of the research participants pointed to a concerning trend: the number of lawsuits that were tied to post-secondary institutions.<sup>49</sup> Some of these research participants with lawsuits connected to post-secondary institutions have already been introduced, such as

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<sup>49</sup> It is possible that these results are skewed because I am a member of the university community and therefore my networks may have been statistically more likely to learn about my research project. Therefore, it is possible that my networks have a similar affiliation than random sample. It is also possible that other researchers see the value of

Elizabeth who we met earlier in this chapter, Ali and Wanda, a sexual violence advocate who was sued by a former professor for tweeting about allegations of sexual violence against him when they were reported in the media. Male faculty members initiated all of the lawsuits examined in this study. None of the lawsuits were initiated by students accused of sexual violence.<sup>50</sup> There have also been a number of similar lawsuits initiated by faculty, all covered in national media outlets. In Chapter Two, I introduced the lawsuits initiated by former UBC professor Steven Galloway and former Yukon College faculty Charles Stuart against students that had reported them for sexual assault. Galloway also initiated a lawsuit against two of his colleagues at the university and a number of other students, bystanders, and people who commented about the case on Twitter in support of the woman who reported him, for a total of twenty defendants (Lederman, 2020; Theodore, 2018). Ahmed Fekry Ibrahim, a former faculty member at McGill University, sued a student and a faculty member for \$600,000, alleging that they engaged in a “ruthless campaign” that destroyed his reputation and his right to privacy (Hendry, 2018). The lawsuit alleged that his fellow colleague and the student had a “vendetta” against him and created a “smear campaign” to have him fired, despite the “affair” he’d had with a student being entirely consensual (Hendry, 2018). Former Mount Saint Vincent University part-time instructor Michael Kydd sued the university, CTV, Twitter, and the student who reported him for sexual assault, similarly alleging that he’d had a “consensual affair” with the student (Kane, 2017). Kydd also sued Twitter because the student had circulated explicit photos that he sent her on that platform (Kane, 2017). A former University of Windsor law professor

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research and are more likely to participate in studies in comparison to the general public. The significance of this skewing is discussed later in this section.

<sup>50</sup> This isn't to suggest that students accused of sexual violence are not suing after being accused of sexual violence. For example, in November 2020, Declan McCool, a McGill University student sued McGill, the university newspaper and the woman who accused him of sexual assault (Lurie, 2020). It does seem that faculty are more likely to sue than students. I assume this is likely because of the resources required to initiate legal action.

sued his colleague, professor Julie Macfarlane, in Trinidad after she provided a reference to the university in Trinidad, where he had applied, and mentioned that he had faced allegations of sexual harassment while teaching at the University of Windsor (Macfarlane, 2020a).

This section focuses on the experiences of faculty members who were sued or threatened with a lawsuit by other faculty members accused of sexual violence. These faculty members took on roles as active bystanders to assist and support a student or students who disclosed or reported sexual violence by another faculty member. These faculty members faced legal action; they also reported being subjected to additional forms of retaliation by the accused, most notably by the accused initiating formal complaints against faculty members who supported their accusers. In this chapter, I will outline the experiences of four university professors I interviewed to highlight the different ways they were subjected to institutional retaliation, and the unique personal and professional consequences they experienced as a result. The intention of this section is to examine how abusive men strategically use university policies and processes to punish bystanders. The narratives provided in this section suggest a systemic issue of universities doing little to protect bystanders from institutional retaliation. As a result, the university complaint process unknowingly aids in the accused men's retaliation efforts.

Although I interviewed a disproportionate number of people who faced retaliation after a faculty member was accused of sexual violence, it is impossible to state that professors are more likely to sue or retaliate against their accusers. I hypothesize that a disproportionate number of faculty is represented in this study for a number of reasons. First, other academics likely value research more than non-academics, which may have prompted them to participate in the study. Second, as mentioned, nearly all of the research participants with ties to a campus had a background in social justice organizing, which may have led them to taking a more active role in

responding to sexual violence. Third, the university structure provides abusive men in positions of authority with more opportunities to meet women, many of whom are younger. Male faculty members are able to exploit the power dynamics that exist between faculty and student, especially with graduate and upper-year undergraduates who may depend on faculty members for jobs or reference letters.

Within the last decade, there has been renewed public pressure on universities to implement sexual violence policies and prevention programs (Gray et al., 2019; Hoffman, 2015; Our Turn, 2017; Quinlan et al., 2017; E. Smith, 2020; Straatman, 2013). Many major universities across Canada have adopted “Active Bystander Training” to train and encourage university community members to take an active role in preventing, intervening on, and responding to various forms of oppression and violence (Senn et al., 2014; E. Smith, 2020; Straatman, 2013). Despite the widespread existence of and institutional enthusiasm for such active bystander training and programming, the interviews demonstrate that, in practice, universities tend to offload much of the responsibility for creating a safe campus on individual actors within the university. While a university attempts to encourage its community members to take an active role in responding to and preventing sexual violence, the interviews conducted revealed that the universities had no policy infrastructure to protect bystanders from retaliation for taking the encouraged actions. As will be demonstrated throughout this section, universities do not have the appropriate mechanisms to decipher between legitimate and frivolous complaints, and have a duty to treat all complaints as serious. As a result, a false equivalency is created between complaints about sexual harassment and violence, and retaliatory complaints from those who engage in such behaviour. This false equivalency ultimately upholds existing unequal power dynamics and fails to protect silence breakers when they come forward.

While it appears that these lawsuits have emerged within the last few years as a strategy for retorting claims of sexual violence, there is evidence to suggest that a larger history of such lawsuits exists on post-secondary campuses in Canada. One of the earliest defamation lawsuits I was able to find occurred in the early 1980s and was initiated by a group of male professors at Carleton University. The male professors sued a group of journalism students, all women, for holding a press conference denouncing sexual harassment in the department (Backhouse, 2012). While the students never identified any single professor for sexual harassment, the male professors wanted to make it clear that “they were not the culprits, they are the good guys, they are innocent and that their reputation had been tarred because no names had been named” (Interview with Constance Backhouse, 2019). Again, this was not an isolated incident. Another example Backhouse mentioned was that in the late 1980s and early 1990s, women faculty members across the country began writing what they called “Chilly Climate Reports” to report on the gender discrimination, sexual harassment, and racism in their university departments. A group of women involved in writing the reports published an edited collection titled *Breaking Anonymity* to document the chilly climate reports from a number of perspectives (The Chilly Collective, 1995). In the introduction, the editors write that they made the editorial decision to exclude one of the chilly climate reports because the authors were being threatened with a defamation lawsuit (The Chilly Collective, 1995). A group of male professors from that particular department had already initiated a lawsuit against the media outlet who reported on the release of the report (Interview with Constance Backhouse, 2019; The Chilly Collective, 1995). Backhouse noted that she was contacted by the CBC when the lawsuit was initiated, to provide the legal team with background, but never heard from them again and was never informed about the lawsuit’s outcome (Interview with Constance Backhouse, 2019). Nonetheless, the lawsuit

worked—the report was removed from the book, pushing important information about gendered discrimination in university spaces into obscurity. In the following section, I will introduce four professors who were sued or threatened with a lawsuit for supporting people who disclosed or reported sexual violence. In addition, all of the professors interviewed here faced other forms of institutional retaliation by the faculty member accused of sexual violence.

Gina, an early career professor, was up for tenure. Her university department was deeply intertwined with the larger professional industry nationally. The industry had come under widespread public scrutiny for covering up years of sexual violence disclosures and reports. Gina supported a number of women who'd come forward to expose the systemic issue within the industry, and to identify high-profile men within the industry known for repeated abusive behaviour. Gina was inspired to support these women because she had been in an abusive relationship with one of the men identified when she was much younger, though she did not publicly identify herself as someone who had experienced abuse by this man. While much of her activism at this time was done outside of the university, her faculty position was threatened as a result of her support.

Gina's activism led to a falling out with one of her long-time mentors, a highly respected public figure within her industry who publicly supported one of the men accused of sexual violence. Gina questioned why her mentor would support these men. In return, her mentor sent her a cease and desist letter threatening legal action if she continued with her advocacy efforts. In addition, two of the male senior faculty members in her department, neither of whom were accused of sexual violence, reported her to the Dean and the Human Rights and Equity office, complaining that she “was a danger to them in the era of #MeToo and claiming that they were terrified for themselves,” suggesting that she “could put them on a list [of abusive men] at any



minute and could ruin them with one word” (Interview with Gina, 2019). Gina spoke about the power dynamics between her and her colleagues:

You can lose your job for formal complaints. This was during my tenure review, two senior tenured professors, come at me—and they extract a bunch of promises from me that I won’t speak out about [accused name] or about them. Of course, I’ll promise anything. I am in my tenure review. If they go forward with a formal complaint, it will go to the Provost at the same time as my tenure file. Potentially ruining my career. In this climate, if you lose a job—there is no guarantee you are getting another one. (Interview with Gina, 2019)

The investigators from the Human Resources office took eight months to find that the allegations of workplace harassment against Gina were unfounded.

Gina’s career did suffer as a direct result of the retaliation against her. She was initially denied tenure, despite having an impressive professional record, forcing her to engage in additional legal action—initiating what would be a successful grievance to reverse the decision. Despite this formal success, Gina continues to face informal consequences, finding herself stuck in a hostile workplace where it has been made clear she is not wanted. For example, the retaliating professors demanded that Gina stop attending conferences where they would also be in attendance. Gina spoke about the long-term impact their retaliation had on her professional and personal life:

I was deeply depressed. I was suicidally depressed. I upped my meds. I laid in bed. I would get up to take care of the kids. They would go to school and I would go back to bed. They come home, I would cook for them and go back to bed. There were other times when I couldn’t sleep at all. I would be up all night. Just grinding in my head. There

aren't even real thoughts, this happened and this happened. How could you do this? How could you think this? I clawed my skin to shreds. I just started scratching and scratching. Yeah. I am pulling out of it now. I am really not ever in public. I have panic attacks about going to work. I've kind of arranged it so I am in and out. I don't see anybody. It's terrible. Tenure now feels like a 20-year sentence. This simmer of doubt exists around me. (Interview with Gina, 2019)

Gina has clearly articulated how her role as an active bystander in addressing ongoing systemic violence in her professional community had such a serious impact on her professional and personal life that she contemplated suicide. Suicidal ideation was indeed a common theme among the research participants and will be examined further in the following chapter.

While Gina was especially vulnerable to intimidation due to her probationary employment status, seniority is not necessarily a protection from such abuses either. Charlene's story is a case in point. A full-professor, Charlene related a similar experience to Gina's. Charlene was investigated for two disciplinary actions after she supported numerous students who were sexually assaulted and harassed by a junior faculty member in her department. The professor accused of sexual violence filed an internal harassment complaint, and an additional internal complaint against Charlene and a number of her colleagues who also supported the students. This additional internal complaint requested that the university remove Charlene and another professor (who had also supported the students) from the accused faculty member's tenure committee. The university complied with this request. Charlene elaborated on the consequences of this decision, both for her reputation as a professor and for the department:

So, they removed us, so we were actually "punished" on the basis of his complaint against us effectively removing all of the women from his department from consideration

for tenure including the one woman in his field who would actually be able to evaluate his field. So, by removing us, there were no women from his department on his tenure committee. So, he was being evaluated for tenure in a committee of only men after being accused of sexual harassment. The university added women to his committee, just random women in the university who knew nothing about his field. (Interview with Charlene, 2019)

Eventually, Charlene and her colleagues were cleared of the allegations that they had harassed her colleague, but she was unable to clear her name publicly as the investigators' report was deemed confidential by the university. Charlene told me that she faced reputational damage as a result of the investigation into her conduct:

. . . It's real reputational damage to be accused of harassment. Even if it's like a bluntly ludicrous claim. There are people who will believe it. Universities are super conservative. They are massively dominated by men. A lot of men believe that #MeToo is an exaggerated thing in my world, so you know, it's not fun. (Interview with Charlene, 2019)

It is important to highlight the reference Charlene makes to the reputational damage she experienced as a result of her decision to support the students who disclosed and reported sexual violence. While the general focus on sexual violence allegations is the reputational damage endured by men accused of sexual violence, Charlene brought up an important point about how women also experience reputational damage for their roles as silence breakers. As mentioned previously, the analysis of the assistance requests to the TIME'S UP Legal Defense Fund indicated that 72% of those requesting legal assistance experienced retaliation, with 15% of these people reporting that they had been slandered or had their reputation damaged by the perpetrator

or their employer (Tucker & Mondino, 2020, p. 12). For Charlene, the retaliation resulted in additional professional consequences, such as being removed from the tenure review committee, which she felt also damaged her reputation as an academic in her field.

Like Gina and Charlene, Ali, introduced in Chapter Two, was also subjected to multiple workplace complaints. The first was made under the university harassment and discrimination policy. Since the faculty member was unable to prove the allegations, the investigator recommended that the provost dismiss the claim against Ali. Then, the professor filed another harassment complaint citing Ali's conduct as being in breach of the university's human resources policy. Ali was required to meet with two senior university administrators to discuss the allegations. The administrators encouraged Ali to apologize to his colleague and retract the statements he made about the colleague's conduct. After significant back and forth, Ali and the university administrators agreed on appropriate language to include in a letter to his colleague, which was to remain in Ali's employee file for five years, though he was told that the letter was not to be regarded as a disciplinary measure. Several months later, Ali and a number of his colleagues were subjected to yet another complaint when the man accused of sexual violence filed a harassment complaint to the provincial labour commission. Ali was forced to navigate multiple complaints in addition to a civil suit. Ali's experience demonstrates the sheer number of institutional mechanisms available for complaints, and how abusive men can continue to retaliate—after one investigation or tribunal is complete, he begins another process. As argued by Freyd (1997), such attempts are intended to bully and threaten silence breakers back into silence by trying to frame the silence breaker as the actual offender through multiple institutional complaint mechanisms.

For the most part, the faculty I interviewed reported receiving minimal systemic assistance from their respective institutions. University of Windsor law professor Julie Macfarlane recently took her university insurer, Canadian Universities Reciprocal Insurance Exchange (CURIE), to court after they refused to pay for her lawyer, who she hired to fight a defamation lawsuit initiated by a former colleague (*Macfarlane v. Canadian Universities Reciprocal Insurance Exchange*, 2019). Macfarlane is a full professor at an Ontario university and was sued by a former colleague who had lost his job with the university after a series of reports of sexual harassment and other forms of professional misconduct were filed against him (*Macfarlane v. Canadian Universities Reciprocal Insurance Exchange*, 2019). “E” claims that he left the university in December 2014 for “something unrelated that is covered by a confidentiality agreement” (Gerster, 2020). He was then hired by another university, in Trinidad; Macfarlane, who was neither party to the confidentiality agreement nor, in fact, aware of its existence, shared with the university’s administration that he had been terminated from his position. The man, now living in Trinidad, filed a lawsuit for defamation against Macfarlane. When Macfarlane sought to defend herself against the charges, she was told that CURIE would not cover her costs as her activities had occurred outside of her professional duties. Macfarlane in turn took CURIE to court, claiming that she had been acting entirely within her professional responsibilities.

The decision by the insurer forced Macfarlane into another legal battle. She brought a motion to the Ontario Superior Court to compel CURIE to defend her in the lawsuit. Ultimately, the court decided that CURIE had a duty to defend her, agreeing that she was acting within her capacity as a professor when she made the statements about her former colleague and why he left

his position as a tenured professor at the university. The court found that the NDA did not prohibit her from providing a reference to another university.

The defamation trial judge in Trinidad ultimately sided with the colleague, ordering Julie Macfarlane to pay him approximately \$1,000,000 for defamation and ordering both parties to stop speaking publicly about the case (Gerster, 2020). To date, there is nothing to suggest that the order has been enforced by a Canadian court.

The experiences of the professors I interviewed revealed a number of similarities. All of them were investigated by their respective universities for their conduct relating to disclosure or reports of sexual violence against a colleague. Charlene and Ali were subjected to multiple complaints, both within the university and through labour boards. The professors also faced other forms of retaliation—for example, Gina was initially denied tenure while Charlene was removed from a tenure committee. The numerous retaliations significantly impacted their lives on campus as they reported being isolated from their colleagues to varying degrees. Some shared that they dealt with depression and suicidal ideation, which I will discuss in the following chapter.

The faculty I interviewed demonstrate *how* DARVO can operate in post-secondary institutions. By initiating institutional complaints against faculty who have raised concerns about their behaviour, the men accused of sexual violence shifted the focus away from the allegations made against them and attempted to transform themselves into victims of harassment and unprofessionalism. Their complaints not only centred their own victimization but, further, tied up those who had called them out for misbehaviour in time-consuming and emotionally draining legal and quasi-legal processes. While each of the professors caught up in these complaint processes were ultimately vindicated, the process for all of them took months to resolve and resulted in long-term consequences for them—most notably, a poisoned work environment.

These findings are particularly important in the current climate as post-secondary campuses and governments across the country are investing significant resources into various campaigns and research projects responding to sexual violence. Yet a significant contradiction emerges in that post-secondary institutions are not actively protecting faculty members acting in good faith by attempting to protect current and future university community members from harm. Instead, when members of the campus community do take an active role in responding to disclosures of sexual violence, the university does not have the appropriate mechanisms to identify retaliatory counter-complaints initiated by faculty accused of sexual violence.

Given how grave the consequences were for professors who supported students who had spoken out against their colleagues' abuses, there is concern that they, or others, would be hesitant to support student complaints in the future. Yet, when I asked the professors I'd interviewed if they would continue to support survivors of sexual violence, they all enthusiastically said that they would. Charlene said that this experience has taught her more about how to navigate institutional policies and investigative mechanisms. In fact, she said that she wishes she had done more:

. . . I feel definitely the lawsuit taught me a little bit about how to do stuff, you know, the things to avoid and mistakes that maybe we made, like, how to go forward but for me it wouldn't deter me from doing the same thing again. Honestly, I would have done more, I would do more. If I had the same situation again, I would do more. . . . Because I just didn't know how to do stuff and now that I've seen a whole scenario play out that was pretty ugly makes me realize it's doable, you can do it. You just have to be smart about it.

(Interview with Charlene, 2019)

Confirming that he would do more, Ali also recognized that his own experiences as a bystander and supporter, troubling as they were, were still less traumatic than that of someone who has experienced sexual violence:

What a third party “whistleblower” goes through in a legal suit is nothing in comparison to what happens to a survivor who is sued for speaking out. With support, I was able to feel good about the stand that I had taken. What made me feel even better was having opportunities to let the [university] administration know that I thought their attempts to establish a sexual misconduct policy fell short, and to support students agitating for tougher rules. You must not allow such a lawsuit to make you feel afraid, or silence you forever. (Interview with Ali, 2019)

These sentiments are encouraging. Perhaps recognizing the broader, chilling effects of retaliatory actions, these specific professors were willing to draw on their relative institutional power to subvert such intentions. This approach should be supported by post-secondary administrators—specifically, if post-secondary administrators want to continue encouraging staff and faculty to be active bystanders, the universities must also be prepared to protect bystanders from retaliation. In the current institutional structure, the university has an obligation to investigate complaints, even if they know they lack merit—a requirement that is well-intentioned but which can be, and is, abused by abusive men.

### **Reporting to the Police and Being Reported to the Police**

Abusive men also tended to make police reports against silence breakers, most often for criminal harassment. In total, four of the participants were investigated by the police, three of which were threatened with criminal charges for harassment. Lynn, introduced earlier in this chapter, was the only participant who was criminally charged and tried. Another participant was



not investigated by the police but did report a sexual assault to them, and the police officer then reported the silence breaker to her work for misconduct, which will be explained later in this section. Given the small sample size of this study, it is incredibly concerning that such a large proportion of participants who experienced sexual violence were in turn threatened by the police with criminal charges. The police effectively worked in tandem with abusers to threaten silence breakers. This finding is particularly concerning in a context in which police frequently refuse to investigate reports of sexual violence and are often reluctant to lay charges (Crew, 2012; Doolittle, 2017; DuBois, 2012). Returning to the discussion in Chapter One, a recent investigation by journalist Robyn Doolittle into Canadian police declaring reports of sexual assault as “unfounded” discovered that one in five reports of sexual assault (19.39%) are deemed unfounded in Canada. Doolittle also learned that, when unfounded cases are considered part of the total count of sexual assault charges reported, only 34% of such reports result in charges being laid (Doolittle, 2017). Canadian anti-violence advocates have raised similar concerns that police frequently dismiss or minimize reports of criminal harassment by men against women (LaLonde, 2020). Yet, it appeared that when abusive men called the police to report harassment from women, the police were quick to investigate and threaten the women with charges. The following section describes how abusive men use the criminal legal system to retaliate against silence breakers, and how the legal system becomes an active participant in facilitating their abuse.

Although Lynn was the only research participant criminally charged for making false allegations, three other research participants told me that they were contacted by police after the men who sexually assaulted them filed police reports against them. For example, Laura attended a settlement meeting with her former employer where the two parties were unable to come to a

mutual settlement agreement. After the failed meeting, Laura was contacted by local police in the Canadian city in which she resided to notify her that she was under investigation:

So, once [the CEO/abusive man] realized, I think, he couldn't do the civil litigation thing to me because I don't have money, so that would be useless and they don't really have money to carry that through and also that they would lose and maybe have to pay me like costs, he tried to find other ways to retaliate. So, he called the . . . police and told them I made up everything to get money from him. [The police] contacted me and said I was being investigated for criminal harassment and extortion. I was like—oh, that's great. I told them the story and said I posted this open letter [about the abuse], this is an active civil suit in the UK and this guy is just doing whatever he can to hurt me and he's now trying to weaponize criminal law against me. [The police] were kind of just like, "Oh, okay." And I never heard from [the police] again. . . . There's definitely been ongoing retaliations but not anymore threats. (Interview with Laura, 2019)

Two other research participants found out that they were under investigation after they posted on social media about their experiences of sexual violence. In both cases, the men contacted the Toronto police, alleging that the digital disclosures of violence constituted harassment. Morgan explained their interaction with the Toronto police:

He called the police on me and all they did was call me and they said . . . I believe that the cops didn't even know what they were talking about. It was just an empty threat. This police officer called me. He was, "Yeah, so you and this guy you used to date and it didn't end very well, and now you are saying some not nice things about him on the internet." I'm like, "Yeah, that's what happened, officer." Then he was like, "Well he just wants you to stop you know and between all the, you know I've seen everything, he

showed me everything. And between all the texts and the emails and then this and that, I've got enough to charge you for criminal harassment." But there were no texts. I hadn't communicated with him by text in months. There were no emails and [we] never even emailed the five years we were dating. The only time I ever harassed him, it was indirectly on my own Instagram. So, this cop was obviously, didn't even see anything. And was just talking shit, bluff and get me to . . . I was like, "Yup, I understand." You know, kept it short and sweet. I wasn't about to try and plead with a cop to get my side of the story . . . I was just like, "Thank you, officer," and I got off the phone and I was like, what the . . . and [ex-partner] fancies himself so anti-cop and this cool punk guy and as soon as his precious reputation is threatened he calls the cops. (Interview with Morgan, 2019)

Catherine, who was sexually assaulted by numerous men from the same community, was also notified that she was under investigation by the police while the lawsuit was ongoing:

A different perpetrator who was friends with the person who had filed defamation against me took screen shots from my blog and filed a police report. So, after I got served, I had police calling me and harassing me. (Interview with Catherine, 2019).

Laura, Morgan, and Catherine had all made the decision not to report the original sexual violence to the police. This was an intentional and political decision each of them made, fully recognizing the numerous barriers survivors of sexual violence face when trying to engage with the criminal justice system. Instead, these three silence breakers sought justice through alternative means. All three of these participants strategically used social media, while Laura also filed a complaint with the employment tribunal in the UK. Although none of the three participants had any further contact with police after the initial notification of an investigation,

the threat of criminalization demonstrated to the participants that the police were not there to support them. This conclusion was borne out by another research participant as well. Kristen reported the sexual assault to the police. She also experienced police retaliation, albeit in a different way than the other participants did.

As a youth, Kristen started volunteering for a Canadian political party in a small Canadian city. During that time, a senior political staff member started sexually harassing her. A few years later, when Kristen was 19, the same staff member sexually assaulted her. Kristen reported the sexual assault to the police, who did not lay charges, and to the political party who in turn ignored the report. Frustrated by a lack of action by both the police and the political party, Kristen published a blog post about these systemic failures to respond to her report of sexual violence and named everyone involved, which was subsequently picked up by national media.<sup>51</sup> As a result of this, the man she accused, the police, and the political party worked together to retaliate against Kristen.

The man who sexually assaulted Kristen sent her a cease and desist letter. Very shortly after, the political party that Kristen worked for notified her that she was under investigation for an anonymous complaint and that she had breached a party policy unrelated to the sexual assault.<sup>52</sup> During the internal party investigation, Kristen learned that the allegations of misconduct against her were reported by the police officer who had been assigned to investigate her initial report. Kristen said that the only way the police officer could have known this information would have been from speaking to the man who assaulted her. The alleged breach of

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<sup>51</sup> Kristen told me she initially approached traditional media to cover the story. All of the news outlets agreed to publish the story as long as her abuser was not named, citing a fear of legal action against them. Kristen opted to publish the allegations in a blog post that was, in turn, picked up by national media.

<sup>52</sup> I have omitted the specifics of the investigation into her conduct as it was widely reported in the media and could be used to possibly identify her.

party policy was minor in comparison to the sexual violence she endured, but Kristen’s alleged breach of party policy was treated, by both the political party and the media alike, as far more concerning.

Kristen was disheartened by the fact that the internal investigation into her conduct and the tribunal was expedited, and the political party paid approximately \$20,000 CAD in legal fees while the internal party investigation into the conduct of the man who sexually assaulted her was still ongoing at the time we spoke, over a year after being reported. The numerous institutional failures and the subsequent retaliation had a significant impact on Kristen’s well-being: “I started doing therapy and I was like, I don’t think I’m that traumatized from the assault, I think I am traumatized from everything that came after the assault” (Interview with Kristen, 2019)—a sentiment shared among many of the research participants.

This section has demonstrated that abusive men will strategically use reports to the police to intimidate silence breakers. While most of the reports went nowhere, the fact that the police even called the silence breakers was emotionally distressing for them—emotional distress that was heightened by the knowledge that they could report sexual assault and have it be dismissed without any investigation into the allegations. Lynn faced criminal charges that went to trial, and while this occurred outside of Canada, she still felt a deep level of betrayal that the Canadian government did not intervene or advocate to have the criminal charges dropped.

## **Conclusion**

Litigation and other institutional processes must be regarded as weapons that can be strategically used by abusers to inflict harm upon silence breakers under the guise of justice and fairness. This chapter demonstrated the numerous ways that abusive men operationalize institutional complaint mechanisms as a means to punish and surveil silence breakers. Returning

to DARVO, this chapter demonstrated the tangible ways abusive men will wield institutional mechanisms, in addition to a lawsuit or the threat of a lawsuit, to deny the allegations against them and place the silence breaker on the defensive, most often by being accused of harassment by the abusive man.

As an example, the University of British Columbia passed the “Retaliation, Safe Disclosure, and Reporting Policy.” This policy allows university community members to report suspected retaliatory behaviour (The University of British Columbia Board of Governors, 2020). The policy states that: “UBC appreciates that Disclosers take personal risks when coming forward to report allegations of Improper Conduct, and wishes to create an environment where impediments to Disclosers reporting alleged Improper Conduct or participating in Investigations in good faith are minimized” (The University of British Columbia Board of Governors, 2020). The policy recognizes that while they cannot entirely insulate disclosers from the risks of reporting, “UBC will take such measures as are reasonable, appropriate, and feasible to protect Disclosers from retaliation” (The University of British Columbia Board of Governors, 2020). The policy defines “retaliation” as:

Any actions recommended, taken, or threatened by a Respondent where those actions are motivated in whole or in part by the desire to make reprisal against a Discloser for the Discloser having engaged in an Informing Activity and, for greater certainty, includes counselling another person to engage in conduct that would constitute Retaliation if it was undertaken by the Respondent. (The University of British Columbia Board of Governors, 2020, s.1.1.8)

The Policy also indicates that certain activities are not considered retaliation—most notably, for the purposes of this dissertation, “engagement in good faith in any legal proceedings” (S.

1.18[b]). Furthermore, The Policy notes that Disclosers should be aware that their disclosure “may result in a legal claim being made against them by the other party or other individuals (including, for example, a defamation or breach of privacy claim), and may wish to seek advice before doing so” (S.7.6). Therefore, if a professor is to initiate a defamation proceeding, unless the courts declare that it has been initiated in bad faith, it is unlikely that the policy will be of any assistance in protecting faculty from legal retaliation that occurs outside of the university context. Further, such legal action may take years to resolve or dissolve. With that being said, the policy is newly enacted, and it will take time to see how it is able to protect disclosers from retaliation from internal university processes. Either way, as we have seen throughout this dissertation, policies and laws often fail to make meaningful changes in the day-to-day lives of people who have experienced sexual violence.

The extent that men accused of sexual violence were able to use the police to intimidate silence breakers should also concern feminist advocates and researchers. At a time when the police are rightfully being scrutinized for systemically ignoring reports of sexual assault, it is incredibly concerning to note the sheer number of research participants who were investigated by the police for “criminal harassment” after seeking other means of justice, outside of the formal legal system, for the sexual violence they experienced. This finding highlights the entrenchment of masculinity and the desire for the preservation of reputation over the safety of women. Ultimately, the engagement of multiple institutional processes, often occurring simultaneously, exacerbated the experience of sexual violence. For the silence breakers who experienced sexual violence directly, they were forced to recount the violence numerous times in order to defend the subsequent actions they took. For some, this meant being interrogated by police officers, or being required to attend meetings with the perpetrator. All of the silence breakers had to

constantly defend the actions they took when they made the decision to report, disclose, or support someone who had reported sexual violence. Their actions and decision-making process were closely analyzed, moving attention away from the abuser and onto their own actions.

Interview participants who experienced sexual violence noted that they felt the impact of the sexual assault was secondary to the impact of institutional betrayal, which will be discussed in the following chapter.



## **Chapter Five: Consequences of Litigation**

There are significant consequences of litigation or the threat of litigation against silence breakers at both an individual and a systemic level. Taken together, I argue that we risk witnessing the re-privatization of sexual violence discourse if these lawsuits continue as the consequences of being sued or threatened with a lawsuit may prevent people from disclosing, reporting or speaking about sexual violence more generally. In this Chapter, I begin by examining the individual consequences, beyond litigation that were consistent among the interviews. To begin, I will introduce a myriad of consequences the litigation had on participants' health and overall well-being. The following section identifies censorship as another individual consequence that, for many, was tied to their physical and emotional well-being. For many of the silence breakers, the silencing effect of litigation was directly tied to their emotional distress and physical health problems. Individual censorship leads to broader questions of censorship at a systemic level, specifically examining what is referred to as "media libel chill"—when media outlets water down allegations or decide not to run stories out of fear of litigation. I identify the systemic consequences of media libel chill and its larger implications on sexual violence discourse. In conclusion, I argue that numerous personal and societal consequences stem from lawsuits targeting silence breakers—the most concerning systemic consequence being the potential for pushing sexual violence discourse from the public sphere as concerns grow about the potential for litigation.

### **Impact on Health and Well-Being**

Many of the research participants revealed that they developed significant physical and mental health problems as a result of their respective lawsuits. I situate this finding within Heidi Rimke's (2018) framework, which argued that women's distress and struggles are socially structured and not "defects of abnormal individuals" (p. 15). The psychological and physical

illnesses that silence breakers experience cannot and must not be individualized or de-politicized (Rimke, 2018). I fundamentally reject the notion that the symptoms the research participants experienced can be separated from the anti-therapeutic impacts of the legal system and other modes of institutional retaliation. I argue that we must examine the interconnections between physical illness and psychological distress that silence breakers experience as symptoms of a patriarchal society where men can strategically use the law and other institutional mechanisms as modes of abuse, to inflict further harm upon their victims. I am not disputing the fact that there are well-documented mental, emotional, and physical consequences of sexual violence, and that this can severely impact the well-being of people who have experienced sexual violence (R. Campbell & Raja, 1999; Ullman, 2004; Ullman & Brecklin, 2003; Ullman & Filipas, 2001; Ullman & Peter-Hagene, 2016). In this section, I identify the debilitating impacts of sexual violence and subsequent legal action on silence breakers, and argue that such symptoms should not be regarded as individual pathology. Additionally, I argue that the social structures responsible, which enable such distress, must be examined and identified. Perhaps not surprisingly, the research participants who reported experiencing the most severe health consequences were those who had experienced sexual violence; a more surprising theme was that bystanders who were sued also reported experiencing a high number of health problems that they linked to the stress of their respective lawsuits, as well as systemic injustices and the compounding of the trauma of sexual assault(s).

### **Emotional Distress**

The feminist psychology literature on betrayal trauma is an incredibly useful framework for better understanding how both individual abusers and institutions can exacerbate the trauma of sexual violence (Freyd, 1997; C. P. Smith & Freyd, 2013). Sexual violence is frequently intertwined with betrayal. At an individual level, this occurs if the perpetrator is in a position of

trust—for example, an intimate partner, a family member, or a friend (C. P. Smith & Freyd, 2013). When an institution is involved and fails or has failed to intervene or respond appropriately to sexual violence, silence breakers also frequently report experiencing heightened betrayal, referred to as “institutional betrayal” (C. P. Smith & Freyd, 2013). For example, members of the university community often develop a sense of trust and dependency on the university through interpersonal relationships on campus. Many community members view their university as a safe space that cares about their well-being (C. P. Smith & Freyd, 2013). When a woman is sexually violated, she may experience institutional betrayal after reporting the assault to the university only to have those responding to the report deny or minimize her experience. People may experience more severe institutional betrayal if their institution failed to prevent sexual violence from occurring, for example, by allowing a faculty member known for sexually harassing students to continue teaching. The literature has found that those who have experienced institutional betrayal often experience higher levels of several post-traumatic symptoms and psychological distress, which further exacerbates the trauma of being sexually assaulted (C. P. Smith & Freyd, 2013). For example: women who report that their institution failed to prevent or respond to their disclosure of sexual violence frequently experienced heightened anxiety, disassociation, and trauma-specific sexual symptoms (Rosenthal, Smidt, & Freyd, 2016).

Nearly all of the research participants reported experiencing anxiety, depression, and suicidal ideation.<sup>53</sup> For those who experienced sexual violence, lawsuits hindered their ability to emotionally recover from the sexual violence. Elizabeth explained:

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<sup>53</sup> Suicidal ideation refers to thoughts of suicide but do not necessarily mean an individual has attempted suicide (APA Dictionary of Psychology, 2020).

I'm going to use the words of my counselor, she said it's like trying to heal burns when you are standing in the fire. You're never going to heal those burns as long as you are still in the fire. That's sort of where it is. Everything I've had to do has been coping mechanisms and survival. I can't even peel back any of the layers and get to the actual trauma. (Interview with Elizabeth, 2019)

Elizabeth noted that despite years having passed since she first learned of the lawsuit, she continues to experience emotional distress:

I was in such a trauma state. When I was in the midst of it, I just kept going, oh tomorrow will be better, next week will be better. I kept waiting for that . . . you know, how sometimes you go through that couple weeks, or couple days where you feel shitty and then you get up and you have this renewed energy. . . . Well, I anticipated that that was going to happen. Any day now. And here I am four years, five years later, right? And that's been hard too, just realizing that that is not happening. I just keep waiting for it to end. (Interview with Elizabeth, 2019)

While Elizabeth's extended trauma stemmed specifically from her status in legal limbo, meaning she could not know with any certainty if, or when, she may be called upon to defend herself, her feelings of being trapped in trauma were not unique to her. More generally, the slow pace of the legal system, including many delays in proceedings, was cited as a common cause of distress among participants, who were continuously re-traumatized by being forced to re-live the sexual violence they'd experienced and having their experiences vigorously denied and minimized by both their abuser and the legal system.

For a number of research participants, this sense of never-ending trauma has led them to suicidal ideation. Disclosures of suicidal ideation was a common theme among research participants. Camila explained how the lawsuit contributed to her thoughts of suicide:

I have been in really bad places—it is so difficult to get through living and finding a will to live without the added layer of someone trying to tell you it isn't real and it's defamatory and your experience is invalid and you're a Jane Doe—some corpse that no one has identified. That is so—it really reinforces—nihilistic and suicidal impulses, that is the biggest danger of it. (Interview with Camila, 2019)

For some, suicidal ideation continued even after the legal matter was concluded. Catherine, who was no longer in the legal system after reaching a settlement agreement, told me she continues to feel suicidal years later because what happened fundamentally changed her perspective on the world:

I am still suicidal. I'm out of danger, but (starts crying) the thing that fucks me the most is knowing that I live in a world where this happens. Where this could happen to so many vulnerable people. The world is not equipped to help us, or even believe us. (Interview with Catherine, 2019)

As I have argued previously (Gray, 2016a), suicide and suicidal ideation is most often framed within psy-discourses of individual pathology and mental illness. Suicidal ideation cannot be regarded solely as a barometer of mental illness but rather should signal how much damage the legal system can inflict upon people. But I do not regard their disclosures of suicidal ideation within this framing because such an approach conveniently ignores the numerous forms of structural and systemic violence individuals experience that can *make* people *want* to die (Gray, 2016a). Further, the more concerning element to me is how the legal system can be used

strategically by abusive men to inflict such incredible emotional distress upon others that they actively consider ending their lives.

### **Physical Health**

Beyond psychological and emotional distress, four of the research participants also noted that they developed health problems in the midst of their lawsuits. Two of the participants mentioned that they had developed chronic pain, and two of the participants—both whom had legal cases that went on for years—developed severe digestion issues during their respective legal battles. Medical studies have found that adult abuse survivors are at risk of developing a wide range of long-term negative health outcomes, including an increased likelihood of disease, due to the chronic stress associated with sexual violence (Kendall-Tackett, 2007). Research participant Tamara told me that she developed a range of health problems that she attributed to the stress of having to constantly defend her victimization in numerous legal and quasi-legal forums:

I go through really severe blows and it's showing up in my body now. Not being able to let go. I am going for ovarian tests now, sore, lasting for months and I was diagnosed with GERD, which is gastro oesophageal reflux disease, but I am convinced it is all the stress. I can't digest anymore. (Interview with Tamara, 2019)

Olivia, a journalist, conducted an investigative report into the systematic abuse of Indigenous children by a white man in a position of power. After the story was published, the man she wrote about sued her, and she counter-sued him for defamation, discrediting her reporting. During the legal proceedings, Olivia developed severe digestion issues and lost 15 pounds (Interview with Olivia, 2019). Olivia linked witnessing the numerous institutional failures to protect Indigenous women and children in order to protect a white man to the health problems she experienced during and after the defamation trial:

What I saw was a machine that protects a guy, like, there are 65 people now who have told me about his abuse. Either it happened to them, they witnessed it, or they reported it. Sixty-five. I saw the machinery, I think what really got my gut and my inability to digest food now was how well the machinery works to protect someone who people have said is an extremely violent man towards women and children. (Interview with Olivia, 2019)

A number of the participants shared similar observations after witnessing how institutions respond to sexual violence, which in turn challenged their perceptions of safety and justice.

Catherine shared a similar sentiment, which she linked to chronic pain she had developed:

I think my feelings of safety and integration with the world, which were already pretty fucked up, definitely got worse. I think after a time I had to just stop fighting, because my body was shutting down. So as much as I would love to continue pursuing legal options and trying to find a way, not only to find justice, but also to protect other people, I just can't right now. And it's very hard to accept that. But I need to rest and heal and maybe find some other way to exist in the world. (Interview with Catherine, 2019)

The numerous forms of retaliation silence breakers often face, forcing them to constantly have to defend their victimization or their rights to safety, made the participants sick. As demonstrated throughout the dissertation, the silence breakers often became targets while the abusive men framed themselves as the victims of unfair attacks. The purpose of this section is not to pathologize silence breakers but rather to demonstrate the incredible power that abusive men can wield over silence breakers, literally making them sick by forcing them to constantly defend themselves in various institutional settings. One way that symptoms often associated with PTSD are often exacerbated is through silencing, with those unable to speak about violence, either witnessed or done to them, openly and in a supportive environment reporting experiencing

increased symptoms. In the next section, I will demonstrate how a lawsuit, or even the threat of a lawsuit, is a means of censorship imposed on silence breakers—another facet of systemic silencing by default because of how the legal system is structured.

## **Censorship**

Censorship had a profound impact on the research participants. From a voluntary withdrawal from social media as a form of protective self-censorship (often leading to increased feelings of isolation and despair), to being asked to sign non-disclosure (or “gag”) orders by the courts, to a broader pattern of media libel chill, the ability of silence breakers to engage in public discussions, either about the specifics of their own cases or about sexual violence more generally, is considerably compromised by the spectre of lawsuits. Whether these are real or only threatened, legal retaliation profoundly affects speech about sexual violence, by silence breakers, their supporters, communities, and media alike. Significantly, the silence often benefits the plaintiff far more than it does the silence breaker. Just as significantly, the silence pushes more general discourse about gendered violence out of the public sphere and into obscurity.

### *Individual Silence*

The first thing (most) lawyers will tell anyone involved in a lawsuit is, don’t talk about the lawsuit with anyone. This instruction can result in loneliness and isolation as a significant trauma has now been rendered unspeakable. Beyond not talking about the lawsuit, even to close friends, lawyers will often recommend that silence breakers also make their social media accounts private. In theory, this is good advice because it limits the information that a plaintiff can use to discredit a silence breaker’s narrative of sexual violence. This is especially true in cases of sexual violence; as has been demonstrated by numerous studies, especially of the criminal legal system, if a complainant’s behaviour does not align with that of the ideal victim,



she will be scrutinized for her choices—the tables turned on her—rather than the abusive behaviour itself being scrutinized (Craig, 2018; Randall, 2010; Tanovich, 2015). Knowing this, lawyers have an obligation to advise silence breakers to minimize their public presence in an effort to reduce what material a plaintiff can acquire to use against her and/or reduce potential additional allegations of defamation. While this advice is standard for both parties in any type of legal proceeding, there are very specific and concerning societal and individual implications in cases of gendered violence.

The #MeToo movement highlighted the power of social media to amplify allegations of sexual violence to an extent that would not have been possible for previous generations (Powell, 2015). New digital media challenged ‘old media’ in that it disrupted the hierarchy of content creation, allowing those without a platform to create and disseminate content, thereby expanding the ability of people, specifically women and girls, to engage in the public sphere, and to contribute in meaningful ways to public discussions about gendered violence (Powell, 2015; Rogan & Budgeon, 2018; Mendes et al., 2018, 2019). Online spaces can be very powerful for silence breakers as they can receive information, participate in public dialogue, have a voice, and receive validation and vindication, in addition to controlling their narrative and holding offenders accountable (Powell, 2015). This was true for the research participants in this study, many of whom used social media for a number of purposes, including voicing concerns about the way their report of sexual violence was responded to by the police or their workplace, for support, and/or as a way to receive validation.

While online spaces can empower silence breakers, feminist researchers caution that technology can also be used as a weapon by abusive men (Powell & Henry, 2017). The accessibility of technologies provides a platform for abusive men to continue their sexual

harassment, abuse, and violence in the digital sphere (Powell & Henry, 2017). Prior to their individual lawsuits, some of the participants used social media to connect with online communities following their experiences of violence. But, the use of social media also opened them up to additional surveillance by perpetrators and their allies, leading to a lawsuit or the threat of a lawsuit. For example, Catherine was an active user on the now-defunct social media platform Tumblr. Catherine found Tumblr to be a supportive online network that connected her with others experiencing the aftermath of violence. Catherine talked about how the various legal retaliations she experienced took away a crucial support network and forced her into silence:

I used to publish a lot of my life online and I didn't feel able to do that after [the lawsuit]. So, I didn't have access to my Tumblr blog anymore because [the abusive man] had taken screen shots of it. Also, because their friends were following it and sometimes posting things I say in other places. Just felt like surveillance all the time. (Interview with Catherine, 2019)

The surveillance of Catherine's online activities was distressing and invasive. Similar to Catherine, Camila told me that she knew her abuser was monitoring her social media account, which felt like an extension of the abuse she'd endured during their relationship.

I had a couple of weirdly, not overtly or threatening but emails from this guy saying that [her ex] was looking at what I was saying and warning that he was surveilling my social media. I got worried about what he would do. (Interview with Camila, 2019)

Shortly after, he initiated legal action. But, as mentioned previously, he did not serve Camila, which put her in legal limbo. As a result, Camila still self-censors what she puts on social media, knowing that he is watching her online activity and that he can amend the claim to include new allegations of defamation and serve her with the lawsuit at any moment.

Since many of the interview participants referenced their online activities in the interview, I was curious what they thought of the #MeToo movement and asked them for their feelings on how the hashtag had ignited widespread dialogue on sexual violence. Camila and Elizabeth were grateful that the public discussion on sexual violence was happening, but they also felt excluded from the public discourse because they knew that their online interactions were under surveillance and could lead to further legal consequences. Camila said:

. . . seeing the conversation going on helps in some way and the other side of that is that I can't participate as much as I want to. I can't be part of that conversation because of the law in Canada and how this stuff works and that lawsuit sitting out there. (Interview with Camila, 2019)

Elizabeth shared a similar sentiment:

I cannot speak because it might make the lawsuit worse. I cannot go on Twitter and do #MeToo. I cannot do any of these things because it puts me in a more vulnerable position. And it drives me nuts that this happened to me and I can't even talk about it. Kills me. (Interview with Elizabeth, 2019)

Camila and Elizabeth demonstrate that although the #MeToo movement has amplified discourse surrounding sexual violence, not all silence breakers have been afforded the privilege of participating. Both expressed their exclusion from these online discussions had a profound impact on their well-being.

Research participants noted that the lawsuit often had a chilling effect on others, too, who became wary of commenting on allegations of sexual violence after a lawsuit had been threatened or initiated. Some of the participants were frustrated at this fear. For example, research participant Wanda is currently being sued for commenting on a high-profile sexual

violence case on social media. Wanda felt that despite the consequences she personally faced as a result of being named on a lawsuit, the possibility of a lawsuit should not deter other people from speaking out about sexual violence. Wanda criticized some of her peers in the anti-violence movement who have retreated into silence out of fear of legal action:

The extent that people internalize that they are not going to say anything negative ever because think of the cost. Watching people warn each other—don't say this thing—it is just gross. It gets in the way of addressing problems. There will always be people who are powerful who do bad things—afraid of transparency. That has been infuriating.

(Interview with Wanda, 2019)

Wanda noted her frustration with others who remain silent out of fear of legal action. She correctly noted that such fear is a major obstacle to addressing problems of gendered violence. Janet, a private practice lawyer I interviewed who specializes in sexual abuse litigation, expressed a similar frustration—that a lawsuit has the power to keep people from talking about sexual violence. Janet disagreed that the fear of a defamation lawsuit should keep people from speaking out about sexual violence:

People had said you can't tell people about [a sexual assault allegation], you will be sued for defamation. What? Everyone knew it went on. That is absurd. You can be sued for defamation—but—people trot that out as if that is the answer to the question or an insurmountable obstacle. (Interview with Janet, lawyer, 2019)

For both Janet and Wanda, far more concerning than being sued is the possibility that we may engage in a collective silence surrounding sexual violence. Moreover, they each raised the concern that becoming fearful of speaking will only serve to protect people in positions of power.

Neither Janet nor Wanda attempted to minimize the significant consequences of being sued; in fact, Wanda spoke at length about the tremendous cost the lawsuit had on her well-being. Rather, their interventions aligned with a theme that emerged among other research participants as well, and especially bystanders, who similarly felt that a lawsuit should not deter future activists or advocates from speaking about sexual violence. Many of these participants cited their social and institutional privilege. Indeed, as demonstrated in the previous chapter, the faculty I interviewed said that while their respective lawsuits were emotionally draining and damaging to their careers, they did not regret supporting the individuals who reported or disclosed sexual violence. Rather, they felt that given their relative social and institutional privilege, they had a duty to protect and support those with less privilege and even knowing what they do now, would act the same way again. These responses reinforce the general argument made throughout this dissertation, namely that the silencing effects of retaliatory lawsuits have both individual but also social consequences, and that their real dangers lie in the risk that we will stop talking about sexual violence.

A theme that emerged among the research participants, most of whom were bystanders—they felt that a lawsuit should not deter future activists or advocates from speaking about sexual violence. Many cited their social and institutional privilege—the faculty I interviewed said that while their respective lawsuits were emotionally draining and damaging to their careers, they did not regret supporting the individuals who reported or disclosed sexual violence. Rather, they felt that given their relative social and institutional privilege, they had a duty to protect and support those with less privilege and even knowing what they do now, would act the same way again.

#### *The Violence of the Gag Order*

While the preceding sections focused on the often somatic emotional and psychological effects of being engaged in a retaliatory lawsuit, the silencing that follows from lawsuits can also

be legally orchestrated, albeit with similarly embodied results. A gag order—more formally referred to as a Non-Disclosure Agreement (NDA) refers to a legal order prohibiting the parties from speaking about legal or quasi-legal proceedings. Most gag orders have no time limitations and are unlimited in scope forbidding the parties from disclosing anything about the litigation or the settlement (Macfarlane, 2020b, p. 364). Julie Macfarlane states that a major challenge in conflict resolution is the “public nature of an agreed outcome” because “there is neither a requirement nor a legal compulsion to reveal the outcomes, if one or more parties prefer to keep the matter private” (2020b, p.361). For the participants I spoke to, a gag order that prohibited them from speaking about what had happened to them often caused tremendous pain. This pain is the reason I have elected to use the term “gag order” as opposed to the more neutral “non-disclosure agreement” precisely as a way to recognize this pain. Furthermore, for the participants I spoke to, it was not so much an agreement as it something they were forced to accept. To gag someone due to a lack of other options, without their full and willing consent, is violent.

Gag orders are frequently used in legal settlements in all areas of law (Macfarlane, 2020b). As discussed in Chapter Two, there are many reasons why both parties may wish to settle the lawsuit out of court, including the significant costs tied to litigation, and seeking to keep certain facts of the case out of the public realm (Sheldrick, 2014). Gag orders are often presented as if they are there to protect the privacy of people who have experienced sexual violence (Macfarlane, 2020b). In reality, there is little evidence to suggest that gag orders are beneficial for silence breakers, or, rather if they are more beneficial for social institutions and the person accused of sexual violence to escape public scrutiny (Macfarlane, 2020b).

Research participants told me that they felt pressured by their lawyers to enter into a gag order because it was the belief of the lawyer that they could not settle the case without one. Over

a decade ago, the *Ontario Cornwall Public Inquiry* (2009) raised concerns about the legal expectation that survivors of sexual violence remain silent about the abuse they've experienced. *The Cornwall Public Inquiry* (2009) was the final report of an inquest, requested by the Government of Ontario in 2005, detailing the numerous systemic failures of the justice system and other public institutions in responding to allegations of childhood sexual abuse in Cornwall, Ontario. The inquiry included a policy roundtable on confidentiality provisions in civil settlements. The *Cornwall Inquiry* concluded that including confidentiality agreements in legal settlements that arise from reports of sexual violence created additional harm for survivors of sexual violence because “for survivors of sexual abuse, and where secrecy and shame are part of their injury, having to maintain silence in return for a payment can have very negative consequences” (Gladue, 2009, p. 387).

*The Inquiry* (2009) noted a major issue with gag orders was that they are most often boilerplate gag orders that fail to account for the unique needs of people who have experienced sexual violence. For example, some of the agreements suggest that a person cannot discuss a settlement with anyone, including spouses or counsellors—a clause potentially detrimental to the well-being of someone who has experienced sexual violence (Gladue, 2009, p.387). Ultimately, *The Inquiry* (2009) recommended that individuals should be able to discuss their experience of abuse and the settlement freely without limitations while allowing for protection with respect to the quantum of payment or the identity of the victim, if that is what the victim wants (p.388). Research participants noted similar concerns about the long-term impact a gag order would have on their individual recovery, not to mention the consequences of being prohibited from shining a light on systemic failures to respond in cases of sexual violence.

In fact, two of the participants later challenged their gag orders for both personal and political reasons, which I will examine later in this section. Secondly, these participants didn't regard the decision as an agreement between two equal parties. Instead, they perceived the power dynamics between themselves and their abuser to have been skewed, forcing them into silence.

Both Laura and Bonnie Robichaud entered into gag orders following their respective complaints. Neither of the settlements they received were tied to the lawsuits examined in this study but instead to actions they took against the institutions liable for the sexual violence they experienced. These participants spoke to me about their gag orders and cautioned against them, which provided important insight into the potential consequences for future silence breakers who may be pushed into a gag order. In the 1980s, Bonnie Robichaud entered into what she called a "secret agreement" with her workplace. The legal agreement prohibited her from talking about the sexual harassment she experienced there. Laura, like many survivors, had experienced multiple instances of sexual violence, including at a previous workplace. Laura took legal action against the previous organization she worked for, resulting in her signing a strict gag order in exchange for \$15,000 CAD. Laura told me she deeply regretted entering into a settlement agreement. She spoke about the consequences of the gag order on her well-being:

I actually developed symptoms where my face would go numb and I was having all these throat issues. I was having physical symptoms of feeling gagged. I was working on that in therapy and I realized a lot of it was stemming from [the gag order]. Actually, was gagged. (Interview with Laura, 2019)

This experience deterred her from entering into another gag order when she again experienced sexual violence. When Laura found out she was being threatened with a lawsuit, she knew,



because of the negative consequences she had previously experienced, that signing a gag order was not an option for her:

I ended up getting offered a settlement, like it was pretty substantial. It was like \$60,000 CAD, which almost would bankrupt their company probably. Like they were desperate to shut me up. But they refused to settle with me without a gagging clause. I said under no circumstances will I sign one.<sup>54</sup> (Interview with Laura, 2019)

Robichaud echoed a similar sentiment, saying that the confidentiality requirement “puts more insult on big injury” (Interview with Bonnie Robichaud, 2019). One of the motivating factors for Robichaud in seeking leave at the SCC was to make the terms of the agreement public.

Robichaud wanted to share what had happened to her publicly, and to see a larger systemic remedy: “as long as it is a secret, we don’t know about it, we can’t study them.” (Interview with Bonnie Robichaud, 2019).

I asked all of the lawyers interviewed in this study for their thoughts on gag orders in lawsuits against silence breakers. The lawyers offered a range of opinions on them; while some were adamant that a legal settlement could not happen without a gag order, others said they often advised clients against a broad gag order. While their opinions were divergent, nonetheless, all were cognizant of the costs of gag orders for silence breakers in sexual violence cases. This sensitivity is likely a result of the participant selection process—I mostly spoke to lawyers with extensive experience working with clients who had experienced sexual violence, and who tended to agree that lawyers inexperienced in sexual violence litigation may be unaware of the ways in which lawsuits involving sexual violence are unlike other cases they may litigate, where

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<sup>54</sup> When I shared my research findings with Laura nearly two years after this interview, she told me that while they did not reach a settlement agreement, the organization did need to declare bankruptcy and cited her complaint and the legal costs as a key reason why.

confidentiality agreements are standard practice and may cause further harm to the silence breaker. This lack of understanding was confirmed by a number of research participants who told me that they had worked with lawyers who lacked a political analysis of sexual violence, and who quickly advised their clients to agree to the gag order because of its standard use in other types of litigation, such as personal injury law with massive insurance corporations that often use boilerplate-type agreements.

A long-time sexual abuse litigator questioned whether gag orders could even be enforced—it may be difficult to prove that a defendant has breached the settlement, the victim will likely not have money to pay damages, and the courts may be unwilling to uphold such an agreement as a matter of public policy:

It's very rare that I see anyone even attempt a traditional gag order. If they do, I just laugh at them and say, first of all, I don't think it will ever be enforceable. I think they're void as [they are] against public policy. Now there's no case that says that, but I would be very happy to argue the first case of that issue. That's ridiculous. (Interview with Darlene, lawyer, 2019)

Research participant Laura's experience demonstrates that Darlene could be correct. Laura told me that eventually she became so frustrated with the way the gag order negatively affected her healing process that she decided to disregard the terms of the settlement entirely and began speaking openly about what happened to her, including the role the institution played in keeping her quiet. At the time of the interview, the organization had not pursued a breach of settlement for her breaking the gag order.

That being said, Darlene's perspective was not shared by all of the lawyers I spoke to. Jessica, another lawyer specializing in sexual violence litigation, told me she found that plaintiffs

so commonly request terms of confidentiality that it is unavoidable during settlement negotiations. Despite this, Jessica noted there is room for creativity, especially if the allegations are already in the public domain. She shared the specifics of a non-disclosure agreement she negotiated recently for a client:

A lawyer experienced some pretty heinous sexual harassment by a pretty senior lawyer and we negotiated this ridiculous multi-stage NDA. I basically said to the other side, she is in the early years of her career, how does she continue to work in this industry for the next 40 years and remain silent about what happened to her as an articling student? And what if she is a senior partner in the next 20 years on a panel and she gets asked, did you ever experience this? She has to be tight lipped and the whole encounter in her work to do with her profession. We ended up negotiating things. She can never name him. She can name who the employer was at the time. After five years, she can talk about the fact that she experienced sexual harassment by a senior lawyer during her career or something like that. (Interview with Jessica, lawyer, 2019)

Jessica demonstrated that it is possible to negotiate a creative settlement in cases of sexual violence, and one that will not entirely silence the silence breaker. In fact, lawyers experienced in sexual abuse litigation, like Darlene and Jessica, follow the recommendation made by *The Cornwall Inquiry* (2009) to ensure that the gag order is not overly broad. But as mentioned previously, not all of the silence breakers had lawyers who were knowledgeable about how sexual violence litigation is fundamentally different from standard personal injury litigation such as motor vehicle claims. It is imperative that lawyers representing silence breakers are aware of the potential long-term psychological distress a gag order may cause a silence breaker if it is overly broad.

The silence breakers I spoke to cited fear at being forced into signing a gag order if they couldn't afford to take the case to court. Laura and Robichaud reported experiencing profoundly adverse impacts on their well-being as a result of signing their respective gag orders. Both women resisted and fought the gag order once they realized it was hindering their political activism and healing process. Many of the participants who faced legal action or a legal threat cited concern that the possibility of a gag order could impact their personal healing journey. Many of these participants also worried that the inability to speak openly about sexual violence would hinder the anti-violence movement from moving forward.

Clearly, gag orders arising from retaliatory lawsuits function to censor the speech of silence breakers. For example, Bonnie and Laura, who both signed gag orders relating to workplace sexual violence, eventually challenged their gag orders after recognizing both the individual and systemic consequences of such an agreement. While Bonnie formally went to the courts to argue that she should not be silenced, Laura simply started speaking about what happened to her despite the gag order. Research participants Wanda and Janet encouraged bystanders to not allow a potential lawsuit to deter them from addressing sexual violence within their communities. Finally, research participants noted concerns about lawyers pushing them to sign a gag order even if they or another silence breaker is resistant. A number of the participants felt that their lawyer lacked a political analysis of sexual violence and was therefore unable to comprehend the long-term consequences for them were they to sign a gag order.

### **Media Libel Chill**

Thus far, this chapter has focused on the numerous consequences of silence breaking for individuals. But, as argued throughout this dissertation, lawsuits not only silence and punish individual silence breakers; lawsuits also systematically hinder and sometimes eliminate sexual violence discourse altogether. Retaliatory lawsuits against those who speak out against sexual

violence, and especially defamation suits, have a palpable effect on media outlets. In particular, mainstream media suffers from libel chill, which systematically hinders sexual violence discourse from entering the public sphere.

Traditional media has a significant role to play in advancing gendered violence as a matter of public interest. A number of the research participants discussed how they used the media as a tool in their own advocacy, to bring awareness to sexual violence and institutional failures to respond to disclosures and reports of sexual violence. Some of the research participants spoke about the necessity for media outlets to cover stories about sexual violence, to draw public attention to the systemic barriers women face when reporting sexual violence. For these participants, the media was an effective tool for influencing systemic change in institutional responses to sexual violence:

Good journalists are all that's left some days between us and the totally tyrannical culture because they are the people who can at least tell your stories. So, it wasn't like, shall I, shan't I go to the media? This is a continuous path of how I think about any kind of advocacy. (Interview with Brenda, 2019)

Yet, despite this reliance on the media to both narrate women's stories and educate the public about systemic issues, such as gendered violence, the media themselves are not immune to legal retaliation.

Yet, despite this reliance on the media to both narrate women's stories and educate the public about systemic issues, such as gendered violence, the media themselves are not immune to the nuances of legal retaliation. As explained in Chapter Three, the tort of defamation includes the specific offence of libel, which refers to print and other media. Holding back on publishing (or broadcasting) stories out of fear of being charged with libel is known as "libel chill." In 2008,

Justice Binnie, writing for the majority in *WIC Radio Ltd. v. Simpson* (2008), addressed how libel chill can negatively impact media reporting:

There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action. Investigative reports get “spiked”, it is contended, because, while true, they are based on facts that are difficult to establish according to rules of evidence. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims . . . but in actions launched simply for the purpose of intimidation. “Chilling” false and defamatory speech is not a bad thing in itself, but chilling debate on matters of legitimate public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements. (para. 15)<sup>55</sup>

Despite the SCC’s broad warnings about the democratic hazards of “chilling debate on matters of legitimate public interest,” recent years have seen mainstream media responding more directly to concerns about libel than they have in ensuring that stories about gender violence are told. For example, when the *Toronto Star* published a story about a boxing gym for women who have experienced violence, they featured the story of a member of the gym but did not seek comment on the abuse allegations from the woman’s ex-husband. Despite the fact that he was not named in the piece, the husband threatened legal action for defamation (Reynolds, 2016, as cited in Gerrits, 2019, p. 123). The threat led to the editors issuing a revision on the online story:

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<sup>55</sup> In this case, Rafe Mair, a well-known radio show host, used his broadcast to compare Kari Simpson, a well-known anti-LGBTQI activist, to Hitler, the Ku Klux Klan, and skinheads. Simpson sued Mair and his employer, WIC Radio, for defamation, arguing that Mair’s implication that Simpson advocated violence against gay people was libellous. The SCC ruled in Mair’s favour, deciding that while his remarks were defamatory, they were protected by fair comment.

This article was edited from a previous version because it did not meet the Star’s standard of fairness. The Star’s Newsroom Policy and Journalistic Standards Manual states that “The Star is obligated to obtain and publish all sides of any story it reports. Before publication, every effort must be made to present subjects with all accusations.” The article had referred to a Toronto woman’s claims of violence by her husband. While the man was not named, he was not given opportunity to respond to those allegations, as he should have been before the article was published. (*Toronto Star*, 2016, as cited in Gerrits, 2019, p. 123)

If news outlets are hesitant to label a woman a “survivor” in a story that does not name the perpetrator out of fear of possible litigation, even if the central facet of the story is not necessarily about the specifics of the violence, it is entirely possible that sexual violence could risk being pushed out of mainstream media or result in a vague or watered-down version of what happened to avoid litigation. I will return to the discussion of public interest pertaining to sexual violence in the following chapter.

Libel chill seems to have had an impact on Canadian media reporting on sexual violence post #MeToo. One lawyer I spoke to told me that since the #MeToo movement began, she has noticed a distinct shift in what media outlets are willing to publish about allegations of sexual violence, likely out of fear of litigation. She noted that news outlets have become more reluctant to publish stories unless women are willing to be named:

. . . the media has become more reticent about letting victims speak to them on any confidential basis. In the case I am currently caught up in [Northern Ontario City], the victims are terrified of lending their name to anything. . . . But the media won’t print their stories unless they agree to be identified. (Interview with Jessica, lawyer, 2019)

These worries are not unfounded. The last several years have seen a number of lawsuits against media outlets following the publication of a story or article about sexual violence allegations. For example, former Ontario Progressive Conservative Party leader Patrick Brown sued a number of media entities and people responsible for publishing a story alleging he had engaged in “sexual misconduct” (The Canadian Press, 2018). A Canadian poet and former editor, at Coach House Books, Jeramy Dodds, filed a \$13.5 million-dollar lawsuit against the *Globe and Mail* and *Toronto Star*, and four unidentified women (Brean, 2018). The story reporting the lawsuit indicated that there would be a separate lawsuit filed at a later date against *BuzzFeed News* as well (Brean, 2018). Dodds initiated the lawsuit after his name appeared on a list of “shitty media men” along with an anonymous letter that he “used his literary prominence to sexually exploit women” (Brean, 2018). Dodds’ statement of claim stated that the women and newspapers worked in tandem to “ruin him professionally, make him lose his job, damage his personal and professional reputation and livelihood, and to ‘achieve revenge’ for ‘unknown personal reasons’” (Brean, 2018). Further, Dodds argued that the media outlets who reported on the list and the letter wanted to “make an example of Mr. Dodds” as “part of the larger cultural story about the #MeToo Movement” (Brean, 2018). Mr. Dodds alleged that the media outlets tried to use him to capitalize on the “current popularity of stories about the sexual abuse claims by men of women through abuse of power,” and therefore co-operated with the “women’s agenda” to destroy his career (Brean, 2018). A Google News search reveals that since Brown and Dodds’ lawsuits were filed in 2018, no news outlets have reported on the pending lawsuits or the multiple allegations of sexual violence.



Freelance authors are in a unique predicament and are likely to have far less support from a news outlet if they are sued. Indigenous author Alicia Elliott (2018)<sup>56</sup> published an article in *Flare* magazine about her own experience of libel chill and the unique consequences for freelance authors. Elliott (2018) wrote about her decision to pull an editorial about numerous historical sexual violence allegations made by Indigenous people against a white man in a position of power. She decided to pull the story after she learned that the news outlet wanted to run the story without having it checked by a lawyer (Elliott, 2018). Without that added protection, Elliott's own fears of legal action set in; as a freelance writer, she was especially concerned that a lawsuit could financially devastate her and her family. As a result, Elliott (2018) decided to self-censor and pull the piece from publication to avoid the possibility of being sued.

These fears are not unfounded. For example, Marilou McPhedran was sued for an opinion piece that was published by the *Globe and Mail*, despite the extensive lawyering of the piece. Initially, the *Globe* refused to help her pay for the lawsuit, and only provided her with financial support when they faced pressure to do so from an editor at another major Canadian newspaper:

The OMA only sued me for the op-ed in the *Globe*. That op-ed, Mandi, had been lawyered by the *Globe*, by the *Globe* experts. They approved it for publication. But, when the OMA . . . [they] sued only me and the *Globe* said, "Oh, good luck with that." Good luck with that? They lawyered it. They approved it. They published it. They let me hang. Until the publisher of the *Toronto Star* called the publisher of the *Globe and Mail* and said, "This is just wrong. What you are doing to her is just wrong, you know? What about

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<sup>56</sup> Right before this article was published, Alicia Elliott was one of the defendants sued by Steven Galloway. The Notice of Civil Claim cites four tweets written by Elliott as defamatory. Likely for legal reasons, Elliott does not address the lawsuit initiated by Galloway in this piece.

freedom of the press? What about protecting the people you have chosen to publish? Your own lawyer said it was okay.” . . . The *Globe* then . . . came in and said we will contribute up to, I think \$100,000 to \$105,000 but we chose your lawyer. (Interview with Marilou McPhedran, 2019)

Among other things, the OMA’s lawsuit against McPhedran ensured that media outlets did not publish stories about the original issue of contention—the sexual violence of patients by regulated medical officials—in the five years the lawsuit was ongoing (Interview with Marilou McPhedran, 2019).

In a similar vein, Bailey Gerrits’ (2019) dissertation examined the patterns of contemporary Canadian newspaper coverage of domestic violence. Gerrits’ study found that journalists and editors take the possibility of a libel lawsuit into consideration when deciding what cases of domestic violence will be reported on. The editorial decision is often guided by whether there is an element of public interest—for example, if there is a potential public safety issue with others potentially at risk of being victimized by the alleged perpetrator. Many journalists (and legal system actors) regard violence between intimate partners as a private matter, especially if they are not public figures, as opposed to a matter of public interest. As a result, reports of gendered violence may be omitted from the news because of the perceived limitations of the libel defences available to the media and, more specifically, in matters of public interest and fair comment (Gerrits, 2019).

Again, media outlets have cause for concern, and even reporting on a criminal conviction for gendered violence may not be sufficient to prevent charges of defamation. In 2020, a reporter, her editor, and her publisher were sued after reporting on a high-profile domestic violence conviction (*Bullard v. Rogers Media et al.*, 2020). In 2016, Mike Bullard, a comedian

and radio personality, was in a relationship with a well-known Toronto news journalist. After they broke up, Bullard was charged with criminal harassment and criminal communications. He was fired from his job after the charges were laid against him. After the preliminary hearing, the judge dismissed the criminal harassment charge but allowed the charges of harassing communications, obstruction of justice, and failure to comply with a recognizance to proceed. Bullard pled guilty to these charges in 2018. Since both parties were prominent Toronto media figures, the charges and the guilty plea received significant media attention.

Sarah Boesveld, a journalist for *Chatelaine*, interviewed the victim for a story that was published online. After the interview was published, Bullard sued Boesveld as well as Rogers Media, the entity that owns *Chatelaine*, and the executive editor, for defamation. Bullard did not include the victim on the lawsuit. In the Statement of Claim, Bullard identified 13 defamatory statements in the article specifically relating to the woman fearing for her safety to the extent that she had to move out of her house, which Bullard argued was not substantiated by the courts as they had dismissed the criminal harassment charges.

Using the newly enacted anti-SLAPP legislation, the defendants filed a motion to have the case dismissed, arguing that the lawsuit would negatively impact expression on a matter of public interest. The motion judge agreed and confirmed the necessity of ensuring that discussions of gendered violence must be protected as a matter of public interest. In the decision, Justice McKelvey wrote that in some circumstances, “permitting the wronged party to seek vindication through litigation comes at too high a cost to freedom of expression” (*Bullard v. Rogers Media et al.*, 2020, para 102). Furthermore, the decision explicitly stated the value of expression on gendered violence:

[T]he value of freedom of expression is high in this case. Gender based abuse is recognized as a serious social problem in our society. It is generally understood that there are systemic barriers to reporting this type of activity. The consequences of gendered based harassment are too often severe and the public interest in expression on this topic is high. (*Bullard v. Rogers Media et al.*, 2020, para. 103)

While this decision is a victory, both for the new anti-SLAPP legislation and for the protection of speech about gendered violence as a matter of public interest, it is important to remain cautiously optimistic. I will examine the new legislation in detail in the following chapter. Finally, if the media, like those who experience sexual violence, become hesitant to report on sexual violence due to libel chill, we risk losing important sexual violence discourse, which will ultimately negatively impact individuals who experience sexual violence while protecting the perpetrators of sexual violence.

## **Conclusion**

A lawsuit, along with the other forms of retaliation outlined in the previous chapter, has significant consequences on those being sued. Most obvious is the financial cost of the lawsuit. The research participants also disclosed that they developed mental and physical health problems after being sued, which was tied to the stress of the retaliation. The physical symptoms were exacerbated by the expectation of silence as silence breakers lost control of their narratives. Once a lawsuit has been initiated, lawyers often tell their clients to stop talking about what happened to them—advice that may be legally beneficial but can also be detrimental to one’s well-being. The censorship not only impacts individual silence breakers, it systematically contributes to the silencing of sexual violence discourse in the public sphere.

It is not only individuals who are impacted by the threat of a retaliatory lawsuit. Media outlets also experience libel chill. Editors and journalists who may water down or refuse to publish certain stories about sexual violence out of fear of litigation, even if the perpetrator is not named in the story, as demonstrated by the *Toronto Star* boxing gym story. Since the #MeToo Movement took off, it may be reasonably assumed that media outlets would be more willing to publish stories about sexual violence. But, interviews with research participants found the opposite may be true. Many participants noted that they were fearful of litigation for turning over stories to the media, or that news outlets would limit themselves to only publishing less serious allegations, such as harassment, as opposed to exposing experiences of sexual violence. There is a real concern that the fear of lawsuits, both from media outlets and individuals, for speaking about sexual violence may push the dialogue out of the public sphere altogether. In short, the fear of retaliatory litigation risks re-privatizing discourse about sexual violence. Yet, as we also saw, it may be possible to respond to this trend, through classifying such retaliatory suits as Strategic Lawsuits Against Public Participation. The next Chapter will examine the introduction of anti-SLAPP legislation to assess whether such legislative remedies will be a useful tool for silence breakers facing legal action.

## Chapter Six: SLAPPs and Legislative Intervention

Since the 1990s, across North America, there has been growing concern about Strategic Lawsuits Against Public Participation (SLAPP), a type of lawsuit brought specifically for the purpose of preventing public discourse on matters of public interest (See: Canan, 1989; Canan & Pring, 1988; Landry, 2014; Pring & Canan, 1996; Sheldrick, 2014). Within the last two decades, there have been a number of high-profile Canadian cases that could be regarded as SLAPPs including: a lawsuit in 2009 against an environmental activist by a salmon farming company in British Columbia (*Mainstream Canada v Staniford*, 2013); in 2009, the City of Guelph launched a lawsuit against a group protesting the development of an industrial park (Sheldrick, 2014); in 2010, the Youthdale Treatment Centre of Toronto sued former patients and their parents for comments they had made about the treatment practices (Sheldrick, 2014); and in 2001, the Ontario Medical Association sued Marilou McPhedran for an opinion piece she wrote in the *Globe and Mail*, which will be discussed in detail in this Chapter. A range of activities can result in a SLAPP, including: writing a letter to an editor, circulating petitions, contacting a public official, reporting the misconduct of a police officer or teacher to a professional board, speaking at a public meeting, making a submission to city council, reporting unlawful activities, and giving interviews to the media (Sheldrick, 2014). Often, SLAPPs use a range of legal claims that include allegations of defamation, tortious interference with contract or business relations, or in the case of reports to police, malicious prosecution (Phillips & Pumpian, 2017; Sheldrick, 2014). The merits of the case are irrelevant since these cases are not filed with the primary intention of being heard in court but, rather, to entangle the defendant in an expensive legal battle (Sheldrick, 2014).

Growing public concern about such lawsuits has resulted in legislation to protect citizens from SLAPPs being passed in Quebec, Ontario, and BC. Despite the concern about SLAPPs, there has been little discussion within academic literature about lawsuits initiated by men against silence breakers. While anti-violence advocates have argued that retaliatory lawsuits by men against silence breakers should similarly be considered SLAPPs that are protected from legal action, these lawsuits have been ignored within the SLAPP literature and, in turn, the legislation. In this chapter, I argue that by definition retaliatory lawsuits by men accused of sexual violence are SLAPPs, but I have little hope that the current legislation will be of use to silence breakers hoping to have lawsuits against them dismissed by the courts.

This Chapter begins with a cursory overview of the academic SLAPP literature before moving into an overview of the legislation passed in Ontario and BC.<sup>57</sup> I demonstrate that overall, the legislative debates, the courts, and the academic literature have failed to account for the gendered experience of SLAPPs, which will have a detrimental impact on silence breakers who attempt to have lawsuits against them dismissed using legislation. To conclude, I examine two lawsuits regarding disclosures and reports of sexual violence that have sought dismissal under the new legislation to demonstrate the limitations of the legislation for silence breakers (*Lyncaster v. Metro Vancouver Kink*, 2018; *Rizvee v. Newman*, 2017). These two cases are significant as they demonstrate the courts' inability to fully recognize the systemic barriers to reporting sexual violence, illustrating why the courts must recognize sexual violence discourse as speech that needs to be protected. I then turn to a court observation of a document production hearing for an anti-SLAPP motion in Vancouver that I attended. This hearing reproduced problematic and discriminatory stereotypes about women who report sexual assault and

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<sup>57</sup> For an examination of the anti-SLAPP protections in Quebec see: Landry (2014).

demonstrated the long-standing hesitancy of the courts to afford women who report sexual assault with credibility without significant corroboration in the form of documentation.

### **Strategic Lawsuits Against Public Participation: The Literature**

Canan and Pring (1988), who first coined the term, provided four criteria for a lawsuit to be considered a SLAPP. It must:

1. Involve communications made to influence a government action or outcome;
2. Result in civil lawsuits (complaints, counterclaims, or cross-claims);
3. Be filed against nongovernmental individuals or groups;
4. Involve a substantive issue of some public interest or social significance. (p. 8)

Utilizing these four criteria to identify SLAPPs, Canan (1989) went on to identify four categories of SLAPP defendants: environmental activists, community groups drawing attention to neighbourhood concerns, disgruntled customers, and opponents of property and land development. The plaintiffs initiating lawsuits are most often real estate developers, property owners, police officers, alleged polluters, business owners, and state/local government agencies (Canan, 1989). There are a number of general motivations for the SLAPP plaintiff including:

retaliating against successful opposition on an issue of public interest; the attempt to prevent expected future, competent opposition to issues; the intent to intimidate and generally send a message to the opposition that they will be punished and finally; a view that litigation and the courts can be used as a strategic tool to win an economic; and/or political battle. (Canan, 1989, p. 30)

Pring and Canan's definition of a SLAPP has been critiqued by American scholars both for being too broad and too narrow (Sheldrick, 2014, p.27). On one end of the spectrum, it is argued that legitimate lawsuits may be excluded because the right to petition has been defined too broadly



(Sheldrick, 2014, p.27). There is also a concern that defendants “might try to conceal civil wrongs by claiming that they were involved in a political activity, even when there was little merit in the activity” (Sheldrick, 2014, p.27). In contrast, other scholars have argued that the definition of SLAPP is too narrow and have argued that “any lawsuit, if linked to the political activities of the defendant, and regardless of the scope of the activity, should be considered a SLAPP” (Sheldrick, 2014, p.28).

There is significantly more American than Canadian literature on SLAPPs, but there is a growing body of Canadian scholars who have studied SLAPPs in Canada (Landry, 2014; Scott & Tollefson, 2010; Sheldrick, 2014). While the American literature is useful for Canadian scholars, there are some clear distinctions between Canadian and American law. Most notably, American scholarship focuses heavily upon the legal protections provided under the *United States First Amendment*, specifically the right to petition. There is no similar constitutional right provided in the *Canadian Charter of Rights and Freedoms* (Sheldrick, 2014, p.28). Moreover, the *Charter* is of little use in Canadian SLAPPs unless it is clear that there is government involvement in the filing of the lawsuit (Sheldrick, 2014, p.28). This is because the rights contained in the *Charter* only apply to government action. Regardless of the legal differences between the United States and Canada, the underlying objective of a SLAPP is to silence critics and attempt to gain control of public discourse.

Byron Sheldrick (2014) has proposed a conceptual and analytical framework for SLAPPs in Canada. Sheldrick identified the primary characteristics to take into consideration when assessing whether a lawsuit is a SLAPP: the identity and the relative power and resources of the parties to the litigation; the nature of the issue being disputed and the degree to which the issues are public or private; and finally, the degree to which the issues at stake raise questions about the

functioning of democratic political institutions (p. 29). Sheldrick (2014) argued that the major question is whether the litigation potentially threatens democratic processes. For the most part, Sheldrick's framework is helpful; however, Sheldrick (2014) also hypothesized that from his conceptual and analytical framework for SLAPPs, a majority of lawsuits initiated by individuals against others pose minimal risk to democratic values. In the following section, I challenge this statement from a critical feminist analytical framework, specifically by examining lawsuits against silence breakers as SLAPPs.

### **Retaliatory Lawsuits: A Feminist Issue**

One major shortcoming of the SLAPP literature is the assumption of the homogenous defendant. While scholars such as Sheldrick have identified the disparity of resources and power between plaintiff and defendant, his analysis is overly simplistic. For the most part, within the literature, it is assumed that the defendant is male, middle class, and involved in some form of political activism, often linked to environmental concerns or property development. Within the last several years, a growing gendered analysis of SLAPPs has appeared due to the advocacy work of lawyers in anti-violence sectors in Canada and the USA. These lawyers have argued that lawsuits against silence breakers must be considered retaliatory and are in need of SLAPP protection as they stifle important public discourse (Barbra Schlifer Commemorative Clinic, 2019; B. E. H. Johnson & Bonsignore, 2018; Leader, 2019; West Coast LEAF, 2019). As demonstrated by the interviews I conducted, the mere threat of a lawsuit was enough to deter many of the research participants from continuing to engage in the public sphere. There was also a significant chilling effect with the research participants noting that they likely would not report if they experienced sexual violence again in the future because the risk of litigation is simply too high. While the #MeToo movement has raised public consciousness about the pervasiveness of

sexual violence, it has also highlighted the need for legal protections for those who report sexual violence (Barbra Schlifer Commemorative Clinic, 2019; B. E. H. Johnson & Bonsignore, 2018; Leader, 2019; West Coast LEAF, 2019). Most importantly, discourse about and reports of sexual violence must be regarded as a legitimate public interest issue.

When Ontario was developing its anti-SLAPP legislation, McPhedran and Patricia Freeman Marshall, an Ontario-based advocate who spent decades working in the anti-violence sector, testified about the systemic impact of the lawsuit against McPhedran by the OMA (*Hansard Debates: Protection of Public Participation Act, 2015*, 2015). McPhedran noted that the lawsuit halted not only her own advocacy efforts but also the efforts of other advocates working on the issue of patient abuse by medically regulated health professionals in Ontario, which negatively impacted public awareness about the issue. McPhedran testified, “five minutes cannot convey the extent of the silencing effect that this SLAPP suit had on awareness and accountability for sexual abuse of patients, estimated in 2000 to be affecting over 200,000 patients of regulated health professionals in Ontario” (*Hansard Debates: Protection of Public Participation Act, 2015*, 2015, p. 84). Freeman Marshall also testified about the chilling effect that the lawsuit against McPhedran had on her:

I came to appreciate, from that, that my own careful responses would be no defence against such a use of the current law, and with my own health compromised by decades of heartbreaking work with thousands of abuse survivors, I decided to stop speaking publicly. I cut out my advocates tongue. The libel chill that is invisible to most does have faces and one of them is mine. It’s been agonizingly real for me as I know it has been for others. (*Hansard Debates: Protection of Public Participation Act, 2015*, 2015, p. 108)

As demonstrated by McPhedran’s experience, a lawsuit has the potential for the widespread silencing of public discourse about sexual violence. The OMA lawsuit against McPhedran highlighted the need for legal protections against retaliatory lawsuits across Canada, which was one of the events that prompted advocates to advocate for anti-SLAPP legislation in Ontario and BC.

### **The Structure of Provincial Legislation in Ontario and BC**

As a result of the lawsuit against McPhedran, an interview participant, Sarah, who at the time was an executive director of an anti-violence organization started working with advocates in BC who were lobbying the BC provincial government to enact anti-SLAPP legislation. Around 2009, Sarah had a meeting with Chris Bentley, then-Attorney General for Ontario, to present the need for anti-SLAPP legislation in Ontario. Following this meeting, the Ontario Attorney General assembled the “Anti-SLAPP Advisory Panel” (Advisory Panel) and tasked them with preparing a report by Fall 2010 (Ontario Ministry of the Attorney General, n.d.a). The advisory panel was chaired by Mayo Moran, a Dean at the Faculty of Law at the University of Toronto; lawyer Peter Downard; and Brian MacLeod Rogers, a media lawyer who also represented McPhedran against the OMA (Ontario Ministry of the Attorney General, n.d.a). The advisory panel received 31 written submissions from groups and individuals, and heard oral presentations from eight groups and individuals, including McPhedran and Freeman Marshall (Ontario Ministry of the Attorney General, n.d.a). The advisory committee made three recommendations to the Ontario Ministry of the Attorney General in their final report:

1. Ontario should adopt “anti-SLAPP” legislation.
2. The legislation should include a purpose clause for the benefit of judicial interpretation.

3. The language of the legislation should not include the term “SLAPP” but rather emphasize the importance of (a) protecting expression on matters of public interest from undue interference, and (b) promoting the freedom of the public to participate in matters of public interest through expression. (Ontario Ministry of the Attorney General, 2010, p. 1)

Five years later, Ontario passed the *Protection of Public Participation Act* (2015), which introduced sections 137.1 to 137.5 to the *Courts of Justice Act* (CJA). Following the advice of the Advisory Panel, Section 137.1(1) states that the purpose of this section and sections 137.2 to 137.5 is:

- (a) To encourage individuals to express themselves on matters of public interest;
- (b) To promote broad participation in debates on matters of public interest;
- (c) To discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
- (d) To reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

At the centre of the legislation is the explicit intention to protect expression relating to matters of public interest. By design, the legislation does not narrowly define what constitutes public interest to allow for a range of issues to be covered. To determine whether a matter engages the public interest, the motion judge is to apply the principles from the SCC case *Grant v. Torstar Corp* (2009)—a landmark defamation case. The courts define public interest quite broadly; however, *Grant v. Torstar Corp* (2009) sets out the limitations:

First, and most fundamentally, the public interest is not synonymous with what interests the public. The public’s appetite for information on a given subject—say, the private

lives of well-known people—is not on its own sufficient to render an essentially private matter public for the purposes of defamation law. An individual’s reasonable expectation of privacy must be respected in this determination. Conversely, the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject. (*Grant v. Torstar Corp*, 2009, para. 102)

As a procedural matter, section 137.1(3) of the *CJA* allows the defendant to ask the courts to dismiss the proceedings before a defence has been filed. The provision involves a three-part test. First, to have the proceeding dismissed by the courts, the defendant must satisfy the judge that the “proceeding arises from an expression made by the person that relates to a matter of public interest” (*CJA*, s.137.1[3]). This is sometimes referred to as the “threshold requirement.” The onus then shifts to the plaintiff who must clear what the courts call a “merits-based hurdle” and a “public interest hurdle” under s.137.1(4)(a)(i)(ii)(b). The merits-based hurdle requires the plaintiff to satisfy the judge that the proceeding has substantial merits and the defendant has no valid defence in the proceeding (O’Brien & Tsilivis, 2018). The public interest hurdle requires the person bringing forward the motion to dismiss the claim to satisfy the judge that the expression is a matter of public interest so serious that it outweighs the harm that may have been suffered by the person who initiated the legal action. In 2019, BC passed nearly identical legislation to Ontario.<sup>58</sup> As of 2020, there are no other provinces or territories that have similar legislation under consideration.

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<sup>58</sup> The only major difference between the two *Acts* is the Ontario *Act* (2015) states that the application must be heard within 60 days, whereas the British Columbia *Act* (2019) states that the “application must be heard as soon as practicable.” When I am referencing the legislation in BC I will use *PPPA* and in Ontario s.137 to reflect the

In 2020, the SCC provided clarification about what constituted public interest, and how the lower courts should adjudicate motions under s.137.1 of the *Courts of Justice Act* in Ontario and under the *Protection of Public Participation Act* (PPPA) in BC (*Bent et al. v. Platnick*, 2020; *1704604 Ontario Limited v. Pointes Protection Association et al.*, 2020). The SCC re-affirmed that the definition of public interest is intentionally broad in order to protect expression and public participation. The responsibility thus falls upon the person who initiated the lawsuit to demonstrate to the court that the harm—either monetary or non-monetary—that they endured from the expression outweighs the public interest (*1704604 Ontario Limited v. Pointes Protection Association et al.*, 2020). The SCC asserted that what relates to a matter of public interest, as cited in *Grant*, is also applicable for s.137 motions:

In *Grant v. Torstar Corp.* [ . . . ] this Court considered the question of how public interest in a matter is to be established. While that case concerned the defence of responsible communication to a defamation action, it also involved determining what constitutes a “matter of public interest”. The same principles apply in the present context. The expression should be assessed “as a whole”, and it must be asked whether “some segment of the community would have a genuine interest in receiving information on the subject” (paras. 101-2). While there is “no single ‘test’”, “[t]he public has a genuine stake in knowing about many matters” ranging across a variety of topics (paras. 103 and 106). This Court rejected the “narrow” interpretation of public interest adopted by courts in Australia, New Zealand, and the United States; instead, in Canada, “[t]he democratic interest in such wide-ranging public debate must be reflected in the jurisprudence” (para.

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language adopted by the courts. When I am discussing both BC and Ontario together, I will refer to “anti-SLAPP legislation”

106). (As cited in *1704604 Ontario Limited v. Pointes Protection Association et al.*, 2020, para. 27)

Furthermore, the SCC noted that in the legislation, the term “public interest” is:

preceded by the modifier ‘*a matter of*’. This is important, as it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest—there is no qualitative assessment of the expression at this stage. The question is only whether the expression pertains to any matter of public interest, defined broadly. (para. 28, emphasis in original)

In other words, the person who initiated the lawsuit is able to argue that the damage to their reputation outweighs the public interest value of the communication. The SCC cites agreement with the Attorney General of Ontario, who at the time the legislation was debated stated that “reputation is one of the most valuable assets a person or business can possess” (Legislative Assembly of Ontario, p. 1971, as cited in *Pointes*, para. 69). In *Bent*, the SCC re-affirmed that freedom of expression is the “cornerstone of pluralistic democracy,” but noted that the Court “has also recognized that freedom of expression is not absolute” (*Bent et al. v. Platnick*, 2020, para. 1). As demonstrated by *Grant*, the SCC has confirmed that the law of defamation must protect a person from an unjustified assault (*Bent et al. v. Platnick*, 2020, para. 1). Furthermore, the Court emphasized the importance of a “person’s *professional* reputation” as “deserving of special protection” (*Bent et al. v. Platnick*, 2020, para. 137, emphasis in original). The emphasis on reputational value being derived by the market again confirms Post’s (1986) concept of reputation as property.

While these decisions may appear at face value to be beneficial to silence breakers seeking to have lawsuits dismissed by the courts prior to filing a defence, I have identified



several concerns about the application of the legislation in cases of gendered violence. To highlight these concerns, I will provide a brief introduction to two recent decisions by lower courts that have denied expressions of gendered violence as a matter of public interest (*Lyncaster v. Metro Vancouver Kink Society*, 2019; *Rizvee v. Newman*, 2015). I then move into a discussion about how s.137 and *PPPA* provisions work in practice based on the necessary procedural steps of the motion required by the courts. This is drawn from a courtroom observation I conducted in July 2019 in B.C. under the *PPPA*. I then use the legal decisions and courtroom observations to argue why, although the interpretation of what constitutes public interest is broad, I anticipate the legislation will have very minimal material benefit for a majority of silence breakers.

*Rizvee v. Newman (2017)*

Azim Rizvee was running in the 2015 federal election as the Liberal candidate for Milton. Rizvee was not elected. During and following the campaign, Stacey Newman, a Milton woman, wrote in a series of blog posts online and on her personal social media account that Rizvee had bullied and harassed her (Whitnell, 2018). Newman reported the incident to the police and attempted to initiate proceedings for a peace bond under s.810 of the *Criminal Code*, on the basis that she had reasonable grounds to fear that he would cause her personal injury or damage her property (*Rizvee v. Newman*, 2017, para. 40).<sup>59</sup> In March 2016, the peace bond proceedings were to be addressed in court. The Crown went on the record, warning Rizvee that Newman was fearful of him and “does not wish [sic] you to ever touch her, speak directly to her, or enter into her personal space going forward from today. So, hopefully that is clearly understood” (*Rizvee v. Newman*, 2017, ONSC 4024, para. 47). Despite the Crown

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<sup>59</sup> The use of peace bonds in common law dates back to 13<sup>th</sup> c. England as a means to govern minor disputes between individuals. The legal test for a peace bond is the determination of “reasonable fear.” To date, there is very little research on peace bonds in Canada (Doerksen, 2013).

acknowledging that Newman was fearful of Rizvee, the Crown then asked the court for the peace bond application to be withdrawn. None of the court decisions indicate why the Crown made this decision despite putting on the record that Newman was in fact fearful of Rizvee. The refusal of the Crown to move forward with the peace bond is not an isolated incident but rather represents the systemic failure of the courts to adequately recognize and respond to gendered violence. Feminist anti-violence advocates have long criticized the courts for making it incredibly difficult for women to get protection orders (Dangerfield, 2019). Ontario family lawyer Pamela Cross has publicly stated that protection orders “are failing women and children and are very difficult to get” because “the standard of evidence that the judge wants to see is very high” (Dangerfield, 2019).

After the peace bond request was withdrawn by the Crown, Rizvee and his wife, Rabiya Azim, sued Newman for defamation and malicious prosecution.<sup>60</sup> Newman brought forward a motion, pursuant to s.137.1 of the *CJA*, arguing that Rizvee’s action was based on communications she made relating to a matter of public interest and which should, therefore, be protected (*Rizvee v. Newman*, 2017, para. 1). The motion judge found that because Rizvee was in the midst of a political campaign, there was a significant element of public interest at stake in relation to the public statements that Newman had made online. Further, if the lawsuit were to proceed, there was evidence of potential libel chill that could result from Rizvee’s lawsuit against Newman. Newman entered into evidence that the cost of the lawsuit could bankrupt her,

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<sup>60</sup> The tort of malicious prosecution is intended to protect individuals from baseless criminal prosecutions (Osborne, 2015). For a malicious prosecution claim to be successful, the plaintiff is required to prove that the defendant initiated criminal proceedings against the plaintiff, that the criminal proceedings terminated in the plaintiffs’ favour, that there is no reasonable and probable cause for proceedings, that there was malice on the part of the defendant, and that the plaintiff sustained damages (Osborne, 2015). Unlike other torts where motive is not usually taken into consideration, the prosecution must be motivated by malice (Osborne, 2015).

which would restrain both her and others from commenting on matters of public interest in the future (*Rizvee v. Newman*, 2017, para. 124).

The motion judge dismissed the defamation lawsuit, stating that Newman's speech is protected under s.137.1 (2015), but the judge decided to allow the malicious prosecution lawsuit to continue. The motion judge stated that because Newman sought a peace bond by making a report to a Justice of the Peace, the peace bond was not a matter of public interest: "this was a statement provided by Ms. Newman relating to a private matter, namely whether the state would intervene to restrict Mr. Rizvee's actions in relation to her" (*Rizvee v. Newman*, 2017, para. 135). In this way, the motion judge failed to recognize gendered violence as a matter of public interest, redefining it instead as a private, interpersonal matter between two citizens. This remarkable twist in logic appeared despite significant shifts in judicial and societal attitudes that have insisted that gendered violence is clearly a matter of public policy interest that needs to be addressed by the state. For example, in the last several years, the federal and provincial governments have made commitments to dedicate resources to targeting sexual violence. (See: the Province of Ontario released *It's Never Okay: An Action Plan to Stop Sexual Violence* (2015), and the Canadian federal government launched *Canada's Strategy to Prevent and Address Gender-Based Violence* (2019), stating that ending gender-based violence is a "key government of Canada priority"). Although the final outcome was eventually favourable for Newman as Rizvee eventually abandoned the lawsuit this case (Whitnell, 2018), if followed, expressly demonstrates the reluctance of the courts to protect silence breakers from retaliatory lawsuits.

*Lyncaster v. Metro Vancouver Kink Society (2019)*

In *Rizvee*, Newman was denied protection under s.137 because her report within the criminal justice system was framed as a private matter. Yet in another case in B.C., the defendants were denied protection under the *PPPA* legislation. In *Lyncaster v. Metro Vancouver Kink Society*, the BC Supreme Court dismissed their *PPPA* motion and stated that people who experience sexual violence are expected to report to the police. The decision also made it clear the reputational interests of men accused of sexual violence are more important than open discussions about allegations of sexual violence. In 2018, the not-for-profit Metro Vancouver Kink Society (MVKS) Executive Board released an open letter to their members, addressed to Seann Lyncaster, a Burnaby dungeon master who went by the kink name Lord Braven. The letter stated that a member of the kink community had come forward with an allegation that Lyncaster had violated the established consent rules of MVKS (Blaze, 2017). The letter stated that members of the kink community previously requested that Lord Braven participate in a community-based restorative justice process, but he denied their request (Blaze, 2017). As a result, MVKS stated in the open letter that they would no longer recommend Lyncaster's home as being safe for the kink community, rent space from Lyncaster, advertise Lyncaster's events, or allow Lyncaster to volunteer or teach at MVKS. The letter stated that if anyone asked about Lyncaster or his events, they would be directed to the open letter. The letter ended by asking Lyncaster to engage in a restorative justice process. Following the publication of the open letter, MVKS hosted a town hall to discuss the allegations (Saltman, 2019). Once the letter was released, a number of other people came forward with similar allegations of consent violations, as well as accusations that Lyncaster had: outed members of the kink community, invited minors

into his home for BDSM<sup>61</sup>-related discussions, taken advantage of vulnerable young women who were new to the kink community, and abused guests at parties he had hosted (Blaze, 2017).

Lyncaster sued the board members of MVKS, alleging that the open letter, town hall meeting, and meeting minutes had negatively impacted his standing within the BDSM community, resulting in reduced attendance at events he hosted and preventing him from conducting BDSM workshops, which, as a result, led to a loss of income and increased levels of personal stress (Saltman, 2019). Lyncaster sought pecuniary damages and an injunction against MVKS, to prevent them from further impugning his reputation (Saltman, 2019). In turn, MVKS attempted to have the case dismissed under the *PPPA* (2019) (Saltman, 2019).

In the decision, the judge acknowledged that the allegations in the open letter and subsequent public discussions of Lyncaster's behaviour are of public interest because the statements were made to protect the health and safety of the community (*Lyncaster v. Metro Vancouver Kink Society*, 2019, para. 27). As per the legislation, the onus then shifted to Lyncaster, who had to demonstrate that MVKS had no valid defence and that the harms he endured outweighed the public interest, which he did successfully. The court found that the harms endured by Lyncaster were heightened because the open letter was posted for people around the world to see; that the postings would be read by people who may never interact with Lyncaster; that the person who posted the letter online did not know who would view the postings; that the audience for the postings was wide and beyond the general membership of MVKS; that not everyone who viewed the post was a member of the kink community; and finally, that the board member who posted the open letter was aware that there was a lack of

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<sup>61</sup> The term BDSM is a commonly used abbreviation for bondage, discipline, dominance, submission, sadism, and masochism (Gallant & Zanin, 2019). "BDSM and kink involve the consensual use of power, often eroticized, in the form of negotiated roles; pain, in the sense of intense physical sensation; and/or fetish objects or practices for the pleasure of all concerned" (Zanin, 2010, p. 64).

control as to how the letter would be shared (*Lyncaster v. Metro Vancouver Kink Society*, 2019, para. 48). The court also noted that it was entirely possible that MVKS would have no valid defence should the case proceed to trial:

On the record before me, there appears to be a serious question of whether there is evidence corroborating the allegations made against Mr. Lyncaster. I am not satisfied that the public interest in ensuring the safety and health of members of the Vancouver kink community could not have been served by reporting the allegations of criminal misconduct to the police. (*Lyncaster v. Metro Vancouver Kink Society*, 2019, para. 62, emphasis added)

In so saying, Justice Mayer reified the rape myth that if allegations are serious, they would have been reported to the police. Such commentary also fails to account for why members of the kink community, specifically those who engage in BDSM, would be apprehensive about reporting to the police or why they would seek non-legal forums for their own justice and safety. It is entirely possible (and expected) that the police and the courts would diminish their claims of sexual violence as simply a natural by-product of engaging in BDSM or kink.

The *Lyncaster* case raised a significant concern for anti-violence activists and community organizers—namely, how the courts approach community-based responses to sexual violence. Groups that face marginalization are often rightfully distrustful when it comes to seeking protection from state agencies. In turn, many communities have looked to alternatives to the formal legal system when responding to allegations of violence from within their communities. Similarly, MVKS claimed in their open letter that numerous members of the kink community had attempted to engage Lyncaster in a restorative justice process prior to the open letter being released, which he refused to participate in. As a result of his refusal to participate and denial

that any consent violations occurred, MVKS decided to publicly denounce Lyncaster's behaviour and cut all social and professional ties to him in an attempt to protect community members from potential harm.

There is no doubt that Lyncaster may have faced financial consequences and social ostracization as a result of the open letter. Regardless, there needs to be meaningful discussion about how community groups can intervene to ensure the safety and protection of their members when they—for good reason—know they cannot rely upon the state. The motion judge in *Lyncaster* asserted that it was entirely reasonable for the women to go to the police, failing to even acknowledge the stigma associated with BDSM, especially in relation to sexual violence. The expectation that people who experience sexual violence are expected to report to the police also places an unfair burden on individuals who may not have the resources to proceed with a criminal trial. The decision condemns community responses to ensure the safety of the community from sexual violence.

Taken together, *Rizvee* and *Lyncaster* teach us something important. While the results varied somewhat, some common themes can be identified. For one, the specific gender-based violence was treated not as self-evidently public interest speech; rather this was something that the defendants needed to prove to the court's satisfaction. In Newman's case, only her public commentary about a politician was regarded as public interest. The fact that the motion judge would have allowed the malicious prosecution charges to proceed tells us that the specific content of Newman's charges—that Rizvee was harassing her—was not at the centre of the judge's ruling as it was not, in the opinion of the court, regarded as an issue of public interest. Further, Newman was penalized for relying on the legal system to seek a protection order, a

decision that transformed the issue—for the trial judge at least—from a public matter to a private one.

In the case of MVKS, the fact that they did not use the formal legal system was seen by the court as a problem. In this case, the use of social media was especially troubling to the judge, producing, as it seemed to have, a much broader “community” to whom Lyncaster’s violence was made public than what the trial judge deemed appropriate. In both cases, the matter of violence qua violence seemed less important than the way the violence was disclosed, and was not, in and of itself, deemed speech worthy of protection. In *Rizvee* the speech did not even meet the threshold requirement. In MVKS, the speech failed the public interest hurdle. The Court found that the harms to the individual reputation of Lyncaster outweighed the public interest in the protection of the speech. The decision in MVKS is particularly concerning because while the courts may pay lip service to the protection of disclosures of sexual violence at the threshold stage, the court is less willing to protect disclosures of sexual violence when it comes to balancing the reputational interests of men with the public interest. In conclusion, these two decisions suggest that when left to the vagaries of the courts, gender-based violence, so often subject to rape myths already, may not find a common reason as grounds for dismissal under the respective anti-SLAPP protections in BC and Ontario.

### ***PPPA in Action***

In July 2019, I attended a hearing for the *Galloway* lawsuit. Three of the defendants had filed a motion to have the lawsuit dismissed under BC’s *PPPA*.<sup>62</sup> A.B., the woman who reported the sexual assault to campus administration (A.B. was also discussed in the previous chapter, in the section on the publication ban); Glynnis Kirchmeier, an anti-violence activist who tweeted

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<sup>62</sup> In the interest of transparency, while I am a named party on the *Galloway* lawsuit, I was not a named party on this hearing. The hearing had very little material impact upon me or the allegations of defamation against me, with one exception: Galloway sought emails between myself and A.B..



about the case once it was made public; and Teresa Smalec, a writer who wrote a review of A.B.'s art show. This specific hearing was in relation to a dispute between the parties regarding the scope of document disclosure required under the *PPPA*. In adherence to my methodological framework, I wanted to observe this seemingly mundane legal process to better understand and reveal the power dynamics within the *PPPA* that would not necessarily be visible in a court transcript.

To initiate the *PPPA* motion, the silence breaker must file an application along with supporting affidavit evidence. In most cases, it will be very difficult for a *PPPA* application to be successful, unless the silence breaker herself swears an affidavit in support of her application. Within the affidavit, the silence breaker must provide context for the circumstances leading up to the lawsuit. The affidavit must also demonstrate the silencing impact of the lawsuit and establish that the communications relate to a matter of public interest. The plaintiff (who becomes the defendant in the *PPPA* motion) will also file an affidavit to establish their version of events and to argue that the claim has substantial merit and that the reputational harm outweighs any public interest. All of the parties can be cross-examined on their affidavits prior to having the matter heard before a judge. Each party is able to cross-examine the other on the affidavit for up to seven hours in total. While this procedure may be acceptable for a typical SLAPP case wherein a corporation has initiated a lawsuit against an activist, there are particular concerns when the lawsuit involves allegations of gendered violence. The affidavit requires the silence breaker to provide detailed information pertaining to the sexual violence and/or the reporting of the sexual violence. The silence breaker is then subjected to up to seven hours of cross-examination on her affidavit. As discussed during the discovery section, in a civil lawsuit, the cross-examination takes place outside of the courtroom and the silence breaker can be subjected to questions

intended to humiliate or shame her. In addition, opposing counsel is also able to request documents that are identified in the affidavit or during the cross-examination. The court hearing I attended was in regards to a dispute that emerged about the scope of documents that the three silence breakers could be required to produce to the man who was suing them.

In this case, the defendants were cross-examined by the plaintiff's counsel in a closed hearing. During the course of the cross-examination, the plaintiff's lawyer requested production of a significant number of documents from the defendants. A.B., Kirchmeier, and Smalec objected to the document request, including on the basis of the private nature of the documents, as well as on the grounds that the sheer number of documents requested for a motion under the *PPPA* (2019) was overly broad and therefore violated their privacy. Galloway argued that the privacy rights of the woman who reported the sexual violence was of secondary importance to defending his reputation.

Galloway sought 13 broad categories of document disclosure from A.B., 11 from Smalec, and five from Kirchmeier, (Field Notes, July 11, 2019). Among the documents requested from A.B. were: all correspondence regarding the disclosure of the sexual assault to campus administrators and graduate supervisors, a list of names of every person she told about the sexual assault, a draft civil claim against the university for the handling of the sexual assault report (if such draft claim existed), and all correspondences with a number of different individuals in her social network regarding the sexual assault. The plaintiff requested all of Smalec and Kirchmeier's Facebook and Twitter posts regarding an article that was written about the case, including screenshots of all "likes," "re-tweets," and comments; all tweets since the lawsuit was filed; communications between the Smalec and her legal counsel about the article; and finally, all correspondences with A.B. The three women opposed the document request.

The plaintiff's lawyer argued that the courts should not restrict the requested documents because they could be easily accessed by the defendants (Field Notes, July 11, 2019). Further, the plaintiff relied upon a number of rape myths about women who accuse men of sexual violence to justify the document requests. For example, the plaintiff's lawyer argued that A.B. was hysterical and incapable of maintaining her composure during the cross-examination (a fact that was challenged by her lawyer in court). For this reason, the plaintiff argued that he needed access to her personal records to fact check her version of events. Galloway's lawyer also argued that A.B.'s inability to recall every single person she told of her sexual assault demonstrated that her memory was significantly impacted, therefore making it necessary to the truth-seeking function of the law to fact check every statement she made with official documents (Field Notes, July 11, 2019). Finally, the plaintiff argued that the documents could demonstrate malice and prove that the three defendants were working together in order to malign both the plaintiff and the university (Field Notes, July 11, 2019).

The court sided with the plaintiff and ordered that the vast majority of the documents requested be produced by the defendants. The court declined to order production of the communications with between A.B. and a professor to whom she disclosed the sexual violence, a list of the people A.B. disclosed to, and the production of the communications between Smalec and her legal counsel (*Galloway v. A.B.*, 2019). A.B. appealed the ruling in January 2020 (the other two women did not appeal). A.B.'s lawyer, David Wotherspoon, argued in the appeal that "[t]he PPPA should be interpreted in a way that encourages rather than discourages the reporting of sexualized violence" (Lederman, 2020), while the plaintiff's lawyer argued that "the documents were necessary to recover his reputation" (Lederman, 2020). Ultimately, The BC Court of Appeal sided with the plaintiff and ordered A.B. to disclose the requested documents.

The Court of Appeal makes note: “There is of course, prejudice to A.B. in disclosure to the extent that she is being required to produce documents that may have been thought to be private when created. I do not trivialize that prejudice; it unfortunately arises in other litigation involving highly personal matters. But there is on the other hand the reputational interests of Steven Galloway that he seeks to advance. (*Galloway v. A.B.*, 2020, BCCA 106, para. 67). The decision goes on to state that for this reason, “the prejudice to A.B. is outweighed by [the reputational] interests and the potential prejudice to Steven Galloway if denied the document disclosure he seeks on the dismissal application” (*Galloway v. A.B.*, 2020, BCCA 106, para. 68). In this motion, the Court of Appeal was forced to weigh the privacy of A.B. against the reputational interests of Galloway.

This example also brings the discussion back full circle, and is reminiscent of debates, discussed in Chapter Two, about the criminal legal system’s allowances of the production of private records. Lise Gotell (2006) argued that the sheer volume of documentation required to “prove” a woman’s credibility is also the hallmark of an emergence of a new iteration of the “ideal victim”—while at one time the ideal victim was defined by her sexual morality, the new ideal victim is one who is marked by consistency and rationality (2006, p. 769). This ideal victim makes the “right” choices in her own self-governance. Furthermore, “those who can be represented as having failed to meet the standards of consistency, rationality, and psychological coherence risk losing the protections afforded by privacy rights” (Gotell, 2006, p. 770). Gotell’s analysis can be extended to the *Galloway* decision regarding document production. Throughout the document production motion, Galloway’s lawyer constructed A.B. as psychologically unstable, suggesting that her cross-examination was so inconsistent he required documentary evidence to substantiate her claims. The fact that she told people about the sexual violence was

similarly used to demonstrate her questionable decisions regarding her own self-governance. It was constructed and seemingly accepted by the court that when a woman is sexually assaulted, a “real” victim is careful with who she discloses to, ensuring that only the “right” people are told (but who these correct people are is never truly defined). Overall, much like document disclosures in criminal sexual assault cases, this decision signals to people who have experienced sexual violence that they are not to speak about what has happened to them, even to trusted friends or similar sources of support. Even in cases such as A.B.’s, a person who has been incredibly cautious as demonstrated in Chapter Two, it was still not enough to protect her private records from the claims of reputational damage by the man she accused of sexual violence.

To be clear, I am not suggesting that the plaintiff should not have access to *any* documents associated with the allegations made about him. Rather, the point is to demonstrate that the production of documents in this early stage can be invasive and replicate abusive power dynamics. Furthermore, the plaintiff’s lawyer relied on sexist rape myths during the courtroom proceedings—that women are hysterical; that they lie and/or collude to accuse men of sexual violence as a means of revenge; that they seek to destroy men’s reputations; and that A.B.’s inability to maintain composure and provide an explanation suggests that perhaps she reported the sexual violence as a means of revenge against the plaintiff—indicating that document production is not a neutral or straightforward process. The *public* interest in protecting A.B. seems to have eluded the esteemed justices.

## **Conclusion**

Lawsuits against silence breakers need special consideration when the court is balancing between the reputational interests of the plaintiff and the need to protect public interest discourse. When s.137.1 was before the SCC to provide the lower courts direction on what

constitutes public interest, two anti-violence organizations intervened to argue that the legislation needs to consider gendered violence. One of the anti-violence groups, the BC Coalition argued that the courts must recognize the “[S]uperordinate public interest in promoting and facilitating the reporting, disclosure, and discussion of gender-based violence such that it will rarely be outweighed by the purported harm to the plaintiff (2019, para. 4). Furthermore, people who experience sexual violence need to have confidence that “the courts will apply a test that does not, in the name of formal equality, prefer the plaintiff over the defendant-survivor” (BC Coalition, 2019, para. 4). Finally, the BC Coalition argued that men’s reputational rehabilitation “must give way to the greater societal interest in ensuring justice for survivors of gender-based violence, and dismantling rather than entrenching impunity for perpetrators” (BC Coalition, 2019, para. 14). The Barbra Schlifer Commemorative Clinic (BSCC) (2019) arguments echoed these sentiments and encouraged the SCC to provide guidance to the lower courts regarding disclosures of sexual violence being matters of public interest that should absolutely be captured by the *PPPA* (para. 5).

Using the *Whitfield* case as an example, the B.C. Coalition argued that disclosures of sexual violence must be de facto protected by qualified privilege. The Coalition (2019) urged the SCC to “establish an express category of qualified privilege for the reporting and disclosure of gender-based violence” (para 25). This change is envisioned to be analogous to people who act as police informants, who are legally protected to ensure they can come forward without the fear of legal retribution (para 25). To truly protect silence breakers who report sexual assault to the police from facing retaliatory lawsuits, legislative change is required that expands absolute privilege to cover reports to police. This change may potentially deter men from initiating a lawsuit following a formal report of sexual assault made to the police.

Unfortunately, but not unsurprisingly, the SCC decision providing guidance to the lower courts on s.137 provisions did not mention the unique context of lawsuits filed by men accused of sexual violence. The SCC maintained in *Pointes* that the definition of “matters of” public interest is intentionally broad. Since the legislation is still new and the decision even more recent, we will have to wait and see how the lower courts grapple with weighing the issue of the preservation of men’s reputations and the importance of sexual violence discourse.

Despite the broad interpretation of what constitutes public interest, there is reason to raise concerns about the utility of anti-SLAPP provisions for silence breakers. Most notably, the courts still fail to recognize the structural barriers women face in reporting gendered violence. For example, in *Lyncaster* (2018), the motion judge argued that if the assaults were serious, the women should have reported to the police—this, despite decades of empirical research demonstrating the myriad reasons women choose not to report such actions to the police. In *Rizvee* (2017), the judge allowed the malicious prosecution lawsuit to continue because Newman sought a peace bond that was withdrawn by the Crown, again failing to acknowledge the systemic discrimination women often face when attempting to seek protection from the state from male violence. During the two-day hearing, I witnessed a number of problematic and sexist stereotypes about women who report sexual violence. Most notably, that women are often hysterical and their narratives of violence must be corroborated, and that women often collude to destroy the reputations of powerful men due to jealousy or a romantic relationship that has gone bad.

If the cases cited here are any indication, however,, there is reason to raise concerns about the utility of anti-SLAPP provisions for silence breakers. Most notably, the courts still fail to recognize the structural barriers women face in reporting gendered violence. For example, in

*Lyncaster* (2018), the motion judge argued that if the assaults were serious, the women should have reported to the police—this, despite decades of empirical research demonstrating the myriad reasons women choose not to report such actions to the police. In *Rizvee* (2017), the judge allowed the malicious prosecution lawsuit to continue *because* Newman did go to the police to seek a peace bond that was withdrawn by the Crown, again failing to acknowledge the systemic discrimination women often face when attempting to seek protection from the state from male violence, while simultaneously interpreting this action as a private matter, and therefore not within the scope of protections envisioned by the *PPPA*. During the two-day hearing I attended in BC, I witnessed a number of problematic and sexist stereotypes about women who report sexual violence, most notably, that women are often hysterical and their narratives of violence must be corroborated, and that women often collude to destroy the reputations of powerful men due to jealousy or a romantic relationship that has gone bad. Refusing to recognize gendered violence as a specific matter of public interest allows for these old debates to be re-fought, over and over, to the general detriment of silence breakers.



## Chapter Seven: Conclusion

This dissertation examined the impact of lawsuits initiated by men accused of sexual violence against silence breakers. Three central inquiries guided this dissertation. The first was to examine and identify the individual and societal consequences of lawsuits against silence breakers. The second asked how lawsuits contribute to the re-privatization of sexual violence and chill public sexual violence discourse. Finally, I asked whether lawsuits can be theorized as Strategic Lawsuits Against Public Participation (SLAPP). This conclusion will provide a brief synopsis of my thematic findings, answering these three questions. First, however, I will address the limitations of the study and make suggestions for future research.

To begin, one of the biggest limitations of the study is my own fear of being sued for defamation. As an under-employed graduate student, I heavily self-censored as I wrote. I did exactly what I critique in the section on media libel chill: I watered down allegations or left out certain details. This was done for a number of reasons. Most importantly, I wanted to ensure research participants' identities were protected. In one instance, a research participant wanted to waive anonymity and be identified as she had spoken publicly about the lawsuit against her. I ultimately made the difficult decision to anonymize her after the perpetrator in her case continued to increase his retaliatory efforts against her by threatening legal action against anyone who supported her. I anonymized her to protect *myself* from litigation and to ensure that my data could not be subjected to a court order. As mentioned in the preface, I am actively worried about potentially facing additional litigation and the severe consequences of being named on a lawsuit.

Another limitation I wish to address is that I did not adequately address the impact of racism and racialization in this study. Three of the interview respondents identified that racism impacted their respective lawsuits. I was unable to both anonymize their interviews and include

the role that race and racism played in their experiences of sexual violence without potentially revealing their identities as two of the three lawsuits in question were covered by Canadian media. Since lawsuits of this kind are still relatively rare, identifying even a couple of specifics in this regard risked potentially outing the research participants. As demonstrated throughout this dissertation, abusive men's retaliation can have serious consequences—it is my ethical duty as a researcher to protect them from experiencing further retaliation. As an unfortunate result, however, I have not been able to connect the ways in which structural racism has affected some of the participants' experiences in profound ways. For this reason, a suggested area of future research would be an explicit examination of how other forms of systemic oppression impact those being sued.

Two other major limitations relate to a larger systemic issue within the civil legal system. First, it was challenging to attend court dates to witness how these cases played out in court. I attended one hearing in Vancouver in July 2019. The hearing was re-scheduled twice. On one of these occasions, I had already booked flights and accommodations only to find out that the plaintiff's lawyer had a scheduling conflict and was no longer available. I was only made aware of the court date changes because I was being updated by one of the named parties. I was also planning on attending another *Protection of Public Participation Act* motion in Toronto, but I found out mere days before it was to happen that it had been re-scheduled by several months due to overbooking of the courts. Due to COVID-19, the hearing was once again delayed and I was therefore unable to attend. For these reasons, it was incredibly challenging (and frustrating) to attempt to conduct ethnographic observation of court proceedings. I'm sure this frustration is also felt by both parties involved in the lawsuits as these delays were often at the last minute and due to factors outside of their control. It is also challenging to conduct this type of research

because it requires having a personal connection in order to learn about court dates, especially those that are not made public. I was only aware of two cases going to court because a lawyer informed me about the court dates.

The other limitation is that the data collected on civil legal action in Canada is extremely limited. Statistics Canada collects data on the number of cases initiated, number of total active cases, the number of events within the last year (for example, the aggregate number of settlements, lawsuits withdrawn or abandoned, and document filing), and the number of the most common types of civil action (Statistics Canada, 2020a; Statistics Canada, 2020b). Defamation is not listed as being one of the actions about which specific data are collected; instead, defamation falls under the broad category of “Other Tort” (Statistics Canada, 2020b). Academic studies of Canadian defamation actions are also very limited. Young’s (2018) qualitative study of Canadian defamation actions between 1973–1983 and 2003–2013 is the only resource to provide even a snapshot of civil defamation actions in Canada. The limitation of Young’s (2018) study is that the most recent time period observed ended nearly a decade ago. Overall, Canadian legal practitioners, scholars, and policy makers would benefit from qualitative and quantitative research on defamation law. Our collective knowledge about defamation law in practice and within a Canadian context is extremely limited. Even more specifically, as argued throughout this dissertation, we need more information about defamation lawsuits against women who report or disclose sexual violence. More research specifically examining this subset of defamation lawsuits would be helpful for advocacy efforts and policy development.

## **Key Findings**

While preliminary, in the absence of more systematic knowledge of defamation suits against silence breakers, this dissertation still offers several important conclusions that invite

further inquiry. Most importantly, this dissertation has demonstrated that: 1) systemic failure makes women vulnerable to litigation; 2) defamation suits threaten to re-privatize discourse on sexual violence; 3) defamation suits against silence breakers are a form of abusive litigation with significant individual and societal impact; and 4) defamation suits against silence breakers are also a unique form of SLAPP. This section elaborates on each of these key conclusions in turn.

### **1. Systemic Failure Makes Women Vulnerable to Litigation**

Many of the silence breakers I interviewed made or attempted to make formal reports to either an institution, such as a university administrator, or the police. Yet, as demonstrated in Chapter One, institutional responses are often guided by discriminatory rape myths resulting in reports of sexual violence being minimized, disregarded, or declared unfounded. For example, in the 2017 case of *Rizvee* (Chapter Five) Newman sought a peace bond but the Crown refused to issue one, leaving her vulnerable to being sued for malicious prosecution. In Canada, reports to the police are not protected by absolute privilege (*Caron v. A*, 2015), again making their use of the system a potential liability when said report is later used as evidence of her intent to undermine a male's reputation. This perverse use of formal reporting was most pronounced in Lynn's case (Chapter Four). In her case—albeit stemming from the legal system in another country—the acquittal of her abuser meant he was able to have her criminally charged with issuing false allegations. Notably, the Canadian government did nothing to assist Lynn or intervene in her case, leaving her to suffer the emotional, psychological, and financial costs alone. For these research participants, the criminal legal system worked against them. It is, then, not surprising that other research participants made a conscious decision not to report to the police because they did not have confidence in the criminal legal system.

Institutional failure to respond to sexual violence was not limited to the criminal legal system. For example, participants such as Bonnie Robichaud, Kristen, Laura, and Lynn experienced sexual violence in the workplace (Chapter Four). These participants experienced a range of responses from minimization to outright denial that the sexual violence had even occurred. Two participants, Laura and Lynn, were fired after they reported experiencing sexual violence. Robichaud told me she experienced numerous forms of workplace retaliation after initiating legal action against her workplace for the sexual harassment she'd experienced there. All of the participants faced varying degrees of backlash, some instigated by the man accused of sexual violence, others by staff members assisting the accused man in orchestrating punishment for the silence breaker. For example, as discussed in Chapter Four, after Kristen reported her sexual assault to the police and her workplace, the police officer reported *her* to her workplace for misconduct, leading to an investigation into her conduct while, at the time of the interview, the investigation into the sexual assault had not yet been completed.

Similar concerns were identified by university faculty members. All of the faculty members I interviewed actively supported individuals who disclosed or reported sexual violence. In addition to facing legal action or being threatened with a lawsuit by the men accused of sexual violence, the men also initiated institutional complaints within the university against their fellow faculty members, alleging harassment. While all of the complaints were eventually dismissed, there were professional consequences for the faculty members in question—for example, Gina was initially denied tenure and Charlene was removed from a tenure committee. The threatened legal action against Gina and Charlene caused emotional distress, which was compounded by the lengthy investigation into their conduct. Furthermore, both women noted that they experienced professional reputational damage from being accused and investigated for harassment, and that

this continued even after they had been cleared of the allegations by a university investigator. While universities across the country have initiated funding campaigns and programming aimed at encouraging university community members to become active bystanders (see: Chapter Four), their narratives highlight the realities of this role and the lack of structural support from within the university for such individuals. The narratives of the silence breakers demonstrate that abusive men will often engage multiple complaint processes to exhaust silence breakers both emotionally and financially. The high cost of litigation contributes to the re-privatization of sexual violence by making silence breakers fearful of reporting and in some cases speaking even generally about sexual violence, as will be identified in the following section.

## **2. The Risk of Re-Privatizing Sexual Violence**

Lise Gotell (2006) cautioned that if women become reluctant to talk openly about sexual violence out of fear that what they say, especially during therapy, can be entered into court, we risk the re-privatizing of sexual violence. Lawsuits against silence breakers are another iteration of ongoing attempts to silence and censor sexual violence, and in turn risk the re-privatization of sexual violence discourse. I argue that sexual violence discourse must be regarded as legitimate political speech, which in turn must be protected. For this reason, lawsuits against silence breakers must be explicitly recognized as SLAPPs. The SLAPP literature is helpful for contextualizing lawsuits against silence breakers as part of a broader political strategy to silence dissent, but it also must be viewed through a gendered lens in order to grasp the complexity of these lawsuits, including the abusive element that entrenches existing power dynamics between abuser and silence breaker.

Lawsuits against silence breakers are effective silencing tools for a number of reasons. The first is practical. Once a lawsuit has been initiated, most lawyers will instruct their clients to

refrain from making any statements about the sexual violence specified within the suit. The second reason is that once a woman has been warned about a lawsuit, a risk assessment may force her to re-consider the cost of continuing to speak about the sexual violence that took place. The financial or personal cost of speaking may be so significant that she decides to self-censor to protect herself from a lawsuit, or from additional allegations of defamation that can be added to a lawsuit. Finally, some women enter into a gag order during legal proceedings, which prohibits to varying degrees, depending upon what has been negotiated between the parties, what she can say about the sexual violence she endured. The initiation of a lawsuit not only silences the individuals named on the lawsuit; it also hinders others from speaking about either the lawsuit or the allegations of sexual violence out of fear that they could be added to the lawsuit.

As demonstrated in Chapter Six, the censorship associated with a lawsuit, or the decision to self-censor out of fear of being sued, was cited as having negative side effects on silence breakers. Silence breakers often refrained from speaking to *anyone* about what happened to them out of fear of additional litigation. This censorship negatively impacted their healing processes, leading many of the silence breakers to suicidal ideation. But when women are fearful of speaking about sexual violence, even generally, we risk pushing sexual violence out of the public sphere and back into the private sphere. This is especially true in the civil legal system where legal proceedings take place between two private citizens.

In Chapter Six, I also identified how the media experiences libel chill, which deters outlets from publishing stories about sexual violence. Like individuals, media outlets also worry about potential legal action due to the significant cost and time it takes to mount a defence. From the current study, it would be impossible to quantify libel chill, or the extent that media is reluctant to report on cases of sexual violence; however, my research findings suggest that

defamation lawsuits against media outlets have the potential to censor, water down, or even eliminate important discussions on sexual violence. Jessica, a research participant and a private bar lawyer specializing in sexual abuse claims, noted that the #MeToo movement has actually made media outlets wary of publishing stories without the names of the victims attached. Even simply identifying someone as a “survivor” in a news story has been challenged as is the case of the *Toronto Star* despite the fact that the allegations of violence were a minor element of a larger story about a boxing gym that offered classes for people who had experienced gendered violence (See: Chapter Six). Taken together, the chilling of individual speech along with the media libel chill runs the risk of silencing important discourse on gendered violence.

### **3. Lawsuits against Silence Breakers are Abusive Litigation**

This study demonstrated that initiating a lawsuit, or even just threatening a lawsuit, is a way to continue an existing abusive power dynamic. Furthermore, the silence breakers felt that once they had been threatened with a lawsuit, they became aware that their abuser was continuing to monitor their social media accounts and other activities. Another important finding is that abusive men often engaged numerous complaint processes against their silence breaker(s). Jennifer Freyd’s (1997) DARVO framework situated these numerous complaints, including threatening legal action, as one such tactic abusive men take to situate themselves as the true victims. Freyd (1997) acknowledged that an innocent person will defend themselves against false allegations while abusive men will retaliate against anyone who raises concerns about their behaviour. Abusive men will rely on ad hominem attacks on the silence breaker to situate themselves as the true victim and the silence breaker as the offender (Freyd, 1997). Many of the abusive men the silence breakers described in our interviews engaged in similar types of



behaviours. For example, in addition to threatening a lawsuit, a number of the men also made a police complaint or filed a harassment complaint in the workplace against their silence breaker.

Defamation law is the perfect legal tool for abusive men looking to extract revenge upon those who call them into account for their abusive behaviours. Defamation law exists solely for the purpose of protecting reputation. All a plaintiff needs to do is launch a lawsuit alleging that the words a silence breaker has used are defamatory and the burden falls upon the silence breaker to defend her words. In instances where the words allege sexual violence, a defamation trial is more likely to resemble a sexual assault trial. The silence breaker is required to prove that what she said was true, a feat that is often challenging given the private nature of most sexual violence and the hesitancy of courts to believe women's experiences of violence. But what happens within the court is usually irrelevant since so few cases ever make it to trial. The underlying issue here is the mere fact that an abusive man can initiate a lawsuit with such ease. It is the lawsuit itself that inflicts significant harm upon silence breakers, more so than whatever decisions occur within the courts.

As demonstrated in Chapter Five, retaliatory efforts by abusive men who weaponized lawsuits against their accusers resulted in many of the silence breakers experiencing severe physical symptoms that developed after said retaliation began. All of the silence breakers who noted having experienced various health problems and emotional distress explicitly linked their symptoms to the stress of being sued. Most concerning was that the psychological distress experienced by those being sued was so severe that it led a number of research participants to thoughts of suicidal ideation. I do not regard the disclosure of suicidal ideation as an indicator of individual pathology within the research participants; rather, I regard contemplating death as a natural response to a brutalizing legal process that forces silence breakers into an ongoing

relationship with their abusers. In addition to navigating institutional retaliation, the silence breaker must also manage the physical symptoms and emotional distress caused by said legal action. Overall, lawsuits had a tremendous impact on the silence breakers who participated in this study, often compounding the traumatic aftermath of the sexual violence they'd experienced. For many of the silence breakers, the institutional retaliation following a report or disclosure of sexual violence was far more traumatic than the sexual violence itself—for that reason, such lawsuits must be regarded as abusive.

#### **4. Defamation Suits Against Silence Breakers are SLAPPs**

In Chapter Six, I examined whether lawsuits against silence breakers could be regarded as SLAPPs. As noted in that chapter, I argue that the academic literature to date has failed to account for gendered manifestations of SLAPPs, instead focusing on traditional forms of political engagement such as lobbying government officials. Over the last several years, feminist lawyers across Canada and the US have identified retaliatory lawsuits against silence breakers as being a growing concern (Barbra Schlifer Commemorative Clinic, 2019; B. E. H. Johnson & Bonsignore, 2018; Leader, 2019; West Coast LEAF, 2019). I argue that discourse about and reports of sexual violence must be regarded as a legitimate public interest issue and are therefore worthy of protection. While provincial governments in Ontario, BC, and Québec have recognized the need to pass legislation to better protect those subjected to SLAPPs, I raise a number of concerns about whether such protections will be beneficial to silence breakers. I will discuss the limitations of the provincial SLAPP legislation in the following section.

#### **Research Contributions and Suggestions for Future Research**

This dissertation's research makes important contributions to a number of areas of study. First, it deepens the knowledge of a particular retaliation strategy taken against silence breakers.

As new social movements over the last decade have encouraged women to report and share their experiences of sexual violence, abusive men have similarly organized anti-feminist efforts to shut down sexual violence discourse. While there are plenty of ways men and other patriarchal institutions have attempted to silence and censor sexual violence discourse, I specifically examined lawsuits against silence breakers, which often coincided with other forms of retaliation, as demonstrated throughout this dissertation. Due to the limitations of the available data, it is impossible to say if more defamation lawsuits are being pursued in response to disclosures of sexual violence in comparison to previous historical periods, but anecdotal evidence and media coverage suggest this to be the case. Defamation lawsuits against women who report sexual violence are beginning to receive more attention from anti-violence advocates, and this research project will hopefully assist them in their advocacy efforts.

This dissertation's findings also contribute to the academic literature on SLAPPs. A majority of the recent SLAPP literature has been written by political scientists and legal scholars. To the best of my knowledge, there is no qualitative work examining the lived experiences of people who have been sued by a SLAPP. The research findings from this study will provide a more nuanced understanding of the consequences of defending oneself against a SLAPP. This dissertation also offers a gendered analysis arguing that SLAPPs against silence breakers differ from traditional SLAPP suits due to the gendered power dynamics at play.

### **Recommendations for Future Advocacy**

As an anti-violence advocate, I am compelled to provide recommendations for future advocacy to help protect silence breakers from retaliatory lawsuits. These recommendations fall within three broad themes: broadening the scope of advocacy efforts, legal reform, and education and additional research. The first recommendation, derived from my research, has found that

thus far, advocates who have addressed the issue of retaliatory lawsuits following accusations of gendered violence have focused their efforts on protecting the person who has experienced sexual violence. The research findings demonstrate that retaliatory lawsuits often target more than just the person who reports or discloses sexual violence, also targeting advocates who provide public commentary on systemic issues of sexual violence, faculty members who support students who disclose experiences of sexual violence, and journalists who write about allegations of sexual violence. The recent decision in *Bullard v. Rogers Media et al.* (2020) demonstrated potential hope that anti-SLAPP legislation will be a useful tool for journalists who write about sexual violence (Chapter Six). In the lawsuit by former UBC faculty member Steven Galloway, two of the faculty members who supported the student who disclosed experiencing sexual violence recently filed a *PPPA* motion to have the lawsuit dismissed. The motion has not yet been heard, but the decision will provide a better understanding as to how the courts regard the role of faculty in receiving and responding to disclosures of on-campus sexual violence in the future. Overall, if we want to ensure that people who experience sexual violence report or seek support in the aftermath, it is crucial to also protect bystanders who contribute to public discourse on matters of sexual violence as well as those who support individuals who report or disclose sexual violence.

The next recommendation is for potential legal reform to better protect silence breakers from retaliatory lawsuits. While I have serious concerns about the limitations of the law to provide justice and/or protect people who have experienced sexual violence, I also think there are potential remedies that could marginally help those who are sued for reporting or disclosing. While anti-SLAPP legislation has been recently enacted in Ontario and BC, I am not convinced that the legislation will have any material benefit for people who have experienced sexual

violence due to the requirement of the affidavit and document disclosure, as demonstrated in Chapter Five. The other concern I have is that anti-SLAPP legislation is by nature political and, depending on political interests, could be repealed. One potential remedy that could help protect people who report or disclose sexual violence is to expand the legal defense of absolute privilege to include formal reports of sexual violence. Such changes have been made in England and in some US jurisdictions, to extend the defence of absolute privilege to include reports made to the police (*Caron v. A.*, 2015, para. 52). English courts have ruled that public policy arguments weigh in favour of expanding absolute privilege to protect reports made to the police (*Caron v. A.*, 2015, para. 42). In the English case *Westcott v. Westcott* (2008), Sarah Westcott made a police report stating that her father-in-law had assaulted her and her child. The charge was eventually dismissed, and the father-in-law in turn sued Sarah Westcott for defamation. Sarah Westcott argued that for policy reasons, her report should be protected by absolute privilege. The courts agreed:

In order to have confidence that protection will be afforded, the potential complainant must know in advance of making an approach to the police that her complaint will be immune from a direct or a flank attack. There is no logic in conferring immunity at the end of the process but not from the very beginning of the process. . . . In my judgment immunity must be given from the earliest moment that the criminal justice system becomes involved. It follows that the occasion of the making of both the oral complaint and the subsequent written complaint must be absolutely privileged. (*Westcott v. Westcott*, 2008, para. 36)

Similarly, a number of jurisdictions across the US allow for reports to the police to be protected, although there is no uniform approach across the country (*Caron v. A.*, 2015, para. 44). I argue

that similar legislative reform is also necessary in Canada, to protect those who make a report of sexual violence from retaliatory lawsuits.

The other recommendation I make with regards to the legal system is the need for silence breakers to have access to legal information and, ideally, legal advice to help assess the risk of being sued before reporting. Similarly, bystanders also need similar legal information to protect themselves from a potential lawsuit by an accused party. Even though a vast majority of people who experience sexual violence won't be sued for reporting or disclosing, since undertaking this research project, many women have messaged me to inquire about the possibility of being sued before they decided to make a report. I have similarly been contacted by people after they have been sued, in shock that it was even possible for them to be sued for reporting sexual violence. Both scenarios speak to a need for more information on defamation law and the very real limitations of freedom of expression in Canada. One model, which is promising and could potentially assist with this, is the Independent Legal Advice for Survivors of Sexual Assault Pilot Program (ILA) launched by the Province of Ontario. This program is offered in Toronto, Ottawa, and the District of Thunder Bay, and provides those who need it with up to four hours of free legal advice (Burgess, 2018). However, a major shortcoming of such programming is that it is of little use after a lawsuit has already been initiated. Long-time Ottawa anti-violence advocate Sunny Marriner told the CBC in 2018 that in recent years, she has witnessed an increase in the number of defamation lawsuits initiated against survivors of sexual violence, and that the ILA is not enough because it does not provide representation, only legal advice (Burgess, 2018). In Ontario (like most Canadian provinces), regardless of someone's income, legal aid doesn't cover the costs of civil lawsuits, meaning that those sued are responsible for covering the cost of their own legal representation (Burgess, 2018). The lack of systemic support for silence breakers

needing to defend themselves against a retaliatory lawsuit following an incident of sexual violence is deeply concerning and could be partially remedied by reducing the scenarios that allow abusive men to sue. While I recognize it is unlikely that lawsuits will be eliminated entirely, I recommend the expansion of ILA to ensure that silence breakers are able to access legal advice. I also recognize the limitations of this recommendation in that ILA programs are limited to legal advice and do not provide legal representation, which is what is most direly needed after a lawsuit has been initiated against a silence breaker. Thus, in addition to providing robust legal assistance, this emerging social and legal problem would need to be paired with remedies focused on reducing the scenarios that allow abusive men to sue.

The next recommendation is in regards to better education for service providers, lawyers, and people considering making a report or disclosure of sexual violence. Lawyers and other service providers need a better understanding of gag orders and the incredible long-term harm they can cause silence breakers (Macfarlane, 2020b). The use of gag orders also allows men, typically in workplace situations, to move into new employment spaces without having to disclose the reason or reasons they left their previous employment, potentially victimizing more women. More specialized education is needed with respect to the harm caused by gag orders, specifically for lawyers, private bar and in-house counsel, and other service providers. I encourage researchers to examine the use of gag orders and the consequences of them on both individual and societal levels.

The final recommendation is intended for those who encourage remedies for sexual violence to occur outside the confines of the criminal legal system. Rightfully so, there have been many critiques of carceral feminism and the reliance upon the state to respond to gendered violence (Bernstein, 2012; Bumiller, 2008). In theory, transformative justice and non-carceral

alternatives in response to sexual violence appeal to many people who are critical of carceral feminism and expanding the power of the state, which often results in the over-criminalization of racialized men and women. A number of research participants, for political reasons, made the conscious decision not to engage with the criminal legal system after experiencing sexual violence. In turn, they were sued by the men who'd abused them. This is not to suggest that we need to rely upon the criminal legal system, but I do argue that advocates and activists need to critically examine how such processes can be done to also legally protect silence breakers from retaliatory lawsuits.

I don't think any of these recommendations alone will stop retaliatory lawsuits from happening. That being said, I do think these recommendations may aid silence breakers in the future. As it currently stands, there is a vast gap in knowledge regarding such lawsuits that we are only now beginning to understand.

### **Concluding Thoughts**

Since beginning this research project (and being sued myself), I am regularly asked by people if they risk being sued for silence breaking. The problem is, as I have hopefully demonstrated throughout this dissertation, if an abusive man wants to threaten or initiate legal proceedings against a silence breaker, there is nothing stopping him from doing so. The silence breaker can be careful and follow societal expectations of the sexually assaulted woman to the letter, and it won't necessarily matter. For example, she can report to the police or make a confidential report to human resources or her campus administration while remaining personally silent about what happened to her and still she is not necessarily protected from retaliatory legal action. Alternately, she may be aware of the shortcomings of the criminal legal system with respect to complainants in criminal sexual assault trials and choose instead to seek an alternative



form of justice, such as an accountability process facilitated by a group of friends, and the accused can still deny said allegations and sue her—and, for that matter, everyone who participated in the accountability process. A lawsuit successfully challenges her narrative of events while inflicting financial and emotional harm. In many ways, a lawsuit is the ideal tool of an abuser. Throughout this dissertation, I have demonstrated the significant consequences of a lawsuit borne by silence breakers. I also think that women who want to make a report should be aware of the reality that even confidential reports to the police or a university are not necessarily protected from litigation in Canada. I want silence breakers to be aware that although some provinces do have legislation intended to protect public speech, the process to have the matter heard in front of a judge is expensive and the courts continue to run on patriarchal ideology that often times values the sanctity of men's reputations over women's safety and contributions to public discourse.

With that being said, I also don't think that the threat of the possibility of a lawsuit should keep people silent—especially not bystanders. When I am asked if someone should break their silence and risk the possibility of a lawsuit, I am reminded of Janet, a lawyer who in Chapter Five reminded me, “You can be sued for defamation—but—people trot that out as if that is the answer to the question or an insurmountable obstacle” (Interview with Janet, lawyer, 2019). I do believe that silencing sexual violence reports and disclosures is a far worse consequence than being sued. At the same time, I worry about those who report or make a disclosure of sexual violence, truly believing they will be protected by certain institutions.

As I was completing the final draft of this dissertation, the *Hamilton Spectator* reported that three faculty members in the Department of Psychology at McMaster University were suspended from their positions pending a third-party sexual assault investigation (Hewitt, 2020).

The police also laid charges against one of the faculty members for sexual assault and assault causing bodily harm. My immediate reaction was wondering when, rather than if, the women who participated in the investigation, likely believing their reports to the university were confidential and could potentially assist future women, would be sued. Knowing what I know now, I don't know if I can recommend reporting sexual violence as a viable option. But I do think that people, especially those holding positions of relative privilege in society, should not allow a lawsuit to deter them from supporting those who have experienced sexual violence. Ultimately, we need to ensure that sexual violence discourse does not become re-privatized solely because of the fear of a possible lawsuit, which is the underlying intention of such lawsuits. Just as abusive men and patriarchal institutions have sought to silence sexual violence discourse, feminist activists and scholars must similarly organize, at a systemic level, to protect silence breakers from retaliatory lawsuits.

## Post-Script

I started this dissertation with my own personal narrative of being sued and it only feels right to end it with a personal note. The day I was sued was the day this project started. Since lawsuits are painfully drawn out, for most of the time while I was working on this dissertation, the lawsuit was at a standstill to deal with various disagreements between legal counsel. October 29, 2020 marked two years passing since I found out about the lawsuit in the *National Post*.

Coincidentally, the next day, I went to a lawyer's office to have my affidavit commissioned to begin the process of trying to have the lawsuit dismissed under the *PPPA*. Despite two years having passed, the lawsuit is still in its infancy. Preparing the affidavit for the motion demonstrated to me the weight of this lawsuit on me personally but also politically. The preparation of the affidavit took a week away from working on my dissertation edits. Not only was it labour intensive it was also deeply emotional, more so than I could have anticipated.

Although I am not being sued for my own report of sexual violence, my affidavit included a lot of traumatic memories I would rather forget about including the hate mail I routinely receive calling me everything from “ugly”, a “slut”, a “whore”, a “liar” and a “false accuser”. I had to be reminded of the numerous national columns that were printed alleging that I was a liar and false accuser, that what happened to me was just a simple misunderstanding. I had to write, edit, and revise some of the worst things that have happened to me in my life, constantly re-visiting them.

While my lawyer is representing me pro-bono, I still have to pay for disbursements and other costs such as expert reports – I am also running a fundraiser to try and convince people to donate to me and the others being sued amid a global pandemic. I am up against my friends who tell me not to take the lawsuit seriously claiming “it's a joke” and “it's just going to get thrown out

anyways”. I have to remind them that the law is not a friend to women, especially when a man’s reputation is at stake.

As someone who has been through a criminal sexual assault trial and a human rights complaint against my university for systemic gender discrimination, I thought I was ready for anything. This lawsuit feels just as brutal and invasive as the criminal rape trial. My life has once again become open to scrutiny by the courts and the public. I have to choose every word and action carefully, knowing full well that I may have to defend myself during cross-examination. Two years have gone by and there is no end in sight. If I lose, the stakes are high. I don’t worry so much about the financial consequences of losing. I worry more so that the world will lose another anti-violence activist. I worry that there will be a chilling effect. I worry that if the woman who reported Galloway loses, that will send a strong message to women across the country that it’s not worth reporting. Judging from what we have seen to date, that argument could be made regardless of whether or not she wins or loses, there truly are no “winners” here. But for now, I will keep talking about sexual violence and will continue to encourage others to do the same. We will find new ways to resist sexual violence regardless of the legal outcome in this case.

## References

- Alcoff, L., & Gray, L. (1993). Survivor discourse: Transgression or recuperation? *Signs*, 18(2), 260–290.
- Amnesty International. (2018). *Right to be free from rape: Overview of legislation and state play in Europe and international human rights standards*.  
<https://www.amnesty.org/download/Documents/EUR0194522018ENGLISH.PDF>
- Anderson, M., Toor, S., Rainie, L., & Smith, A. (2018, July 11). *An analysis of #BlackLivesMatter and other Twitter hashtags related to political or social issues*.  
<https://www.pewresearch.org/internet/2018/07/11/an-analysis-of-blacklivesmatter-and-other-twitter-hashtags-related-to-political-or-social-issues/>
- Bachman, R. (1998). The Factors Related to Rape Reporting Behavior and Arrest: New Evidence from the National Crime Victimization Survey. *Criminal Justice and Behavior*, 25(1), 8–29. <https://doi.org/10.1177/0093854898025001002>
- Backhouse, C. (2012). Sexual harassment: A feminist phrase that transformed the workplace. *Canadian Journal of Women and the Law*, 275–300.
- Balfour, G. (2002). *The practice of law as structured action: The role of lawyers in the criminalization of violent men and women* [University of Manitoba].  
<https://mspace.lib.umanitoba.ca/xmlui/handle/1993/19791>
- Ballou, G. M. (1981). Recourse for Rape Victims: Third party liability. *Harvard Women's Law Journal*, 4, 105–160.
- Barbra Schlifer Commemorative Clinic. (2019). *Factum of the Intervener Barbra Schlifer Commemorative Clinic*. Supreme Court of Canada File No. 38374. <https://www.scc->

csc.ca/WebDocuments-DocumentsWeb/38374/FM120\_Intervener\_Barbra-Schlifer-Commemorative-Clinic.pdf

B.C. Coalition. (2019). *Factum of the interveners, West Coast Legal Education and Action Fund, Atria Women's Resource Society, B.W.S.S. Battered Women's Support Services Association, Women Against Violence Against Women Rape Crisis Centre*. Supreme Court of Canada File No. 38374. [https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38374/FM130\\_Intervenors\\_West-Coast-Legal-Education-and-Action-Fund-et-al.pdf](https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38374/FM130_Intervenors_West-Coast-Legal-Education-and-Action-Fund-et-al.pdf)

BC Justice Review Task Force. (2006). *Effective and affordable civil justice: Report of the civil justice reform working group to the justice review task force*. [https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/cjrwg\\_report\\_11\\_06.pdf](https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/cjrwg_report_11_06.pdf)

Bender, L. (1993). Overview of feminist tort scholarship. *Cornell Law Review*, 78(4), 575–596.

Bernstein, E. (2012). Carceral politics as gender justice? The “traffic in women” and neoliberal circuits of crime, sex, and rights. *Theory and Society*, 41(3), 233–259. <https://doi.org/10.1007/s11186-012-9165-9>

Bitette, N. (2017, November 9). Shark tank star Robert Herjavec's ex-girlfriend claims in lawsuit that he repeatedly raped her. *Toronto Star*. <https://www.thestar.com/entertainment/television/2017/11/09/shark-tank-star-robert-herjavecs-ex-girlfriend-claims-in-lawsuit-that-he-repeatedly-raped-her.html>

Blatchford, C. (2018, April 2). *Unlike Canada, U.K. has learned sex assault “victims” aren't always victims*. *National Post*. <https://nationalpost.com/opinion/christie-blatchford-unlike-canada-u-k-has-learned-sex-assault-victims-arent-always-victims>

- Blaze, S. (2017, July 12). Open Letter to Lord Braven from the MVK Board [Facebook]. *MVK: Metro Vancouver Kink Facebook Page*.  
<https://www.facebook.com/groups/6949777007/permalink/10155458993592008/>
- Borden, D. L. (1997). Patterns of harm: An analysis of gender and defamation. *Communication Law and Policy*, 2(1), 105–141. <https://doi.org/10.1080/10811689709368620>
- Borden, D. L. (1998). Reputational Assault: A Critical and Historical Analysis of Gender and the Law of Defamation. *Journalism & Mass Communication Quarterly*, 75(1), 98–111.  
<https://doi.org/10.1177/107769909807500111>
- Boynton, S., & Bennett, J. (2020, January 31). Lawsuits allege years of sexual, physical abuse against Indigenous girls in B.C. foster homes. *Global News*.  
<https://globalnews.ca/news/6492407/mcfd-sex-abuse-lawsuits/>
- Brockes, E. (2018, January 15). Me Too founder Tarana Burke: “You have to use your privilege to serve other people.” *The Guardian*.  
<https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault>
- brown, adrienne maree. (2020). *We will not cancel us: Breaking the cycle of harm*. AK Press.
- Bruineman, M. (2019, April 8). Steady optimism—2019 legal fees survey. *Canadian Lawyer Magazine*. <https://www.canadianlawyermag.com/surveys-reports/legal-fees/steady-optimism-2019-legal-fees-survey/276027>
- Bumiller, K. (2008). *In an abusive state: How neoliberalism appropriated the feminist movement against sexual violence*. Duke University Press.

- Burgess, S. (2018, April 13). New legal supports for sex assault survivors fall short, advocates say. *CBC Ottawa*. <https://www.cbc.ca/news/canada/ottawa/legal-advice-sex-assault-survivors-1.4613574>
- Busby, K. (1997). Discriminatory uses of personal records in sexual violence cases. *Canadian Journal of Women and the Law*, 9(2), 148–176.
- Butler, J. (1993). *Bodies that matter: On the discursive limits of “sex.”* Routledge.
- Butler, J. (1994). Gender as performance: An interview with Judith Butler. *Radical Philosophy*, 67, 32–39.
- Butler, J. (2006). *Gender trouble: Feminism and the subversion of identity*. Routledge.
- Cadieux-Shaw, L. (2015, March 7). Defamation, absolute Privilege, and sexual Assault: Caron v A. *The Court.ca*. <https://www.thecourt.ca/defamation-absolute-privilege-and-sexual-assault-caron-v-a/>
- Cameron, A. (2006). Stopping the violence: Canadian feminist debates on restorative justice and intimate violence. *Theoretical Criminology*, 10(1), 49–66.
- Campbell, F. (2020, June 17). Notice posted for class action suit alleging sexual abuse by priests in Halifax-Yarmouth. *The Chronicle Herald*. <https://www.thechronicleherald.ca/news/provincial/notice-posted-for-class-action-suit-alleging-sexual-abuse-by-priests-in-halifax-yarmouth-463433/>
- Campbell, R., & Raja, S. (1999). Secondary victimization of rape victims: Insights from mental health professionals who treat survivors of violence. *Violence and Victims*, 14(1), 261–275.



- Canadian Centre for Justice Statistics Policing Services Program. (2006). *Uniform crime reporting incident based survey*. Statistics Canada. [http://www23.statcan.gc.ca/imdb-bmdi/instrument/3302\\_Q7\\_V2-eng.pdf](http://www23.statcan.gc.ca/imdb-bmdi/instrument/3302_Q7_V2-eng.pdf)
- Canadian Civil Liberties Association. (No Date). Freedom of expression: Public participation: Anti-SLAPP. *Canadian Civil Liberties Association*. <https://ccla.org/focus-areas/fundamental-freedoms/freedom-of-expression-2/public-participation-anti-slapp/>
- Canadian Press. (2015, December 3). UBC names investigator to probe “serious allegations” against Steven Galloway. *680 News*. <https://www.680news.com/2015/12/03/ubc-names-investigator-to-probe-serious-allegations-against-steven-galloway/>
- Canadian Press. (2019a, April 2). Reporter Paul Bliss was fired for repeated allegations of sexual misconduct, CTV says. *CBC Toronto*. <https://www.cbc.ca/news/canada/toronto/reporter-paul-bliss-was-fired-for-repeated-allegations-of-sexual-misconduct-ctv-says-1.5082324>
- Canadian Press. (2019b, November 25). Federal Court approves \$900M deal to settle military sexual assault, harassment cases. *Global News*. <https://globalnews.ca/news/6216833/military-sexual-misconduct-lawsuit-settlement/>
- Canan, P. (1989). The SLAPP from a sociological perspective. *Pace Environmental Law Review*, 23, 23–32.
- Canan, P., & Pring, G. (1988). Strategic lawsuits against public participation. *Social Problems*, 35, 506–519.
- CBC News. (2017, April 3). Lawsuit alleges London police sex-assault investigation discriminatory. *CBC Windsor*. <https://www.cbc.ca/news/canada/windsor/lawsuit-alleges-london-police-sex-assault-investigation-discriminatory-1.4053447>

- CBC News Calgary. (2018, September 21). *Former CTV reporter suing broadcaster, alleged attacker for \$1M*. <https://www.cbc.ca/news/canada/calgary/former-reporter-bridget-brown-suing-ctv-bliss-1.4833567>
- CBC News Nfld & Labrador. (2019, October 4). Class-action lawsuit against province for sexual abuse in youth homes certified. *CBC News Nfld & Labrador*.  
<https://www.cbc.ca/news/canada/newfoundland-labrador/class-action-sexual-abuse-government-youth-homes-1.5309311>
- Chamallas, M. (1998). Architecture of bias: Deep structures in tort law. *University of Pennsylvania Law Review*, 146(2), 463–532.
- Chamallas, M. (2018). Will Tort Law Have Its #Me Too Moment? *Journal of Tort Law*, 11(1), 39–70. <https://doi.org/10.1515/jtl-2018-0008>
- Chrisafis, A. (2017, October 22). Feminist campaigner accuses Oxford professor of rape. *The Guardian*. <https://www.theguardian.com/world/2017/oct/22/feminist-campaigner-accuses-oxford-professor-tariq-ramadan>
- Chunn, D. E., & Lacombe, D. (Eds.). (2000). *Law as a gendering practice*. Oxford University Press.
- Comack, E., & Balfour, G. (2004). *The power to criminalize: Violence, inequality and law*. Fernwood Publishing.
- Conaghan, J. (2003). Tort Law and Feminist Critique. *Current Legal Problems*, 56(1), 175–209.  
<https://doi.org/10.1093/clp/56.1.175>
- Conaghan, J. (2013). *Law and gender* (First edition). Oxford University Press.

- Condon, B., & Mustain, J. (2019, December 2). Catholic abuse legal reckoning: New wave of lawsuits could cost church over \$4B. *Global News*.  
<https://globalnews.ca/news/6242851/catholic-church-sexual-abuse-lawsuits/>
- Connell, R. (1987). *Gender and power: Society, the person, and sexual politics*. Stanford University Press.
- Connell, R. W. (1990). The state, gender, and sexual politics: Theory and Appraisal. *Theory and Society*, 19(5), 507–544.
- Connell, R. W. (1998). Masculinities and Globalization. *Men and Masculinities*, 1(1), 3–23.  
<https://doi.org/10.1177/1097184X98001001001>
- Connell, R. W., & Messerschmidt, J. W. (2005). Hegemonic Masculinity: Rethinking the Concept. *Gender & Society*, 19(6), 829–859. <https://doi.org/10.1177/0891243205278639>
- Craig, E. (2012). *Troubling sex: Towards a legal theory of sexual integrity*. UBC Press.
- Craig, E. (2018). *Putting trials on trial: Sexual assault and the failure of the legal profession*. McGill-Queens University Press.
- Crew, A. B. (2012). Striking back: The viability of a civil action against the police for the “wrongful unfounding” of reported rapes. In E. Sheehy (Ed.), *Sexual assault in Canada: Law, legal practice and women’s activism* (pp. 211–242). University of Ottawa Press.
- Danay, R. (2010). The Medium is not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation. *McGill Law Journal*, 56(1), 1.  
<https://doi.org/10.7202/045697ar>
- Dangerfield, K. (2019, June 6). “A piece of paper that did nothing”: Advocates say protection orders are failing women in Canada. *Global News*.  
<https://globalnews.ca/news/3965001/protection-orders-canada-failing-women/>

- Davis, A. Y. (1983). *Women, race & class* (1st Vintage Books ed). Vintage Books.
- Delaet, D., & Mills, E. (2018). Discursive silence as a global response to sexual violence: From Title IX to truth commissions. *Global Society*, 32(4), 496–519.
- Department of Justice. (2017a). *Victims Rights in Canada*. Department of Justice Canada.  
<https://www.justice.gc.ca/eng/cj-jp/victims-victimes/factsheets-fiches/peace-paix.html>
- Department of Justice. (2017b, October 16). Civil and criminal cases. *Canada's System of Justice*. <https://www.justice.gc.ca/eng/csj-sjc/just/08.html>
- DeVault, M. L. (1999). *Liberating method: Feminism and social research*. Temple University Press.
- Doe, J. (2003). *The story of Jane Doe: A book about rape*. Random House Canada.
- Doe, J. (2017, July 29). Lessons in rape culture from the many trials of Mandi Gray. *NOW*.  
<https://nowtoronto.com/news/mandi-gray-rape-case>
- Doolittle, R. (2017, February 3). Unfounded: Why police dismiss 1 in 5 sexual assault claims as baseless. *The Globe and Mail*.  
<https://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/>
- Draus, A. (2020, January 27). Sexual assault survivor files lawsuit against Halifax police and RCMP. *Global News*. <https://globalnews.ca/news/6468357/sexual-assault-survivor-files-lawsuit-against-hrp-and-rcmp/>
- DuBois, T. (2012). Police investigation of sexual assault complaints: How far have we come since Jane Doe? In E. Sheehy (Ed.), *Sexual assault in Canada: Law, legal practice and women's activism* (pp. 191–210). University of Ottawa Press.

- Dundas, D. (2018, June 8). Fired author Steven Galloway awarded \$167,000 in damages from UBC. *Toronto Star*.
- Elliott, A. (2018, December 6). How a Canadian law is silencing victims of gender-based violence. *FLARE*. <https://www.flare.com/news/canadian-libel-law/>
- Estrich, S. (1992). Palm beach stories. *Law and Philosophy*, 11(1–2), 5–33.  
<https://doi.org/10.1007/BF01000917>
- Feldthusen, B. (1994). Discriminatory damage quantification in civil actions for sexual battery. *University of Toronto Law Journal*, 44(133), 133–165.
- Feuer, A. (2020, February 24). The timeline of the Weinstein Case. *The New York Times*.  
<https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-case-sexual-assault.html>
- Foucault, M. (1977). *Discipline & Punish: The Birth of the Prison* (A. Sheridan, Trans.). Vintage Books.
- Fraser, N. (1990). Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy. *Social Text*, 25/26, 56. <https://doi.org/10.2307/466240>
- Freyd, J. (1997). Violations of power, adaptive blindness and betrayal trauma theory. *Feminist Psychology*, 7(1), 22–32.
- Gerrits, B. (2019). *Who is responsible? Explaining how contemporary Canadian newspapers frame domestic violence*. Queen's University.
- Gerster, J. (2020, May 13). Trinidad court sides with former Ontario professor in defamation case. *Global News*. <https://globalnews.ca/news/6935416/defamation-windsor-trinidad/>

- Giardini, F., & Wittek, R. (Eds.). (2019). Introduction: Gossip and Reputation—A Multidisciplinary Research Program. In *The Oxford handbook of gossip and reputation*. Oxford University Press.
- Gladue, N. (2009). *Report of the Cornwall Inquiry*. Attorney General.  
<https://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/index.htm>
- Glenn, C. (2004). *Unspoken: A rhetoric of silence*. Southern Illinois University Press.
- Global News. (2015, November 18). Acclaimed author Steven Galloway temporarily suspended from UBC post over “serious allegations.” *Global News*.  
<https://globalnews.ca/news/2348836/acclaimed-author-steven-galloway-temporarily-suspended-from-ubc-post-over-serious-allegations/>
- Godden, N. (2011). Claims in tort for rape: A valuable remedy or damaging strategy. *King’s Law Journal*, 22, 157–182.
- Godden-Rasul, N. (2015). Retribution, repress and the harms of rape: The role of tort law. In A. Powell, N. Henry, & A. Flynn (Eds.), *Rape Justice: Beyond the Criminal Law* (p. 112). Palgrave MacMillan.
- Gotell, L. (2006). When privacy is not enough: Sexual assault complaints, sexual history evidence and the disclosure of personal records. *Alberta Law Review*, 43(3), 743–778.
- Gotell, L. (2015). Rethinking affirmative consent in Canadian sexual assault law: Neoliberal sexual subjects and risky women. *Akron Law Review*, 41(4), 865–898.
- Gowriluk, C. (2020, January 27). Man seeks damages for alleged sexual, physical abuse in 1980’s at Anglican school in Selkirk, Man. *CBC Manitoba*.  
<https://www.cbc.ca/news/canada/manitoba/lawsuit-sexual-abuse-anglican-boarding-school-selkirk-1.5437595>

- Grant, M. (2020, March 11). Federal court approves next \$100M RCMP sexual harassment class-action lawsuit. *CBC Calgary*. <https://www.cbc.ca/news/canada/calgary/rcmp-class-action-lawsuit-women-non-policing-roles-approval-order-1.5493266>
- Gray, M. (2016a). Pathologizing Indigenous suicide: Examining the inquest into the deaths of C.J. and C.B. *Studies in Social Justice*, 10(1), 80–94.
- Gray, M. (2016b, July 26). Six lessons I learned from my rape case. *NOW*. <https://nowtoronto.com/mandi-gray-six-lessons-i-learned-from-my-rape-case>
- Gray, M. (2018, February 1). How Margaret Atwood got in trouble with the “good feminists.” *NOW Toronto*. <https://nowtoronto.com/news/is-margaret-atwood-a-bad-feminist>
- Gray, M., & Pin, L. (2017). “I would like it if some of our tuition went to providing pepper spray for students”: University branding, securitization and campus sexual assault at a Canadian University. *Annual Review of Interdisciplinary Justice Studies*, 6, 86–110.
- Gray, M., Pin, L., & Cooper, A. (2019). Curate consultation and the illusion of inclusion in York University’s sexual assault policy making process. In *Dis/Consent: Perspectives on Sexual Consent and Sexual Violence*. Fernwood Publishing.
- Greedy, E. (2020, March 6). The post #MeToo workplace: What’s really changed? *HR Magazine*.
- Harris, C. (2020, June 23). Five elderly Catholic clerics arrested in Joliette for alleged sexual abuse of minors. *CBC Montreal*. <https://www.cbc.ca/news/canada/montreal/quebec-schools-sex-crimes-1.5623433>
- Hewitt, F. (2020, July 28). Two additional McMaster faculty members suspended after more complaints about psychology department. *The Hamilton Spectator*.

- <https://www.thespec.com/news/hamilton-region/2020/07/28/two-additional-mcmaster-faculty-members-suspended-after-more-complaints-about-psychology-department.html>
- Heymann, L. A. (2011). The law of reputation and interest of the audience. *Boston College Law Review*, 52(4), 1341–1440.
- Hoffman, K. (2015, June 30). York University’s sexual assault policy sparks human rights complaint. *Globe and Mail*.
- <https://www.theglobeandmail.com/news/national/education/york-universitys-sexual-assault-policy-sparks-human-rights-complaint/article25194134/>
- Hong, J. (2018, October 26). Fired Yukon College instructor sues student over sex assault allegations. *Yukon News*. <https://www.yukon-news.com/news/fired-yukon-college-instructor-sues-student-over-sex-assault-allegations/>
- hooks, bell. (1989). *Talking back: Thinking feminist, thinking black*. South End Press.
- IACP. (2005). *Investigating sexual assaults: Model policy*. IACP National Law Enforcement Policy Centre. <http://www.evawintl.org/library/DocumentLibraryHandler.ashx?id=328>
- Jacobs, J. (2020, January 12). #MeToo Cases’ New Legal Battleground: Defamation Lawsuits. *The New York Times*. <https://www.nytimes.com/2020/01/12/arts/defamation-me-too.html>
- Johnson, B. E. H., & Bonsignore, A. (2018, January 23). Protect #Metoo victims from retaliatory lawsuits. *The Seattle Times*. <https://www.seattletimes.com/opinion/protect-metoo-victims-from-retaliatory-lawsuits/>
- Johnson, H. (2012). Limits of a criminal justice response: Trends in police and court processing of sexual assault. In E. Sheehy (Ed.), *Sexual assault in Canada: Law, legal practice and women’s activism* (pp. 613–634). University of Ottawa Press.



- Johnson, H. (2017). Why doesn't she just report it: Apprehensions and contradictions for women who report sexual violence to the police. *Canadian Journal of Women and the Law*, 29(36), 36–59.
- Kane, L. (2016, November 17). Margaret Atwood compares UBC probe of Steven Galloway to Salem witch trials. *The Canadian Press*.
- Kaplan, E. (2020, June 18). Daniel Carcillo leads class-action lawsuit against Canadian Hockey League for alleged physical and sexual abuse. *ESPN*.  
[https://www.espn.com/nhl/story/\\_/id/29330583/daniel-carcillo-leads-class-action-lawsuit-canadian-hockey-league-physical-sexual-abuse](https://www.espn.com/nhl/story/_/id/29330583/daniel-carcillo-leads-class-action-lawsuit-canadian-hockey-league-physical-sexual-abuse)
- Kay, B. (2017, December 19). *A sadly necessary handbook for men falsely accused of sexual assault*. <https://nationalpost.com/opinion/barbara-kay-a-sadly-necessary-handbook-for-men-falsely-accused-of-sexual-assault>
- Kay, J. (2018, July 10). “Grope-gate” and #MeToo’s crisis of legitimacy. *Quillette*.  
<https://quillette.com/2018/07/10/grope-gate-and-metooos-crisis-of-legitimacy/>
- Kendall-Tackett, K. A. (2007). Inflammation, cardiovascular disease, and metabolic syndrome as sequelae of violence against women: The role of depression, hostility, and sleep disturbance. *Trauma, Violence, & Abuse*, 8(2), 117–126.  
<https://doi.org/10.1177/1524838007301161>
- King, A. J. (1995). Constructing gender: Sexual slander in Nineteenth-century America. *Law and History Review*, 13(1), 63–110.
- Koshan, J., & Gotell, L. (2020, January 29). Legal gaps persist for intimate partner sexual violence after key ruling. *Policy Options*.

<https://policyoptions.irpp.org/magazines/january-2020/legal-gaps-persist-for-intimate-partner-sexual-violence-after-key-ruling/>

Krzanich, A. (2011). Virtue and Vindication: An historical analysis of sexual slander and a woman's good name. *Auckland University Law Review*, 17, 33–59.

Lai, G. (1998). Network resources, contact resources and status attainment. *Social Networks*, 20, 159–178.

Landry, N. (2014). *Threatening democracy: SLAPPs and the judicial repression of political discourse* (H. Scott, Trans.). Fernwood Publishing.

Leader, A. R. (2019). SLAPP in the face of free speech: Protecting survivors' rights to speak up in the Me Too era. *First Amendment Law Review*, 17(3), 441–476.

Lederman, M. (2015, November 18). UBC suspends chair of creative writing program pending an investigation; The university says “serious allegations” have been raised against acclaimed novelist Steven Galloway. *The Globe and Mail*.

<https://www.theglobeandmail.com/news/national/canadian-novelist-and-chair-of-ubc-creative-writing-program-suspended-from-the-university/article27329465/>

Lederman, M. (2016, November 15). Literary community calls for probe into Galloway case. *The Globe and Mail*.

Lederman, M. (2020, April 10). Court ruling supports Steven Galloway's request for documents in defamation case. *Globe and Mail*. <https://www.theglobeandmail.com/canada/british-columbia/article-court-ruling-supports-steven-galloways-request-for-documents-in/>

*Hansard Debates: Protection of Public Participation Act, 2015*, (2015) (testimony of Legislative Assembly of Ontario). <https://www.ola.org/sites/default/files/node->

files/hansard/document/pdf/2015/2015-09/committee-transcript-1-EN-24-SEP-2015\_JP008.pdf

- Lindberg, T., Campeau, P., & Campbell, M. (2012). Indigenous women and sexual assault in Canada. In E. Sheehy (Ed.), *Sexual assault in Canada: Law, legal practice and women's activism* (pp. 87–110). University of Ottawa Press.
- Lisak, D., Gardinier, L., Nicksa, S. C., & Cote, A. M. (2010). False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases. *Violence Against Women, 16*(12), 1318–1334. <https://doi.org/10.1177/1077801210387747>
- Lundquist, W., & Flegal, F. F. (1981). Discovery abuse—Some new views about an old problem. *Review of Litigation, 2*(1), 1–8.
- Macfarlane, J. (2020a). *Going public: A survivor's journey from grief to action*. Between the Lines.
- Macfarlane, J. (2020b). How a good idea became a bad idea: Universities and the use of non-disclosure agreements in terminations for sexual misconduct. *Cardozo Journal of Conflict Resolution, 21*, 361–379.
- MacIvor, A., & Ryan, H. (2020, May 7). Former N.S. prison guard who claimed innocence on sex allegations now facing 13 charges. *CBC Nova Scotia*.  
<https://www.cbc.ca/news/canada/nova-scotia/brian-wilson-nova-institution-guard-sex-assault-charges-1.5560353>
- Malinen, K. (2014). “This was a sexual assault”: A social worlds analysis of paradigm change in the interpersonal violence world. *Symbolic Interaction, 37*(3), 353–368.  
<https://doi.org/10.1002/symb.103>

- Martin-Alcoff, L. (2018). *Rape and resistance: Understanding the complexities of sexual violation*. Polity.
- Marvasti, A. (2004). *Qualitative Research in Sociology*. SAGE Publications, Ltd.  
<https://doi.org/10.4135/9781849209700>
- McGlynn, C., Westmarland, N., & Godden, N. (2012). 'I Just Wanted Him to Hear Me': Sexual violence and the possibilities of restorative justice. *Journal of Law and Society*, 39(2), 213–240. <https://doi.org/10.1111/j.1467-6478.2012.00579.x>
- McPhedran, M. (2001, June 21). First, do no harm: A decade ago, a task force recommended zero tolerance of sexual abuse by doctors. The policy's effect? Close to zero. *The Globe and Mail*.
- Mendes, K., Ringrose, J., & Keller, J. (2018). #MeToo and the promise and pitfalls of challenging rape culture through digital feminist activism. *European Journal of Women's Studies*, 25(2), 236–246. <https://doi.org/10.1177/1350506818765318>
- Mendes, K., Ringrose, J., & Keller, J. (2019). *Digital feminist activism: Girls and women fight back against rape culture*. Oxford University Press.
- Messerschmidt, J. W. (2018). *Hegemonic masculinity: Formulation, reformulation, and amplification*. Rowman & Littlefield.
- Miller, M. (2017). Brett Ratner sues woman for defamation over rape allegation. *People*.  
<https://people.com/movies/brett-ratner-sues-woman-for-defamation-over-rape-allegation/>
- Mingus, M. (2019, January 9). Transformative justice: A brief description. *Leaving Evidence*.  
<https://leavingevidence.wordpress.com/2019/01/09/transformative-justice-a-brief-description/>

- Molnar, D. (2020, April 30). Supreme court denies Basilian Fathers appeal to sexual abuse lawsuit. *CBC Windsor*. <https://www.cbc.ca/news/canada/windsor/catholic-church-sex-abuse-father-hodgson-marshall-talach-beckett-macleod-mcmahon-1.5551156>
- Naffine, N. (1990). *Law and the sexes: Explorations in feminist jurisprudence*. Allen & Unwin.
- North, A. (2018, October 10). #HimToo, the online movement spreading myths about false rape allegations, explained. *VOX*. <https://www.vox.com/policy-and-politics/2018/10/10/17957126/himtoo-movement-pieter-hanson-tweet-me-too>
- O'Brien, K., & Tsilivis, L. (2018, August 31). *Ontario Court of Appeal clarifies test under “anti-SLAPP” legislation*. [https://www.osler.com/en/resources/regulations/2018/ontario-court-of-appeal-clarifies-test-under-anti-slapp-legislation#\\_ftn1](https://www.osler.com/en/resources/regulations/2018/ontario-court-of-appeal-clarifies-test-under-anti-slapp-legislation#_ftn1)
- Odette, F. (2012). Sexual assault and disabled women ten years after Jane Doe. In E. Sheehy (Ed.), *Sexual assault in Canada: Law, legal practice and women's activism* (pp. 173–190). University of Ottawa Press.
- Ontario Ministry of the Attorney General. (2010). *Anti-Slapp Advisory Panel Report to the Attorney General*. Ontario Ministry of the Attorney General. [https://www.attorneygeneral.jus.gov.on.ca/english/anti\\_slapp/anti\\_slapp\\_final\\_report\\_en.html](https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.html)
- Ontario Ministry of the Attorney General. (n.d.a). *Anti-SLAPP advisory panel*. Ministry of the Attorney General. [https://www.attorneygeneral.jus.gov.on.ca/english/anti\\_slapp/](https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/)
- Ontario Ministry of the Attorney General. (n.d.b). *Civil cases: Suing and being sued in the Superior Court of Justice*. [https://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/suing\\_and\\_being\\_sued\\_7.php](https://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/suing_and_being_sued_7.php)

- Ontario Ministry of the Attorney General. (n.d.c). *Ontario Mandatory Mediation Program*.  
<https://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.php>
- Osborne, P. H. (2015). *The law of torts*. Irwin Law.
- Osler, Hoskin & Harcourt LLP. (2018). *Introductory guide to civil litigation in Ontario*.  
<https://www.osler.com/en/resources/cross-border/2018/introductory-guide-to-civil-litigation-in-ontario>
- Our Turn. (2017). *Our Turn: A national student-led action plan to end campus sexual violence*.  
[https://ssmu.ca/wp-content/uploads/2017/10/our\\_turn\\_action\\_plan\\_final\\_english\\_web.pdf?x26516](https://ssmu.ca/wp-content/uploads/2017/10/our_turn_action_plan_final_english_web.pdf?x26516)
- Pedro, P. (2020, August 19). Sex abuse settlement battle heading for Supreme Court. *Blackburn News*. <https://blackburnnews.com/chatham/chatham-news/2020/08/19/sex-abuse-settlement-battle-heading-for-supreme-court/>
- Penner, P. (2020, March 6). Three civil cases alleging sexual assault by former B.C. RCMP officer go forward. *Victoria News*. <https://www.vicnews.com/news/three-civil-cases-alleging-sexual-assault-by-former-b-c-rcmp-officer-go-forward/>
- Phillips, N., & Pumpian, R. (2017). A constitutional counterpunch to Georgia’s Anti-SLAPP statute. *Mercer Law Review*, 69, 407–432.
- Post, R. C. (1986). The social foundations of defamation law: Reputation and the Constitution. *California Law Review*, 74(3), 691–742.
- Powell, A. (2015). Seeking rape justice: Formal and informal responses to sexual violence through technosocial counter-publics. *Theoretical Criminology*, 19(4), 571–588.  
<https://doi.org/10.1177/1362480615576271>
- Powell, A., & Henry, N. (2017). *Sexual violence in a digital age*. Palgrave Macmillan.

- Priest, L. (2000). Task force to probe abuse by health-care workers: Province wants team to investigate whether survivors feel penalties meted out to abusers are 'fair and just, Witmer says. *The Globe and Mail*.
- Pring, G. W., & Canan, P. (1996). *SLAPPs: Getting sued for speaking out*. Temple University Press.
- Province of Ontario. (2015, March). *It's Never Okay: Action Plan*.  
<http://docs.files.ontario.ca/documents/4136/mi-2003-svhap-report-en-for-tagging-final-2-up-s.pdf>
- Pruitt, L. R. (2003). On the chastity of women all property in the world depends: Injury from sexual slander in the nineteenth century. *Indiana Law Journal*, 78(3), 965–1018.
- Pruitt, L. R. (2004). Her own good name: Two centuries of talk about chastity. *Maryland Law Review*, 63(3), 401–539.
- Quinlan, A., Quinlan, E., Fogel, C., & Taylor, G. (Eds.). (2017). *Sexual Violence at Canadian Universities: Activism, Institutional Responses, and Strategies for Change*. Wilfred Laurier University Press.
- Ramazanoğlu, C., & Holland, J. (2002). *Feminist Methodology*. SAGE Publications Ltd.  
<https://doi.org/10.4135/9781849209144>
- Randall, M. (2010). Sexual assault law, credibility, and “Ideal Victims”: Consent, resistance and victim blaming. *Canadian Journal of Women and the Law*, 22(2), 397–433.
- Randall, M. (2011). *The treatment of consent in Canadian sexual assault law*. The Equality Effect. <http://theequalityeffect.org/pdfs/ConsentPaperCanadaMR.pdf>
- Razack, S. (1998). *Looking white people in the eye: Gender, race, and culture in courtrooms and classrooms*. University of Toronto Press.

- Reinharz, S., & Davidman, L. (1992). *Feminist methods in social research*. Oxford University Press.
- Ribbens, J. (Ed.). (2000). *Feminist dilemmas in qualitative research: Public knowledge and private lives* (Reprinted). SAGE Publ.
- Rimke, H. (2018). Sickening Institutions: A Feminist Sociological Analysis and Critique of Religion, Medicine, and Psychiatry. In J. M. Kilty & E. DeJ (Eds.), *Containing Madness* (pp. 15–39). Springer International Publishing. [https://doi.org/10.1007/978-3-319-89749-3\\_2](https://doi.org/10.1007/978-3-319-89749-3_2)
- Rolph, D. (2008). *Reputation, celebrity and defamation law*. Ashgate.
- Saha, S. (2020, March 10). 76% of the U.S Employees say #MeToo positively impacted the workplace culture, Surveys Careerarc. *HR Technologist*.  
<https://www.hrtechnologist.com/news/culture/76-of-the-us-employees-say-metoo-positively-impacted-the-workplace-culture-surveys-careerarc/>
- Saltman, J. (2019, December 23). Defamation suit against Metro Vancouver kink society to proceed. *Vancouver Sun*. <https://vancouversun.com/news/local-news/defamation-suit-against-metro-vancouver-kink-society-to-proceed>
- Sawa, T., & Barghout, C. (2020, August 17). Sons accuse fashion boss Nygard of “paying known sex worker” to rape them as teens. *Global News*.  
<https://www.cbc.ca/news/canada/peter-nygard-sons-lawsuit-new-york-rape-prostitute-fashion-1.5688920>
- Schmunk, R. (2020, June 25). No charges yet, but lawsuits continue against disgraced social worker months after RCMP investigation ends. *CBC British Columbia*.



- <https://www.cbc.ca/news/canada/british-columbia/robert-riley-saunders-2020-kelowna-lawsuits-social-worker-1.5627211>
- Scott, M., & Tollefson, C. (2010). Strategic lawsuits against public participation: The British Columbia experience. *Review of European, Comparative & International Environmental Law*, 19(1), 45–57.
- Semple, N. (2016). The cost of seeking civil justice in Canada. *Canadian Bar Review*, 93(3), 639–673.
- Senn, C. Y., Eliasziw, M., Barata, P. C., Thurston, W. E., Newby-Clark, I. R., Radtke, H. L., & Hobden, K. L. (2014). Sexual violence in the lives of first-year university women in Canada: No improvements in the 21st century. *BMC Women's Health*, 14(1).  
<https://doi.org/10.1186/s12905-014-0135-4>
- Sharkey, J. (2019, December 12). Woman sues former Kitchener neurologist accused of sexually assaulting 63 patients. *CBC Kitchener-Waterloo*.  
<https://www.cbc.ca/news/canada/kitchener-waterloo/jeffrey-sloka-neurologist-sexual-assault-1.5394001>
- Sheldrick, B. M. (2014). *Blocking public participation: The use of strategic litigation to silence political expression*. Wilfred Laurier University Press.
- Sherlock, T. (2016, June 23). Author Steven Galloway no longer a UBC professor following “breach of trust.” *PostMedia*.
- Skolnick, J. H. (1986). Foreword: The sociological tort of defamation. *California Law Review*, 74(3), 677–689.
- Smart, C. (1989). *Feminism and the power of law*. Routledge.

- Smart, C. (1992). The Woman of Legal Discourse. *Social & Legal Studies*, 1(1), 29–44.  
<https://doi.org/10.1177/096466399200100103>
- Smith, C. P., & Freyd, J. J. (2013). Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma: Institutional Betrayal Exacerbates Sexual Trauma. *Journal of Traumatic Stress*, 26(1), 119–124. <https://doi.org/10.1002/jts.21778>
- Smith, D.E. (1997). Comment on Hekman’s “Truthand Method: Feminist Standpoint Theory Revisited.” *Signs*, 22(2392–398).
- Smith, D.E. (1999). *Writing the social: Critique, theory, and investigations*. University of Toronto Press.
- Smith, Dorothy E. (2005). *Institutional ethnography: A sociology for people*. AltaMira Press.
- Smith, E. (2020, March 6). Every N.S. university to receive bystander training to address sexual violence. *CBC Nova Scotia*. <https://www.cbc.ca/news/canada/nova-scotia/bystander-training-antigonish-women-s-centre-university-college-campus-1.5489077>
- Statistics Canada. (2020). *Civil court cases, by level of court and type of case, Canada and selected provinces and territories* (Table 35-10-0112-01).  
<https://www150.statcan.gc.ca/t1/tb11/en/tv.action?pid=3510011201>
- Status of Women Canada. (2019). *Canada’s Strategy to Prevent and Address Gender-Based Violence*. <https://cfc-swc.gc.ca/violence/strategy-strategie/report-rapport2019-en.html>
- Straatman, A.-L. (2013). *Bystander sexual violence education programs for high school, college and university students*. Learning Network, Centre for Research and Education on Violence Against Women and Children. <http://www.vawlearningnetwork.ca/our-work/briefs/briefpdfs/LB-09.pdf>

- Sutherland, K. (1993). Measuring pain: Quantifying damages in civil suits for sexual assault. In K. D. Cooper-Stephenson & E. Gibson (Eds.), *Tort Theory* (pp. 212–234). Captus Press.
- Tanovich, D. (2015). “Whack” no more: Infusing equality into the ethics of defence lawyering in sexual assault cases. *Ottawa Law Review*, 45(3).
- Taylor, L. (2017). How the criminal code “protects” sexual assault complainants from themselves and constrains their participation in the news media. In L. Taylor & C.-M. O’Hagan (Eds.), *The unfulfilled promise of press freedom in Canada* (pp. 132–145). University of Toronto Press.
- Taylor, L., & Pritchard, D. (2018). The Process is the Punishment: Criminal Libel and Political Speech in Canada. *Communication Law and Policy*, 23(3), 243–266.  
<https://doi.org/10.1080/108010811680.2018.1467155>
- The Canadian Press. (2018). CTV serves statement of defence to Patrick Brown in defamation lawsuit. *CBC*. <https://www.cbc.ca/news/canada/toronto/ctv-patrick-brown-defamation-allegations-1.4738096>
- The Chilly Collective. (1995). *Breaking anonymity: The chilly climate for women faculty*. Wildren Laurier University Press.
- The University of British Columbia Board of Governors. (2020). *Retaliation, Safe, Disclosure and Reporting Policy* (No. SC18). University of British Columbia.  
[https://universitycounsel-2015.sites.olt.ubc.ca/files/2020/04/Retaliation-Policy\\_SC18.pdf](https://universitycounsel-2015.sites.olt.ubc.ca/files/2020/04/Retaliation-Policy_SC18.pdf)
- Theodore, T. (2018, October 30). Novelist Steven Galloway files defamation suit over sexual assault allegations. *Toronto Star*.  
<https://www.thestar.com/entertainment/2018/10/30/novelist-steven-galloway-files-defamation-suit-over-sexual-assault-allegations.html>

- Thom, K. C. (2019). *I hope we choose love: A trans girl's notes from the end of the world*. Arsenal Pulp.
- Thomas Reuters. (2020, June 26). Justin Bieber files \$20M defamation lawsuit over sexual misconduct claims. *CBC*. <https://www.cbc.ca/news/entertainment/justin-bieber-defamation-lawsuit-sexual-misconduct-1.5629552>
- Tucker, J., & Mondino, J. (2020). *Coming Forward: Key trends and Data from the TIME'S UP Legal Defense Fund*. National Women's Law Centre. [https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report\\_FINAL\\_2020-10-13.pdf](https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report_FINAL_2020-10-13.pdf)
- Turchik, J. A., Hebenstreit, C. L., & Judson, S. S. (2016). An Examination of the Gender Inclusiveness of Current Theories of Sexual Violence in Adulthood: Recognizing Male Victims, Female Perpetrators, and Same-Sex Violence. *Trauma, Violence, & Abuse, 17*(2), 133–148. <https://doi.org/10.1177/1524838014566721>
- Uguen-Csenge, E. (2020, January 30). Indigenous woman reaches settlement with Kelowna RCMP over sex assault interrogation. *CBC British Columbia*. <https://www.cbc.ca/news/canada/british-columbia/settlement-kelowna-rcmp-sex-questions-1.5447023>
- Ullman, S. E. (2004). Sexual assault victimization and suicidal behavior in women: A review of the literature. *Aggression and Violent Behavior, 9*, 331–351.
- Ullman, S. E., & Brecklin, L. R. (2003). Sexual assault history and health related outcomes in a national sample of women. *Psychology of Women Quarterly, 27*, 46–57.
- Ullman, S. E., & Filipas, H. H. (2001). Predictors of PTSD symptom severity and social reactions in sexual assault victims. *Journal of Traumatic Stress, 14*(2), 369–389.

- Ullman, S. E., & Peter-Hagene, L. C. (2016). Longitudinal relationships of social reactions, PTSD, and revictimization in sexual assault survivors. *Journal of Interpersonal Violence*, *31*(6), 1074–1094.
- United Nations Women. (2012). *Handbook for legislation on violence against women*.  
[https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2012/12/unw\\_legislation-handbook%20pdf.pdf?la=en&vs=1502](https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2012/12/unw_legislation-handbook%20pdf.pdf?la=en&vs=1502)
- Walker, J. E., & Sossin, L. M. (2010). *Civil litigation*. Irwin Law.
- Ward, D. (2016). In her words: Recognizing and preventing abusive litigation against domestic violence survivors. *Seattle Journal for Social Justice*, *14*(2), 429–464.
- Webb, L. M. (2015). Shame transfigured: Slut-shaming from Rome to cyberspace. *First Monday*.  
<https://doi.org/10.5210/fm.v20i4.5464>
- Weikle, B. (2020, January 29). #MeToo movement has been a “net positive” in Canadian workplaces. *CBC*. <https://www.cbc.ca/news/business/metoo-weinstein-canadian-workplaces-1.5439147>
- Weir, L., & Mykhalovskiy, E. (2010). *Global public health vigilance: Creating a world on alert*. Routledge.
- Wemmers, J.-A. M. (2017). *Victimology: A Canadian perspective*. University of Toronto Press.
- West, C., & Zimmerman, D. (1987). Doing Gender. *Gender & Society*, *1*(2), 125–151.
- West Coast LEAF. (2019). *Maia Bet, et al. V Howard Platnick, et al.; 1704604 Ontario Limited v. Pointes Protection Association, et al. [2019]*. <http://www.westcoastleaf.org/our-work/maia-bent-et-al-v-howard-platnick-et-al-1704604-ontario-limited-v-pointes-protection-association-et-al-2019/>

- West, N. (1992). Rape in the criminal law and the victim's tort alternative: A feminist analysis. *University of Toronto Faculty Law Review*, 96–118.
- Whitnell, T. (2018, November 2). Second lawsuit against Milton journalist abandoned in court. *InsideHalton.Com*. <https://www.insidehalton.com/news-story/9003925-second-lawsuit-against-milton-journalist-abandoned-in-court/>
- World Health Organization. (2002). *Chapter 6: Sexual Violence*. World Health Organization. [http://www.who.int/violence\\_injury\\_prevention/violence/global\\_campaign/en/chap6.pdf](http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf)
- Wriggins, J. (2010). Toward a feminist revision of torts. *American University of Gender Social Policy and Law*, 13, 139–159.
- York Cornwell, E., Taylor Poppe, E. S., & Doherty Bea, M. (2017). Networking in the Shadow of the Law: Informal Access to Legal Expertise through Personal Network Ties: Networking in the Shadow of the Law. *Law & Society Review*, 51(3), 635–668. <https://doi.org/10.1111/lasr.12278>
- Young, H. (2017). The Canadian defamation action: An empirical study. *The Canadian Bar Review*, 95(3), 591–630.
- Zacharek, S., Dockterman, E., & Sweetland Edwards, H. (2017, December 18). The silence breakers. *TIME*. <http://time.com/time-person-of-the-year-2017-silence-breakers/>

## Case Law

- Bent, et al. v. Platnick, et al, 2019, SCC, 35199, <http://canlii.ca/t/hzzd2>
- Bullard v. Rogers Media Inc., 2020 ONSC 3084, <http://canlii.ca/t/j7t0f>
- Canadian Newspapers Co. v. Canada (Attorney General), 1988 52 (SCC), [1988] 2 SCR 122, <http://canlii.ca/t/1ftdc>
- Caron v. A., 2015 BCCA 47, <http://canlii.ca/t/gg863>

D'Addario v Smith, 2015 ONSC 6652, <http://canlii.ca/t/gmg3s>

Franchuk v Schick, 2014 ABQB 249, <http://canlii.ca/t/g7rt9>

Galloway v. A.B., 2020 BCCA 106, <http://canlii.ca/t/j6chr>

Galloway v. A.B., 2019 BCCA 385, <http://canlii.ca/t/j35rw>

Galloway v A.B, 2019 BCSC 1417, <http://canlii.ca/t/j23nd>

Galloway v A.B, 2019 BCSC 395, <http://canlii.ca/t/hznmr>

Grant v. Torstar Corp., 2009 SCC 61 (CanLII), [2009] 3 SCR 640, <http://canlii.ca/t/27430>

Haight v. R.B., 2017 ONSC 5359, <http://canlii.ca/t/h6gmh>

Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130, <http://canlii.ca/t/1frgn>

Lyncaster v Metro Vancouver Kink Society, 2019 BCSC 2207, <http://canlii.ca/t/j481r>

MacFarlane v. Canadian Universities Reciprocal Insurance Exchange, 2019, 2019 ONSC 4631, <http://canlii.ca/t/j1z8q>

Mainstream Canada v Staniford, 2013, BCCA 341, <http://canlii.ca/t/fzqsx>

R. v. Ewanchuk, 1999 CanLII 711 (SCC), [1999] 1 SCR 330, <http://canlii.ca/t/1fqpm>

R. v. Osolin, 1993 CanLII 54 (SCC), [1993] 4 SCR 595, <http://canlii.ca/t/1frvz>

R. v. Inwood, 1989 CanLII 263 (ON CA), <http://canlii.ca/t/1p78h>

Rizvee v. Newman, 2018 ONSC 6054, <http://canlii.ca/t/hvrzw>

Rizvee v. Newman, 2017 ONSC 4024, <http://canlii.ca/t/h4npx>

Robichaud v. Canada (Treasury Board), 1987, 73 (SCC), [1987] 2 SCR 84, <http://canlii.ca/t/1ftl5>

Stuart v. Doe, 2019 YKSC 53, <http://canlii.ca/t/j34c1>

Westcott v Westcott [2008] EWCA Civ 818, [2009] QB 407, [2009] 2 WLR 838, [2009] EMLR 2, [2009] 1 All ER 727, <https://www.bailii.org/ew/cases/EWCA/Civ/2008/818.html>

Whitfield v. Whitfield, 2016 ONCA 581, <http://canlii.ca/t/gsp2p>

Whitfield v. Whitfield, 2016 ONCA 720, <http://canlii.ca/t/gv4md>

Whitfield v Whitfield, 2015 ONSC 3422, <http://canlii.ca/t/gjctv>

Whitfield v. Whitfield, 2014 ONSC 2745, <http://canlii.ca/t/g6s8v>

WIC Radio Ltd. v. Simpson, 2008 SCC 40, [2008] 2 SCR 420, <http://canlii.ca/t/1z46d>

Vanderkooy v. Vanderkooy et al, 2013 ONSC 4796, <http://canlii.ca/t/g04cb>



## Appendices

### **Appendix A: Study Recruitment Materials** *Request for Participation in a Research Study*

“Cease and Desist/Cease or Resist? Civil Suits and Sexual Violence”

Hello,

My name is Mandi Gray and I am a PhD Candidate in the Department of Sociology at York University and am working under the supervision of Professor Amanda Glasbeek.

My dissertation research is looking at the use of lawsuits or the threat of legal action against those who have reported or disclosed having experienced sexual violence by the accused. For this study, it is imperative that I talk to those who have been experienced civil legal action being taken against them to better understand the issue.

I am looking to speak to anyone who has had civil legal action taken against them, or has had legal action threatened by someone accused of sexual violence. The legal action may range from receiving a legal letter (i.e. a cease and desist) to a full civil trial.

I will not be speaking with people who are currently involved in the criminal legal system to make sure that my research cannot affect their case.

If you wish to participate in this study, I will ask you to meet with me for a 60-90 minute interview where we will talk about your experiences of civil legal action being taken against you, the consequences on your daily life, and possibilities for change.

I would like to assure you that this study has been reviewed and received ethics clearance through the York University Research Ethics Committee.

Participants will be given a \$40 honorarium to acknowledge their time and contribution.

If you are interested, please contact me at [email removed] or by phone [removed]

Thank you for your help.

Sincerely,

Mandi Gray

*Request for Participation: Not-for-profit organizations, lawyers and activists*

“Cease and Desist/Cease or Resist? Civil Suits and Sexual Violence”

Hello, my name is Mandi Gray and I am a PhD Candidate in the Department of Sociology at York University and am working under the supervision of Professor Amanda Glasbeek.

My dissertation research is examining the experiences of those who have had civil legal action taken against them by someone accused of sexual violence. This includes those who have reported or disclosed sexual violence, the support network of the person who has reported or disclosed and anti-violence activists/advocates and have faced civil legal action as a result.

For this study, it is imperative I speak with those who have had civil legal action taken against them, legal counsel with experience in this area of law, and service providers who have supported people who have had this experience. I am looking to speak to people located anywhere in North America.

I am interested in talking with you about your experiences as a lawyer, service provider or advocate, if you have assisted someone who has been threatened with or has been served with this type of lawsuit. The interview will take approximately 45-60 minutes at the time and location of your convenience. I am also available for interviews by telephone or Skype for anyone not located in Toronto.

I am asking you to help raise awareness of my project among your clients and colleagues. I have attached both a flyer and a letter to this email discussing my project and asking for research participants. I would appreciate if you could pass on this letter to any client you think may be interested in participating. If they wish to participate, they can contact me with questions or to set up an interview. I would like to assure you that this study has been reviewed and received ethics clearance through the York University Research Ethics Committee.

I have attached electronic copies of both the letter and flyer associated with this project. I can also mail hard copies to you if that is preferred. If so, please email me your mailing address and I will send you an envelope of materials. I am reachable at [e-mail removed] or by phone [removed]

Thank you for your help.

Sincerely,

Mandi Gray

## Consent Form: Legal Respondents

Date: 2018-2019

Study Name: *“Cease and Desist/Cease or Resist? Civil Suits and Sexual Violence”*

Researcher: Mandi Gray, PhD Candidate, Dept. of Sociology, York University.

Purpose: The purpose of this study is to critically examine cases of civil action by someone who has been accused of sexual violence. In this project, I will be speaking to those who have had legal action taken against them for reporting or disclosing sexual violence and with lawyers who have experience in this area of law. More specifically, I will be asking questions about the civil litigation process, access to justice, and current social movements such as MeToo. The data from this project will become part of my dissertation and may be used in subsequent academic publications as well.

What your participation would require: During an interview, you will be asked to answer a series of questions about your experience having legal action taken against you or the threat of legal action being taken in relation to sexual violence or sexual violence activism. You will not be asked any questions relating to the experience of sexual violence itself. The interview will focus on the civil legal system, specifically the barriers to accessing justice and the consequences of the lawsuit or the threat of a lawsuit for reporting or disclosing sexual violence.

Some of the questions will ask about your opinions on larger social movements responding to sexual violence and the individual access to justice concerns that emerge from these lawsuits. This interview should take no longer than 60-90 minutes, and you will receive \$40 to recognize your time and effort.

Risks of Participating: The interview may bring up memories about your experience of sexual violence and the legal processes you may have participated in. While you will not be asked to give details about your assault, speaking about sexual assault may cause emotional and/or psychological distress. A list of counselling options in your geographical region will be made available if you feel the need to speak with someone as a result of your participation in this project, and you may withdraw from the interview at any time.

The researcher will take extreme precautions to ensure that all data is anonymized and is not attached to you. If you publish (verbally or written), your participation in this research project, there is a small but potential risk that the person who took legal action against you may allege that your participation is a breach of a non-disclosure agreement (if one was signed). It is advised that you seek legal advice from your lawyer or a community legal clinic prior to publishing (verbally or written) that you participated in this study.

Within any future publications or presentations, the researcher will ensure that you are completely anonymized by removing geographical location, political affiliations, institutions involved and the names of any people involved. Direct quotes from the transcripts will be used sparingly to preserve anonymity. A list of community legal clinics in your geographical region will be made available.

Benefits of Participating: Despite the growing interest in the issue of sexual violence right now, there are no academic studies examining the experience of those who have had civil action taken against them for reporting or disclosing sexual violence, or the impact of the threat of civil legal action on reporting or disclosing sexual violence. Your participation will benefit the development of the literature in this area and may inform reform efforts in the future.

Voluntary Participation: Your participation in this research is completely voluntary and you may choose to stop participating at any time. Your decision not to volunteer will not impact your relationship with the researcher, York University, or any other individual or group associated with the research now or in the future.

Withdrawal: You may stop participating in the study at any time, for any reason, if you so decide. You are not obligated to answer any of the questions asked. Your choice to stop participating will not impact your relationship with researcher, York University, or any other individual or group associated with the research now or in the future. In the event that you withdraw completely from the study, all associated data collected will be immediately destroyed wherever possible.

If you decide to stop participating, you will still be eligible to receive the honorarium for agreeing to be in the project.

Confidentiality: Confidentiality will be provided to the fullest extent possible by law. All information you supply during the research will be held in confidence and your name and identifying information (including city of residence, institutions, or people involved in the legal action) will not appear in any report or publication of the research.

With your permission, the interview will be digitally recorded. The recordings will be stored on a secure database accessible only by password by the researcher. Transcriptions will be made from the recordings within a month of their creation, and the original recordings destroyed within six months. The transcriptions will not include your real name or other identifying information. The transcript will be stored indefinitely on a secure server in a secure location, accessible only by the researcher. The transcriptions will be kept indefinitely for future research.

Since the focus of this research project is to examine the experience of civil litigation as oppose to experiences of sexual violence, any discussions about the sexual violence itself will be omitted from the transcript.

The data collected in this research project may be used – in anonymized form – by the researcher in subsequent research investigations exploring similar lines of inquiry. Such projects will undergo ethics review by the HPRC, our institutional REB. Any secondary use of the anonymized data by the research team will be treated with the same degree of confidentiality and anonymity as in the original research project.

If you would prefer that the session not be recorded, notes will be taken by hand and stored in the same manner as electronic transcriptions.

Questions about the Research:

If you have questions about this project or your role in the research, do not hesitate to contact me by email [e-mail address] or by phone [removed].

You can also contact my PhD supervisor, Professor Amanda Glasbeek, by e-mail [removed] or by phone [removed]

This research has been reviewed and approved by the Human Participants Review Sub-Committee, York University’s Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process, or about your rights as a participant in the study, you may contact the Senior Manager and Policy Advisor for the Office of Research Ethics at York University by telephone [removed] or by at e-mail [removed]

Legal Rights and Signatures:

I, \_\_\_\_\_, consent to participate in the project *Cease and Desist/Cease or Resist? Civil Suits and Sexual Violence* by Mandi Gray. I have understood the nature of this project and wish to participate. I agree that non-identifying information that I provide may be used in publications arising from this research project. I am not waiving any of my legal rights by signing this form. My signature below indicates my consent.

Consent to Participate

Participant \_\_\_\_\_ Date \_\_\_\_\_

Consent to the Recording of the Interview

Participant \_\_\_\_\_ Date \_\_\_\_\_

## Consent Form: Legal Professionals and Advocates

Date: 2018-2019

Study Name: *“Cease and Desist/Cease or Resist? Civil Suits and Sexual Violence”*

Researcher: Mandi Gray, PhD Candidate, Dept. of Sociology, York University.

Purpose: The purpose of this study is to critically examine cases of civil action by someone who has been accused of sexual violence. In this project, I will be speaking to those who have had legal action taken against them for reporting or disclosing sexual violence and with lawyers who have experience in this area of law. More specifically, I will be asking questions about the civil litigation process, access to justice, and current social movements such as MeToo. The data from this project will become part of my dissertation and may be used in subsequent academic publications as well.

What your participation would require: During an interview, you will be asked to answer a series of questions about your opinions on the use of lawsuits following a disclosure or report of sexual violence. The interview will focus on your legal work to better understand the issue. Some of the questions will ask about your opinions on larger social movements responding to sexual violence and the individual access to justice concerns that emerge from these lawsuits.

This interview should take no longer than 60-90 minutes.

Risks of Participating: Some participants may be concerned that being a part of this project may have negative effects on their employment. No names or identifying information will be included in any final written work resulting from this research.

Benefits of Participating: Despite the growing interest in the issue of sexual violence right now, there are no academic studies examining the experience of those who have had civil action taken against them for reporting or disclosing sexual violence, or the impact of the threat of civil legal action on reporting or disclosing sexual violence. Your participation will benefit the development of the literature in this area and may inform reform efforts in the future.

Voluntary Participation: Your participation in the research is completely voluntary and you may choose to stop participating at any time. Your decision not to volunteer will not impact your relationship with the researcher, York University, or any other individual or group associated with the research now or in the future.

Withdrawal: You may stop participating in the study at any time, for any reason, if you so decide. You are not obligated to answer any of the questions asked. Your choice to stop participating will not impact your relationship with the researcher, York University, or any other individual or group associated with the research now or in the future. In the event that you withdraw completely from the study, all associated data collected will be immediately destroyed wherever possible.

Confidentiality: Confidentiality will be provided to the fullest extent possible by law. All information you supply during the research will be held in confidence and your name and identifying information will not appear in any report or publication of the research.

With your permission, the interview will be digitally recorded. The recordings will be stored on a secure database accessible only by password by the researcher. Transcriptions will be made from the recordings within a month of their creation, and the original recordings destroyed within six months. The transcriptions will not include your real name or other identifying information. The transcript will be stored indefinitely on a secure server in a secure location, accessible only by the researcher. The transcriptions will be kept indefinitely for future research.

The data collected in this research project may be used – in anonymized form – by the researcher in subsequent research investigations exploring similar lines of inquiry. Such projects will undergo ethics review by the HPRC, our institutional REB. Any secondary use of the anonymized data by the research team will be treated with the same degree of confidentiality and anonymity as in the original research project.

If you would prefer not to have the session recorded, notes will be taken by hand and stored in the same manner as the electronic transcriptions.

Questions About the Research:

If you have questions about this project or your role in the research, do not hesitate to contact me by email [email address] or by phone [removed]

You can also contact my PhD supervisor, Professor Amanda Glasbeek, by e-mail [removed] or by phone [removed]

This research has been reviewed and approved by the Human Participants Review Sub-Committee, York University's Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process, or about your rights as a participant in the study, you may contact the Senior Manager and Policy Advisor for the Office of Research Ethics at York University by telephone at [removed].

Legal Rights and Signatures:

I, \_\_\_\_\_, consent to participate in the project *Cease and Desist/Cease or Resist? Civil Suits and Sexual Violence* by Mandi Gray. I have understood the nature of this project and wish to participate. I agree that non-identifying information that I provide may be used in publications arising from this research project. I am not waiving any of my legal rights by signing this form. My signature below indicates my consent.

Consent to Participate

Participant \_\_\_\_\_ Date \_\_\_\_\_

Consent to the Recording of the Interview

Participant \_\_\_\_\_ Date \_\_\_\_\_

## Appendix B: Interview Materials

### Dissertation Interview Guide

#### Respondents

##### Sample Guidelines for Respondents

- Aiming for 15-20 participants
- The research project aims to speak to people who have had civil legal action taken against them by an alleged perpetrator of sexual violence. It is anticipated that the sample will include a wide range of people including but not limited to: activists, advocates, people who have experienced sexual assault and their friends or family and reporters.

##### Introductory Questions for Respondents

- Begin with introductions and conversation about project
- Provide consent and demographic forms
- Start with consent document. Discuss main issues outlined on form, particularly the fact that participants can stop at any time or refuse to answer any questions during the interview or on the demographic forms
- Discuss any questions participants may have about either document
- Outline structure of interview – Begins with general case scenarios and moves into more direct questions about participant experiences and opinions
- Reiterate that participants may choose to stop at any time or not answer questions that they do not wish to respond to.

##### Questions for Civil Suit Respondents

1. In as much or as little detail as you like, I will begin by having you describe the actions or events that led to civil action being taken against you.
2. Before the civil action was taken, was the possibility of a lawsuit something that you anticipated or expected that could happen?
  - a) If yes, what – if any steps did you take to minimize the risk of civil action?
3. Thinking back to when you were first served with legal action being taken against you, what was your initial response?
  - a) In the following days or months after being served, what actions did you take to respond to the allegations outlined in the civil suit? Probe: for example, removal of social media posts, do online research, contact lawyers or organizations for assistance.
4. Can you walk me through your experience of the civil legal system from beginning to end?



5. How do you feel about the final outcome of the case?

#### Possibilities for the Future

1. What would you identify as three of the biggest challenges, barriers or losses from this experience?
2. What if any impact has the larger public discussion about sexual violence within the last few years had on your experience (for example: #MeToo, Times Up, Jian Ghomeshi)?
3. What advice would you give someone who is experiencing a similar legal issue?

#### Conclusion

1. Is there anything else that you would like to add to this conversation that we have not discussed yet?
2. Do you have any recommendations for improving the format of these interviews?

### LAWYERS / ADVOCATES

#### Sample Guidelines for Lawyers/Advocates

- Aiming for 15-20 participants
- Must have experience in the area of civil litigation specifically representing someone who has been sued or has sued for defamation, libel or malicious prosecution in response to sexual violence allegations or who have worked with someone inquiring about the possibility of civil action being taken against them in relation to sexual violence

#### Questions for Lawyers/Advocates

1. How do you come into contact with most of your clients who have a civil legal issue relating to an allegation of sexual violence or are inquiring about the possibility of a civil legal issue for reporting or disclosing sexual violence?
2. What are the primary concerns that emerge in your conversations either before or in the early stages of legal action being taken?
3. From what you have seen, what would you say are the biggest barriers for clients facing legal action for making accusations of sexual violence?
4. Within the last several years, there has been an increase in public dialogue about sexual violence, for example, #MeToo and Times Up.

- a) What has the impact been on your work as an advocate?
  - b) Do you think these larger discussions have influenced your clients to speak out about sexual violence?
5. What (if any) changes do you envision could better meet the needs of those facing civil legal action in these cases?

Conclusion

6. Is there anything else that you would like to add to this conversation that we have not discussed yet?
7. Do you have any recommendations for improving the format of these interviews?