

Lawyer's letter protected from defamation claim by absolute privilege (*Neve v. Adams*)

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Lawyers writing to third parties for information about their clients' dispute may need to refer to the nature of the allegations at issue against adverse parties. The parties who are the subject of such correspondence may feel that they have grounds to pursue a claim for defamation based on the nature of the allegations, particularly if matters have yet to be determined.

Before commencing a claim in that regard, however, the doctrine of absolute privilege should be considered as the communications may well be immune from attack, as demonstrated by the motion decision in *Neve v. Adams*, 2024 ONSC 6117 (CanLII).

The motion arose in a defamation action between shareholders of two private corporations. Before the action was commenced, the defendants' lawyer wrote to the long-standing accountant for the corporations, stating that her clients were in the process of commencing a court proceeding against the plaintiff, and intended to seek various orders against him. The letter stated that the allegations against the plaintiff related to, amongst other things, "payments and transactions improperly taken and entered into by him." The letter further noted that the plaintiff had denied the allegations.

The plaintiff subsequently served the defendants with a libel notice referring to the letter and sued them for defamation.

In response to the claim, the defendants took the position that the statements in their lawyer's letter were communications protected by absolute privilege.

The definition of "absolute privilege" in *Halsbury's Laws of England*, vol 28, 4th ed. (London, UK: Butterworths, 1997), as adopted by the Court of Appeal for Ontario in *Amato v. Welsh*, 2013 ONCA 258, at paragraph 34, is as follows:

No action lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognised by law. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, whether oral or written, relevant or irrelevant, malicious or not.

One underlying policy of absolute privilege is to create a "zone of protection" for lawyers acting in pursuit of their clients' interests, as lawyers must be free to present their clients' cases without fear of a lawsuit: *Wickham v. Hamdy*, 2019 ONSC 1960 (CanLII), at paragraph 35. As such, absolute privilege is not confined to statements made in court but extends to all preparatory steps and communications made with a view to judicial proceedings so long as they are directly concerned with actual or contemplated proceedings.

The defendants brought a motion under Rule 21.01(1)(a) of the Ontario *Rules of Civil Procedure*, which provides that a party may move for a judicial determination before trial of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs.

For the motion, the defendants relied on an affidavit sworn by one of the defendant shareholders, which stated that the defendants had made the decision to sue the plaintiff before their lawyer sent the letter to the corporations' accountant. The affidavit stated that they made a decision to "pause" the litigation when they were served with the libel notice.

Generally, no evidence is admissible on a motion under Rule 21.01(1)(a) without leave. However, the plaintiff did not seek to cross-examine the affiant, and the motion judge reasoned that its contents were therefore not in dispute. The motion judge admitted the affidavit into evidence on the basis that it would assist the court in determining whether the allegedly defamatory statements were communicated during an occasion of privilege.

The motion judge assessed the contents of the letter at issue to determine whether it was preparatory to or intimately connected with a judicial proceeding, referring to the five factors for determining if the occasion was one of absolute privilege, namely whether:

- i. Steps had been taken to prepare for litigation when the communication was delivered;
- ii. The decision to litigate had already been made;
- iii. The defendant commenced legal action shortly after the publication of the alleged libelous statements;
- iv. The defamatory statements were made for the purpose of obtaining evidence; and
- 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.

In the motion judge's view, the statements in the letter at issue were protected by absolute privilege. Steps had been taken to prepare for litigation as the defendants had retained the lawyer to assist them in the ongoing dispute with the plaintiff. The letter stated that the decision to litigate had already been made. The defendants were in the process of commencing a court proceeding against the plaintiff to seek various orders against him before receiving the libel notice. The underlying issues remained outstanding.

The allegedly defamatory statements were also made for the purpose of obtaining evidence. The letter contained a list of documentary evidence being sought, including bank statements and corresponding invoices/receipts for charges.

Lastly, the letter was written during the course of counsel's investigation of her clients' case with a view to litigation. The letter was addressed and directed only to a "limited audience" consisting of the accountant and the plaintiff's lawyer, who was copied on the letter.

In the result, the motion judge concluded that the contents of the letter and the circumstances in which it was sent caused the communication to be protected by absolute privilege and it was plain and obvious that the defamation action could not succeed.

The decision is a cogent example of the protection granted to statements in a letter written by a party's litigation lawyer. The plaintiff's statement of claim was struck without leave to amend. The underlying dispute between the shareholders has yet to be adjudicated. A PDF version is available for download [here](#).

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