

Absolute privilege stops lawsuits based on use of intimate video at a case conference (Burns v. Osuji)

Absolute Privilege | Case Conferences | Litigation & Dispute Resolution

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In the law of defamation, absolute privilege is a complete defence. However, the doctrine of absolute privilege extends beyond defamation law to prevent other causes of action that arise out of “anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made in respect of such behavior or statement.”

In *Burns v. Osuji*, 2026 ABKB 108, the defendant lawyers were able to rely on the doctrine of absolute privilege to strike out two separate actions brought against them for playing an intimate video of the plaintiffs at an Early Intervention Case Conference (“EICC”).

The plaintiffs were the former husband of the defendant lawyers’ client and the husband’s girlfriend. The husband and the wife were involved in divorce proceedings, to which the husband’s girlfriend was not a party.

Soon after the husband and wife separated, the husband began a new relationship with the girlfriend.

In response to this romance, the wife began surveillance of her husband and installed hidden cameras in his separate bedroom in their former matrimonial home.

A few months after the husband and the wife separated, the wife surreptitiously recorded intimate activities between the husband and the girlfriend. She then shared her surreptitious video with her lawyers, who, in turn, disseminated the video to other parties involved in the divorce proceedings, including the lawyers representing the children of the husband and the wife and submitted it to the court in a scheduled EICC.

The EICC is a court-mandated judicial or quasi-judicial proceeding, which is held *in camera*. Its purpose is to facilitate settlement discussions or to determine procedural next steps.

The husband and the girlfriend claimed that the dissemination of the intimate video caused them damages and separately commenced lawsuits against the wife and her lawyers for breach of confidence, intentional infliction of mental distress and public disclosure of private facts.

In her pleading, the girlfriend stated that “the Defendants submitted hidden camera videos from the night of...December 30, 2021, to the Court for use in the upcoming Early Intervention Case Conference...”

In his pleading, the husband stated that his wife “...shared the recorded videos with [her lawyers]” and that “[her lawyers] knowingly disseminated the recorded videos to [the husband’s] lawyer and others involved in court proceedings related to the divorce...”

The defendant lawyers sought to dismiss the actions under [rule 3.68 of the Alberta Rules of Court](#) on the grounds that they did not disclose reasonable claims and had no merit.

At first instance, an Applications Judge refused to grant the relief sought.

The Applications Judge found that it was not plain and obvious the claims would fail because the defence of absolute privilege raised by the lawyers was subject to a narrow exception involving irrelevant or gratuitous statements, especially when made about a non-party.

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The defendant lawyers appealed the decision of the Applications Judge on the grounds that a decision she had relied upon had been subsequently overturned by the Court of Appeal, and that, among other reasons, there was no narrow exception to the defence of absolute privilege.

The defendant lawyers highlighted that, as set out in the respective pleadings of the husband and the girlfriend, the intimate video was disclosed for the purposes of the EICC and was not used in any other way.

Furthermore, the defendant lawyers argued that they could not be liable to the husband and his girlfriend because they did not owe them a duty of care.

In contrast, the husband and girlfriend argued that the defendant lawyers could not rely on the defence of absolute privilege because the purpose of the EICC was to deal with parenting issues involving the children of the husband and the wife, and that the intimate video was immaterial, irrelevant and unnecessary to the divorce proceedings.

As well, the husband and the girlfriend submitted that the defendant lawyers were aware that the intimate video had been illegally obtained.

In allowing the appeal of the defendant lawyers, the court found that there was no dispute that the EICC was a judicial or quasi-judicial proceeding and that the intimate video had been shared within a step recognized as affording privilege.

Although, the court noted that the video's disclosure may have been ill-judged and gratuitous, this did not detract from the ability of the defendant lawyers to rely on the defence of absolute privilege because the defence attached to the occasion.

The content or motive behind the sharing of the video with the court and the lawyers for the parties involved in the divorce proceedings was immaterial.

The court also stated that based *Tuharsky v. O'Chiese First Nation*, 2025 ABCA 267, there was no exception to the defence of absolute privilege, including no exception for non-parties.

Although this finding was sufficient to determine that it was plain and obvious that the allegations of the husband and the girlfriend disclosed no valid claim, the court also found that the defendant lawyers did not owe any duties to the husband and the girlfriend.

The court accepted that in general lawyers do not owe a duty to a party adverse in interest to their client. Neither the husband nor his girlfriend provided the court with any legislation or jurisprudence to show that the defendant lawyers owed them a duty of privacy or confidentiality.

The key takeaway from this case is that absolute privilege is a powerful defence that is not restricted to defamatory statements or actions. As stated in *BC Teachers' Federation v. Thorne*, 2010 BCSC 953, as a matter of public policy, the defence of absolute privilege is intended "...to ensure that all participants in the justice system are undeterred by fear of reprisal." If absolute privilege was restricted to only defamation actions, the public policy justification for the defence would be defeated.

At the time of writing, it is unknown whether the defendant lawyers will face any discipline from the law society for disseminating the intimate video to the lawyers for the other parties in the divorce proceedings and the court or whether the wife will be found liable for installing hidden cameras in her husband's bedroom or making the surreptitious intimate video of her husband and his girlfriend and providing it to her lawyers. A PDF version is available to download [here](#).

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