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Court of Appeal clarifies law on absolute privilege

In *Salasel v. Cuthbertson* (2015 ONCA 115), the Court of Appeal provided welcome clarification on the doctrine of absolute privilege, in a decision that revisited the case of Hassan Rasouli.

Ms. Salasel's husband, Mr. Rasouli, was put on life support after suffering complications following surgery. His physicians recommended the withdrawal of life support and the family disagreed, resulting in a court battle which proceeded all the way to the Supreme Court.

The Rasouli family then brought this action in the Superior Court, claiming special damages for legal fees in the prior proceedings, which they characterized as being spent "to keep Hassan alive". The family also claimed damages for intimidation, assault, negligence, abuse of process, breach of contract and breach of fiduciary duty.

The essence of the Rasouli family's action centred on a letter from counsel for the physicians to counsel for the family prior to the commencement of the initial action. In the letter, the physicians' lawyer indicated that the physicians had determined that they would not continue to offer mechanical ventilation to Mr. Rasouli, but that given that the Rasouli family objected to this decision and intended to bring an application for an injunction requiring continued care, the physicians would defer the implementation of their decision.

The family characterized the letter as a threat to kill Mr. Rasouli.

The defendant physicians successfully moved to stay or dismiss the action on the basis of issue estoppel and absolute privilege.

The Court of Appeal dismissed the Rasouli family's appeal of the motion judge's decision. The Court held that the doctrine of absolute privilege provides that no action lies for words spoken or documents used in the course of proceedings, and for the purpose of the proceedings, before courts or judicial tribunals. Absolute privilege acts to bar any action based on such communications, however framed, and not only defamation actions. As such, absolute privilege attached to the letter from counsel.

The Court of Appeal made clear that absolute privilege extends to communications directly related to contemplated proceedings, regardless of whether the communications are by counsel commencing the proceedings or by counsel who will be responding. Finally, the Court dismissed the argument that that the letter created a conflict between the physicians' duty of loyalty to their patient and absolute privilege.

With respect to the additional legal costs sought, the Court held that issue estoppel applies to prevent a litigant from seeking additional or exceptional costs after a costs award has already been made in a prior proceeding. The Rasouli family could have asked for additional costs in the prior proceedings, but could not do so now by way of a new action.

- Research contributed by David Shore, 2014/2015 articling student.