

CHATELAIN

Bill Cosby is suing his Canadian accuser. Can Ghomeshi sue his?

Cosby has launched a lawsuit against Andrea Constand. If Jian Ghomeshi is acquitted, here's what legal action he could take.

Feb 19, 2016 Sarah Boesveld ■

As the criminal case against Bill Cosby moves ahead, the comedian **has launched** one of the few counterattacks left at his disposal: A lawsuit against his Canadian accuser, **Andrea Constand**.

Cosby is suing Constand, her mother and the *National Enquirer* tabloid for breaking a confidentiality agreement drawn up in 2006 — their participation in the revived criminal investigation into whether he drugged and sexually abused Constand, he argues, amounts to a breach of contract.

While Canada's legal system prevents the same kind of action, the move raises an interesting question as the nation awaits a decision in the Jian Ghomeshi trial: Could the former CBC personality sue the women who brought him to court?

He definitely can — and the complainants in the Ghomeshi case can sue him, too.

To explain the civil action that can follow a sexual assault trial, *Chatelaine* spoke with Susan Vella, one of Canada's leaders in the area of civil sexual assault law.

If he's acquitted, Ghomeshi can file a defamation suit against the women who complained to police. This has been a "revived strategy" for people acquitted of sexual assault, Vella says, and could be particularly relevant in a high-profile case such as this. In 2013, two Ancaster, Ont. sisters were **ordered to pay** their uncle \$125,000 in damages after a judge found he had not sexually abused them as children. "There was a huge outcry about that, and [concern about] a chilling effect," Vella says. "But there are a lot of qualifiers to that type of action." Whatever a witness says in court before a judge cannot be considered defamatory. Neither can what they say in

private to a family member, therapist or someone in a “support” role. But if they maliciously spread lies, it’s a different story, Vella says, and can be grounds for defamation. Statements in the media about the accused are often fair game for a defamation suit.

Ghomeshi’s other option could be a malicious prosecution lawsuit, though those are very hard to win, according to Vella. “[The plaintiff] would have to demonstrate that the complainants went to the police maliciously, that they didn’t ever believe he was a perpetrator, but they went and said he was,” she says. A suit could also be filed against police and the Crown for bringing charges that did not have a reasonable chance of conviction, but that would only succeed if there was malicious intent. For example, if the police knew about a statement recanting her story but “buried it,” Vella says.

The complainants can sue Ghomeshi whether he is convicted or acquitted. If he’s convicted, they don’t have to prove his guilt — the civil court would uphold Justice Horkins’ finding. It’s a place they can find remuneration for psychological trauma, loss of income or betrayal of trust, Vella says. If he’s acquitted, it’s a place to find justice — particularly since an acquittal is not actually a finding of innocence in the eyes of the law. “You start fresh,” says Vella. “The plaintiffs have to prove that it’s more likely than not the defendant sexually touched them without their consent.” The defendant has to prove he didn’t.