

BC COURT OF APPEAL RULES ABSOLUTE PRIVILEGE PRECLUDES CLAIM FOR BREACH OF PRIVACY

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In British Columbia, alleged breaches of privacy are actionable in court only under the *Privacy Act*, R.S.B.C. 1996, c. 373. In a departure from the law of Ontario, there is no common law tort of invasion or breach of privacy available to plaintiffs in British Columbia. It is in this context that the British Columbia Court of Appeal recently ruled that British Columbia's statutory cause of action for breach of privacy does not apply to the disclosure of private information during judicial proceedings.

Background

The British Columbia Court of Appeal's decision in *Duncan v. Lessing and Lessing Brandon Company LLP*, 2018 BCCA 9 involved two claims against a lawyer for breach of privacy under British Columbia's *Privacy Act*. In the first alleged breach, the Appellant, Mr. Duncan, claimed that his former wife's lawyer had improperly served sensitive information about his finances in a family law proceeding on multiple non-party companies. In the second alleged breach, Mr. Duncan claimed that the lawyer had shared private information about his financial situation with another lawyer during a casual conversation and that this information had been traced back to him and subsequently caused him embarrassment.

Court Dismisses Claims

Both of Mr. Duncan's claims were dismissed.

For the second alleged breach, a finding of fact was made that there was no reasonable expectation of privacy in the circumstances. That was sufficient to dispose of that aspect of Mr. Duncan's claim.

For the first alleged breach, the Court of Appeal held that the effect of section 2(3)(b) of the *Privacy Act* is to incorporate the absolute privilege that applies in the law of defamation to breach of privacy claims by creating a statutory exemption. Section 2(3)(b) of the *Privacy Act* provides that "a publication of a matter is not a violation of privacy if the publication was privileged in accordance with the rules of law relating to defamation."

As a result, the question faced by the Court of Appeal in *Duncan* became: would the disclosure of documents in the case at hand be protected by absolute privilege if the claim were in defamation rather than under the

Privacy Act? The Court of Appeal concluded that it would, “since, according to the rules of law relating to defamation, the occasion was one to which absolute privilege attached, the statutory exception in the *Privacy Act* applies. As such, there was no violation of privacy.”^[1]

The Doctrine of Absolute Privilege

In coming to its decision, the Court of Appeal addressed the following questions:

1. How are privacy interests in the conduct of civil litigation addressed in the common law?
2. What is the scope of the common law doctrine of absolute privilege?
3. How does the common law doctrine of absolute privilege apply to claims under the *Privacy Act*?

On the first two questions, the Court of Appeal discussed the role that the implied undertaking plays in the litigation process, reviewed the scope of absolute privilege, and considered the interaction between the two. While both doctrines work to protect similar public policy interests:

[the] purpose of the implied undertaking is to limit the invasion of privacy interests in civil proceedings without impairing the efficiency of the proceedings. Absolute immunity on the other hand is designed to protect freedom of speech and communication in judicial proceedings.^[2]

Mr. Duncan acknowledged the doctrine of absolute privilege but argued that the conduct of the lawyer should fall outside this immunity due to the fact that the lawyer had unnecessarily combined two separate applications into one, which led to the disclosure of personal information to non-parties upon service. However, the Court of Appeal rejected Mr. Duncan’s arguments and stated that he had missed the overall point of the privilege. This is because “[it] is not the nature of the conduct which gives rise to the immunity, but the occasion on which the conduct is performed. A judicial proceeding is a protected occasion within the meaning of the rule.”^[3]

On the third question, the Court of Appeal considered how the doctrine of absolute privilege applies to the *Privacy Act*. In particular, the Court of Appeal diverged from the decision of the trial judge over the breadth of its application. Unlike the trial judge who based her decision on the operation of the doctrine of absolute privilege generally, the Court of Appeal limited their decision to the exemption created under the *Privacy Act* rather than base it on the doctrine as a whole. The Court of Appeal held that absolute privilege cannot shield a lawyer from any conduct related to a judicial proceeding as claims such as professional negligence and malicious prosecution are based on the conduct of lawyers during litigation and are not defeated by the absolute privilege doctrine.

Takeaways

A notable aspect of the Duncan decision is the clear role that policy considerations played in the Court of Appeal's reasoning. The Court of Appeal relied on passages that characterized the granting of absolute privilege to lawyers as a public benefit as it frees lawyers from the fear that they may be sued for something they did or said in the pursuit of their clients' interests. This public interest is ultimately given a greater weight than the personal interest of privacy. However, the Court of Appeal did acknowledge that the law relating to absolute privilege is not settled in relation to claims other than defamation and breach of privacy and was "reluctant to extend what is an extraordinary immunity unless it is necessary in order to protect the public interest considerations that underlie the immunity."^[4]

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[1] Duncan v. Lessing and Lessing Brandon Company LLP, 2018 BCCA 9 at para 62.[ps2id id='1' target='']

[2] Duncan at para 55.[ps2id id='2' target='']

[3] Duncan at para 53.[ps2id id='3' target='']

[4] Duncan at para 8.[ps2id id='4' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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