

Vicious Hockey Hit Costs Player \$70,000

Brian Sunohara
January 2020

Emotions can run high in sports, even in recreational adult leagues. That is understandable due to the competitive nature of many athletes.

However, players must play within the rules and spirit of the game. Failing to do so can result in criminal charges and a significant monetary judgment against the offender, not to mention life-changing injuries to the victim.

In the recent case of *Casterton v. MacIsaac*, 2020 CanLII 1088, a men's league hockey player was ordered to pay an opposing player damages of over \$700,000 for a vicious hit.

Facts

The plaintiff and the defendant played in a non-contact men's hockey league. Most of the players were in their late twenties. Although the league was a "beer league", the players were, by and large, talented, experienced, hockey players.

With less than one minute left in the game, the plaintiff skated behind his net and shot the puck towards a corner.

The defendant was skating at a very fast speed and collided with the plaintiff. The defendant was assessed a ten minute gross misconduct penalty and a further seven minute penalty for intent to injure.

The referee testified that he had never seen such an act of violence in a hockey game. He was of the opinion that the defendant deliberately attempted to injure the plaintiff.

The plaintiff briefly lost consciousness. There were several cuts to his face. Half of his two top teeth were broken off.

The defendant was criminally charged with assault. He was convicted twice, but the convictions were overturned on appeal. A third criminal trial did not proceed because the Crown took too long to re-try the case.

The plaintiff sued the defendant in a civil action. The matter proceeded to a three week trial.

Standard of Care

Justice Gomery noted that hockey is a fast-paced sport where some degree of body contact is inevitable, even in a non-contact league.

Players can expect that they may be accidentally injured in a game. They accept this risk when they play.

However, a player's implicit consent is not unlimited. A player does not accept the risk of injury from conduct that is malicious, out of the ordinary, or beyond the bounds of fair play.

If a court finds that an injury was caused by conduct that was intentionally malicious, then the defendant is liable.

If there was no malicious intent, the court considers whether the conduct was out of the ordinary or beyond the bounds of fair play. Relevant considerations in this regard include the type of league in which the game was played, the level of play in the league, the applicable rules, and the nature of the game.

Decision on Liability

The defendant failed to meet the applicable standard of care. His conduct was either deliberate or reckless.

The defendant anticipated the hit, whereas the plaintiff did not. The defendant could have avoided the collision. Justice Gomery rejected the defendant's evidence that the plaintiff made a sharp, unexpected turn.

Justice Gomery accepted evidence that blindside hits, especially to the head, are absolutely prohibited. They have no place in recreational hockey or in any hockey game.

In particular, Justice Gomery found as follows:

[122] I conclude that Maclsaac intentionally skated at high speed towards Casterton from an angle where his approach could not be seen. He positioned his arms and drew up his body in such a way as to maximize bodily contact, causing a collision between Maclsaac's shoulder and forearms and the lower

half of Casterton's face. Casterton did not anticipate the check and, as such, made no moves to protect himself or attempt to avoid the collision. Each player admitted that, if Casterton's theory of how the collision occurred were accepted, this was a blindside hit.

[123] Based on the evidence of Winton and Desjardins about Maclsaac's body posture, I find that Maclsaac either deliberately attempted to injure Casterton or was reckless about the possibility that he would do so. But even if I concluded that the hit was neither intentional nor reckless, applying the test in *Kempf*, Maclsaac would be liable for Casterton's injuries because he failed to meet the standard of care applicable to a hockey player in the circumstances. Every player who testified stated that a blindside hit to the face is and was outside the bounds of fair play.

As a result, the defendant was found liable for the injuries sustained by the plaintiff.

Contributory Negligence

Relying on an expert witness, the defendant argued that the plaintiff was partly liable for his injuries because he wore a half visor instead of a full mask, thereby increasing the risk of a brain injury on impact.

Justice Gomery rejected this argument. Since the league permitted players to wear a half visor, the plaintiff was not negligent in doing so.

The defendant also alleged that the plaintiff was cognitively impaired during the game due to his long-term cannabis use. The defendant stated that the plaintiff was not focusing on the play around him and that his reaction time was slower. In this regard, an expert witness testified that chronic cannabis use would give rise to a risk of impairment in the context of a fast-moving game like ice hockey.

Justice Gomery rejected this argument. The expert made assumptions about the plaintiff's history of cannabis consumption which were not supported by the evidence. Further, the evidence that the plaintiff might have been cognitively impaired during the game was contradicted by other evidence about his cognitive abilities at the time.

Therefore, no contributory negligence was found on the plaintiff.

Quantum of Damages

The plaintiff testified that he gets migraine headaches several times per month. A headache typically lasts a day and requires him to remain at home. Further, he has problems with his jaw, shoulder, and neck.

The plaintiff also has difficulty processing things and gets frustrated. He testified that, as a result of his impairments, he has had to give up many activities. Further, his relationships with his family and friends have been adversely affected.

An expert neuropsychologist called by the plaintiff testified that the plaintiff is not impaired in any cognitive area, but that he is impaired relative to his pre-accident condition.

The expert stated that the plaintiff is having difficulty with efficiency and sustained attention, which he did not have prior to the incident. In addition, the expert diagnosed the plaintiff with an adjustment disorder with anxiety, as well as post-concussive symptoms.

Justice Gomery said that the plaintiff exaggerated his current symptoms to some extent. However, Her Honour accepted that the brain injury has had a dramatic impact on his life.

The plaintiff was an extremely fit, active, and engaged person prior to the accident. He is still able to function vocationally, socially, and recreationally, but in a much more limited way.

General damages for pain and suffering were assessed at \$100,000. This was reduced to \$63,000 because the plaintiff had already received a settlement of \$37,000 from the hockey league.

The plaintiff was awarded past loss of income of \$199,512. He is a personal trainer. Justice Gomery accepted the plaintiff's evidence that he has been able to work fewer hours since the accident. The plaintiff was also awarded future income loss of \$440,039.

Justice Gomery declined to award punitive damages.

Therefore, the total damages were just over \$700,000.

Conclusion

Players are at risk of injury in any type of hockey game, including in a non-contact recreational league. A hockey player must accept that risk.

However, participants do not accept the risk of injury from conduct that is malicious, out of the ordinary, or beyond the bounds of fair play. If a player is a victim of such conduct, then he or she may be entitled to a significant award of damages.

Despite the competitive nature of sports, players must be level-headed and play within the rules of the game.