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Five Minutes for Litigating: A Highlight of Sports Liability in Ontario

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Sports offer many things: entertainment, escape, exercise, social fun, and, inevitably, degree of risk. Injuries are a reality in most sports, be it recreational or competitive, amateur or professional.

As stated by Justice Milanetti in *Nichols v. Sibbick* concerning a no-contact men's recreational hockey league, "Players will inevitably collide, sticks will inevitably clash, pucks will fly in unforeseen directions." When two combatants take their battle from the arena to the courtroom, lawyers should ensure that their clients know the score before taking their shot.

Sports metaphors aside, players in sporting activities are generally protected from civil liability in Ontario by the implied consent of all the participants to physical interference that can be an integral part of the particular sport being played. When assessing liability as concerns a participant's actions with the context of a game, courts have historically reviewed the common and anticipated activities within that game to assess what one could reasonably expect to be subjected to within that game. Though it seems to be mere common sense, there are some nuances within this legal analysis.

The Ontario Court of Appeal in the 2015 decision of *Kempf v. Nguyen*[1], decided that, in general, the definition of reasonable care amongst sporting competitors will depend upon the perils which a person engaged in an activity might reasonably be expected to encounter. The Court of Appeal stated:

> *In hockey or basketball, for example, players have to assume some risk of injury from bodily contact, even contact intentionally inflicted or in breach of the rules of the game. A body check -- even one that calls for a penalty -- or contact fighting for a rebound in which the opposing player is called for a foul is part of the ordinary risk of each game. Conduct in these contact sports becomes unacceptable only when it is malicious, out of the ordinary or beyond the bounds of fair play.*

[1] 2015 ONCA 114 (CanLII)

The following cases concern actions for damages arising from injuries that occurred during men's recreational hockey games. They are instructive in drawing a line between bodily contact that is an expected part of the game and that which is not. As noted above in *Kempf*, it takes a certain escalation of violence, contact, or unsportsmanlike conduct before a court will impose civil liability on a competitor.

A 2005 Ontario Superior Court of Justice case, *Nichols v. Sibbick*[2], concerned a men's recreational no-contact hockey game in which the defendant was playing defence and attempted to stick check the plaintiff to stop him from shooting the puck. The defendant missed, high striking the plaintiff in the eye. The plaintiff's eye had to be surgically removed. Though the hit was high, against the rules of play, and worthy of a penalty within the game, the defendant was not found liable and the action was dismissed.

In that case, Justice Milanetti emphasized the need to determine the correct standard of care. Within a sporting contest, such as a no-contact hockey game, the standard of care owed to other players is different from that owed to persons in normal daily living. Participation, in and of itself, is an acceptance of the risks inherent in the game. That said, Justice Milanetti referred to another Ontario case, *Sexton v. Sutherland*[3], for the proposition that reckless and intentionally harmful conduct falls outside those accepted risks. In that framework, her Honour proceeded to the next, natural steps of the investigation: what is the nature of the risks assumed by a participant in a particular game? What risk would a reasonable participant expect within such a game? How would a reasonable participant conduct him or herself within such a game? To that end, Justice Milanetti reiterated a test formulated by the British Columbia Court of Appeal in *Unruh v. Webber*[4] as follows:

> *The standard of care test is what would a reasonable competitor, in his place do or not do. The words 'in his place' imply the need to consider the speed, the amount of body contact and the stresses in the sport as well as the risks the players might reasonably be expected to take during the game, acting within the spirit of the game and according to the standards of fair play. A breach of the rules may be one element in that issue but not necessarily definitive of the issue.*

In *Nichols*, Justice Milanetti found that the defendant was attempting to prevent a shot and ultimately a goal in the tied game by checking the plaintiff's stick. Given the recreational nature and no contact rules of the game as well as the pace and competitive level of the teams, this action by the defendant, though resulting in a play that was contrary to the rules of the game, was found to be a legitimate tactic that a reasonable competitor would use. Her Honour, in making her decision, acknowledged that the no-contact nature of the match does not eliminate the inherent dangers of the sport of ice hockey; that there will always be activities within sport that bring risk to participants.

The Superior Court in Ontario recently confirmed the above inherent risk reasoning when determining sporting liability. In *Levita v. Alan Crew et al*.[5] the plaintiff brought an action

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[2] 2005 CanLII 23685 (ON SC)

[3] [1991] O.J. No. 624 (ON CJ, Gen. Div.)

[4] [1994] B.C.J. No. 467 (BC CA)

[5] 2015 ONSC 5316 (CanLII)

against the defendants for a fractured right tibia and fibula which occurred during a recreational, no-contact hockey league game. While the facts were disputed, the subject conduct was a hit from behind. Justice Firestone, after hearing the case, stated that a finding of negligence would only follow if the defendant proved that the plaintiff breached the standard of care by engaging in conduct which fell short of what a reasonable hockey player participating in a hockey game in the parties' league would do or refrain from doing, taking into account the nature of the game and its inherent risks to which the players willingly consented. Though a mouthful, it is the full and accepted test for sporting liability in Ontario. Ultimately, the action was dismissed. Justice Firestone found that there was insufficient evidence to make the necessary finding that the defendant's intention in skating into the plaintiff was to injure him. While the defendant's actions were aggressive, they were not malicious, out of the ordinary or beyond the bounds of fair or expected play. Justice Firestone provided some guidance as to the factors to consider in determining whether evidence exists of an intention to injure, as follows: whether there was a previous incident between the players at any time which would disclose any resolve or intention on the defendant's part to injure the plaintiff; whether the actions of the defendant at the time "were such that one would reasonably conclude there was an intention to cause injury;" and the degree of force that would have been necessary to cause the injury.

So what does it take for a competitor to be found liable for a fellow competitor's injuries in the course of play? The above "hockey play" cases can be contrasted with the decision in *Leighton v. Best*[6]. During a recreational "Gentleman's Hockey" game, the plaintiff's stick struck the defendant in the face. The players subsequently jostled and the defendant punched the plaintiff in the jaw. The force of the blow sent the plaintiff to the ice and his jaw was broken in three places. The defendant was found liable in damages for battery on the basis that the punch exceeded the scope of the plaintiff's consent to the application of force. In deciding the matter, Justice Riopelle found that the defendant's conduct was unusual and beyond the scope of the ordinary standards applicable to Gentleman's Hockey. His Honour ruled that the implied consent was to jostle, wrestle and maybe land a few harmless punches over protective gear, however, the defendant exceeded the scope of implied consent by removing the plaintiff's helmet to land a punch of such force that there must have been an intention to injure or at least recklessness as to the consequences of such a hard blow. Though it can often be a fine line to review competitive conduct between players within a game setting, Justice Riopelle's reasons for judgment and comments on the play in question provide an example of the contextual approaches that are taken in sporting liability cases.

In general, and certainly in the context of injuries arising from exchanges between hockey players, aggression, malice, or intent to injure will be viewed by courts within the context of the particular game. The conduct of a particular participant toward another that results in the two proceeding to trial will be measured against the normal, anticipated risks within the confines of the game. Simply, plaintiffs from sport and game related injuries are presumptively expected to accept the normal playing risks associated with the undertaken activity, sport, or game. To quote Justice McCawley in *Henderson v. Canada Hockey Association Inc.*[7], a case in which a player collided with a referee resulting in injuries:

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[6] 2009 CanLII 25972 (ON SC)

[7] [2016] M.J. No. 101

> *The law in Manitoba and Ontario is clear that ordinary carelessness or negligence is not a basis for recovery in cases involving injuries caused by one player to another during a sporting event. Only where there is a deliberate intent to cause injury or reckless disregard for the consequences of one's own actions will a finding of negligence result. All participants in a physical contact sport like hockey, including a referee, are presumed in law to assume willingly the risk of harm attendant on the regular and expected conduct of the game. The player making injurious contact with another player can only be held liable for the results of that physical contact if there is a deliberate intent to injure or conduct so outside the normal scope of play.*

How then should coaches, conveners, organizations, and facilities to protect themselves from penalty box conduct which puts them in the witness box (at defence counsel table?)

For those who must deal with players spoiling for a fight or looking to settle scores within a game, precautions must be taken to avoid vicarious civil liability through the *Occupiers' Liability Act*, by findings of agency, or other forms of "aiding and abetting" hot-headed, combative participants. The following steps should be considered to protect against liability in such circumstances:

- Confirming proper training and certification requirements for coaches and referees;
- Ensuring proper insurance for the activities undertaken within a venue is purchased with any additional named insureds listed on the policy;
- Mandating waivers and rule summaries are signed by all participants prior to participation in the game;
- Requiring certain equipment and/or protective devices are worn by participants prior to participation;
- An agreement between the building owners/operators and the league, game convenor, or participants themselves laying out timing, indemnities, insurance, and scope of duties and responsibilities of the parties in the context of the game;
- The ability to collect any and all evidence from a particular gaming event should an incident occur including note pads for collecting witness contact information, video surveillance preservation if available, and the names of any paramedics, staff, or other parties that may arrive after the incident; and,
- A properly kept and up to date organization of participants, payment collected, waivers signed, and attendance logs.

One can appreciate that the above requires proper supervision and organization of games and can create a level of paperwork and hassle that go beyond the time and effort organizers are willing to commit. However, these same organizers will be glad to know they took the above steps once a claim is served and their insurance companies request the above records and information.

Though all this may seem like an attempt to complicate sport, add bureaucracy to recreational leagues, and kill whatever fun remains in our overly litigated world of human interaction, taking the precautions outlined in this article will go a long way to preventing injuries, as well as costly litigation contests, making games more fun for everyone involved.

The full article can be found at page 16 at the following link:
https://www.oiaa.com/members/wp-magazine/november-2017-wp-magazine/