Examining the rules of the game by jurisdiction: Slide tackle injury decision upheld in B.C. Court of Appeal

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In *Miller v Cox*, 2024 BCCA 3 (*Miller*), the British Columbia Court of Appeal delivered a message to athletes in British Columbia: Playing within the rules of the game cannot immunize you from liability for reckless play.

The law in British Columbia recognizes that athletes accept a certain level of risk by participating in their sport. However, athletes in British Columbia may be found liable for injuring an opponent if their actions are found to not be those of a "reasonable competitor".[1]

In *Miller*, the plaintiff was a recreational soccer player who was in possession of the ball and bearing down on goal when the defendant delivered a slide tackle, from behind, causing the plaintiff to injure his shoulder. The issue at trial was whether the defendant's slide tackle was an action that a reasonable competitor would take.

Baker J. of the Supreme Court of British Columbia found that the defendant in *Miller* was negligent and held that his actions were outside the conduct a player would reasonably expect in a recreational league. Baker J. noted that there was no chance of the defendant getting the ball from the slide tackle and that the defendant was aware of the risk of injuring the plaintiff with the move.[2]

On appeal, the defendant's primary argument was that a careless play will only become negligence where the conduct that causes the injury is not permitted by the rules of play. The defendant submitted that the judge applied an incorrect standard of care whereby the plaintiff need only establish carelessness on the part of the defendant to establish liability. The defendant argued that because slide tackles were permitted by the rules of the game, the judge erred in law by applying the wrong standard of care.

Fitch J.A., writing for the British Columbia Court of Appeal, rejected the defendant's argument, and observed that a body check, while permitted within the rules of hockey, may attract liability if the body check exposes the opponent to an unreasonable risk of harm.[3]

The *Miller* decision provides several important takeaways for athletes and sports leagues in British Columbia, which we highlight below.

1. Importance of the rules of the game varies by jurisdiction

The British Columbia Court of Appeal's decision in *Miller* highlights the contrast between the law in British Columbia and the law in some of Canada's eastern provinces. While the *Miller* decision makes clear that in British Columbia a player can be found liable for reckless conduct causing an injury to an opponent even if that conduct falls within the rules of the game, in Manitoba and Ontario courts may place greater weight on whether the defendant's conduct was permitted by the rules.

Temple v Hallem is a Manitoba Court of Appeal decision concerning an incident from a co-ed softball game where the larger male defendant slid into the smaller female plaintiff who was playing catcher at home plate. The trial judge in *Temple* allowed the plaintiff's claim, finding that the defendant's conduct went outside of the rules of the game, describing the incident as follows: "[t]he action of a 180-pound young man, hurtling down the base line towards a 117-pound woman, and going into what is a virtually, a professional slide, and violently colliding with the plaintiff, in my view, goes beyond the rules of good conduct and fair play demanded by the league."

Huband J.A., writing for the Manitoba Court of Appeal, referred to the oft-cited Manitoba Queen's Bench decision in *Agar v Canning*,[4] which underpins much of the sports negligence case law in Ontario. Huband J.A. found that the *Agar* decision "suggests that only a deliberate violation of the rules calculated to do injury will give rise to civil liability. Otherwise, people who engage in sport are assumed to accept the risk of accidental harm."[5]

Huband J.A. allowed the defendant's appeal, holding that the defendant's slide was permitted by the rules of softball and that a defendant will not be found liable if their conduct was within the rules of the game and not carried out with an intention to cause injury: "[u]nder other circumstances, outside game conditions, the collision by the defendant into the plaintiff would constitute a serious assault. But game conditions prevailed, under which the plaintiff assumes the risk of injury so long as the rules are not violated with an intention to do injury."[6] The plaintiff's application for leave to appeal to the Supreme Court of Canada in *Temple* was subsequently refused.[7]

An Ontario court reached a similar stance on the law. *Dunn v University of Ottawa* involved an attempted punt return in a football game where the defendant ignored the "five-yard rule" and collided with the plaintiff punt returner, causing serious injury. In oral judgment, Cunningham J. of the Ontario Court of Justice stressed the importance of the rules of the game in the determination of liability, stating "[w]here contact is legal, within the rules of the game, no liability can attach. Even if contact is made outside the rules of the game, there can be no liability unless the player can establish that the Defendant knew he was breaking the rules, and had formed a deliberate resolve to injure or that he was reckless as to the consequences of his actions."[8] In finding the defendant liable, Cunningham J. emphasized that the defendant acted with flagrant disregard of the "five-yard rule".[9]

In the criminal context, British Columbia courts have found that athletes consent to receiving a certain level of harm provided that the harm is within the rules of the game, even where those rules are "unwritten", as suggested by the Provincial Court of British Columbia in *R. v. McSorley*.[10] However, this principle does not appear to have been transposed to sports negligence law in British Columbia.

As stated in our earlier article on the trial judgement in Miller, athletes in British Columbia should be mindful of taking overly aggressive actions that could create an unjustified risk of harm for their opponents. The British Columbia Court of Appeal's decision in *Miller* suggests that an athlete may attract liability for their reckless conduct even if that conduct was otherwise permitted by the rules of the game. In other words, an action resulting in a minor penalty, or no penalty, within the game may nonetheless result in a major penalty in court. As Justice Fitch quipped in *Miller*: "[w]hile the referee was in charge of the match, the judge was in charge of the litigation. She was, in effect, the final referee."[11]

2. Key takeaways: Experts and video

In *Miller*, Baker J. made her determination of how the slide tackle was delivered, and whether the slide tackle was an action that would comport with what a "reasonable competitor" would do in the circumstances, based on the testimony of the parties and lay witnesses. It is unclear whether either party considered putting forward an expert who could provide evidence on what a reasonable competitor in the defendant's cleats would do in such a situation.

Reasonable athletes may disagree as to whether a heightened level of physical contact can be expected to deny a scoring chance. A trip to deny a breakaway in hockey, a hard foul on a driving layup in basketball, or a tackle inside the penalty area in soccer are all examples of penalties that may result in injury but are nonetheless commonplace and expected in their respective sports.

It is unclear whether an expert speaking to the reasonableness of the slide tackle in *Miller* could have helped the defendant's case. However, defendants in future sports negligence cases should consider whether an expert would be of use for explaining how the defendant's actions were those of a "reasonable competitor".

Further, although Baker J. found all witnesses in *Miller*,except for the defendant, to be straightforward and credible, it is notable that the trial was held more than four years after the incident.

Rather than depend on the recollections of witnesses several years after the fact, sports organizations should consider installing cameras to record games. Insurers of sports organizations should also consider requiring or incentivizing their clients to use video to ensure that incidents are properly recorded to assist when matters end up before the court.[12]

Contact us

Contact the authors or any of the contacts below for questions regarding the legal framework governing the matters discussed in this article or any other sports and gaming issues.

Footnotes

[1] See *Unruh (Guardian of) v. Webber* (1994), 1994 CanLII 3272 (BC CA), 88 B.C.L.R. (2d) 353 (C.A.) at paras. 29-30; *Zapf v. Muckalt* (1996), 1996 CanLII 3250 (BC CA), 26 B.C.L.R. (3d) 201 at paras. 15-16.

[2] *Miller v. Cox*, 2023 BCSC 349.

[3] *Miller v Cox*, 2024 BCCA 3, at para. 45.

[4] *Agar v Canning*, 1965 CanLII 872, 54 WWR (ns) 302.

[5] *Temple v Hallem*, 1989 CanLII 5323, [1989] 5 W.W.R. 669, para. 11.

[6] *Temple v Hallem*, 1989 CanLII 5323, [1989] 5 W.W.R. 669, para. 12.

[7] *Temple v Hallem*, 105 N.R. 240 (note), 65 Man. R. (2d) 80 (note).

[8] *Dunn v University of Ottawa*, [1995] O.J. No. 2856, 1995 CarswellOnt 3170, para. 14.

[9] *Dunn v University of Ottawa*, [1995] O.J. No. 2856, 1995 CarswellOnt 3170, para. 16.

[10] *R. v. McSorley*, 2000 BCPC 116.

[11] *Miller v Cox*, 2024 BCCA 3, at para. 40.

[12]For an example of the importance of video evidence, see *Dunn v University of Ottawa*, [1995] O.J. No. 2856, 1995 CarswellOnt 3170, where neither athlete had any memory of the collision, and the court appears to have relied heavily on video evidence from a nationally televised game.

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