

Torts that Might Apply in a Dispute Between Neighbours in a Condominium (*Novakovic v. Salvador*)

Defamation | Litigation | Litigation & Dispute Resolution | Torts

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Part of the purpose of our blogs is to help educate the reader about the law and the tests that apply to various causes of action.

The decision in *Novakovic v. Salvador*, 2023 ONSC 4198, which arose out of a dispute between two neighbouring unit owners in a condominium, serves as a great educational tool for this purpose and shows that the torts that might apply in a dispute between neighbours living in the same condominium.

In this case, at the material times, the plaintiff lived in a condominium unit on the floor directly above the defendant's unit. The plaintiff was 69 years old. The defendant was 38 years old.

The plaintiff was concerned about excessive loud music and the smell of cannabis smoke, which she alleged came from the defendant's unit. Accordingly, she made complaints to the condominium's Board. In or around the same time that the plaintiff began making her complaints, the defendant alleged that someone was vandalizing her front door with foul substances, including dog feces and smashed eggs, and after witnessing the plaintiff, through her door's peep hole, allegedly carrying out the vandalizing activity called police.

The defendant told police what she had seen and that she feared for her own safety. The police then visited the plaintiff's unit where she was arrested for mischief and taken out of the building in handcuffs. However, the charges were ultimately dropped. A claim against the police for malicious prosecution was settled.

The defendant also commenced a human rights complaint against the plaintiff, alleging discrimination on the basis of race and complained about the alleged conduct of the plaintiff to the condominium's property manager and Board.

In the human rights complaint, the defendant contended that the plaintiff's alleged vandalism constituted retaliation for the alleged excessive noise and odour complaints the plaintiff was making against the defendant. The human rights application was dismissed for lack of jurisdiction.

Ultimately, the plaintiff sued the defendant for, among other things, malicious prosecution, defamation and nuisance.

The plaintiff contended that the defendant had initiated the criminal charges against her, made statements to third parties that tended to lower her reputation, and that the loud music and odours from the defendant's unit disturbed her peaceful possession and enjoyment of her own unit. The plaintiff argued that as a result of the noise, she was unable to sleep in her unit and had been required on a couple of occasions to sleep in the concierge area of the condominium.

With respect to the defamation action, the defendant raised the defences of qualified and absolute privilege.

The plaintiff was only successful in her claim in nuisance.

Malicious prosecution

Malicious prosecution is an intentional tort that provides a plaintiff with a remedy for losses arising out of an unjustified prosecution.

As set out in cases such as *Miaga v. Kvello Estate*, 2009 SCC 51, for a plaintiff to succeed in an action for malicious prosecution, all of the following four elements must be proven:

- a) the defendant initiated the prosecution;
- b) the prosecution was terminated in the plaintiff's favour;
- c) there was an absence of reasonable and probable cause to commence or continue the prosecution; and
- d) the defendant's conduct in starting the criminal process in motion was motivated by malice.

The plaintiff's claim for malicious prosecution was unsuccessful because most of the tort's elements were not proven. The court found that the defendant was not "actively instrumental" in setting the criminal prosecution in motion. The defendant had only made a report to the police, who exercised independent judgment in deciding to arrest the plaintiff. As a general rule, unless there are exceptional circumstances, the police are treated as the prosecutor and the court will consider the police officer who laid the charge as the person who set the prosecution in motion: see *Chaudhry v. Khan*, 2015 ONSC 1847.

As well, the defendant had reasonable and probable grounds to contact the police and to believe that the plaintiff had vandalized her front door. Lastly, there was no malice.

Defamation

The plaintiff's defamation action revolved around the statements the defendant:

- (i) made to property management and the condominium Board of Directors;
- (ii) pled in the Human Rights application; and
- (iii) made to the police.

The court concluded that the defences of qualified privilege or absolute privilege applied to the various statements.

Qualified privilege protects a defendant's statements in circumstances where the maker of the statement had an interest or duty to make it and the person to whom it was made had a corresponding interest or duty to receive it. As determined in *D'Addario v. Smith*, 2015 ONSC 6652, affirmed 2018 ONCA 163 (CanLII), this privilege attaches to the occasion in which the statement is made, not the statement itself.

If the defendant's statement is made with malice or there is "proof that the defendant either knew the statement was false or was reckless as to its falsity", the qualified privilege will be lost.

The plaintiff provided no evidence of malice to defeat the qualified privilege as it related to the statements made to police and the condominium Board. The court found that the defendant's statements to police made in the context of her report were clearly covered by the qualified privilege and that the Board had a duty to receive complaints from its condominium members.

Nuisance

With respect to nuisance, the plaintiff was required to prove that the interference with the enjoyment of her unit was both substantial and unreasonable. In *Antrim Truck Centre v. Ontario (Transportation)*, 2013 SCC 13, the Supreme Court of Canada explained that a substantial interference with property is one that is non-trivial. The reasonableness analysis is concerned with whether the non-trivial interference was unreasonable in all of the circumstances. The relevant factors a court applies to determine whether interference is unreasonable include:

- a) the severity of the interference;
- b) the nature of the interference, its duration and effect;



- c) the character of the locale;
- d) the utility of the defendant's conduct;
- e) the sensitivity of the use interfered with; and
- f) any other relevant defences.

Although based on the test, not every interference or inconvenience will be actionable, the court was satisfied that on occasion the noise that emanated from the defendant's unit was excessively loud and negatively impacted the plaintiff's ability to sleep. There was evidence that internal rules and regulations of the condominium had been violated and that two letters from the condominium's lawyer about excess noise and smoke had been delivered to the defendant. There was also evidence that the plaintiff felt stressed and that she was unable to relax in her own home.

In considering all of the relevant circumstances, the court concluded that the plaintiff had proven on a balance of probabilities that there were 13 confirmed incidents of excessive noise and that the plaintiff's use and enjoyment of her unit and health were adversely impacted. She was awarded \$15,000 for the defendant's nuisance.

The foregoing highlights three of the torts that frequently come before the courts. In the decision, the court also considered the torts of negligence, invasion of privacy, intentional infliction of mental suffering, and harassment. The plaintiff was unsuccessful in proving all of these causes of action. Nevertheless, we recommend reading this case for its discussion on the tests that apply to these torts and the court's confirmation that there is no existing common law tort of harassment in Ontario.

It is not expected that these two former neighbours will again be involved in an acrimonious dispute with one another as the defendant moved out of her unit in 2017 and sold it in 2019. A PDF version is available to download [here](#).

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