Unsportsmanlike conduct: The different standards of care between athletes in Canada

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Athletes in British Columbia may face more than red cards, penalties and ejections for an overly aggressive play that injures an opponent. In the recent Supreme Court of British Columbia decision of *Miller v. Cox*, Justice Baker held that a recreational soccer player was liable for a "dangerous and reckless" slide tackle that injured an opponent, finding that the slide tackle went beyond the risks the plaintiff impliedly consented to by participating in the game. The decision highlights the different standard of care tests used by the provinces for determining legal fault in sports negligence claims.

The high bar for finding fault in other provinces: Deliberate intent to injure

In some provinces, such as Manitoba, Ontario and New Brunswick, the standard of care owed between athletes is largely based on the 1965 Manitoba Queen's Bench case of *Agar v. Canning*,[1] where the court found a hockey player liable for deliberately striking an opponent in the face with his stick, which rendered his opponent partially blind.

In reaching the above conclusion, the court noted that persons who engage in sport must be assumed to accept some risk of accidental harm and that "[it] would be inconsistent with this implied consent to impose a duty on a player to take care for the safety of other players corresponding to the duty which, in a normal situation, gives rise to a claim for negligence."[2] However, the court held that a player's immunity from liability ends when his actions "show a definite resolve to cause serious injury to another" player, even when the player's actions are retaliatory and in the heat of the game.[3]

Later decisions from Ontario cite *Agar v. Canning* as establishing the "high bar" that a player's actions must be deliberate and with an intent to cause serious injury to an opponent, among other factors, for the behaviour to fall outside of the scope of implied consent.

For example, in *Levita v. Crew,* the Ontario Superior Court of Justice found that a hockey player was not liable for delivering a body check, which the plaintiff claimed was late and from behind, that caused the plaintiff to break several bones in his leg. The court found that the plaintiff was aware of the inherent risks of playing and impliedly

consented to being body-checked in the course of play, even where that contact might warrant a penalty. The court was unable to conclude on the evidence that the defendant intended to injure the plaintiff.

The lower bar in British Columbia: Unreasonable conduct in the circumstances

In contrast, the standard for establishing fault in sports negligence cases in British Columbia is whether the defendant's conduct was unreasonable in the circumstances, which is markedly easier for a plaintiff to demonstrate than to prove a deliberate intent to seriously injure.

In cases such as *Forestierei v. Urban Recreation Ltd.* and *Unruh (Guardian ad litem of) v. Webber*, British Columbia courts have held that "an athlete consents only to what is reasonable conduct from his or her opponent," and "[the] standard of care test is – what would a reasonable competitor, in his place, do or not do."

The British Columbia Court of Appeal, in *Zapf v. Muckalt*, summarized the test as a determination for the trial judge, based on the evidence, "to decide what risks are assumed and what a reasonable competitor would do in the circumstances of each case." On that occasion, the Court upheld the trial judge's finding that the defendant hockey player was negligent when he hit the plaintiff from behind, causing the plaintiff to become a quadriplegic. The trial judge implied that the defendant, as he was approaching the plaintiff from behind at a high speed near the boards, had a duty to ensure that the check was delivered shoulder-to-shoulder.

The Court finds Mr. Cox liable

In *Miller v. Cox,* Justice Baker canvassed the different standards of care in other provinces and adopted the following passage from Lorne Folick, Michael Libby and Paul Dawson's *Sports and Recreation Liability Law in Canada* as an accurate summary of the law:

> The practical result of this difference in views between provinces means, quite simply, that an injured hockey player in British Columbia faces a much less substantial burden of proof of an actionable injury than does a similar player in other provinces. It will be sufficient in the former case to simply show a failure to adhere to the relevant standard of care, while in the latter, intentional conduct (or at least recklessness) is required.[4]

In *Miller v. Cox,* the defendant Karl Cox's slide tackle on the plaintiff Jordan David Miller caused Mr. Miller to fall and severely injure his shoulder. After hearing from several witnesses, Justice Baker found that Mr. Cox had no possibility of contacting the ball when he approached Mr. Miller from a blind spot and executed a two-footed "scissoring" slide tackle that caused Mr. Miller to fall with such speed that he was unable to brace for impact with the ground. Justice Baker concluded that Mr. Cox's actions were outside the conduct a player would reasonably expect in a recreational league and awarded Mr. Miller $103,764.11 in damages.

Key takeaway

The effect of *Miller v. Cox*, and the different approach to finding fault in British Columbia vis-à-vis other provinces, is that an athlete in British Columbia may find him- or herself liable for an opponent's injuries following an overly aggressive play, even if the athlete did not have a clear intent to injure his or her opponent. In contrast, the same athlete may not face liability in Ontario, for instance, if the plaintiff is unable to demonstrate a deliberate intent to cause serious harm. Athletes in British Columbia who are aware of this risk may second-guess making an overly aggressive challenge or hit, because the penalties may extend well beyond the playing surface.

Contact us

Please contact the authors or any of the contacts below from our Sports & Gaming Law team for questions regarding the legal framework governing the matters discussed in this article or any other sports and gaming issues.

[1] 54 W.W.R. 302, 1965 CanLII 872 (MBQB).

[2] *Ibid*, at 303.

[3] *Ibid*, at 304. In decisions such as *Levita v. Crew*, 2015 ONSC 5316, at para. 87, and *Sexton v. Sutherland*, [1991] O.J. No. 624, 26 A.C.W.S. (3d) 472, at para. 7, the court suggested that the requirement of intent to cause "*serious*" harm or injury excluded liability for anything that might be the "inevitable consequence of a rough and tumble game".

[4] *Miller v. Cox*, 2023 BCSC 349, citing Lorne Folick, Michael Libby and Paul Dawson, *Sports and Recreation Liability Law in Canada* (Toronto: Thomson Reuters, 2017), at 285-286.

Footnotes

[1] 54 W.W.R. 302, 1965 CanLII 872 (MBQB).

[2] *Ibid*, at 303.

[3] *Ibid*, at 304. In decisions such as *Levita v. Crew*, 2015 ONSC 5316, at para. 87, and *Sexton v. Sutherland*, [1991] O.J. No. 624, 26 A.C.W.S. (3d) 472, at para. 7, the court suggested that the requirement of intent to cause "*serious*" harm or injury excluded liability for anything that might be the "inevitable consequence of a rough and tumble game".

[4] *Miller v. Cox*, 2023 BCSC 349, citing Lorne Folick, Michael Libby and Paul Dawson, *Sports and Recreation Liability Law in Canada* (Toronto: Thomson Reuters, 2017), at 285-286.

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