Is the defence of absolute privilege available for communications in advance of litigation?

A lawyer acting in a judicial proceeding on a party's behalf enjoys absolute immunity from defamation claims.

For example, representations made by counsel to the court, and evidence filed with the court, are absolutely privileged.[1] Pleadings are absolutely privileged, at least insofar as they are used in the ordinary course of the administration of justice.[2] Facta prepared by counsel and filed with the court are also absolutely privileged.[3]

A New York attorney who provided Ontario solicitors with a copy of a RICO complaint pending against the plaintiffs in New York was also entitled to avail himself of the protection of absolute privilege. The Ontario solicitors had requested a copy of the complaint for use in the Ontario litigation.[4]

The law in Ontario is less clear about the circumstances in which absolute privilege is available to parties and their lawyers with respect to communications made in advance of the commencement of litigation. Absolute privilege was held to attach to a draft statement of claim forwarded to a party: *Dingwall v. Lax*.[5] The court held that this pre-litigation communication was so "intimately connected to a judicial proceeding the institution of which was being seriously considered" that it was an acceptable extension of absolute privilege.

However, in *Moseley-Williams v. Hansler Industries Ltd.*,[6] Cullity J. suggested that a party did not enjoy absolute immunity when it instructed counsel to forward a letter to the plaintiff and others warning them that they were engaged in improper sales activity and advising them that if they did not immediately desist in this conduct the defendant would pursue such legal rights as it deemed appropriate, including the recovery of damages and injunctive relied. The court concluded that this was no more "than a contemplation of the possibility of litigation without any definite, or conditional decision to embark on this course."

Professor Raymond E. Brown, one of Canada's foremost authorities on defamation law, disagrees with this approach. In his view, the warning given in *Moseley-Williams* was the kind of warning that always precedes litigation, and should be treated as contemplating litigation even if the decision to litigate is not included in the warning. To require express language to that effect is to favour form over substance. While counsel was not joined as a defendant in this action, the position of the client and counsel is the same.

In Professor Brown's opinion, whatever abuses there may be in insulating the various participants from an action for defamation for statements made in advance of the litigation can be minimized by insuring the good faith and seriousness of counsel and parties in commencing a lawsuit, the relevance of the communication to the prospective litigation, and the fact that only the technicality of filing the statement of claim separates the absolute as against the qualified immunity afforded counsel, client and prospective witnesses.[7]

From a defendant's perspective, the protection of absolute privilege is greatly preferable to that of qualified privilege. Where a defendant solicitor can show that his or her communication was made on an occasion of absolute privilege, the plaintiff's action will be summarily dismissed. A defence of qualified privilege requires a factual inquiry into the presence or absence of malice.

1522491 Ontario Inc. v. Stewart, Esten Professional Corporation[8] illustrates this point.

The Divisional Court allowed Stewart, Esten's appeal from the decision of Justice Pitt, who refused to strike out the plaintiff's defamation action against the firm. It argued that the communication forming the basis for the defamation claim was absolutely privileged. The Divisional Court agreed. Where a communication is made on an occasion of absolute privilege, the alleged impropriety of the solicitor's motives are irrelevant and cannot be the subject of inquiry.

The facts of the case were that two real estate developers were engaged in a dispute about a parcel of land. Stewart, Esten acted for one of them. The plaintiff in the action was the other developer.

The alleged defamatory communications were contained in a letter and a draft statement of claim attached to it. The letter was addressed to a town planner, who later that day swore an affidavit that Stewart, Esten used to obtain a certificate of pending litigation against the disputed land. The statement of claim was issued the following day.

Justice Pitt refused to strike out the statement of claim against Stewart, Esten pursuant to Rule 21. Pitt J. held that the closeness in time of the communication with the issuance of the statement of claim and the identity of the person as an important witness who that day swore an

affidavit used in connection with the action were not, by themselves, dispositive of the issue of absolute privilege. He wrote that a communication made prior to the issuance of the statement of claim that contained gratuitously defamatory material that was clearly irrelevant to the issues in the lawsuit might not attract protection grounded on absolute privilege. Nor is absolute protection afforded to a communication, the objective of which was to induce or facilitate perjured or merely factually false testimony.

Justice Ferrier, who wrote the judgment of the Divisional Court, held that Justice Pitt erred in law in focussing on the nature of Stewart, Esten's conduct, rather than the occasion on which the conduct occurred. If the statements were made on an occasion of absolute privilege, the solicitor's motives are irrelevant and cannot be the subject of inquiry. Several circumstances or factors may support a finding that the occasion upon which the communication was made was one of absolute privilege.

They are:

(i) Steps have been taken to prepare for litigation when the communication was delivered: *Moseley-Williams v. Hansler Industries Ltd.*, [2004] O.J. No. 5253, para. 44;

(ii) The decision to litigate has already been made: *Moseley-Williams*, para 44;

(iii) The defendant commenced legal action shortly after the publication of the alleged libelous statements: *Moseley-Williams*, para. 44; *G.W.E. Consulting Group v. Schwartz* (1990) 66 D.L.R. (4th) 348 (Ont.H.C.) at para 35;

(iv) The defamatory statements were made for the purpose of obtaining evidence: *Moseley-Williams*, supra, at paras 43-44; *G.W.E., supra,* at para 33;

(v) The communications were made in the course of a solicitor's investigation of a client's case with a view to litigation, and were directed to a limited audience from whom the solicitor anticipates obtaining relevant or potentially relevant information: *Moseley-Williams*, *supra*, at para. 48; *G.W.E. supra*, at para 33; *Dingwall, supra*, at para 26; *Fuss v. Fidelity Electronics of Canada*, [1996] O.J. No. 161 (Ont.Ct.Gen.Div.), per *MacKinnon J.* at para 7; *Lubarevich v. Nurgitz,* [1996] O.J. No. 1457 (Ont.Ct.Gen.Div.), per G.D. Lane J. at para 22.

Justice Ferrier found that all five factors applied in this case. The occasion was therefore one of absolute privilege. The alleged impropriety of the solicitors' motives was therefore irrelevant and could not be the subject of judicial inquiry.

While the Stewart, Esten case does not resolve the difference of opinion between Justice Cullity and Professor Brown, it does illustrate the protection absolute privilege affords to litigation counsel, where counsel can bring themselves within its ambit.

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[1] *Admassu v. Macri*, 2010 ONCA 99

[2] *Dooley v. C.N. Weber Ltd.* (1994), 19 O.R. (3d) 779 (Ont. Ct. Gen. Div.) See *Hill v. Church of Scientology*, (1994) 18 O.R. (3d) 385 (C.A.). wherein the Court of Appeal refused to extend privilege to a solicitor who read out to reporters motions material which had not yet been filed with the court.

[3] *Web Offset Publications v. Vickery*, (1999) 40 O.R. (3d) 527 (Ont. Div. Ct.)

[4] *Web Offset Publications v. Vickery* (1999) 43 O.R. (3d) 802 (C.A.)

[5] (1988) 63 O.R. (2d) 336.

[6] [2004] O.J. No. 5253, 2004 Carswell Ont. 5827 (S.C.J.), affirmed on other grounds (2005), 2005 CarswellOnt.991, at para. 46

[7] *The Law of Defamation in Canada – Second Edition* – looseleaf at 12-152.

[8] 2010 ONSC 727 (CanLII), reversing the decision of Pitt, J., 2008 CanLII 63198 (On.S.C.). Leave to Appeal to the Divisional Court was granted by Karakatsanis J., 2009 CanLII 15656 (ON S.C. Div.Ct.),