

# Court reinforces reporters' duties around publication bans

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For Law Times

An Ontario Superior Court judge has found reporters have a positive duty to find out about the scope of a non-statutory publication ban even if the court doesn't set it out accurately in open court or post it in an easily accessible location.

Justice Duncan Grace made the finding in awarding \$40,000 in damages to a witness in a sexual assault trial whom the *London Free Press* identified in an online and print article about the case. The decision in *Doe v. Sun Media* is reportedly the largest reported damages award in Canada as a result of a breach of a publication ban.

Michael Lerner, who represented a woman identified only as Jane Doe in the civil action, suggests the award sends a message beyond the issue of breaching a publication ban. "It reinforces the fact that all court orders are to be taken seriously," says Lerner, a partner at Lerner's LLP in London, Ont.

The court originally ordered the publication ban in the fall of 2010 at the retrial of Gregory Last on sexual assault charges.

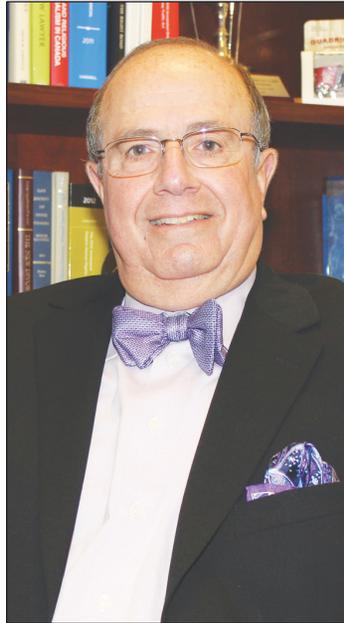
The court had already convicted Last of a separate sexual as-

sault in another proceeding a few weeks earlier where Doe wasn't a witness. In the second trial, Doe testified as a Crown witness. Superior Court Justice Alan Bryant, after a brief discussion with the Crown, agreed to impose a ban on anything that could identify the complainant and all non-police witnesses, including Doe. The judge didn't require the Crown to make submissions about the evidentiary basis for the expansive publication ban as required in the test set out by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.* and *R. v. Mentuck*.

Jane Sims, a reporter with the *Free Press*, was in the courtroom when Bryant issued his order. Sims wrote a story that day that included reference to the scope of the publication ban.

The court didn't prepare or distribute a formal order. The back page of the court copy of the indictment stated that there was an order restricting publication of evidence pursuant to s. 486.4(1) of the Criminal Code but didn't set out its terms.

The court adjourned the retrial for nearly five months after imposing the ban in October 2010. When it resumed, it was with the same Crown attorney, but the trial was now before Justice Lynne Leitch. She inquired in open court



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about publication orders, and Crown attorney Laurie Tuttle replied that there was a ban on anything that could identify the complainant. The ban on witnesses, including Doe, didn't arise.

After she testified, Doe's name appeared in the online and print versions of the *Free Press*.

Sims, an experienced reporter and a finalist for a National Newspaper Award this year for her coverage of the courts, testified in the civil action that she was "mortified" when she learned of the breach.

Grace agreed that her actions were inadvertent. "The case is an unfortunate one," wrote Grace in his ruling. He noted that the court file should have contained the full order read out months earlier by the registrar and the Crown wasn't "fully accurate" in the response about the scope of the ban.

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

Iain MacKinnon, who represented the *Free Press* and often acts for media organizations, says the decision makes clear that a reporter shouldn't rely only on what arises in court.

"It is not the Crown or court's responsibility. You have to go up and double check [the court file]," says MacKinnon, a partner at Chitiz Pathak LLP in Toronto.

Doe previously suffered from a number of psychological and other health issues, including drug and alcohol abuse. Members of Last's family knew her identity before the newspaper article identified her.

Following the article, she was confronted twice and called

a "rat" and a "snitch" and her anxiety levels increased.

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

The court heard that there are only three previous cases in Canada where judges awarded damages for a breach of a publication ban. All of them date back to the 1990s, with the highest award having reached \$19,000.

Doe was seeking \$75,000 to \$100,000 in damages.

The *Free Press* suggested \$1,000 to \$5,000.

The appropriate amount of damages turns on the facts of each case, says Lerner. But the decision in *Doe* "does open the door to increased damages" for violations of publication bans, he suggests.

Christopher Dawson, an associate at Lerner's who was also counsel for Doe, says the ease with which people can view newspaper articles and post them online may also affect the damages in any future case.

"There is now a potential for the information to be replicated and shared far beyond the geographical area" of the original publication, says Dawson. **LT**