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CITATION: Amato v. Welsh, 2011 ONSC 3364
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**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: DAVID AMATO and S.A. CAPITAL GROWTH CORP.

Plaintiffs (responding parties)

AND:

PETER R. WELSH, AYLESWORTH LLP and JULIA DUBIN

Defendants (moving parties)

BEFORE: Mr. Justice Lederer

COUNSEL: *R.P. Agarwal*, for the Plaintiffs/responding parties

Peter C. Wardle & Simon Bieber, for the Defendants/moving parties

HEARD: April 18, 2011

ENDORSEMENT

[1] It has long been understood that an absolute privilege protects lawyers from action for words spoken in the ordinary course of any proceeding, before any court or judicial tribunal recognized by law.

[2] This is a motion for leave to appeal a decision in which the judge refused to strike out certain paragraphs in a Statement of Claim to which it is said the privilege applies.

[3] The plaintiffs were the victims of a Ponzi scheme. They loaned money to the perpetrators of the scheme on the promise of returns of approximately 25%. The scheme was apparently orchestrated by Robert Mander, who retained the defendants to act as his counsel. The plaintiffs plead that, on the recommendation of Mander, they, too, retained the defendants.

[4] The Ontario Securities Commission (“OSC”) initiated an investigation in respect of the scheme. They sought to interview Mander and an associate, Peter Sbaraglia. The defendant, Julia Dublin, a partner at the defendant, Aylesworth LLP, was one of two lawyers who represented Mander and Sbaraglia at the interviews. The plaintiffs say that, at the time the interviews took place, they remained clients of the firm. The plaintiffs allege that, during the interviews, the lawyers made representations that resulted in their breaching the duty they owed to the plaintiffs. In support of these allegations, the Statement of Claim contains pleadings that rely on what was

said and not said by the lawyers during the course of the interviews. The defendants rely on the absolute privilege to say that these paragraphs should be struck.

[5] The Court of Appeal has explained the privilege 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 recognized 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. The privilege extends to documents properly used and regularly prepared for use in the proceedings. Advocates, judges and juries are covered by this privilege. However, a statement will not be protected if it is not uttered for the purpose of judicial proceedings by someone who has a duty to make statements in the course of the proceedings.

...

The immunity extends to any action, however framed, and is not limited to actions for defamation.¹

[6] The policy rationale for the immunity has been described as:

...And absolute privilege attaches to statements made in the course of judicial proceedings because it is an indispensable attribute of the judicial process. It is necessary that persons involved in judicial proceedings, whether judge, jury, parties, witnesses or legal representatives, be able to discharge their duties freely and without fear of civil action for anything said by them in the course of the proceedings. Were civil liability to attach or be capable of attaching, it would impede inquiry as to the truth and justice of the matter and jeopardize the 'safe administration of justice'.²

[7] It has been said that this rationale is heightened in cases involving statements made by counsel:

...it seems to me that a counsel has a special need to have his mind cleared from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider, whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry

¹ *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.* (1999), 38 C.P.C. (4th) 297, at paras. 19 and 20 (Ont. C. A.)

² *Mosley-Williams v. Hansler Industries Ltd.*, 2004 CarswellOnt 5827 at para. 27 (Ont. S.C.J.)

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with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law, is privileged; and the reason of that rule covers a counsel even more than a judge or a witness.

...

*With regard to counsel, the question of malice, bona fides, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once.*³

[Emphasis added]

[8] The motions judge understood that the privilege applied to the proceedings of the OSC, including the interviews:

It is clear that the characterization of the OSC as a quasi-judicial body is apt. It is also clear that the statements referred to in the impugned paragraphs of the Statement of Claim took place during, and incidental to, quasi-judicial proceedings. There is no doubt that the doctrine of absolute privilege pertains to communications made in the course of a formal investigation into a complaint to the OSC.⁴

[9] Nonetheless, he dismissed the motion to strike the paragraphs in the Statement of Claim that pertained to the comments made (and not made) by the lawyers at the interviews. The judge was concerned that the lawyers were seeking to rely on the privilege in respect of statements they were under no compulsion to make:

Furthermore and perhaps more importantly, it is not clear that the Aylesworth Defendants had any duty to make any statement during the course of the OSC investigation, or for that matter even to attend before the OSC. If they attended voluntarily and then made voluntary statements or stood silent in a manner that

³ *Munster v. Lamb* (1883), 11 Q.B.D. 588, at pp. 603-605, as quoted in *Dooley v. C.N. Weber Ltd.* (1994), 19 O.R. (3d) 779 at para. 14 (Ont. Gen. Div.)

⁴ *Reasons of the Motion Judge*, at para. 7

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amounted to a breach of duty or breach of fiduciary obligation to the plaintiffs, it seems to me manifestly unjust that they should be able to use the doctrine of absolute immunity as a shield.⁵

[10] The judge left it for the trial judge to determine how the evidence of what happened at the interviews should be dealt with:

In my view, it is preferable that a trial judge deal with this issue as a question of admissibility of evidence rather than hiving off part of the plaintiff's claim at this early stage.⁶

[11] This approach is based on the understanding that, despite the fact that the statements at issue were made in the course of a quasi-judicial proceedings to which the absolute privilege applies, it is possible that, in the particular circumstances, the privilege did not apply. The proposition is that the privilege, while it exists, is not absolute. Counsel for the plaintiffs, the responding parties, says that this is demonstrably so. He relied on this quotation from *Demarco v. Ungaro*⁷:

The last consideration to be dealt with is the *perceived anomaly related to the absolute privilege enjoyed in respect of anything said in Court by a lawyer*. I confess that *I am unable to appreciate why it should follow from the existence of that privilege that a lawyer may not be sued by his or her client for the negligent performance of the conduct of the client's case in court*. The privilege, a fundamental aspect of the law of slander, is not concerned with relationships among persons. It relates to legal proceedings in open Court. The special relationship of lawyer and client is not involved as it is, of course, when one is considering the law of negligence.

[Emphasis added]

[12] The case is distinguishable. It did not deal with what was said but, rather, the manner in which the case was conducted. The question the judge considered was whether a lawyer, in the conduct of a trial, "is alone among all other professional persons, incapable of being sued by the client for negligence."⁸ The immediate issue was whether the lawyer could be sued for negligence for failing to lead evidence which he knew was available and would have supported the position of the client⁹. The quotation to which I have referred above and on which counsel for

⁵ *Reasons of the Motion Judge*, at para. 19

⁶ *Reasons of the Motion Judge*, at para. 18

⁷ [1979] O.J. No. No. 4011; 21 O.R. (2d) 673 at para. 29

⁸ *Demarco v. Ungaro*, at para. 2

⁹ *Demarco v. Ungaro* at para. 4

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the plaintiff relied, makes the point that the privilege does not extend to the negligent performance of the lawyer in the conduct of the case of his or her client. It does not say that the privilege does not apply to what is said in the course of a judicial or quasi-judicial proceeding. In the case I am asked to consider, it is not being said that the plaintiffs cannot sue the lawyers. The Statement of Claim alleges the lawyers were negligent. Had the motion to strike succeeded, paragraphs making that claim would have remained. As the judge hearing the motion observed, the impugned statements "merely support or buttress a cause of action based on other independent facts which have been pleaded".¹⁰

[13] The limitation of the privilege to what was said (or, in this case, allegedly not said) was recognized when the motion was argued. In his endorsement, the judge quoted paragraph 38 of the Statement of Claim. It was among those the lawyers wished to have struck. It states:

In or about July of 2009 each of Sbaraglia and Mander were investigated by the OSC. At examinations in aid of those investigations, Dublin, along with another member of Aylesworth, represented both Mander and Sbaraglia.¹¹

[14] In oral argument, counsel for the lawyers conceded that this paragraph does not attract the protection of the privilege. The motion to strike that paragraph was withdrawn. The fact that the investigations took place is separate from what the lawyers said at the interviews with the representatives of the O.S.C.

[15] Counsel for the plaintiffs goes on to say that, to employ the privilege as is being proposed here, would be contrary to the policy that underlies its existence: the duty of loyalty and zealous representation of one's client. In short, lawyers should not have immunity from their own clients. The duty of loyalty to a client should take priority over the protection afforded to the lawyer by absolute immunity. The judge on the motion observed that there is no authority to support that legal proposition, but neither was it addressed in the jurisprudence that was cited to him. There is a further complication. The clients that the lawyers were representing at the interviews were not the plaintiffs to this action. They attended on behalf of Mander and Sbaraglia. These clients also have the right to expect their counsel to represent them completely and not be constrained by the fear of a lawsuit that may be commenced by others. If the lawyers placed themselves in a position of conflict by acting both for the plaintiffs and Mander and Sbaraglia, that may be the subject of an action, but so far as I can see, there is nothing that says that the plaintiffs' interests should supersede those of the Mander and Sbaraglia such that the absolute privilege is lost and the plaintiffs are able to sue over what was said in interviews where others were being represented.

[16] The judge on the motion understood the uncertainty this situation presented. He said:

¹⁰ *Reasons of the Motion Judge*, at para. 18

¹¹ *Reasons of the Motion Judge*, at para. 4

There is no doubt that a client can sue his or her former lawyer based upon how that lawyer conducted an earlier proceeding. What is not clear is whether that cause of action can include statements that the lawyer made during the course of that proceeding. Nor is it clear whether absolute immunity applies to the lawyers' silence as opposed to what the lawyer said.¹²

[17] On this basis, he accepted the submission of counsel for the plaintiff that the doctrine of absolute immunity did not dictate the necessity of striking out any part of the Statement of Claim and left it for the trial judge to determine whether the evidence should be admitted.

[18] It is in these circumstances that Julia Dublin and the law firm seek leave to appeal.

[19] The authority to grant leave is governed by Rule 62.02(4) of the *Rules of Civil Procedure*, which says:

62.02(4) Leave to appeal shall not be granted unless,

- (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
- (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[20] On this motion, the moving parties, the lawyer and the law firm rely on both heads of the rule.

[21] For the purpose of these reasons, I rely only on Rule 62.02(4)(b). In relying on this provision, the moving party is not required to establish that the "decision is wrong or probably wrong". The threshold is lower. It is satisfied if the correctness of the decision is "open to very serious debate".¹³ This may be shown when the "legal test applied and factors considered by the motions judge... are novel, and not in accordance with established case law."¹⁴

¹² *Reasons of the Motion Judge*, at para. 15

¹³ *Brownhall v. Canada (Ministry of Defence)* (2006), 80 O.R. (3d) 91 (S.C.J.) at para. 30; and, *Canada Egg Marketing Agency v. Sunmylea Foods Ltd.* (1977), 3 C.P.C. 348 (Ont. H.C.), at paras. 13 and 14

¹⁴ 1642279 *Ontario Ltd. v. SCE Construction Management*, [2009] O.J. 4432 (Div. Ct.), at para. 8

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[22] It is well-established that statements to a judicial or quasi-judicial tribunal are subject to an absolute privilege such that no cause of action can arise from such statements.¹⁵ Moreover, the motions judge observed that there was no jurisprudence respecting the question of whether the duty of loyalty to a client should take priority over the protection afforded to a lawyer by the absolute immunity. He noted that it was not clear whether the cause of action could include statements made during a proceeding, conduct of which was the basis of the action. Thus, the matters he was asked to consider are novel.

[23] The first requirement of the test is met. There is reason to doubt the correctness of the decision.

[24] The question that remains is whether the issues are of such importance that leave to appeal should be granted. Why not just leave this, as the motion judge has, to the trial judge to determine whether the evidence should be admitted? To me, this is not a question of the admissibility of evidence but, rather, the application of a significant principle meant to allow counsel to carry out their responsibilities without fear or concern that he or she may be the subject of an action.

[25] The doctrine of absolute privilege is an "indispensable attribute of the judicial process" as it protects the "safe administration of justice" by encouraging counsel, witnesses, judges and experts to speak freely in judicial or quasi-judicial proceedings without fear of civil liability. As the motions judge determined, "If civil liability could be attached to what the person says in the course of those proceedings, it would impede inquiry into the truth and jeopardize the administration of justice".¹⁶

[26] If this is left to the trial judge, the material, information and statements which are the subject of the privilege will be required to be revealed and canvassed over the course of the discovery process in preparation for the trial. What was said? Why was it said? What information was it based on? In other words, the privilege will have been breached before it can be determined if it applies. On this basis, this is a matter of importance such that leave to appeal should be granted.

[27] For the reasons reviewed, leave is granted.

¹⁵ *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.* (1999), 38 C.P.C. (4th) 297 (Ont. C. A.); *Sussman v. Eales* (1986), 25 C.P.C. (2d) 7 (Ont. C.A.); *Fraliegh v. R.B.C. Dominion Securities Inc.* (2009), 99 O.R. (3d) 290 (S.C.J.); *Mosley-Williams v. Hansler Industries Ltd.* 2004 CarswellOnt 5827; and, *Dooley v. C.N. Weher Ltd.*, *supra*.

¹⁶ *Mosley-Williams v. Hansler Industries Ltd.*, *supra*, at para. 27; *Dooley v. C.N. Weher Ltd.*, *supra*, at paras. 19-22; and, *Reasons of the Motions Judge*, at para. 10

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[28] Pursuant to an agreement between the parties, I award costs to the moving parties (Julia Dublin and Aylesworth LLP) in the amount of \$5,000.


LEDERER J.

Date: 20110603