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Condo Law

That's Defamation! Or is it?

The Answer, as is Often the Case When Defamation is Alleged, is a Resounding …Maybe

If you hold any kind of position in a condominium – whether volunteer director or paid staff member – there's a possibility you have been, or will be at some point, subjected to some pretty nasty comments, both public and private.

Being criticised is never fun. And often those on the receiving end of negative comments believe they have a claim against the speaker for defamation.

The desire to protect your reputation is understandable. And often the words spoken – "The Board member is a crook!" – are indeed defamatory, assuming they're false and that the words were published to a third-party other than the person being defamed.

But in many cases, the answer is not so clear cut. What if, for example, instead of claiming the Board member is a crook, the person says the Board member is incompetent and is not acting in the best interests of the corporation. Is that defamation? The answer, as is often the case when defamation is alleged, is a resounding …maybe.

Take the case of *Swan v. Durham Condominium Corporation No. 45*. A group of owners drafted a requisition to remove board members from office on the grounds that the director failed *"to act honestly and in good faith"* and failed *"to exercise the care, diligence and skill that a reasonably prudent person would exercise in the circumstances."* The court agreed with Swan that these words were defamatory. The question, said the court (on appeal), is whether *"a reasonable unit owner [would] understand that the [Swan] was dishonest or a person of low moral character by reading the words?"* The court concluded that the answer is yes.

So that's that, then? Well, not quite. Because in a defamation case establishing that the words were defamatory is only the beginning. Next comes the hard part, which is deciding whether there is liability for defamation. And in order to answer that question you need to look into the context in which the words were spoken. In Swan, the court found that, while the words were defamatory, there was no liability for defamation. For one thing, the court found there was justification (i.e. truth) to the allegations. In addition, the court found the words were protected by the defence of 'fair comment', which is a defence that protects expressions of opinion in matters of public interest. The defence of public interest only applies if the speaker acted in good faith.

The court in *Swan* also found that the defence of "qualified privilege" applied. Qualified privilege is a defence to defamation that arises where a person who makes a statement has a legal, moral or social duty to make it and the recipient has a corresponding interest in receiving it.

Qualified privilege was explored in another condo case, *Wan v. Lau*. In that case, the defendant sent an email to fourteen people claiming, erroneously, that the defendant had forged a signature on a

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proxy. Although the defendant realised, he had made a mistake and apologized, Wan nevertheless sued for defamation. The Court found that Lau had a defence in qualified privilege since *"The directors, management, and all unitholders, had a legitimate interest in knowing that a unitholder was alleging fundamental misconduct in the conduct of condominium affairs."* Note, however, that the protection afforded by qualified privilege would have been lost had the words been published outside of the condominium community.

Another more recent hurdle for plaintiffs in defamation cases is the so-called anti-SLAPP legislation. The legislation was passed in response to numerous high-profile cases in which individuals who had publicly protested the actions of large corporations were faced with claims for defamation. There was a concern that the purpose of the litigation was to intimidate people into keeping quiet. For that reason, these types of actions became known as "SLAPP" lawsuits: A Strategic Lawsuit Against Public Participation.

In Ontario, anti-SLAPP legislation allows a judge to dismiss a defamation claim if the words amount to an expression in a matter of public interest.

The anti-SLAPP defence was used in a case in which an individual, Katie Mohamed, was sued for defamation for comments she made about United Soils Management Ltd. The company had applied to amend an agreement with the local municipality as to what substances it could deposit into its gravel pit. The gravel pit is located close to the Oak Ridges Moraine, a sensitive geological area and source of drinking water. Ms Mohamed was concerned about the amendment and wrote to a closed Facebook group that the amendment could "potentially poison our children."

Ms Mohamed asked the court to dismiss the action, relying on the anti-SLAPP legislation. The court agreed, finding that the action had no merit and that the legislation *"directs that we place substantial value on the freedom of expression over defamation in the public sphere…those who act in the public realm need to realize that not everybody will accept what they wish to do or agree with what they say and may make statements that go beyond what may seem, to the recipient, to be appropriate."*

In *Taft Management Inc. v. Gentile*, a condominium case, the court refused to use the anti-SLAPP legislation to dismiss the claim. In that case, the defendant, Gentile, who was a condominium corporation Board member, had emailed other Board members making disparaging remarks about the property manager. Although the Board member apologised, twice, the property management company and its principal sued the Board member for defamation. The Board member asked the court to dismiss the case under the anti-SLAPP legislation. The Court refused, stating that the emails in question *"relate to ordinary and routine matters in condominiums – not matters of public interest but rather matters of a private interest which would normally be dealt with by the board of directors of a condominium corporation and its property manager.… nothing about the two emails or their subject matter when seen as a whole rises to the level where it can be said that the 'public interest'…is engaged."*

That the motion was dismissed does not mean that the court found in favour of the plaintiff – it simply allowed the case to proceed to trial, during which the defendant would have the opportunity raise all other defences available in a defamation case.

The *Gentile* case should not be read to mean that condominium matters are not matters of public interest. The court's decision appears to have hinged on the nature of the emails rather than the fact that they related to a condominium matter. If, say, the communication related to a Board election, the decision may have been different.

None of this means that people should go around making false accusations about others. But it should be clear, however, that while a person has a right to protect his/her personal reputation against false attacks, that right often comes up against the public policy in favour of protecting freedom of speech. It can be a delicate balance, which is why the outcome of defamation cases is often difficult to predict. As well, there may be other strategies to deal with troublesome or defamatory statements. One is communication. Often a well-drafted response to someone spreading false claims may be a much more effective rebuttal than a claim for defamation. And, where the victim of the allegations is a board member or staff member of a condominium corporation, and the behaviour is so pervasive and combined with other forms of abuse such as shouting and physical intimidation, that it constitutes harassment. In that case, the condominium corporation may have other remedies available to it. CV

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