

Absolute privilege stops lawsuits based on use of intimate video at case conference

By **Stephen A. Thiele**

Law360 Canada (March 2, 2026, 3:04 PM EST) -- The doctrine of absolute privilege provides a complete defence for actions 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 behaviour or statement."

The scope of this defence is very broad and, as seen in *Burns v. Osuji*, 2026 ABKB 108, will even protect a defendant for behaviour or statements made in quasi-judicial or judicial proceedings that involve a non-party to such proceedings.



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In this case, the defendant lawyers were sued in two separate actions for the dissemination and playing of an intimate video of the male and female plaintiffs at an early intervention case conference (EICC). The plaintiffs were involved in a romantic relationship. However, they had no knowledge of the recording of the intimate video, which was made surreptitiously by the male plaintiff's wife.

Although the male plaintiff and his wife were separated, they continued to reside together in their matrimonial home. Shortly after separating, the male plaintiff and female plaintiff began their relationship, and the wife set up a hidden camera in the male plaintiff's bedroom.

The wife disseminated the surreptitiously recorded intimate video to her lawyers, who, in turn, disseminated it to the male plaintiff's lawyers, to the lawyers representing the children of the male plaintiff and the wife, and to the court for the purposes of the EICC.

The plaintiffs were troubled by the making and dissemination of the video, and accordingly they sued the defendant lawyers and the wife for breach of confidence, intentional infliction of mental distress and public disclosure of private facts.

In her pleading, the female plaintiff alleged 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 male plaintiff alleged 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...”

Under Rule 3.68 of the *Alberta Rules of Court*, the defendant lawyers brought an application to dismiss the actions on the grounds that they did not disclose reasonable claims and had no merit.

Although the EICC was a court-mandated judicial or quasi-judicial proceeding to facilitate settlement discussions or to determine procedural next steps, and held *in camera*, an applications judge refused to dismiss the actions.

The applications judge found that it was not plain and obvious the claims would fail based on the defence of absolute privilege. In the view of the applications judge, the defence of absolute privilege was subject to a narrow exception involving irrelevant or gratuitous statements, especially when made about a non-party.

The dissemination of the intimate video was not particularly relevant to the proceedings at the EICC, and the female plaintiff was not a party to the divorce proceedings.

The defendant lawyers appealed this decision. They contended that the applications judge had relied on a case that was subsequently overturned by the Court of Appeal, and that, among other reasons, the defence of absolute privilege was not subject to a narrow exception involving irrelevant or gratuitous statements.

The defendant lawyers submitted that the intimate video had only been disclosed for the purposes of the EICC. The intimate video was not otherwise used.

In the alternative, the defendant lawyers argued they could not be liable to the plaintiffs because they did not owe them a duty of care.

The plaintiffs contended that the defendant lawyers’ appeal should be dismissed because the intimate video was immaterial, irrelevant and unnecessary to the divorce proceedings. The plaintiffs showed that the purpose of the EICC was to deal with parenting issues involving the male plaintiff’s and his wife’s children and argued that the defendant lawyers were aware that the intimate video had been illegally obtained.

Although the appellate court judge stated that the disclosure of the video may have been ill-considered and gratuitous, the defendant lawyers’ appeal was allowed because the dissemination of the video was protected by the defence of absolute privilege. The parties did not 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.

The defence of absolute privilege attached to the occasion, and not the content or motive behind the sharing of the video with the court and the lawyers for the parties involved in the divorce proceedings.

Notwithstanding that the female plaintiff was not a party to the divorce proceeding and that the video may have been immaterial and irrelevant to the EICC, the appellate court found that based on the Alberta Court of Appeal decision in *Carruthers v. Tuharsky*, 2025 ABCA 267, there was no exception to the defence of absolute privilege, including no exception for non-parties.

In *obiter*, the appellate court also found that the defendant lawyers did not owe any duties to the plaintiffs. The court accepted that, in general, lawyers do not owe a duty to a party adverse in interest to their client. The plaintiffs were unable to show that the defendant lawyers owed them a duty of privacy or confidentiality.

While the making of a surreptitious intimate video in the privacy of an individual’s bedroom arguably cries out for a judicial remedy, this case demonstrates that absolute privilege is a powerful defence when such a video is only used in quasi-judicial or judicial proceedings.

However, the wife may still face liability for the alleged breach of the plaintiffs' privacy, and, potentially, the lawyers could face professional discipline for the dissemination of the intimate video. Even though the defendant lawyers did not owe a duty of care to the plaintiffs and were entitled to advance the interests of their client in the divorce proceedings, the defendant lawyers acknowledged that the conduct of lawyers was governed by the Law Society. As noted in *ESA Holdings Ltd. v. Shea Nerland Calnan LLP*, 2007 ABQB 78, while the duties of a lawyer owed to an opposite party are viewed very restrictively, lawyers still owe duties to the court and the governing body of the legal profession.

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