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SPORT LIABILITY LAW

A GUIDE FOR AMATEUR SPORTS ORGANIZATIONS AND THEIR INSURERS

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I. INTRODUCTION

Millions of Canadian children and adults participate in amateur sport competition. Amateur sport encompasses both individual and team sports with varying degrees of player skill, size and physical contact. Such variance, in combination with unpredictable individual behaviour and vigorous physical activity, creates inherently unstable situations in which mishaps are bound to occur. In some instances, the nature of the activity is such that even spectators run the risk of sustaining injury, for example a hockey spectator who is injured by a flying puck. In some outdoor sports, uncontrolled forces of nature add to the risk.

The unusual blend of risk factors and frequency of injury in sport makes it unattractive for insurers and only a few remain in the field, although liability coverage is still available for most activities. The prevailing view among many administrators and operators of amateur sports organizations is that injured participants are more likely to sue than ever before. Whether or not such sentiments are accurate, liability and the cost of insurance are still concerns for all involved in amateur sports.

What is certain is that participation levels in amateur sport are increasing and consequently so are the number of mishaps resulting in injuries for which potential lawsuits will arise. And although a more active, healthy and physically fit population is certainly desirable, heightened levels of participation in the amateur sports arena brings questions of risk and legal liability in sport into more prominence.

This paper provides a general summary of sport liability law in Canada. It begins by discussing how basic tort law principles are applied in the context of sport. It then discusses some of the circumstances which may lead to legal liability, and how liability can be avoided, in whole or in part, by players, sports organizations and occupiers through legal defences such as voluntary assumption of risk, contributory negligence and the use of exculpatory agreements such as waivers.

II. CIVIL LIABILITY FOR SPORTS INJURIES

1. TORT LIABILITY IN SPORT – BASIC PRINCIPLES OF NEGLIGENCE

Injuries occur frequently in sport. However, the mere occurrence of an injury does not automatically provide the victim with a legally compensable injury which will attract an award of damages. What distinguishes sport as a setting for the application of the principles of civil liability is that to a large degree it consists of voluntary, purposive risk-taking for its own sake. As a result, a mechanical application of fundamental tort principles in all sport situations would produce absurd results.

A. Negligence

Generally, sport is governed by the same legal rules that apply to other aspects of social conduct. A tort (civil wrong) committed in a sport setting attracts the same consequences as it would elsewhere: a wrongdoer may be held liable to provide compensation in the form of damages for the harm incurred. Negligence, the aspect of tort law that deals with unintentional wrongs, operates on the "*neighbour*" principle. Generally speaking, your "*neighbour*" is someone whom you can reasonably foresee may be harmed if you are careless.[1]

B. Duty and Standard of Care

Negligence is said to occur when an individual is under a legal obligation to exercise reasonable care towards the plaintiff, known as a duty of care, and that individual's behaviour or actions fall below a requisite standard of care. Standard of care is a flexible concept, and is usually determined with reference what an average "reasonable" person would do, or not do, under the same circumstances. In other words, the law imposes a duty of care upon individuals who are presumed to possess "common sense" to perceive the potential dangers inherent in a given situation and to exercise the same degree of caution as any other individual would in those same circumstances. While the standard is not one of perfection and allows for mistakes and errors of judgment to be made, the reasonable person is cautious by nature and more alert to risk than most people.[2]

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[1] *Donoghue v. Stevenson,* [1932] A.C. 562 (H.L.)

[2] P. H. Osborne, *The Law of Torts*, 4th ed. (Toronto: Irwin Law, 2011), at p. 29.

In determining the applicable standard of care, courts refer to an objective standard of conduct. So for example, an individual's specific knowledge or experience (or lack thereof) cannot be used as an excuse for his failure to meet this standard. Further, if someone holds themselves out as having special skills or training, such as would be required to teach parachuting or scuba diving for example, that person will be held to have an elevated standard of care, with the same skill and knowledge as the average skilled practitioner in that area. Accordingly, he or she will be expected to "measure up" to the standard of such skilled practitioners, whether or not he actually possesses those skills.

Children present an exception to the general rule that individuals are held to an objective standard of care. In contrast to adults, children are held to a standard of care that is subjectively determined, based upon the child's age, ability, level of understanding and experience. This deviation is based upon the assumption that a child's sense of judgment and capacity to perceive risk are typically not as fully developed than those of an adult.

The standard of care required in a given situation is related to the degree of risk that the particular activity presents and the foreseeability of the harm. The reasonable person avoids creating a foreseeable risk to injury to others. The degree of risk in any situation is typically influenced by the following factors:

1. the severity of the risk (or the potential seriousness of the resulting injury, damage or loss);

2. the frequency of the risk (or the likelihood of the injury, damage or loss occurring; and

3. the imminence of the risk (or the immediacy of the danger).[3]

The case of *Dyke v. British Columbia Amateur Softball Association*[4] demonstrates an example of a standard of care assessment, in the context of a scorekeeper at a softball game who suffered a head injury after being hit by a foul ball. The scorekeeper had been standing in an unprotected area and not in the dugout because it was flooded. No breach of the standard of care was found because the occupier provided safe alternative locations for the scorekeeper to stand in. The Court of Appeal confirmed the trial judge's definition of the standard of care as follows:

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[3] J. Kitchen and R. Corbett, *Negligence and Liability – A Guide for Recreation and Sport Organizations* (Alberta: Centre for Sport and Law, 1995).
[4] 2008 BCCA 3.

> *With respect to being struck by foul balls the standard of care for occupiers is to provide adequate fencing in order to protect those persons located in 'danger zones', those areas where the risk of being struck would otherwise be unreasonably high.*

In assessing the requisite standard of care for the occupier with respect to adequate fencing in the above case, the reasonable standard of protection was largely determined with reference to industry standards. Accordingly, there is no obligation to provide absolute protection in facilities designed for the viewing of a particular sport; the protection only needs to be reasonable.

The standard of care in any given situation is influenced by four factors:

1. *written standards* - includes government statutes and regulations, national and provincial building code standards, regulatory equipment standards, non-statutory guidelines established by or for a specific activity or industry, policy and procedural manuals for a particular sport program or facility, and an organization's own risk management plan and internal policies and procedures.

2. *unwritten standards* - includes common practices in the industry, discipline or profession, such as eyewear for racket sports, and helmets for bicycles. A common practice may include discontinuing a softball game in stormy conditions because lightning could be attracted to the metal backstop or metal bats.

3. *case law* - refers to court decisions addressing similar fact situations which provide guidance on appropriate conduct to other judges as well as to sports administrators, programmers, instructors, coaches and leaders.

4. *common sense* - refers to intuition based on one's knowledge and experience that something does not seem safe or right and ability to perceive significant risks and act accordingly.[5]

[5] For a more comprehensive discussion of the determination of standard of care, see Kitchen and Corbett's handbook referenced above, pgs. 14-18.

C. Causation

The final element of negligence is causation. The negligence of the defendant must have *caused* the injury to the plaintiff. In determining whether causation has been established, the court applies the "but for" test which requires the court to ask "but for" the actions of the defendant, would the plaintiff's injuries have occurred?[6] If the answer is no, then the defendant will be held responsible for the damage. If the answer is yes, then the defendant's negligence is not responsible for the plaintiff's damages, as the damage would have occurred whether or not the defendant was negligent.[7] The inquiry into causation also requires that the conduct of the defendant be a proximate cause of the loss, or in other words that the damage not be too remote from the factual cause.[8]

As pointed out by one academic commentator, while the application of the "but for" test is not a strict analysis and is usually assessed by the court simply identifying the question and reaching a conclusion, it can be broken down into steps:[9]

> *First, the harm that is alleged to have been caused by the defendant must be identified. Second, the specific act or acts of negligence must be isolated. Third, the trier or fact must mentally adjust the facts so that the defendant's conduct satisfies the standard of care of the reasonable person, being sure to leave all other facts the same. Fourth, it must be asked if the plaintiff's harm would have occurred if the defendants had been acting with reasonable care. The fifth step is to answer the question.*

The British Columbia case of *Hussack v. Chilliwack School District No. 33*[10] dealt with the issue of causation when a school boy was hit in the face with a field hockey stick in gym class. The boy initially suffered a concussion, which over time developed into the psychiatric illness known as somatoform disorder. The defence argued that the plaintiff's subsequent somatoform disorder was not a foreseeable injury in the circumstances. However, the court concluded that it was foreseeable that a student could get hit in the head by a stick, which could cause a concussion, and developing somatoform disorder was consequential to the post-concussion syndrome. As a result,

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[6] *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para 21.
[7] P. H. Osbourne, *The Law of Torts, Fourth Edition* (Toronto: Irwin Law, 2011) at p. 53.
[8] S. M. Waddams, *The Law of Damages*, (Toronto: Canada Law Book, 1991) at para 14.450, as cited in *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para 54..
[9] D.W. Robertson. "The Common Sense of Cause in Fact" (1997), 75 Tex. L. Rev. 1765 at p. 1769-73, as cited in P. H. Osborne, *The Law of Torts*, 4th ed. (Toronto: Irwin Law, 2011).
[10] 2011 BCCA 258 at para 54-75.

"but for" the blow to the head by the field hockey stick, the sequence of events leading to the development of somatoform disorder would not have been triggered.

D. Damages

Lawsuits addressing sport-related injury are the most common type of litigation in sports law. In most cases, the plaintiff is either a participant or spectator. The defendant may be another participant or a person or organization that has in some way facilitated the event. The usual remedy is an award of damages to compensate the plaintiff for his actual or anticipated losses. Such damages are typically awarded for pain and suffering, for medical, health care and other expenses, and for lost earnings. In extreme cases of misconduct, the court may supplement the compensatory damage award by awarding punitive or exemplary damages.[11] It is important to underscore that in order for a plaintiff to prove negligence, real harm must have been suffered by the plaintiff as a result of the tortfeasor's carelessness. In the sport setting, scrapes, bruises, fright or mental anguish usually do not represent substantial loss, and will not provide the basis for negligence.

A discussion of the various circumstances in which courts will impose legal liability in the amateur sport setting follows. As outlined below, the standard of care is a necessarily ambiguous concept as it is always influenced by the potential risk of specific circumstances. Thus the behaviour required to meet the standard of care will vary with the type of activity, location of the program, number and age of participants, skill level, weather conditions, and numerous other factors.

2. INTENTIONAL TORTS - CIVIL ASSAULTS AND TRESPASS:

As addressed in more detail below, participation in contact sports is taken to involve consent to the ordinary blows and collisions incidental to play, including contact that is in breach of game rules. The common law has attempted to define the limits of implied consent by distinguishing the ordinary and expected checks, tackles, and physical contact from actions that are deliberately and unnecessarily harmful. For an action to be intentional, the defendant must have either intended the consequences of his conduct or the consequences of the conduct must be substantially certain to result.[12] The leading Canadian case in this area is *Agar v. Canning*.[13] This case involved an

[11] *Karpow v. Shave*, [1975] 2 W.W.R. 159 (Alta. S.C.) (plaintiff awarded $2000 for a broken nose and $500 for exemplary damages after he was punched in the face by spectator after a hockey game ended).
[12] P. H. Osborne, *The Law of Torts*, 4th ed. (Toronto: Irwin Law, 2011) at p. 251.
[13] (1965), 54 W.W.R. 302 (Man. Q.B.); affd. (1966), 55 W.W.R. 384 (Man. C.A.)

amateur hockey player who after being hooked by the plaintiff responded by knocking the plaintiff unconscious by bringing his stick down with a two handed blow onto the plaintiff's face. In reaching its decision, the court confirmed that there are limits to a player's immunity from liability based on implied consent by stating:

> *But injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of implied consent.*

The court found that the defendant's deliberate retaliatory blow exceeded the limit and as a result he was found liable for assault. However, since the plaintiff had provoked the attack, damages were reduced by one-third. Subsequent cases have similarly found hockey and other players liable for intentional violent blows to opposing players. Teams may also be found vicariously liable where team officers have encouraged or authorized an assault or have failed to control or supervise their players.[14]

3. ASSUMPTION OF RISK, INHERENT RISK AND CONTRIBUTORY NEGLIGENCE:

A. Assumption of Risk vs. Inherent Risk

Risk is inherent in every sport. Fortunately, the law does not impose a duty upon individuals to guard against every imaginable danger. Obviously, some degree of risk is reasonable, acceptable, and often unavoidable. For example, falling while attempting a balance beam routine in gymnastics, suffering bruises or sprains in contact sports such as hockey, soccer, or football, and getting rope burns while rock climbing are all obvious and necessary risks of sport. As a result, when a sports participant or spectator sues for negligence, the defendant will often argue that there was voluntary assumption of risk.

As pointed out by one academic commentator,[15] the doctrine of voluntary assumption of risk has two distinct meanings that are often mingled and confused in sports cases: "voluntary assumption of risk" and "inherent risks in sport." The voluntary assumption of risk defence operates to defeat the plaintiff's claim after negligence has been established. It is a defence of consent applicable to negligence actions. To rely on this defence, the defendant must show that the plaintiff agreed to give up any cause of

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[14] See *Martin v. Daigle* (1969), 6 D.L.R. (3d) 634; *Holt v. Verbruggen* (1982), 20 C.C.L.T. 29 (BCSC); *Siebolts v. Wilson* (1985), 33 A.C.W.S. (2d) 130 (BCSC); *Lachance v. Bonsant*, [1983] C.S.; *Olinski v. Johnson* (1992), 36 A.C.W.S. (3d) 1054 (Ont. Gen. Div.)

[15] J. Barnes, *Sports and the Law in Canada*, 3d ed. (Toronto: Butterworths, 1996)

action and willingly accepted a risk that was fully understood, including the knowledge of the risk of injury. Establishing that the plaintiff agreed to abandon his right to sue the defendant in negligence is difficult and consequently this defence is typically only applied in cases involving waivers and other similar agreements.

The "inherent risk in sports" defence is based on the following logic neatly summarized by Barnes in his chapter addressing negligence and assumption of risk:

> *Playing sports or attending events involve certain necessary and inevitable risks from flying objects or flying bodies. Where injury arises from normal and reasonable practice inherent in the game, there will be no liability. Such incidents are regarded as mere accidents whose costs must be borne by the victim. The value of sports derives from their inherent conflict, speed, exertion and physical contact. The occasional accident is the price to be paid by player or spectator for the benefits of sports.*[16]

Competitors are deemed to accept the inherent risk in physical sports such as hockey by virtue of their participation. In the *Agar*[17] case, the court referred to the types of contact and risk of injury that is accepted in team sports such as hockey, stating at p. 54:

> *Hockey necessarily involves violent bodily contact and blows from the puck and hockey sticks. A person who engages in this sport must be assumed to accept the risk of accidental harm in return for enjoying a corresponding immunity with respect to other players… the leave and licence will include an unintentional injury resulting from one of the frequent infractions of the rules of the game. The conduct of a player in the heat of the game is instinctive and unpremeditated and should not be judged by standards suited to polite social intercourse.*

In the Ontario case of *Nichols v. Sibbick*,[18] the plaintiff failed to establish negligence after his eye was surgically removed after being hit with a hockey stick. By participating in a physical sport such as hockey, the player was deemed to have accepted the inherent risk that, "*players will inevitably collide, sticks will inevitably clash, [and] pucks will fly in unforeseen directions.*" Liability would have required a careless act outside of the accepted risk.

In summary, where negligence is found, it is rare for a court to hold that the plaintiff waived any legal claim through a bargain to give up rights of action. Accordingly, the common law defence of voluntary assumption of risk will rarely succeed. However, where no negligence is found or where injury arises from inherent risk, the plaintiff's

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[16] *Supra*, at 7, p. 276
[17] *Supra*, at 5
[18] *Nichols v. Sibbick*, 2005 ONSC 23685.

case will likely fail for that very reason, and there is no need to consider voluntary assumption of risk as a separate defence.

B. Contributory Negligence and Apportionment of Blame

In addition to the duty owed to ones "neighbour", the law also imposes a duty to look out for one's own safety. When an injured party's own conduct contributed to the accident, the injured party is said to have been contributorily negligent. In B.C., the *Negligence Act* allows blame to be apportioned on a percentage basis.[19] Damages are then reduced to the extent to which the plaintiff is found to have contributed to the accident. Contributory negligence can arise in three ways: where the plaintiff was a partial cause of the accident; where the plaintiff was injured after putting himself in a dangerous position; or where the plaintiff failed to take protective measures in a dangerous situation, where he was aware of the danger.[20]

In sport liability cases it is common for plaintiffs to be found at least partially responsible for the accident and to be awarded proportionately reduced damages. The Ontario case of *Galka v. Stankiewicz*,[21] demonstrates this concept. In *Galka*, two men attended an archery range and knowingly entered a restricted area to retrieve lost arrows. As an experiment one man shot an arrow into the restricted area while the other man stood in the restricted area to watch where the arrow would land, with the hope that the arrow would lead them to their previously lost arrows. The arrow struck the man in the restricted area resulting in extensive injury. Liability was apportioned on a 50/50 basis due to the contributory negligence of the injured party who knowingly placed himself in a dangerous situation by entering the vicinity of an oncoming arrow.

4. ALLOCATION OF RISK BY CONTRACT - WAIVERS, RELEASES AND WARNINGS

Since the risk of injury in sport is highly unpredictable, it is difficult for sports associations to gauge their potential exposure to liability. One way in which sports associations may attempt to avoid liability is through the use of various exculpatory agreements that act to waive or release the association from liability that might arise from an injury. The legal advantage that these kinds of agreements hold is that they provide a contractual defence that can be relied on instead of the more fact dependent

[19] R.S.B.C. 1996, c. 333; formerly R.S.B.C. 1979, c. 298.
[20] P. H. Osborne, *The Law of Torts*, 4th ed. (Toronto: Irwin Law, 2011) at p. 109.
[21] *Galka v. Stankiewicz*, 2010 ONSC 2808.

defences such as voluntary assumption of risk, inherent risk, and contributory negligence.

Various terms are used to describe exculpatory agreements, which are most commonly referred to as waivers, releases, indemnity clauses, exculpatory contracts, or hold harmless agreements. Releases and the like attempt, by means of an agreement, to release the defendant from all potential liability that arises from participant injuries. Such agreements often take the form of registration forms, season passes, clauses in tickets or signed entry forms by which the defendant claims that the plaintiff contracted out of the right to sue in tort. The effect of a comprehensive release clause is that the operator has no duty of care towards the user and therefore no obligation to compensate the user for any mishap.

Courts will typically confine the legal effect of waivers and exclusionary wordings on tickets to their precise terms and will not give them any broader interpretation than is necessary. However, once a user signs a waiver, its contents are usually considered binding, whether or not they were read and understood, particularly where the document in question was carefully drafted and clearly marked as a waiver.

The *Delaney v. Cascade River Holidays Ltd.* case involved a white-water raft excursion on a British Columbia river. Delaney drowned when his raft overturned. The court found that the waiver Delaney signed before the trip was appropriate, given the hazardous nature of the activity, and that it was complete - it covered the defendant, its employees and its agents before, during, and after the trip. The waiver clearly relieved the defendant's employees and agents of liability for any reason, and specifically referred to negligence. The court was also impressed by the evidence that Delaney had been advised in advance of the trip that he would be required to sign a waiver and that he was given an opportunity to read, understand the waiver and to fully appreciate the risks involved in the excursion.

The Ontario case of *Isildar v. Kanata Diving Supply, a division of Rideau Diving Supply Ltd.*[22] is another example of a sports liability case where the limitation of liability provisions in a release were held to be enforceable. In that case, the widow and son of a man who died during a scuba diving course brought a claim for damages in negligence and breach of contract against the operator of the course. Even though the court concluded that the defendant course operator was negligent and was in breach of its contract for services with the plaintiff, the release signed by the deceased before he commenced his scuba course was upheld by the court as valid, and operated as a bar to the plaintiff's claims.

[22] [2008] O.J. No. 2406.

In the very recent case of *Loychuk v. Cougar Mountain Adventures Ltd.*,[23] the B.C. Court of Appeal upheld and gave effect to a waiver signed by the plaintiffs, and releasing the defendant zip-line operator from all liability, including claims arising from the defendant operator's own negligence. In its reasons, the Court of Appeal was persuaded by the clear wording of the waiver, and stated the following in emphasizing the enforceability of the waiver:

> *The principle evinced by the foregoing authorities is that it is not unconscionable for the operator of a recreational-sports facility to require a person who wishes to engage in activities to sign a release that bars all claims for negligence against the operator and its employees. If a person does not want to participate on that basis, then he or she is free not to engage in the activity.*

The defendants in *Smith v. Horizon Aero Sports Ltd.*[24] did not fare nearly as well as the defendants in *Delaney*, *Islidar* and *Loychuk*, *supra*. This decision underscores the importance of carefully drafted wordings. In *Smith*, the plaintiff was injured during a parachute jump when she forgot the training she had received on how to steer her parachute. She sued the school, the instructor, and the Canadian Sports Parachuting Association. The court found that the Association, as the body certifying parachute instructors, was not liable, but it did find the individual instructor negligent on various grounds, including the plaintiff's readiness to make her first jump. The plaintiff herself was found 30% contributorily negligent for failing to concentrate on what she was doing.

The defendants argued that the waiver signed by the plaintiff before the course relieved them of liability. Unfortunately, the waiver did not refer to the potential negligence of the school or the instructor, and as a result was not upheld. In reaching its decision, the court stated:

> "*It* [the waiver] *is not, however, without clearer wording, to be referable to the defendants' neglect to do the very thing which they undertook to do, namely, to use reasonable care to teach the plaintiff how to jump in safety, including the art of canopy control, and to use reasonable care to test her and to supervise her jump to ensure that she was physically and emotionally in a condition where she could exercise the clear and quick judgment necessary for her descent.*"

[23] [2012] B.C.J. No. 504.
[24] [1981] B.C.J. No. 1861 (Q.L.)(S.C.)

Using the term "negligence" might have saved this particular waiver and allowed the defendants to escape liability. Instead, the defendants found themselves jointly and severally liable for 70% of a $600,000 judgment.

Notwithstanding the court's general willingness to give effect to clearly-worded and clearly-marked waivers, a waiver will not likely be held enforceable in a situation where the waiver was signed by a parent or guardian on behalf of an infant plaintiff. This was demonstrated in *Wong (Litigation guardian of) v. Lok's Martial Arts Centre Inc.*[25] In that case, the 12-year old infant plaintiff claimed to have suffered injury when he was violently thrown to the ground in the course of a sparring match at a martial arts school owned and operated by the defendants. The plaintiff, through his litigation guardian, claimed against the defendants in negligence.

When the infant plaintiff enrolled in the martial arts school, his mother signed a membership form on his behalf which contained a Release. The wording of the Release provided that the defendant would not be liable for injuries, damages, actions or causes of actions whatsoever, including without limitation those resulting from acts of negligence on the part of the defendant.

The defendants applied to have the claims dismissed in reliance on the Release, and the issue before the B.C. Supreme Court was whether a child's parent could effectively execute a pre-tort release on behalf of a minor. The Court determined that the *Infants Act*[26] did not permit a parent or guardian to bind an infant to an agreement waiving the infant's right to bring an action in damages in tort. As a result, the defendants could not rely on the Release signed by the plaintiff's mother on his behalf, even if the wording of the Release was sufficient to otherwise shield the defendants from any liability in negligence.

The cases discussed above suggest that organizations seeking to rely on a waiver should be cautious, particularly given the courts' tendency to dismiss such agreements. A waiver should meet these specific requirements that have been identified as necessary by the courts:

1. The agreement must be clearly written on a contractual document.
2. The agreement must be clearly and unambiguously worded in terms that can be easily understood by a lay person.
3. The agreement must clearly exclude negligence.

[25] [2009] B.C.J. No. 1992.
[26] RSBC 1996, c. 223

4. The participant's attention must be directed to the limit of liability clause, irrespective of whether or not the document was signed.

An effective waiver must be exhaustive in its terms and be carefully communicated to adult participants. Many program operators now recognize these requirements and have developed techniques to avoid exclude liability. The ski industry provides a good example of an effective use of waivers.

5. LIABILITY OF PLAYERS

As discussed earlier, where one participant alleges that he has been negligently injured by another, the court, in assessing fault, must modify the standard of care according to the circumstances and inherent practices of the game. In assessing fault, the court must also take into account the fact that acceptable treatment of fellow players varies from sport to sport. Where the nature of an activity allows participants time to consider and room to manoeuvre, *e.g.*, golf, greater care and consideration is required. On the other hand, where a game like hockey or soccer is played at high speeds in a confined area, an excessively rigorous standard defeats the nature and the purpose of the activity.

The extension of negligence principles to sporting events that involve vigorous physical contact can present great difficulty to those whose job it is to assign blame in a legal setting. This point will be illustrated below through discussion of three decisions which involve player's bringing lawsuits against other players.

Unruh v. Webber[27] involved an exhibition hockey game. The defendant intentionally checked the plaintiff from behind close to the boards rendering the 17-year old plaintiff a quadriplegic. At trial, the defendant admitted that he knew that a check from behind was against the rules and that such a hit might cause a devastating spinal cord injury. The defendant appealed on liability and quantum, arguing that the trial judge failed to apply the proper standard of care in light of the fact that the accident occurred in the course of a competitive, contact sport. The defendant further argued that the judge had, in effect, held that an infraction of the rule against checking from behind was sufficient to ground liability. The defendant also submitted that the infraction occurred while he was "in the agony or in the heat of the moment", so he could be guilty of no more than an error in judgment, which, under the circumstances could not attract liability. The Court of Appeal dismissed the appeal, holding that although the defendant did not

[27][1994] B.C.J. No. 467 (Q.L.)(C.A.)

intend to inflict injury, a reasonable competitor would not have hit the plaintiff from behind.

In 1997, the B.C. Court of Appeal once again grappled with the application of negligence principles to hockey, in *Roy v. Canadian Oldtimers' Hockey Association*.[28] In this case, the plaintiff claimed for damages arising from injuries sustained in an old timers' hockey game that occurred during a mutual chase for the puck. Just before both players reached the puck, the defendant's right shoulder came into contact with the plaintiff's left shoulder causing both players to fall to the ice. As a result of the contact, the defendant was assessed a minor penalty for body contact which was prohibited by the rules of this particular game. In rendering its decision, the Court of Appeal summarized the law on this issue as follows:

> *The element of risk, to the extent it is normally accepted as part and parcel of the game by reasonable competitors, acting as reasonable men of the sporting world, is one of the circumstances that may be considered under the "standard of care" issue.*
>
> *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.*

The Court of Appeal concluded that the contact between the plaintiff and defendant, while deliberate and meriting a penalty, was contact of the kind which the plaintiff should reasonably have expected and that the defendant's conduct did not fall below the standard of a reasonable competitor in his place.

In *Babiuk v. Trann*[29] the plaintiff claimed damages against the defendant for an alleged assault during a rugby match. At trial, the defendant admitted striking the plaintiff and breaking his jaw after the whistle had blown the play dead. At the same time, the defendant argued his entitlement to the defence of a third party based on his assertion that the use of force against the plaintiff was reasonable and necessary in order to prevent injury to a team-mate. The defendant's argument prevailed with the court's finding that defendant "*instinctively reacted*" and struck the plaintiff to prevent further injury.

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[28] [1997] B.C.J. No. 262 (Q.L.)(C.A.)
[29] [2003] S.J. No. 614 (Q.L.)(Q.B.)

The previous three cases serve to highlight how difficult it is to extend negligence principles to sporting events, particularly those that involve and require vigorous physical contact and those in which the participant's conduct in the heat of the game is largely instinctive and most often unpremeditated.

6. LIABILITY OF COACHES AND REFEREES

The common law imposes a duty upon coaches to provide competent instructions in technique or skills and to take reasonable precautions to reduce unnecessary danger in the general organization of the activity. The coach must discharge responsibilities in three general areas: facilities and organization, instruction and supervision, and medical care.[30] With respect to the first area, a coach has a duty to select premises and equipment that are reasonably safe and suitable for the intended purpose and to ensure that the event or activity is safely organized. A coach is also under a duty to exercise reasonable care in the control and supervision of activities, anticipate and warn against dangers and prevent participants from embarking on unreasonably dangerous activities. With respect to instruction, supervision, and the provision of medical care, a coach, in order to protect himself from liability, must:

1. provide competent and informed instruction in how to perform the activity;

2. assign drills and exercises that are suitable to the age, ability, fitness level or stage of advancement of the group;

3. progressively train and prepare the participants for the activity according to an acceptable standard of practice;

4. clearly explain to participants the risks involved in the activity;

5. group participants according to size, weight, skill or fitness to avoid potentially dangerous mismatching;

6. inquire about illness or injury and prohibit participation where necessary;

7. in the event of a medical emergency, provide suitable first aid; and

[30] *Supra*, at 7, p. 302

8. where possible, keep written records of attendance, screening, training and teaching methods in order to provide evidence of efficient control.

The case of *Hamstra v. British Columbia Rugby Union*[31] involves an allegation of negligence against a coach for, among other things, failure to properly group athletes participating in rugby match according to size. The plaintiff had been rendered a quadriplegic as a result of a scrum collapse. The defendant BC Rugby Union ran the trial match while the defendant coach selected the players. The plaintiff alleged that the two players on either side of him were mismatched against the two props on the opposing team's front row and that the mismatch caused the scrum to collapse. He argued that the standard of care to be imposed upon the defendants was that of the careful and prudent parent. He also submitted that the school was liable as an occupier and that the defendants should have warned him and his parents of the risk of injury.

The trial court dismissed the action holding that in order to establish negligence on the part of the coach the test was whether he acted in accordance with the ordinary skill and care of a selector/coach in the circumstances in which he found himself on the date of the incident. The court also found that as long as the coach acted in accordance with the laws of the game and the guidelines, he had met the test and could not be found negligent. The court also found that the B.C. Rugby Union owed a duty of care to take reasonable care in all the circumstances, in keeping with the standard of care the law imposed on the coach. Ultimately, the court determined that there was no mismatch, no breach of the laws of the game, and no negligence on the part of the coach and that in any event, the sole cause of the accident was the plaintiff losing his balance. It followed that the B.C. Rugby Union was also not negligent.

The action was dismissed but an appeal was allowed and a new trial ordered. The Court of Appeal's reasons dealt only with the alleged error by the trial judge with respect to proving instructions to the jury and the Court of Appeal did not address the trial judge's original findings of liability.

Cases alleging negligence against game officials are rare, but an official may be found negligent for failing to protect participants from injury. According to Barnes,[32] an official's duties include inspecting the facility and the competitors, issuing instructions and warnings, and closely following and regulating play. With respect to facility inspection, officials are under a duty to examine the playing area to see that it complies with regulations and is free from hazards or defects. In addition, an official must

[31] [1997] 1 SCR 1092
[32] *Supra*, at 7, p. 305

exercise reasonable care in reviewing facilities and in deciding whether weather conditions make it dangerous to begin or continue to play. Officials must also check participants for illegal or defective equipment, foreign substances, and dangerous clothing or ornaments. During the event, officials must supervise attentively, enforce the rules and take appropriate disciplinary action to keep control. Clearly, however, a court will only find liability against an official where it is established that a participant's injury is causally linked to the official's negligence.

7. FACILITY (OCCUPIERS') LIABILITY

The law of occupiers liability plays an important role in any examination of how negligence law is applied to sport injury cases because so many involve injuries caused by hazards that are part of the premises on which the activities are taking place.

Generally speaking, a person in control of land or premises has a duty to protect from harm all those who enter into the land or premises. This legal responsibility lies with those who control the premises, and not necessarily with those who own the premises. The duties of an occupier are set out in a statute called the *Occupiers' Liability Act* RSBC 1996, c. 337 (the "Act") which exists in each Canadian province, with some minor variations.

The Act imposes a duty upon occupiers of premises to take reasonable care that persons coming onto the premises will be reasonable safe in doing so. The degree of care required is what is reasonable "in all the circumstances of the case." Thus, the level of care required on the part of an occupier varies with the nature of the premises, the activities on the premises, and to controlling the conduct of third parties on the premises. A discussion of some of the relevant case law will further illustrate the role that occupiers' liability plays in the sports liability context.

In *Simms v. Leigh Rugby Club*, [1969] 2 All ER 923, a case decided under English occupiers' liability legislation, the court held that the statutory duty of care did not require an occupier of a rugby field to eliminate the dangers in playing on a field that met the usual standards. It also held that a rugby player is deemed to accept those dangers for the purposes of the Act. This case appears to establish that the defence of inherent risk applies in sport liability cases where liability is governed, in whole or in part, by occupiers, liability legislation. In B.C., subsequent cases have generally been consistent with the Simms decision to the extent that the cases suggest that adherence to the usual standards for the activity for which the facility is intended usually provides a good defence to injury claims that derive out of participation in a sporting activity.

For example, in *Forsyth v. Pender Harbour Golf Club Society*, 2006 BCSC 1108, the plaintiff fell down a slope at the Pender Harbour Golf Club, after she "duffed" her ball a short distance from the ladies tee, which landed down a slope that was too steep to be machine groomed and was described as being part of the rough rather than part of the fairway. As the plaintiff travelled down the slope, pulling her gold cart behind her, she slipped and landed on her right ankle, which she broke, and she slid down the slope.

The central issue in this case was whether the Pender Harbour Golf Club Society breached its statutory duty of care, to ensure that the plaintiff was reasonably safe in using the premises. However, in dismissing the claim, the Court noted that the fact the slope was obvious, and the fact that it was potentially slippery was also obvious as the area was surrounded by patches of rock, weeds, and a water hazard. Further, although the plaintiff had never traversed the slope before, she had played on the course on at least 20 prior occasions. Thus the Court concluded that the plaintiff "*understood the obvious risks inherent in descending the slope, which was clearly steep and potentially slippery terrain, and willing assumed them*."

However, liability can still result where injuries are caused by unsuitable features of the premises, by defective surfaces, structures or equipment, by inadequate signs or lighting, or by operating equipment in dangerous conditions. At the same time, it is important to emphasize that the occupier is not obliged to ensure participants' safety in all circumstances and there will be no liability where reasonable precautions could not have prevented the accident, where appropriate standards and procedures were observed, or where injury arose from risks inherent in the sport.

8. PRODUCTS LIABILITY

Injuries in sport are often linked to defective or dangerous equipment. In the sport context most product liability claims against manufacturers stem from poor product design which often only reveals itself after the product has been used for some time.

A piece of equipment will not be considered defective if it does not stand up to a test for which it was not manufactured or designed. The judicial reasoning contained in *Moore v. Cooper Canada Ltd.* (1990), 2 C.C.L.T. (2d) 57 (Ont. H.C.) is illustrative of this point. In this decision, a 22 year old hockey player was injured when he slid head first into the boards. The resulting neck injury rendered him a quadriplegic. In dismissing a claim against the helmet manufacturer, the court reasoned that the helmet was intended to protect the wearer from head injury only – no other protection was promised to, or

expected by the player. Since the helmet had in fact protected the player's head, the court found that the product was fit for the purpose for which it was manufactured and sold. The Court also found, based on expert testimony, that no helmet, regardless of design, could have prevented the player's spinal injury.

In a recent decision, the Supreme Court of British Columbia took this reasoning one step further and concluded that a manufacturer does not have to manufacture its product according to the safest design available, so long as the design was reasonable in the circumstances.

In *More v. Bauer Nike Hockey Inc*., 2010 BCSC 1395; aff'd 2011 BCCA 419, the then 17 year old plaintiff chased after a puck once it was dumped near of behind the goal. As he skated in, an opposing player made contact with him near the goal line. As a result, the plaintiff caught the edge of his skate, rotated, fell and slid on his rear end, hitting the boards with his back and the back of his helmeted head, in a near seated position. Unfortunately, the plaintiff suffered a subdural hematoma, a devastating brain injury. The primary allegations against Bauer were that it failed to adequately design or manufacture its hockey helmets to protect against serious head injuries when used in a hockey game.

In this case, Bauer had a duty to take reasonable steps to ensure that its hockey helmets were safe for their intended use and had to design products that minimized the risks arising from their intended use – though not eliminate those risks all together. Further, in assessing negligent design cases, the Court noted regard must be had to:

- Whether the product is defective under ordinary use, or although non-defective, has a propensity to injure;
- The state of the manufacturer's knowledge of the dangerousness of its products in order to determine if the manufacturer should not have manufactured or distributed its product, or whether it could have distributed its product but with a warning;
- If such a warning was appropriate, the reasonableness of the warning; and
- If the product should not have been manufactured or distributed, a determination of whether the product caused the injuries complained of.

However, with respect to safety equipment, the Court recognized that safety equipment is not inherently dangerous in the same way other products may be. Instead they are meant to protect from an existing risk of harm. Thus if one applies the usual negligent design analysis, a finding that an item of safety equipment is not inherently dangerous

might mean that a manufacturer is not liable for injuries even if the safety device offered little or no protection. This would obviously render the analysis meaningless, due to the intended use of the safety equipment. To avoid this problem, the Court took a contextual approach to this issue and considered whether the safety equipment is inherently dangerous if it fails to provide reasonable protection when in normal use.

Further, the Court went on to note the earlier Supreme Court of Canada decision of *Dallaire v. Paul-Emile Martel*, [1989] 2 S.C.R. 419:

> *The appellant further argued that the design of the conveyer was inadequate because the equipment should have been so designed that it would be unnecessary for the covers to be removable and because the covers should at least have been equipped with hooks. It is perhaps true that the conveyer could have been designed to be safer, and it is true that without protection the worm screw did represent a danger. However, the respondent had provided adequate covers capable of ensuring safety and which could be used without great difficulty.*

The Court concluded that a manufacturer is not required to utilize the safest design available, so long as it was reasonable in the circumstances. Ultimately the Court dismissed the negligence claim against Bauer, concluding that the plaintiff's helmet afforded him a "*reasonable level of safety for rear impacts having regard to the risk of the wearer sustaining a serious head injury*."

Thus the design of the equipment is only intended to address certain risks, associated with the ordinary use of the equipment and the expectations of the wearer. Further, a manufacturer of safety equipment is only obligated to minimize the risks associated with the intended use, but not eliminate those risks altogether. Also, while it may be desirable to employ the safest design available, a manufacturer is not obligated to do so, so long as the design that it did use was reasonable in the circumstances.

9. INJURIES TO SPECTATORS

A spectator may suffer injury due to an aspect of a sport, the condition of the premises or the actions of other spectators. However, where a spectator is injured due to an aspect of a sport, such as an errant ball (or puck), then liability is largely determined by considering whether adequate protective structures were in place and whether or not those structures were defective. The law in this area is strangely devoid of a great deal of precedent in this area and draws from a range of sources, however, a fairly recent B.C. Court of Appeal case provides a nice overview of what is expected of an

"occupier" of a sports facility. Further, the Court of Appeal has made it clear that an "occupier" is only required to determine areas where the risk of injury is high and then provide adequate protective structures in accordance with generally accepted standards.

In *Dyke v. British Columbia Amateur Softball Assn*, 2005 BCSC 1422; aff'd 2008 BCCA 3, the plaintiff was keeping score at a softball game while standing in the spectator area behind a fence that separated the playing field from the spectator stands. The softball game was held at a sports facility known as Softball City. Despite being behind a fence, the plaintiff was injured after being struck on the head by a foul ball. The plaintiff alleged that Softball City breached its duty of care as an "occupier" by failing to provide safe and accessible dugouts and/or a scorer's boxes that would have ensured her safety, thus breaching its statutory duties pursuant to the *Occupiers Liability Act*, RSBC 1996 c. 337 (the "Act").

One of the central issues in this case was the creation of an unreasonable risk of being struck by a foul ball, which was tied to a determination of the standard of care and the concept of inherent risk.

With respect to the standard of care imposed on occupiers of sports facilities, the Court noted that an "occupier" is only required to provide "*adequate fencing in order to protect persons located in danger zones*," namely, those areas where the risk of being struck by an errant ball (or puck for that matter) would otherwise be unreasonably high. However, an "occupier" of a sports facility is not required to protect everyone in an area where there is a possibility of being struck. The mere possibility of being struck does not define an area as a "*danger zone*." Rather, it is the probability of injury in a given location that defines the "*danger zone*," which will undoubtedly vary depending on the sport played and the layout of each facility. Further, even though an area is not classified as a "*danger zone*," this does not mean that there is absolutely no risk of danger, but simply that the risk of danger is reasonable. Furthermore, where the risks are reasonable, the law deems the visitor to have assumed those risks once they have appreciated that they may be struck by an errant ball (or puck).

The Court also noted that the presence of an inherent risk associated with an activity does not negate the duty of an "occupier" but it merely alters the standard of care to which an occupier is held.

In terms of what constitutes a reasonable level of protection for a given location, the Court noted this is largely determined by reference to the industry standard, or the level of protection that is customarily provided in facilities designed for viewing of a particular sport.

In deciding this matter, the Court concluded that the risk of being struck by a foul ball would only have been made unreasonably high if the protective fencing had been deficient, such that the plaintiff would have been struck. However, the Court went on to conclude:

> *…the risk to which the plaintiff was exposed was not unreasonably high. Indeed, had a spectator been hit while standing in the exact same spot, the risk would have been deemed reasonable, as the protective fencing in the area had met industry and municipal standards. Thus, the risk of being struck while in that location was inherent to the sport and the spectator would bear the risk of being struck.*

In this case, Softball City had not breached the standard of care as it provided "*adequate fencing in order to protect persons located in danger zones*." Softball City was not required to protect all of its spectators from the mere possibility of being struck. However, the plaintiff chose to sit in a relatively unprotected area, when there were fully protected seats available to her, and she failed to pay proper attention while the ball was live and in play. The Court found that her actions constituted a significant departure from the reasonable standard of care expected of a spectator.

III. APPROACHES TO RISK REDUCTION AND MANAGEMENT

For a number of reasons, risk management in the sport environment is extremely important. A carefully developed and well executed risk management program can provide an invaluable tool for sport organizations that seek to reduce risk of injuries to participants, defend themselves against lawsuits, reduce insurance costs, and protect coaches, officials, and volunteers.

Below we provide a few examples of strategies that sport organizations can employ to manage risk and potentially avoid liability. The list that follows is by no means exhaustive and is meant only to provide a useful starting point.

1. design a system that causes sport facilities and equipment to be regularly and thoroughly inspected;

2. follow a policy that imposes minimum standards and qualifications of instructors, coaches and other staff;

3. obtain adequate insurance;

4. develop a general safety plan to deal with foreseeable situations that could be dangerous or lead to liability;

5. place easily readable signs or pictures that inform and warn participants and spectators of the inherent risks associated with the activity;

6. prepare and properly administer carefully drafted waivers and informed consent agreements;

7. keep a written record of safety system and individual steps taken to avoid injury and loss;

8. develop procedures for thorough inspections and maintenance of sport facility; and

9. inform coaches, staff, volunteers and administrators of various ways in which liability can be incurred and train them never to admit liability or fault.

IV. CONCLUSION

At some point in our lives, most of us will voluntarily participate in an amateur sport event of some kind. Whether we participate directly as players or indirectly as spectators, the risk of sustaining injury is considerably higher in the sport environment than in most other areas of our lives. This is because sport, by its very nature, often encourages vigorous, aggressive, and high speed physical activity, often requiring bodily contact. This situation can pose problems for courts who must balance society's interest in promoting individual health and physical fitness with its interest in ensuring that those who participate in sport are able to do so in a reasonably safe and hazard free environment. As a result of this "high risk" environment that amateur sport organizations find themselves in it is imperative that they are aware of the various circumstances under which courts will impose legal liability in the amateur sport setting so that organizations can minimize their exposure to risk. It is the author's hope that this paper will provide some valued insight and guidance in this regard.

V. CASE SUMMARIES

1. *Delaney Estate v. Cascade River Holidays Ltd.*, [1981] B.C.J. No. 1487 (Q.L.)(S.C.)

This action was commenced by the estate of a 34-year old male who drowned while participating in a rafting expedition organized and run by the defendant. The court considered whether the defendant should be held liable for negligence for failing to: 1) provide adequate life jackets; 2) properly instruct passengers as to procedures to be followed if dumped or immersed in water; and 3) provide a following raft. In its defence, the rafting company submitted that: 1) the deceased voluntarily assumed the risk inherent in the river adventure with full knowledge of the nature and extent of such risks; and, in the alternative, 2) it was released of all claims pursuant to the terms of a standard liability release; and 3) the deceased was contributory negligent. The court found the defendant negligent in failing to provide adequate personal floatation devices but upheld the validity of the release the deceased signed prior to the commencement of the trip on the basis that the language used in the release was clear and unambiguous and expressly excluded liability for negligence.

2. *Isildar v. Kanata Diving Supply, a division of Rideau Diving Supply Ltd.*, [2008] O.J. No. 2406 (S.C.).

In this action, the widow and son of a man who died while participating in a scuba diving course sued the defendant course operator for damages in negligence and contract related to the loss of the deceased's care, guidance and companionship. The plaintiffs also claimed damages for the past and future loss of his financial support, for the loss of his household services and for funeral expenses. The plaintiffs alleged that the defendant owed a duty of care to the deceased to provide a competent and professional diving instruction, and that the defendant had a contractual obligation to the deceased, including the requirement to rent to him diving equipment in good working order and suitable for the requirements of each dive. The deceased signed a release from liability form prior to making the dive. Notwithstanding that the Court found that the defendant was both negligent and in breach of its contract with the deceased, the Court held that the contractual release from liability signed by the plaintiff was enforceable, and therefore barred the claims brought by the plaintiffs. The Court was persuaded by the fact that the language used in the release was clear and unambiguous and expressly excluded liability for negligence.

3. *Loychuk v. Cougar Mountain Adventures Ltd.*, [2012] B.C.J. No. 504.

This was an appeal to the B.C. Court of Appeal to decide the enforceability of the releases signed by the appellants before going on a zip-line tour operated by the defendant. The appellants were injured when they collided while travelling on the same zip-line. They commenced an action against the defendant for damages. The defendant admitted that the incident was caused by the negligence of its employees but asserted that the appellants had waived their cause of action. On summary trial, the lower court held that the releases were a complete defence to the appellants' claims and dismissed their action. On appeal, the B.C. Court of Appeal agreed, noting that it was not unconscionable for the operator of a recreational-sports facility to require a person who wished to engage in activities to sign a release that barred all claims for negligence against the operator and its employees.

4. *Wong (Litigation guardian of) v. Lok's Martial Arts Centre Inc.*, [2009] B.C.J. No. 1992 (Q.L.)(S.C.)

In this action, the 12-year old plaintiff was a member at the defendants' martial arts school. He was participating in a sparing match at the school when he was violently thrown to the ground by another participant and injured. The plaintiff, through his mother as litigation guardian, alleged the defendants were negligent in failing to take preventative measures to ensure that injuries did not occur in the course of the sparring matches. The defendants relied on a release signed by the plaintiff's mother stating that the students were responsible for their injuries and that the defendant was not liable for any injuries suffered. The Court reviewed the B.C. *Infants Act*, and determined that he legislature had intended that this Act establish the sole means of creating contractual obligations that bound minors. Since the Act did not did not permit a parent or guardian to bind an infant to an agreement waiving the infant's right to bring an action in damages in tort, the Court held that the release signed by the plaintiff's mother was unenforceable.

5. *Smith v. Horizon Aero Sports Ltd.*, [1981] B.C.J. No. 1861 (Q.L.)(S.C.)

In this action, the plaintiff sued for breach of contract and negligence with respect to injuries she sustained in the course of making a parachute jump which rendered her a paraplegic. Prior to making the jump, the plaintiff signed a hold harmless agreement, the validity of which was ultimately not upheld. Instead, the court held Horizon vicariously liable for its instructor's failure to meet its standard of care with respect to the plaintiff's training and the supervision of her jump. The plaintiff's damage award of $600,000 was reduced by 30% for contributory negligence.

6. *Matheson v. Board of Governors of Dalhousie University* (1983), 25 C.C.L.T. 91 (N.S.S.C.T.D.)

In this action, the plaintiff, a member of the university wrestling team injured his ankle during a warm-up game at the beginning of practice. The injury occurred when the team coach threw the plaintiff down using a heel trip. Although there was a non-contact rule in this game, it was commonly breached in warm-up games. At the time, the plaintiff was recovering from a previous knee injury, but had voluntarily participated in the practice after informing the coach that he was only supposed to participate in light workouts. The court dismissed the plaintiff's claim against the coach and the university on the basis that he had voluntarily assumed the risks involved in participating in the practice. The court ruled that being harmed by another person's intentional breach of the rules was a risk inherent to the activity because of the known regularity with which the rules were breached.

7. *R. v. Ciccarelli* (1989), 54 C.C.C. (3d) 121 (Ont. Dist. Ct.)

This case involved an appeal from the provincial court's finding that the accused was guilty of assault for striking his opponent over the head three times with his hockey stick. In this decision the court articulated the test for determining the scope of implied consent in the context of a team sport such as hockey. The defence argued that players are "deemed to consent to an application of force that is in breach of the rules of the game, if it is the sort of thing that may be expected to happen during the game." The court rejected this argument and instead adopted the approach taken by the court in R. v. Cey which held that "players in competitive sport such as this game [hockey] must be deemed to enter into such sport knowing that they may be hit in one of many ways and must be deemed to consent thereto so long as the reactions of the players are instinctive and closely related to the play and whether nor not a foul is being committed." The court in Cey further held that the scope must be determined by reference to the following objective criteria: 1) the nature of the game played i.e. whether the game is being played in an amateur or professional league; 2) the nature of the particular act or acts and their surrounding circumstances; 3) the degree of force employed; 4) the degree of the risk of injury; and 5) the state of mind of the instigator. In this case, the assault occurred after the play had been whistled dead and on this basis the court held that the trial judge properly concluded that the acts of the accused were beyond the implied consent of the players of the game.

8. *Agar v. Canning*, [1966] C.C.S. 798 (Man. C.A.)

In this case, the plaintiff suffered a serious eye injury during a hockey game when struck by the defendant, an opposing team player. At trial the court held that the

defendant was liable in damages since the injury had been inflicted deliberately but reduced the amount of damages on the ground of provocation and the nature of the sport. The defendant appealed against this judgment. The court of appeal unanimously considered that the trial judgment was fully supported by the evidence and should not be disturbed.

9. *R. v. Mayer* (1985), 41 Man. R. (2d) 73 (Man. Q.B.)

In this case, the accused was tried on a charge of assault for approaching an opposing player from behind after the play had stopped in a hockey game and sucker punching him in the face knocking him unconscious. The court held that the accused could not rely on the defence of implied consent given that the incident occurred after the play had stopped and was not reasonably incidental to the game. In its reasoning the court stated "In dealing with contests of sports, generally, an implied consent exists with respect to such applications of force as a reasonably incidental to the particular type of sporting event being played and to the particular classification of play within various levels of any particular sport." The court further stated "As a result of the nature of the sport of hockey as played in North American, I am satisfied that participants impliedly consent to a considerable amount of force being applied to their bodies during the course of active participation in the game. This implied consent may apply to hooking and slashing and tripping and charging and escalation of physical contact into fist fights, but every case depends on its own circumstances and in this case, this court must look to the nature of the particular assault itself and the circumstances under which it was committed. And then ask whether Papanicus [the injured victim] had consented to that force by virtue of the fact that he agreed to play hockey." The accused was convicted.

10. *Unruh v. Webber*, [1994] B.C.J. No. 467 (Q.L.)(C.A.)

In this case, the plaintiff and the defendant were playing a hockey exhibition game when the defendant intentionally checked the plaintiff from behind close to the boards. The defendant admitted at trial that he was well aware that the check from the rear was banned under the rules and that a player employing the tactic might cause a devastating spinal cord injury. The 17-year old plaintiff did in fact sustain such an injury rending him a quadriplegic. The defendant appealed the findings of liability and quantum against him arguing that the trial judge failed to apply the proper standard of care given that the accident occurred in the course of a competitive, bodily contact sport and that the judge, in effect, held that an infraction of the rule against checking from behind in and of itself was sufficient to ground liability. The defendant further argued that while in the agony or in the heat of the moment he was guilty of no more than an error in judgment, which, under the circumstances could not attract liability. The court

of appeal dismissed the appeal finding that although the defendant did not intend to inflict injury, he did not act as a reasonable competitor, in his place, would have acted when he hit the plaintiff from behind. The court further held that the trial judge's specific finding that the defendant was reckless was amply supported by the evidence. Note this decision articulates the "standard of care" in the context of sport competitions.

11. *Hamstra v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092

This was an action for damages for injuries sustained in a rugby match. The plaintiff was rendered a quadriplegic as a result of a scrum collapse. The defendant BC Rugby Union ran the trial match. The defendant coach selected the players. The plaintiff alleged that the two players on either side of him were mismatched against the two props on the opposing team's front row. He alleged that the mismatch caused the scrum to collapse. He took the position that the standard of care imposed upon the defendants was that of the careful and prudent parent. He also submitted that the school was liable as an occupier and that the defendants should have warned him and his parents of the risk of injury. The court dismissed the action holding that the standard of care applicable to the coach was less exacting than that of a careful and prudent parent since he was a volunteer. The court concluded that in order to establish negligence on the part of the coach, the test was whether he acted in accordance with the ordinary skill and care of a selector/coach in the circumstances in which he found himself on the date of the incident. Furthermore, as long as he acted in accordance with the Laws of the Game and the guidelines he had met the test and could not be found negligent. BCRU, a volunteer organization which promoted the game, owed a duty of care to take reasonable care in all the circumstances, in keeping with the standard of care the law imposed on the coach. There was no mismatch, no breach of the Laws of the Game and no negligence on the part of the coach. It followed that the BCRU was not negligent. The sole cause of the accident was the plaintiff losing his balance.

12. *Rootes v. Shelton*, [1968] A.L.R. 33 (High Ct.)

This appeal to the High Court came from the Supreme Court of New South Wales Court of Appeal decision which had set aside a jury verdict in an action for damages for negligence in circumstances where experienced water skiers were performing a cross over operation. In the course of the operation, one of the skiers being towed behind the boat collided with a stationary boat. The jury verdict was set aside on the ground that the driver of the boat owed no relevant duty to the injured skier, both being participants in a sport who had, by engaging in it, accepted the risks of injury which might be involved in taking part. The High Court's decision to restore the jury verdict was unanimous. In reaching its decision the court held the following:

> *By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connection, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist.*

13. *Condon v. Basi,* [1985] 2 All E.R. 453 (C.A.)

In this case, the Court of Appeal considered whether the appellant owed the respondent a duty of care in the context of a local amateur soccer game. The subject incident involved a late tackle which caused a broken leg. The trial judge found that the tackle constituted "*serious and dangerous foul play which showed a reckless disregard of the plaintiff's safety and which fell far below the standards that might reasonably be expected in anyone pursuing the game.*" In determining the law that applied, the appellate court held that the tribunal of fact must determine whether the defendant failed to exercise that degree of care which was appropriate in all the circumstances, or that he acted in a way to which the plaintiff could not have been expected to have consented. In considering the relevance of whether the impugned conduct constituted non-compliance with the rules, the court cited with approval the reasoning of Kitto J. in the *Rootes* decision referred to above:

> *… the conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiff's injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of conduct for purposes of the carrying on of the activity as an organized affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the "rules of the game". Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or no weight in the circumstances.*