Becoming Jane or John Doe: Can Civil Litigants Use a Pseudonym to Protect Their Privacy?

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Whether litigants are suing or being sued, one of the first sacrifices they make is their privacy regarding the matters in dispute. The resulting public revelations can sometimes lead to embarrassment, or worse, which has been described as "an unavoidable consequence of an open justice system."[1]

Today's increased recognition of the importance of privacy interests may seem at odds with the limited recognition they receive in civil litigation. Litigants often ask, "Can I shield my identity from the public?" Usually, the answer to this question is no. The importance of an open court system is normally the overarching public policy imperative. The open court principle has been described as "the very soul of justice."[2]

Court processes exist, however, through which litigants can ask that their privacy be recognized. One such measure is to allow them to protect their privacy by using a pseudonym or initials instead of their legal name. Doing so is a protection against the public, not the opposite party. An examination of the developed law reveals that the use of initials or a pseudonym is not driven by the interests of protecting privacy *per se*, though there are suggestions that it may yet develop in that direction. This article explores and enumerates the limited circumstances in which a party can proceed using his or her initials, or become, for the purposes of the record, Jane or John Doe. For convenience, in this article we refer to both initials and Jane or John Doe as the use of "pseudonyms."

The Principle of Openness

A would-be Jane or John Doe must contend first with the strong presumption in favour of the "openness" of the courts, particularly in respect of judicial acts. In *MacIntyre v. Nova Scotia (Attorney General)*,[3] Justice Dickson (as he then was) quoted Jeremy Bentham's rationale for this presumption:

> *In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.*[4]

The presumption of openness is usually sufficient to dispose of the argument that the privacy rights of a party should be protected. As Dickson J. held,

> *Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well-established, however, that covertness is the exception and openness the rule. Public confidence in the integrity in the court system and understanding of the administration of justice are thereby fostered.*[5]

MacIntyre was a case about public access to executed search warrants and related informations, but the reasons advanced for the presumption of openness also apply in the civil context.[6] In civil litigation, judges determine the rights of parties, and these judicial determinations are not truly open to public scrutiny if the identity of one of the parties is a secret. In consequence, subrule 14.06(1) of Ontario's *Rules of Civil Procedure*[7] requires that the title of every court proceeding set out the names of all parties.

Openness is not merely a matter of guarding against "judicial injustice," as Bentham called it. Courts have observed that the use of pseudonyms gives rise to other concerns:

> *It is easier for false allegations against innocent defendants to be maintained if plaintiffs are not exposed to the full glare of public scrutiny. And an action involving an unnamed plaintiff will minimize the opportunity for third parties to come forward with knowledge of the case. This latter concern could work to the benefit or the detriment of either side in the case.*[8]

The issue of third parties coming forward is not a concern about moral hazards affecting the judge or a party; rather, it is a concern about an impairment of the court's ability to discover the truth.

Each of these considerations informs the strong presumption in favour of openness and militates against the use of pseudonyms in civil litigation.

Nor is consent of the parties alone sufficient to obtain an order. Often, all parties would be happy to litigate in private. The court, however, must consider the interests of the public.[9]

The Exceptions

While Rule 14 requires that the parties to a civil action be named, subrule 2.03 provides that the court "may, only where and as necessary in the interests of justice, dispense with compliance with any rule at any time." This rule provides a starting point to seek an order to use a pseudonym, but the onus rests with the party seeking to do so.[10]

The presumption in favour of openness and against the use of pseudonyms can be overcome in some circumstances, including to prevent harm and to protect the innocent. The use of pseudonyms may also be allowed to protect confidentiality when the very purpose of the action is to protect confidentiality. Finally, there may be some scope for new exceptions, such as the use of pseudonyms in the context of anonymous Internet activity. Each of these circumstances is discussed below.

(i) The Prevention of Harm and the Protection of the Innocent

A party will be permitted to use a pseudonym if it is established that he or she would otherwise likely suffer irreparable harm. The court has employed a three-part test, based on the test for an interlocutory injunction:[11]

> *(1) whether there is a serious issue to be tried;*
>
> *(2) the likelihood of irreparable harm; and,*
>
> *(3) the balance of convenience.*[12]

The heart of this test is the inquiry into the likelihood of irreparable harm, and the evidence before the court on the motion will be important. This is illustrated by two decisions of the Ontario Superior Court of Justice involving Dr. Stubbs, a plastic surgeon who performed penile enhancement surgery. Two of Dr. Stubbs' patients were dissatisfied with the results of their operations. Each sought to sue using a pseudonym. They also sought orders banning the publication of their names and any identifying information.[13]

In the first *Stubbs* action, the motion was supported by the affidavit of a treating psychiatrist.[14] Because the psychiatrist concluded that the disclosure of the plaintiff's identity could be very traumatic for the plaintiff, the Court concluded that the second stage of the test had been met and, ultimately, granted the order.

In the second *Stubbs* action, the plaintiff provided no evidence of irreparable harm other than his own stated concern that he would be embarrassed.[15] The Court concluded that this evidence was insufficient, since "the subjective feelings of the plaintiff cannot be the test for giving an anonymity order."[16] An approach based on subjective feelings, the Court held, would "open the floodgates for preliminary motions for anonymity orders."[17]

The *Stubbs* decisions highlight the importance of proving the likelihood of irreparable harm. This is true not only regarding the unusual facts of the *Stubbs* cases, but also regarding the far more common circumstance of civil sexual assault claims. In the recent case of *Jane Doe v. D'Amelio*,[18] Justice Nolan of the Ontario Superior Court of Justice held that, in the absence of medical or psychological evidence, the plaintiff's own affidavit evidence of irreparable harm was an insufficient basis for granting the anonymity order sought.[19] Overcoming the presumption of openness "requires clear and compelling evidence."[20]

A similar conclusion was reached in *John Doe v. B(S)*,[21] in which the Supreme Court of Newfoundland and Labrador refused an order permitting a plaintiff to commence an action using a pseudonym. The intended defendant was the plaintiff's employer, who was later convicted of sexually abusing the plaintiff. However, no evidence of harm was provided on the motion. The Court observed that the embarrassment caused by the publicity surrounding the evidence that is likely to be submitted is not sufficient reason to make the order.[22]

The third stage of the test involves determining the balance of convenience. The two *Stubbs* decisions differ on the test to be applied. In the first *Stubbs* case, the Court held that the balance of convenience is not between the parties but "between the plaintiff and the public."[23] In the second *Stubbs* case, the Court held that this stage of the test also requires an assessment of the balance of convenience between the plaintiff and the defendant.[24] In that case, Justice Cumming found that

> *[a]s a general proposition, it is probable that witnesses are more likely to be truthful in their testimony if they know it is subject to being scrutinized by an audience within the context of their identity being known.*[25]

The protection of plaintiffs is also important in determining the balance of convenience. In *J. Doe v. TBH*, both the plaintiff, a victim of sexual assault, and the defendant, a publicly funded agency, sought permission to use pseudonyms. The Court held that victims of sexual assault were innocent victims who could be protected at the cost of public accessibility of the court system.[26] In making this finding the Court relied on *MacIntyre*, in which protection of the innocent was identified as a social value of superordinate importance.[27] It is unclear whether *J. Doe v. TBH*, which was decided before *Jane Doe v. D'Amelio* and both *Stubbs* cases, would be decided the same way today, absent evidence of harm. In *J. Doe v. TBH*, the defendant was unsuccessful. Even though the agency was a charitable organization doing "very good work and caught up in a situation not of their own making," this social value was not of sufficient importance to justify making the order.[28]

The key to obtaining an order on this basis appears to be good evidence of irreparable harm — more than mere embarrassment. The court will balance that harm against the other interests at stake. Privacy is not a focal point of the test.

(ii) Protection of Confidentiality

A court may also permit the use of a pseudonym where disclosure of the plaintiff's name would effectively destroy the right to the confidentiality that the plaintiff seeks to protect through an intended action. Put another way, confidentiality will be protected where "confidentiality is precisely what is at stake" in the action.[29]

This principle was articulated in *A.(J.) v. Canada Life Assurance Co.*,[30] which involved plaintiffs suing an insurer that had allegedly revealed the HIV status of the plaintiffs without their consent. The plaintiffs were allowed to proceed with the action under pseudonyms to ensure that justice was done.[31]

This exception appears to be grounded in the principle that there is no right without a corresponding remedy. If the right to keep information confidential could be vindicated only by disclosing the confidential information through court proceedings, then the right itself would be useless.

(iii) Anonymous Internet Activity

Another (and as yet only potential) basis for proceeding under a pseudonym involves disclosure orders in cases of anonymous Internet activity.

The Federal Court of Appeal raised this potential basis for an anonymity order in *BMG Canada Inc. v. John Doe*.[32] In *BMG*, Canadian music producers wished to bring an action against certain persons who they had reason to believe were infringing copyright through "music sharing" on the Internet. The producers did not know the identities of the prospective defendants, who used pseudonyms for their online activities. To identify the prospective defendants and serve them with a claim, the producers sought an order for third party discovery against the prospective defendants' Internet service providers ("ISPs").

Citing privacy concerns and the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"),[33] the ISPs refused to provide the names of their clients without a court order. The Federal Court of Appeal held that, as part of the test for granting an order, "the public interest in favour of disclosure must outweigh the legitimate privacy concerns of the person sought to be identified" and that, in the circumstances of the case, the balance favoured disclosure of the identity of the prospective defendants.[34] The Court then made the following observation:

> *[I]t must be said that where there exists evidence of copyright infringement, privacy concerns may be met if the court orders that the user only be identified by initials, or makes a confidentiality order.*[35]

Despite this reference to the possibility of an order permitting the use of a pseudonym, seeking that order has not been common practice in the cases that follow *BMG*, and there is no reason to assume that the order would be automatic. Yet it is interesting to see that privacy interests in anonymous music sharing may be worthy of that protection. If that is so, a more compelling case would be available with respect to anonymous Internet speech, which is founded on the *Charter* right of freedom of expression.

No case appears to have yet raised *Charter* rights in the context of a litigant seeking to use a pseudonym in civil litigation. It has, however, long been recognized in the United States that anonymity is a component of free speech. This principle was developed before the Internet and recognizes that from time to time throughout history, people have been able to criticize oppressive practices and laws either anonymously or not at all. The United States Supreme Court has said, "It is plain that anonymity has sometimes been assumed for the most constructive purposes."[36] Although there is not the same long jurisprudential history in Canada, the relationship between freedom of expression and anonymity was considered in the *Elections Canada v. National Citizen's Coalition* case,[37] in which the Ontario Court of Justice found that the removal of individuals' right to remain anonymous constituted an unjustified breach of the *Charter* right to freedom of expression.

It must be recognized, however, that the principle of open courts is also tied to the *Charter* right of freedom of expression. As the Supreme Court of Canada stated in *CBC v. New Brunswick*, "openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings."[38]

When the activity at issue is anonymous Internet activity, it remains to be seen the extent to which a case will be made for the use of pseudonyms. Usually, a party seeks to use a pseudonym to obtain protection from the world at large, not the opposite party (who would know the identity of the party seeking a pseudonym). It is difficult to see why the world at large ought not to know that someone is music sharing. But a more compelling case could be made that anonymous speech may call for this protection, particularly where anonymity is sought out of fear of reprisal.

The Reach of the Right to Privacy

Since the *MacIntyre* decision of the Supreme Court of Canada, now 30 years ago, our legal system has increasingly recognized privacy. Legislative change has come through the introduction of *PIPEDA* and other privacy legislation in Canada. The courts have made clear that the *Charter* includes an expectation of privacy under both ss. 7 and 8.[39] Society now demands privacy protection in many business relationships. Yet the cases about the use of pseudonyms demonstrate that the assertion of a privacy interest alone has not been enough. The countervailing public interest in an open court system is a strong one, repeatedly affirmed since *MacIntyre*.[40]

As the trend toward increased privacy protection continues, the courts may have to consider that issue directly and determine whether privacy should have greater recognition and, if so, in what circumstances.

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1 *B.(A.) v. Stubbs*, [1999] O.J. No. 2309, 44 O.R. (3d) 391 at para. 23 [*Stubbs* 1999].
2 *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522 at para. 52 [*Sierra Club of Canada*].
3 [1982] S.C.J. No. 1, [1982] 1 S.C.R. 175 [*MacIntyre*].
4 *Ibid.* at para. 53.
5 *Ibid.* at para. 59.
6 *Ibid.* at para. 62.
7 R.R.O. 1990, Reg. 194.
8 *Re John Doe*, [2005] N.J. No. 394, 2005 NLTD 214 at para. 17.
9 See, for example, the comments of Steele J.A. in the Manitoba Court of Appeal in *Jane Doe v. Manitoba*, [2005] M.J. No. 151, 2005 MBCA 57.
10 *Jane Doe v. D'Amelio*, [2009] O.J. No. 4042, 98 O.R. (3d) 387 at para. 10.
11 *T.(S.) v. Stubbs*, [1998] O.J. No. 1294, 38 O.R. (3d) 788 at para. 29 [*Stubbs* 1998]; *Stubbs* 1999, *supra* note 1; *Jane Doe v. D'Amelio*, *supra* note 10.
12 *Supra* note 10 at para. 13.
13 *Stubbs* 1998 *ibid.* at para. 1; *Stubbs* 1999 *supra* note 1 at para. 1.
14 *Ibid.* at para. 22.
15 *Supra* note 1 at para. 26.
16 *Ibid.* at para. 27.
17 *Ibid.*
18 *Supra* note 10.
19 *Ibid.* at paras. 20, 22.
20 *Ibid.* at para. 20.
21 *Supra* note 8.
22 *Ibid.* at para. 6.
23 *Supra* note 11 at para. 55.

[24] *Supra* note 1 at para. 35.
[25] *Ibid.* at para. 36.
[26] [1996] O.J. No. 839, 45 C.P.C. (3d) 1 at para. 5.
[27] *Ibid.* at para. 4.
[28] *Ibid.* at para. 9.
[29] *A.(J.) v. Canada Life Assurance Co.*, 70 O.R. (2d) 27 at para. 21 (H.C.J.).
[30] *Ibid.*
[31] *Ibid.*
[32] [2005] F.C.J. No. 858, 2005 FCA 193.
[33] S.C. 2000, c. 5.
[34] *Supra* note 32 at paras. 36, 42.
[35] *Ibid.* at para. 45.
[36] *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960).
[37] *Canada (Elections Canada) v. National Citizen's Coalition*, [2003] O.J. No. 3420 at paras. 18, 20-21, 34, 36-38, s. 1 analysis [2003] O.J. No. 3939 at paras. 29-30, 32 (Ont. C.J.).
[38] [1993] 3 S.C.R. 480 at para. 23.
[39] *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427; *Cheskes v. A.G. Ont.*, [2007] O.J. No. 3515 at para. 112 (Ont. S.C.J.).
[40] See, for example, *Sierra Club of Canada*, *supra* note 2.