

Doctrine of absolute privilege: Defamation claim survives dismissal

By **James R.G. Cook**

Law360 Canada (February 21, 2025, 2:15 PM EST) -- The doctrine of absolute privilege is often raised as a defence in defamation claims that involve communications made during the course of legal proceedings. Statements made in pleadings such as a statement of claim or statement of defence are generally shielded from defamation claims on this basis. However, in other cases, it may be less clear whether absolute privilege applies to the statements at issue.

In order to determine whether absolute privilege applies, courts may need to assess evidence of the parties' intent and the context in which the statements are made, as demonstrated by the Superior Court of Justice decision in *Drabinsky v. Kepinski*, 2025 ONSC 408.

The plaintiff in the case was a well-known Canadian theater producer. In 2009, he was convicted of two related criminal offences, sentenced to five years' imprisonment, and released after 17 months. He subsequently received a full pardon from the government of Canada in relation to the convictions.



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The defendant (AK) was a businessperson and a defendant in an ongoing commercial action in which he was being sued for millions of dollars. The plaintiff was not a party in those proceedings.

During the commercial dispute, AK swore an affidavit in which he stated that he had lent money to a company for use in a Broadway production that the plaintiff was producing. The affidavit referred to the plaintiff's criminal conviction. The affidavit further suggested that the company and its senior adviser had improperly absconded with the funds and noted that the company continued to do business with the plaintiff in unrelated matters.

The plaintiff sued AK and his lawyer, alleging that the statements in the affidavit were defamatory. In the statement of claim, the plaintiff alleged that AK was told that the loan was not the company named and that AK's lawyer was provided with a copy of the pertinent loan agreement before AK swore the affidavit so this could have been ascertained. Further, the plaintiff alleged that the defamatory statements were made for an entirely improper purpose and had no relevance or relationship to the proceedings.

The statement of claim specifically alleged that absolute privilege did not apply to the impugned statements.

This did not stop the defendants from moving to strike the claim. They brought a motion under Rule 21.01(1)(b) of the Ontario *Rules of Civil Procedure*, arguing that it was plain and obvious that the statement of claim disclosed no reasonable cause of action against them, arguing that the doctrine of absolute privilege applied.

The motion judge referred to the Canadian law surrounding the doctrine of absolute privilege, which protects statements made on certain limited occasions from defamation claims, referring to cases such as *Salasel v. Cuthbertson*, 2015 ONCA 115, at paragraph 35.

Absolute privilege generally applies to statements made in the course of judicial or quasi-judicial proceedings and extends to statements contained in documents such as pleadings, factums and other written submissions. The purpose of the protection is to promote the search for truth and the “free and fearless conduct of judicial proceedings”: *Duke v. Puts*, 2004 SKCA 12, at paragraph 56, quoting Raymond E. Brown, *The Law of Defamation in Canada*, 2nd ed.

While parties to a proceeding have remedies they may pursue against the adverse parties during the litigation, a non-party does not. In the motion judge’s view, the principles relating to absolute privilege were not intended to have litigation used as a “free-for-all” to make defamatory statements against non-parties without allowing them any recourse.

Further, as motions under Rule 21.01(1)(b) is generally based on the pleadings without evidence, the record was limited to the extent that the overall circumstances could be assessed. Although evidence is not admissible on a motion to strike under Rule 21.01(1)(b), documents that are expressly referenced in the statement of claim are incorporated into it by reference and can be filed for the motion. The motion judge noted, however, that the affidavit in which the impugned statements were made was not contained in the record filed for the defendants’ motion.

This posed a significant obstacle to the defendants since an assessment of absolute privilege depends on the overall context in which the impugned statement is made. The motion judge noted that the court could have reviewed the affidavit to have a better sense of the extent of the circumstances in which the impugned statements were made and whether they were either truly extraneous to the purpose of the affidavit or the type of statement that would fall within the scope of absolute privilege. However, this could not be done based on the record filed.

The motion judge therefore concluded that it was not plain and obvious that the claim against AK was bound to fail for the purposes of the motion to strike.

As to the claim against AK’s lawyer, the motion judge accepted that the policy concerns involving litigation lawyers are more acute than those involving non-lawyers since they are involved in matters of controversy and are regularly required to make statements about parties and non-parties. Lawyers may be instructed to take certain positions by their clients and may have certain obligations to follow those instructions. However, counsel for AK’s lawyer did not provide the motion judge with any authority that immunized him against the general limitations of absolute privilege.

In certain cases, claims for the abuse of civil proceedings may be pursued independently of the law of defamation, even against counsel: e.g. *Curtis v. McCague Borlack LLP*, 2024 ONCA 729 at paragraphs 15-16. In the motion judge’s view, the same principles underlying an abuse of process claim meant that counsel were not necessarily exempt from liability for statements made in the course of litigation, regardless of the circumstances. As with the claim against AK, a contextual analysis was required to determine whether the claim should be struck. This could not be done based on the record filed.

Based on the record filed, the motion to dismiss the defamation action was denied and the claim will continue in the ordinary course. The result may have been different had the motion been brought with a more fulsome record to allow the court to engage in the contextual analysis required to assess whether absolute privilege applied to the communications at issue.

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