COURT OF APPEAL FOR ONTARIO

CITATION: Salasel v. Cuthbertson, 2015 ONCA 115
DATE: 20150220
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Hoy A.C.J.O., van Rensburg and Brown JJ.A.

BETWEEN

Parichehr Salasel, in her own capacity and as substitute decision maker and litigation guardian for Hassan Rasouli, Mojgan Rasouli and Mehran Rasouli

Appellants

and

Dr. Brian Cuthbertson, Dr. Gordon Rubenfeld and Dr. Richard Swartz

Respondents

J. Gardner Hodder, for the appellants

Erica J. Baron and Andrew McCutcheon, for the respondents

Heard: January 22, 2015

On appeal from the judgment of Justice Edward Morgan of the Superior Court of Justice, dated May 20, 2014, reported at 2014 ONSC 3071.

Brown J.A.:

I. OVERVIEW

[1] The appellants, Parichehr Salasel, in her own capacity and as substitute decision-maker and litigation guardian for her husband, Hassan Rasouli, and their children, Mojgan Rasouli and Mehran Rasouli, appeal from the Judgment of

Justice Edward Morgan dated May 20, 2014, in which he dismissed their action against the respondent physicians pursuant to Rule 21.01(3)(d) of the *Rules of Civil Procedure*.

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[2] In October, 2010, Mr. Rasouli suffered debilitating complications following surgery at Sunnybrook Hospital (the "Hospital"). He was kept alive by mechanical ventilation. The respondents, Dr. Brian Cuthbertson, Dr. Gordon Rubenfeld and Dr. Richard Swartz, were Mr. Rasouli's treating physicians. They recommended the withdrawal of mechanical ventilation from Mr. Rasouli. His family opposed that decision.

[3] As a result of that disagreement, two applications were commenced in the Superior Court of Justice – one by the Rasouli family and one by the physicians – over the issue of whether the physicians required the consent of Ms. Salasel, her husband's substitute decision-maker, or the approval of the Consent and Capacity Board ("CCB"), to withdraw the life-sustaining measures from Mr. Rasouli. Those cases proceeded through this court to the Supreme Court of Canada which, in its October, 2013 decision, held that the physicians were required to seek Ms. Salasel's consent to the withdrawal of the life-sustaining measures, failing which there had to be a ruling by the CCB: *Rasouli v. Sunnybrook Health Sciences Centre*, 2011 ONSC 1500, 105 O.R. (3d) 761; *Rasouli v. Sunnybrook Health Sciences Centre*, 2011 ONCA 482, 281 O.A.C.

183; and *Cuthbertson v. Rasouli*, 2013 SCC 53, [2013] 3 S.C.R. 341. I will refer to those proceedings as the "Prior Proceedings".

[4] The Supreme Court of Canada heard the appeal in the Prior Proceedings in December, 2012. On January 21, 2013, the appellants commenced this action. In it Mr. Rasouli seeks $1 million in special damages and $1 million in general, aggravated and punitive damages for intimidation, assault, negligence, abuse of process, breach of contract and breach of fiduciary duty. The Statement of Claim specifies that the special damages sought consist of the approximately $500,000 in legal fees spent "to keep Hassan alive". The other appellants seek damages of $250,000 each under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3, and for the intentional infliction of mental suffering.

[5] The respondent physicians brought a motion under Rule 21.01(3)(d) of the *Rules of Civil Procedure* to stay or dismiss the action on two grounds. First, the respondents argued that to the extent the action sought the recovery of legal fees incurred in the Prior Proceedings, it was barred by the doctrine of issue estoppel because it sought to re-litigate cost awards made in the Prior Proceedings. Second, the respondents contended that the balance of the claims were frivolous, vexatious or an abuse of process in that they were barred by the doctrine of absolute privilege. The motion judge accepted the respondents' submissions, found that the appellants' claims were barred by the doctrines of issue estoppel and absolute privilege, and dismissed the action.

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[6] For the reasons set out below, I would dismiss the appellants' appeal from the Judgment of the motion judge.

II. ISSUES ON APPEAL

[7] The appellants raise the following issues on their appeal:

(i) The motion judge erred in finding that the doctrine of issue estoppel applied to prevent them from claiming, as special damages in this action, the difference between the actual legal fees they had incurred and the costs they were awarded in the Prior Proceedings; and,

(ii) The motion judge erred in finding that a January 24, 2011, letter from counsel for the respondent physicians to counsel for Mr. Rasouli was written on an occasion of absolute privilege.

III. THE TEST UNDER RULE 21.01(3)(d)

[8] Rule 21.01(3)(d) of the *Rules of Civil Procedure* permits a defendant to move to stay or dismiss an action on the ground that "the action is frivolous or vexatious or is otherwise an abuse of the process of the court". Any action for which there is clearly no merit may qualify for classification as frivolous, vexatious or an abuse of process, with a common example being the situation where a plaintiff seeks to re-litigate a cause which has already been decided by a court of competent jurisdiction. A court only invokes its authority under rule 21.01(3)(d) or pursuant to its inherent jurisdiction to dismiss or stay an action in the clearest of cases: *Currie v. Halton Regional Police Services Board* (2003), 233 D.L.R. (4th) 657 (Ont. C.A.), at paras. 17 and 18.

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[9] The motion judge was alive to those requirements, observing, at para. 20, that the rule required “a hard look at the factual background, and especially the position and conduct of the parties.”

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IV. FIRST ISSUE: DID THE MOTION JUDGE ERR IN DISMISSING THE APPELLANTS’ CLAIM FOR LEGAL FEES AS SPECIAL DAMAGES ON THE BASIS OF ISSUE ESTOPPEL?

(a) The appellants’ claim for special damages and the decision of the motion judge

[10] The determination of the Prior Proceedings in the Superior Court of Justice resulted in Himel J. making a consent cost award under which the respondent physicians paid Mr. Rasouli costs of $40,000. The Court of Appeal ordered the respondents to pay costs of $25,000. The Supreme Court of Canada made no award of costs, holding that the matter was one of public interest. The respondents paid the cost awards. In this action Mr. Rasouli seeks to recover, as special damages, his “extra costs”, consisting of the difference between the amount of the legal fees actually incurred in the Prior Proceedings and the amount awarded to him in the courts’ cost awards. The motion judge held that the doctrine of issue estoppel prevented the appellants from re-litigating their entitlement to any legal costs of the Prior Proceedings under the guise of a damages claim.

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[11] To invoke issue estoppel, a party must meet three pre-conditions: (i) the issue in the proceeding must be the same as the one decided in the prior decision; (ii) the prior judicial decision must have been final; and, (iii) the parties to both proceedings must be the same or their privies: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 23. The appellants acknowledge that the decision of the Supreme Court of Canada in the Prior Proceedings was a final one, and they accept that for purposes of their claim for legal fees as damages that the parties in the Prior Proceedings and the present action were the same or privies.

[12] The appellants submit that the motion judge erred in concluding that the issue regarding legal fees raised in this action is the same as that decided in the Prior Proceedings. In his reasons, the motion judge described the argument advanced by the appellants on this point as follows:

> [26] Counsel for the Plaintiffs submits that one of the important ingredients of issue estoppel is missing here in that the subject matter of the two proceedings is not truly the same. He contends that costs are tangential to the proceedings, and so therefore the prior proceeding and this proceeding do not raise the same issue. Citing the Court of Appeal's judgment in *Somers v Fournier* (2002), 60 OR (3d) 225, at para 19, he states that "costs of litigation are incidental to the determination of the rights of the parties. They are not part of the *lis* between litigants."

After reviewing and comparing the issues raised in the Prior Proceedings and the present action, the motion judge rejected the appellants' argument, holding:

> [27] An award of costs may not be the very subject matter of the litigation, but it is not incidental in the sense that the prior court did not specifically turn its mind to the issue. The costs awarded to Mr. Rasouli by Himel J. and by the Court of Appeal, and the denial of costs by the Supreme Court of Canada, are certainly not in the category identified by Dickson J. (as he then was) in *Angle v Minister of National Revenue*, [1975] 2 SCR 248, at 255, of a conclusion "which must be inferred by argument from the judgment." Rather, the costs rulings form part of the conclusions "that were necessarily…determined in the earlier proceedings": *Danyluk v Ainsworth Technologies Inc.*, [2001] 2 SCR 460, at para 24.

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(b) Analysis

[13] The appellants contend that in reaching his conclusion the motion judge committed four errors.

[14] First, they argue that they were not able to raise the issue of damages in the nature of legal fees in the Prior Proceedings because they could not assert a claim for damages in an application. Consequently, the appellants submit, they should be permitted to assert in this action the claim for monetary relief they could not advance in the application. There is no merit in that submission: it was open to the appellants to request in the Prior Proceedings larger cost awards than those which were made by the courts.

[15] Second, the appellants point to several cases which, they contend, stand for the proposition that a party can recover its costs of a prior action as damages in a subsequent action. The motion judge referred to one of the cases in his

reasons, *Weinstein v. A. E. LePage (Ontario) Ltd.* (1984), 47 O.R. (2d) 126 (C.A.). In that case, the purchaser of land under an agreement of purchase and sale sued the vendor for specific performance, but failed. The vendor then sued his listing agent for breach of contract, arguing that the agent's breach had prompted the purchaser to sue and during the pendency of the lawsuit the vendor had lost the opportunity to sell the land to another person. Although the vendor had not claimed the costs of defending the first action in the subsequent one against the listing agent, this court ventured the view that the costs of defending the first action could be recoverable as damages in the second. As the motion judge correctly pointed out in his reasons, issue estoppel did not arise in *Weinstein* "as the parties were different."

[16] The appellants argue that the motion judge erred in failing to consider and apply the other cases to which they had referred. Two of the cases resembled *Weinstein* in that the parties to the two proceedings were different:

(i) in *Crispin & Co. v. Evans, Coleman & Evans Ltd.* (1922), 68 D.L.R. 623 (B.C.S.C.), aff'd [1923] 3 D.L.R. 1190 (B.C.C.A.), a purchaser of salmon was able to recover from its non-performing vendor the costs it had incurred of defending an arbitration brought by its counter-party on the re-sale contract; and,

(ii) in a negligence case, *Mailhot v. Savoie*, 2004 NBCA 17, 268 N.B.R. (2d) 348, a client was able to recover against his solicitor the legal fees he had spent in prosecuting an action against a purchaser of lands to whom certain lots had been conveyed as a result of a mistake made by the solicitor in the transfer deed.

The other four cases differed materially from the present case in their facts:

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(i) in *Mondel Transport Inc. v. Afram Lines Ltd.*, [1990] 3 F.C. 684 (F.C.T.D.), while the Federal Court awarded the plaintiff, as damages, the legal costs it had incurred in a foreign jurisdiction to secure the release of cargo, there was no suggestion in the decision that the foreign court had dealt with any request for legal costs by the plaintiff;

(ii) in *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872, 106 O.R. (3d) 661, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 85, the plaintiff had advanced a claim for abuse of process. Although this court observed that proof of some measure of special damage was one of the constituent elements in the tort of abuse of process, in *Harris* the special damages sought by the plaintiff were not legal costs, but a "supra-competitive" price the plaintiff paid for a drug over a period of time;

(iii) in *West v. Cotton*, 1993 CarswellBC 2026 (B.C.S.C.), the trial judge in a personal injury action decided to fix the costs of that action notwithstanding the plaintiff's request that he postpone the determination of those costs until it was ascertained whether the plaintiff would recover its full legal costs of the action in related proceedings, one of which was against a party to the action. In *obiter* at para. 13 of his reasons, the trial judge suggested that making a cost order in the personal injury action should not prejudice the plaintiff's ability to argue for recovery of his actual legal costs as damages in the related proceeding "provided that there is no duplication of the issues raised and decided." The appellants did not file before us any case which reported whether the plaintiff was awarded its actual legal costs of the personal injury action in either related proceeding; and,

(iv) in *Berry v. British Transport Commission*, [1962] 1 Q.B. 306, the English Court of Appeal repeated the principle that in an action for malicious prosecution the plaintiff can claim damages for the costs she incurred in defending the criminal prosecution against her. In his concurring reasons, Devlin L.J., voiced a desire to see a reform of the law concerning civil costs. Until such a reform took place, he re-iterated, at pp. 319 and 323 of his reasons, the need to maintain the general principle that the right to costs must always be considered as finally settled in the court which determined the issues to which that right to costs was accessory.

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In sum, none of the cases put forward by the appellants stand for the proposition that a party in a first proceeding against another could recover, in a second proceeding against the same person, the "extra" legal costs it was not awarded in the first proceeding.

[17] Third, the appellants submit that the motion judge failed to apply the principles of issue estoppel set out in the decision of the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, where, at para. 24, the court stated, in part:

> The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

[18] The appellants argue that the cost awards in the Prior Proceedings were not fundamental to the injunctive relief granted to Mr. Rasouli and therefore it is open to them to bring an action to recover legal costs as damages. In my view, the appellants' position is incorrect and, instead, the following portions of the motion judge's reasons accurately state the law on this point:

> [27] An award of costs may not be the very subject matter of the litigation, but it is not incidental in the sense that the prior court did not specifically turn its mind to the issue … [T]he costs rulings form part of the conclusions "that were necessarily…determined in the earlier proceedings": *Danyluk v Ainsworth Technologies Inc.*, [2001] 2 SCR 460, at para 24.

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…

> [30] I agree with the authors of *Clerk and Lindsell on Torts* (20th ed.), 28-130, where they state definitively that, "[a] successful claimant cannot bring a fresh action against the defendant in order to recover as damages his 'extra costs', that is, the difference between the costs which the defendant was ordered to pay and the costs actually incurred…". Courts across Canada have come to similar conclusions: See *Humble v Vancouver Municipal & Regional Employees Union*, 1989 CarswellBC 1299, at paras 86, 92, aff'd [1991] BCJ No 2995 (BCCA). This issue was addressed squarely by the Manitoba Court of Queen's Bench in *P&G Cleaners Ltd. v Johnson*, [1996] MJ No 566 (Man QB), at para 17, which concluded that issue estoppel applies:
>
> > On the previous proceedings related to dispensing with Mr. Johnson's consent, the issue arose as to whether he was entitled to solicitor and client costs of those proceedings based on the wording of Clause 5(a) above. I held that he was not entitled to solicitor and client costs. That is the precise issue which the respondent is seeking to re-litigate in these proceedings and is res judicata.

[19] On this issue the appellants' reliance on the decision of this court in *Somers v. Fournier* (2002), 60 O.R. (3d) 225 (C.A.) is mis-placed. *Somers* considered whether the costs of a proceeding in Ontario should be characterized as a substantive or procedural matter for purposes of choice of law under private international law. It was in that very different context that this court stated, at para. 19: "costs of litigation are incidental to the determination of the rights of the parties. They are not part of the *lis* between litigants." *Somers* did not deal with

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the consequences of a prior, final determination of entitlement to legal costs on a subsequent proceeding.

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[20] Finally, the appellants submit that the motion judge erred by failing to consider whether he should exercise his residual discretion not to apply the doctrine of issue estoppel to the appellants' claim for "extra costs". As recalled by the Supreme Court of Canada in *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, [2013] 2 S.C.R. 125, at para. 35, even where the pre-conditions for issue estoppel are established, courts retain the discretion not to apply issue estoppel to ensure that no injustice results. Applying issue estoppel may work an injustice if the prior proceedings were unfair to a party or, even where they were not, if significant differences existed in the purpose, process and stakes of the two proceedings. The discussion in *Penner* took place in the context of whether any such significant differences existed between prior administrative proceedings and subsequent civil court proceedings such that it would work an injustice to apply the result of the former to the latter.

[21] The appellants argue that the purposes of the Prior Proceedings and this action diverge significantly. With respect, they do not on the issue of costs. Both proceedings were commenced in the same adjudicative body, the Superior Court of Justice. Expectations concerning how parties in such court proceedings can recover costs are well-established: claims for cost awards must be made in the proceeding in which the costs were incurred. In the present action, the

appellants seek to recover "extra costs" they could have claimed in the Prior Proceedings. In those circumstances, no basis would exist to exercise a residual discretion not to apply issue estoppel.

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[22] For these reasons, I see no error in the conclusion of the motion judge that issue estoppel applied to bar the appellants' claim in this action for the recovery of "extra costs" incurred in the Prior Proceedings or in his dismissal of the appellants' claim for their "extra costs" as special damages under Rule 21.01(3)(d) because it was frivolous, vexatious or otherwise an abuse of the process of the court.

V. SECOND ISSUE: DID THE MOTION JUDGE ERR IN DISMISSING THE REST OF THE APPELLANTS' CLAIMS ON THE GROUND THAT THEY WERE BARRED BY ABSOLUTE PRIVILEGE?

(a) The remaining claims of the appellants and the decision of the motion judge

[23] The motion judge dismissed the balance of the appellants' claims on the basis that the event upon which those claims rested – a January 24, 2011 letter written by Mr. Harry Underwood, counsel for the respondent physicians, to counsel for Ms. Salasel (the "Underwood Letter") – was protected from suit by absolute privilege. The appellants submit that it was far from clear or obvious that the Underwood Letter was written on an occasion of absolute privilege and

the motion judge erred in not allowing their claims based on that letter to proceed to trial.

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[24] The Underwood Letter stated:

> Dear Mr. Schibel:
>
> Re: Hassan Rasouli
>
> This will confirm our telephone conversation today.
>
> The critical care physicians at Sunnybrook, for some of whom we act, have determined that they will not continue to offer extraordinary care (mechanical ventilation) to Mr. Rasouli. We understand that the Rasouli family, for whom you act, does not accept this decision and intends to bring an application for an injunction to require the continuation of the treatment pending an application to the Consent and Capacity Board. The doctors are prepared to defer the implementation of their decision provided that you proceed, immediately, to obtain an urgent appointment for a one day hearing of the intended application. That matter has been left in your hands and I await word from you as to the available date or dates.
>
> I also confirm that I advised you that the doctors are very willing to facilitate an independent examination of Mr. Rasouli by a neurologist should the family so desire.
>
> Finally, I am enclosing for your information the note made by Dr. Jon Ween, the Sunnybrook staff neurologist who recently performed a neurological assessment of Mr. Rasouli so as to provide a second neurological opinion.
>
> Yours very truly,
>
> McCarthy Tétrault LLP
>
> Per: Harry Underwood

[25] In their Statement of Claim and Factum the appellants characterized the Underwood Letter as a threat to kill Mr. Rasouli upon which they based their

claims for intimidation, assault, negligence, abuse of process, breach of contract, breach of fiduciary duty and intentional infliction of mental suffering. The centrality of the Underwood Letter to the remaining claims of the appellants was noted by the motion judge in his reasons:

> [34] Counsel for the Plaintiffs concedes that had the doctors simply brought their own court application for a declaration that they have authority to withdraw treatment, without having their lawyer send a letter to that effect, there would be no threatening or otherwise tortious conduct. The entire claim turns on the fact that their lawyer first wrote a letter.

[26] The motion judge concluded that the Underwood Letter was protected by absolute immunity because it was intimately connected to a judicial proceeding – the Prior Proceedings – the institution of which was being seriously considered by the respondents. He held that in those circumstances it was an abuse of process to bring this action in violation of the doctrine of absolute immunity.

(b) The circumstances in which the Underwood Letter was written

[27] Before considering the grounds of appeal advanced by the appellants on this issue, a review of the chronology of major events is required in order to place the Underwood Letter in context.

[28] Mr. Rasouli underwent his surgery at the Hospital on October 7, 2010. Ten days later he slipped into an unconscious state. His doctors diagnosed him with post-operative meningitis. A series of meetings ensued between the Rasouli

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family and the treating physicians. Towards the end of November the physicians informed the family that they wished to withdraw Mr. Rasouli from the life-support offered by a mechanical ventilator. The family objected. Discussions about treatment continued.

[29] On January 10, 2011, the physicians told the family they would begin to withdraw Mr. Rasouli from life support that evening. That prompted Ms. Salasel to meet the next day, January 11, with counsel, Mr. Schible of the Hodder Barristers firm.

[30] Following that meeting, Mr. Schible sent an email to Ms. Daphne Jarvis, counsel for the Hospital, advising of his retainer by Ms. Salasel and stating, in part:

> I shared with them [hospital staff] my view that the best course is to have a hearing before the Ontario Consent & Capacity Board over the Hospital's proposed treatment plan that includes: (1) a direction that Mr. Rasouli be taken off a breathing machine; and (2) a direction that if/when Mr. Rasouli has difficulty breathing, he not be provided with a breathing machine.
>
> …
>
> Ms. Parichehr, as the next of kin in charge of personal care decisions under the Substitute Decisions Act, disagrees with the treatment plan above.
>
> …
>
> The Board is a specialized adjudicator for these types of cases and can probably hear us more quickly than the Ontario Superior Court.

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…

> The only way that the Hospital can, in good faith, subject its proposed treatment plan to the Superior Court's review is by undertaking to not implement same until the application is heard and a decision is rendered (perhaps after many months of being on reserve). Thus, all parties have an interest in a relatively faster and less expensive proceeding before the Board.
>
> …
>
> I confirm my understanding … that the Hospital will not implement the proposed treatment plan … until you and I have figured out a course of action.

[31] Ms. Jarvis responded by stating the Hospital's position that the decision to withdraw mechanical ventilation did not constitute a treatment decision requiring the consent of Ms. Salasel, but that counsel would be available to engage in further discussions. Following the exchange of a few further emails, Mr. Schible emailed Ms. Jarvis on January 13, 2011, stating:

> I confirm our conversation around 2:40 pm today. I confirm that I had received instructions to bring an application in Superior Court seeking an interim order, pending a determination on the merits, which determination, we would say, should be made by the CCB. As I told you, that could certainly be done tomorrow or on Monday. However, I thought I would report to you my instructions above, and give you an opportunity to agree that this should not be necessary. It will only mean additional costs and in fact delay.
>
> …
>
> I confirm that you said that you will get back to me and that, in the meantime, the Hospital will not change Mr. Rasouli's current treatment (i.e., he will remain on the breathing machine).

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> So the situation is this: If your response is positive, we can start planning the presentation of our case for the CCB (and it should be clear that the Hospital will/should maintain the status quo, pending the decision of the CCB). If your response is negative, I will forthwith issue the application above (and the Hospital will/should maintain the status quo, pending the decision of the Superior Court).

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[32] That elicited the following response from Ms. Jarvis later the same day:

> I'm also confirming that with you having advised that you have instructions to commence a legal proceeding as you've described, the patient's critical care physicians who you would be attempting to enjoin are in the process of consulting legal counsel independent from the Hospital. Physicians' counsel is Harry Underwood of McCarthy's, to whom I'm copying this email.
>
> …
>
> I have made Harry Underwood aware of the position you are taking, and he will be meeting with his clients and taking instructions as soon as he is able, and they will also be taking his advice with respect to the preservation of the status quo, however, I'm sure based on my discussions with him that no steps will be taken until one of us gets back to you with respect to your proposal and you've had a reasonable opportunity to follow through on your instructions.

[33] Eleven days later, on January 24, Mr. Schible received the Underwood Letter. According to the appellants' Statement of Claim:

> By email dated January 26, 2011, the defendants, again through their lawyers, took the position that they were entitled to proceed, in any event, and advised that they would do so, unless the Superior Court restrained them by February 25, 2011.

The next day, on January 27, 2011, Mr. Rasouli, by his litigation guardian and substitute decision-maker, Ms. Salasel, commenced an application against the

Hospital, Dr. Cuthbertson and Dr. Rubenfeld, seeking to restrain them from implementing their proposed changes to his treatment plan. In their Statement of Claim the appellants pleaded that they brought the application "as a result of these threats by the defendants".

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[34] Several days later, on February 4, 2011, Drs. Cuthbertson and Rubenfeld commenced a separate application against Mr. Rasouli and Ms. Salasel seeking declarations that as the attending physicians for Mr. Rasouli, they could lawfully withdraw or withhold life-sustaining treatment from him without the consent of the patient's substitute decision-maker. In their Statement of Claim the appellants described the physicians' proceeding as a "cross-application".

(c) Analysis

Absolute privilege

[35] The doctrine of absolute privilege contains several basic elements: 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 privilege extends to documents properly used and regularly prepared for use in the proceedings; and, a statement will not be protected if it is not uttered for the purposes of judicial proceedings by someone who has a duty to make statements in the course of the proceedings: *Amato v. Welsh*, 2013 ONCA 258, at para. 34.

[36] At issue in this case is a communication made by counsel for the respondent physicians before the actual commencement of legal proceedings. As noted by Cullity J. in *Moseley-Williams v. Hansler Industries Ltd.* (2004), 38 C.C.E.L. (3d) 111 (Ont. S.C.), aff'd [2005] O.J. No. 997 (Ont. C.A.), Ontario has adopted a broader application of the rule of absolute privilege to such pre-suit statements than jurisdictions such as British Columbia, Alberta and England. The scope of the Ontario rule was summarized comprehensively by the Divisional Court in *1522491 Ontario Inc. v. Steward, Esten Professional Corp.*, 2010 ONSC 727, 100 O.R. (3d) 596, at paras. 37 and 39 to 44:

> [37] In Ontario, absolute privilege may extend to communications by a party's solicitor made before the actual commencement of proceedings.
>
> …
>
> [39] As Cullity J. points out in *Moseley-Williams*, the following statement from Fleming has been referred to with approval in Ontario decisions:
>
>> The privilege is not confined to statements made in court, but extends to all preparatory steps taken with a view to judicial proceedings.... But the statement or document must be directly concerned with actual contemplated proceedings.
>
> [40] However, Cullity J. also found that the authorities do not appear to support an extension of the privilege to all occasions when the possibility of litigation is contemplated, or even when a threat of litigation is made, or when a lawyer is endeavouring to assert and protect a client's rights.

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> [41] Thus, when a defendant in these circumstances moves to dismiss the claim on the ground of absolute privilege, the decision the court has to make is whether the communication was made "for the purpose of, or preparatory to, the commencement of [judicial] proceedings".
>
> [42] Something more than merely a contemplation of the possibility of litigation is required. The court must decide whether the occasion is "incidental" or "preparatory" or "intimately connected" to judicial proceedings and not one that is too remote.
>
> [43] It is in this sense that Cullity J. accepted that "... some inquiry into the purpose of their publication would appear to be unavoidable"… That case dealt with a motion for judgment under rule 20. On a rule 21.01(1)(b) motion, the "inquiry" is made on the assumed truth of the facts pleaded in the statement of claim.
>
> [44] It must be stressed that "*it is the occasion, not the communication, that is privileged*. The privilege belongs to the occasion by reason of the setting." [Citations omitted; emphasis in original.]

Determining whether an occasion is preparatory to, or intimately connected with, judicial or quasi-judicial proceedings involves, as Cullity J. aptly put the matter in *Moseley-Williams*, at paras. 57 and 58, an exercise of ascertaining where a line is to be drawn so that the degree of connection between the occasion and the judicial proceeding is not too remote.

[37] Against that background, let me turn to consider the three reasons the appellants advance in support of their submission that the motion judge erred in finding that the Underwood Letter was protected by absolute privilege.

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Availability of absolute privilege in non-defamation actions

[38] First, the appellants submit that the doctrine of absolute privilege for pre-litigation communications only precludes the bringing of defamation claims in respect of the communication. That is not correct. As stated by this court in *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.* (1999), 124 O.A.C. 125, at para. 20, the immunity afforded by absolute privilege "extends to any action, however framed, and is not limited to actions for defamation". In that case, the intentional acts upon which the plaintiff by counterclaim was relying in support of its claim for intentional interference with contractual relations were affidavits sworn by the defendants to obtain receivership orders. This court upheld the decision of the motion judge striking out the counterclaim on the basis that the affidavits were protected by absolute privilege.

The degree of connection between the Underwood Letter and the litigation

[39] The second reason advanced by the appellants contains two inter-connected elements. They argue that absolute privilege did not attach to the Underwood Letter because at the time it was written no substantive steps had been taken to prepare for litigation in the sense that the respondent physicians had not made a decision to litigate, and it was the appellants, not the respondents, who first commenced a legal proceeding following the communication of the Underwood Letter.

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[40] Certainly by the date of the Underwood Letter, a decision to litigate had been made by the appellants. As disclosed by the chronology of events set out above, by January 13, 2011, Ms. Salasel had informed the Hospital of her decision to commence an application in the Superior Court of Justice seeking to restrain the physicians from withdrawing life-support from her husband without her consent. The Hospital's counsel passed that information along to the physicians' counsel, Mr. Underwood. The decision to litigate the issue of consent had been made and communicated 11 days before Mr. Underwood sent his letter to counsel for the Rasouli family. The Underwood Letter not only communicated the physicians' position on the appropriate treatment for Mr. Rasouli – a position not acceptable to the Rasouli family – but also advised that the physicians would co-operate in seeking a prompt determination of the dispute from the courts:

> The doctors are prepared to defer the implementation of their decision provided that you proceed, immediately, to obtain an urgent appointment for a one day hearing of the intended application. That matter has been left in your hands and I await word from you as to the available date or dates.

The two applications were commenced shortly thereafter. When read in the context of the contemporaneous events, the Underwood Letter was written at a time when it was clear that the physicians would be required to respond to the litigation which Ms. Salasel intended to initiate against them.

[41] The appellants submit that absolute privilege should not attach to the Underwood Letter because the first legal proceeding had been commenced by

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the recipient of that letter, not the party whose counsel wrote it. I do not accept that submission. It is true that in several Ontario cases which held that absolute privilege attached to a pre-suit communication of a lawyer, the communication had come from plaintiff's counsel who sent a letter attaching the intended statement of claim either to counsel for the opposite party or to a witness: *Dingwall v. Law* (1988), 63 O.R. (2d) 336 (Ont. H.C.) and *Steward, Esten Professional Corp.* By contrast, the Underwood Letter was not written on behalf of Ms. Salasel, the party who commenced the first of the Prior Proceedings, but by counsel for the respondent physicians who only started their application after Ms. Salasel had issued hers. I do not see that sequence of events as preventing absolute privilege from attaching to the Underwood Letter. Before the Underwood Letter was written, it was clear that judicial proceedings would take place over the issue of whether consent was required to withdraw mechanical ventilation. Shortly after the Underwood Letter was written, the proceedings commenced, with the application and "cross-application" seeking opposing relief in respect of the same issue. Since the privilege extends to communications directly concerned with actual contemplated proceedings, it would be inconsistent to afford the protection to communications by counsel for one party, but to deny it to communications by counsel for the other party.

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The applicability of the principles set out in *Amato v. Welsh*

[42] Finally, the appellants submit that the motion judge erred by failing to consider the implications of the decision of this court in *Amato v. Welsh*, 2013 ONCA 258, 305 O.A.C. 155. That decision, the appellants argue, supports their position that absolute privilege should not be used as a rationale for protecting doctors from suits in which their patient alleges the physicians threatened to harm him. According to the appellants, the public policy considerations outlined in *Amato* preclude a finding, at least on a Rule 21.01(3)(d) motion, that an action based on the Underwood Letter is barred by reason of absolute privilege.

[43] *Amato* involved a motion to strike out a claim under Rule 21.01(1)(b) as disclosing no reasonable cause of action. In *Amato* the plaintiffs, former clients of the defendant lawyers, sued for negligence, breach of fiduciary duty and breach of the duty of loyalty during the course of the lawyers' representation of the plaintiffs. The plaintiffs had invested funds in a scheme run by other clients of the lawyers. The Ontario Securities Commission ("OSC") conducted a hearing into whether the investment set-up was a Ponzi scheme. In their action, the plaintiffs alleged that their lawyers failed to disclose at the OSC hearing the investments they had made, thereby diminishing their chances of recovering their investments. Although the lawyers did not question their clients' right to sue in negligence, breach of fiduciary duty and breach of the duty of loyalty, the lawyers argued that those causes of action could only be founded on the allegation of the

competing retainers the lawyers had with different clients, not on any statements the lawyers had made or failed to make during the OSC hearing. Consequently, the lawyers moved to strike out that portion of the plaintiffs' pleading, arguing that it disclosed no reasonable cause of action because the statements made by the lawyers during the OSC hearing were protected by absolute privilege. This court viewed the interplay between a lawyer's obligation arising out of the duty of loyalty to a client and the protection afforded to a lawyer by the doctrine of absolute privilege as central to the attack on the plaintiffs' pleading. It concluded, at para. 69 of its reasons, that it was at least arguable that, in a proper case and on a full record, the duty of loyalty owed by a lawyer to a client could trump the immunity afforded by the doctrine of absolute privilege, and this court was not prepared to strike out the claim on a Rule 21.01(1)(b) motion.

[44] The appellants draw on *Amato* to advance two reasons why absolute privilege should not attach to the Underwood Letter. First, the appellants contend that just as *Amato* held that a duty of loyalty by a lawyer might trump the immunity afforded by absolute privilege, similarly a physician's duty not to threaten to harm his patient could be held to trump absolute privilege. In my view, the appellants' argument overlooks a material difference between the circumstances in *Amato* and those in the present case. In *Amato* the disputed statements were made by lawyers during the course of their retainer by the plaintiff clients, thereby giving rise to a possible conflict between the lawyers'

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duty of loyalty to their clients and absolute privilege. By contrast, in the present case the statutory regime concerning consent to medical treatment established by the *Health Care Consent Act*, S.O. 1996, c. 2, Sched. A ("*HCCA*") recognizes that disputes over appropriate medical treatment may arise between treating physicians and a patient's substitute decision-maker, and the *HCCA* establishes a mechanism for resolving those disputes through applications to the Consent and Capacity Board: *Cuthbertson*, at para. 2. It is difficult to see how a duty of loyalty by the physician in respect of treatment decisions for a patient – akin to the duty of loyalty owed by a lawyer to a client discussed in *Amato* – could arise when the statutory regime governing treatment decisions specifically recognizes that the physician and the substitute decision-maker may disagree about a treatment plan.

[45] Placed in that context, the Underwood Letter communicated the physicians' views on treatment and discussed some of the mechanics involved in resorting to the courts to resolve the dispute, as previously proposed by counsel for the Rasouli Family. The Underwood Letter did not create a potential conflict between the principles of duty of loyalty and absolute privilege, which was the concern of this court in *Amato*.

[46] Second, the appellants submit that the integrity of the justice system is not protected by extending immunity to a physician who threatens to end his patient's life unless the intended victim has resort to that justice system to prevent the

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injustice of his own death. The appellants characterize the Underwood Letter as a threat. When considering whether the doctrine of absolute privilege applies to a particular communication, the analysis necessarily focuses on the occasion on which a communication was made, not on its content. Nevertheless, in assessing this particular submission advanced by the appellants, one cannot ignore the judicial statements made in the Prior Proceedings which described the dispute between the appellants and the respondent physicians over the treatment plan for Mr. Rasouli as one of public importance which merited judicial consideration. In the Superior Court of Justice decision, Himel J. stated, at para. 103:

> It is clear from the evidence that the hospital, doctors and substitute decision-maker in this case all have as their priority the best interests of the applicant [Mr. Rasouli].

In its reasons, this court stated, at para. 16:

> For reasons that follow, we would dismiss the appeal. In so concluding, we do not minimize the concerns raised by the appellants [the physicians]. They are serious and warrant careful consideration.

Finally, the Supreme Court of Canada, at para. 205 of its reasons, concluded that the parties should bear their own costs of the appeal "[i]n light of the public importance of the questions raised in this appeal".

[47] In sum, I see no reason to interfere with the conclusion of the motion judge that the appellants' remaining claims constitute an abuse of process, for the

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purpose of Rule 21.01(3)(d), and should be dismissed. In light of the specific circumstances in which the Underwood Letter was written, as described above, I conclude that this is a clear case in which the communication was protected by the doctrine of absolute privilege.

VI. DISPOSITION

[48] For those reasons, I would dismiss the appeal.

[49] The parties agreed that the costs of the appeal should be fixed at $7,500, all inclusive, so I order the appellants to pay the respondents that amount.

Released: February 20, 2015 (A.H.)

"David Brown J.A."
"I agree Alexandra Hoy A.C.J.O."
"I agree K. van Rensburg J.A."

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