Sports Law: Making the Case[1]

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In Personal Injury law, most lawyers and clerks are familiar with the issues and considerations that are applicable in the more traditional types of cases, for example as a result of motor vehicle collisions, slips and falls etc. Cases that involve personal injuries sustained while the client was engaged in sport ("Sports Law") can involve a host of issues and considerations that do not arise in these other, more traditional personal injuries cases.

In Sports Law cases, the relevant issues and considerations differ based on the specific circumstances of each individual case. This paper addresses some of the common considerations that must be taken into account in order to make the case, including: the voluntary assumption of risk; the impact and effectiveness of waivers; consideration of contributory negligence; and, the implications that alternative forums and/or parallel proceedings may have for a potential action.

Voluntary Assumption of Risk (*Volenti Non Fit Injuria)*

The doctrine of *volenti non fit injuria* is often described as "to a willing person, injury is not done". This is potentially a full defence for the defendant who is able to establish that:

- the claimant was fully aware of all of the risks involved, including the nature and the extent of the risk; and,
- the claimant expressly or implicitly consented to waive all claims for damages.

In the well-known case of *Crocker v Sundance Northwest Resorts Ltd.,* the SCC described the defence of voluntary assumption of risk as follows:[2]

> The defence of voluntary assumption of risk is based on the moral supposition that no wrong is done to one who consents. By agreeing to assume the risk the plaintiff absolves the defendant of all responsibility for it […] It only applies in situations where the plaintiff has assumed both the physical and legal risk involved in the activity.

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1 Thank you to Andrew MacIver, student at law at Siskinds LLP, for his helpful assistance.

2 *Crocker v. Sundance Northwest Resorts Ltd.,* [1988] 1 SCR 1186 at para 31.

In describing this defence, the SCC cited a portion of Fleming's *The Law of Torts* where it was suggested that voluntary assumption of risk and contributory negligence are similar and often overlap. The rationale for not collapsing the two into a single defence is that "people should remain free to agree to waive their legal rights, at least under conditions of free and informed for consent."[3]

By participating in sports, participants voluntarily accept some degree of risk. In *Crocker,* the SCC acknowledged that a *volenti* defence may be made out either by participation in a sport that was "obviously dangerous" (implicit consent) or by signing a waiver prior to participating in the sport (explicit consent). Waivers of liability may provide a full defence, but that can also be a factor indicating that a participant did in fact voluntarily assume a risk.

Some injuries will fall within the scope of the risk accepted by participants; however, injuries caused by the intentional or negligent conduct of potential defendants may be beyond the scope of the risk voluntarily assumed by participants and they may be able to recover for their losses.

In order to determine whether a participant's injuries are the result of a risk which they voluntarily assumed, one must consider the specific circumstances within which the participant is engaged in that specific sport. Participants with additional experience and expertise within a particular sport, including knowledge of the applicable risks, are more likely to be found to have voluntarily assumed that risk.[4] This would provide a complete defence for the potential defendant. On the other hand, where the participant is not well informed of the risks and relies on the defendant(s) to take appropriate safety measure and inform them of applicable risks, a court is more likely to find that the participant has not voluntarily assumed any or much risk.

Further, the conduct which caused or contributed to the participants injuries may be beyond the scope of the risk voluntarily assumed by the participant. We see this most frequently in the classic hockey fight cases. While hockey may be a contact sport, this does not suggest

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3 C*rocker* at para 31, citing John Fleming, *The Law of Torts*, 6th ed (Sydney: The Law Book Company Ltd., 1983) at 264.

4 See e.g. *Levita v. Crew,* 2015 ONSC 5316 at para 113: the plaintiff's voluntary assumption of risk by playing in a hockey league for over 10 season while well aware of the style of play would have operated as a full defence had a negligence claim been made out.

that the rink is exempt from the rule of law. Players who have contravened the rules of hockey, i.e. checking from behind, have been held liable for the resulting injuries.

In the recent Quebec case *Zaccardo*[5], the injured plaintiff was awarded $8 million in damages for what is currently believed to be the highest award for a sports-related injury in Canadian history. At the age of 16, Andrew Zaccardo was checked from behind and into the boards. Zaccardo never walked again. The court sent a strong message that hockey players can be held legally responsible for their actions, as will the associations who fail to enforce appropriate rules of conduct.

Waivers

A waiver is "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage."[6] In the context of sports, a waiver is generally a written document that purports to be an abandonment of legal rights against certain releases, often including, but not limited to: venues; organizers of sporting competitions events or activities; and other participants. A properly worded and executed waiver may provide a complete defence for a potential defendant.

In *Isildar v Rideau Diving Supply,* the Ontario Superior Court of Justice outlined the analysis required to determine whether a release of liability is valid:[7]

> 1. Is the release valid in the sense that the plaintiff knew what he was signing? Alternatively, if the circumstances are such that a reasonable person would know that a party signing a document did not intend to agree to the liability release it contains, did the party presenting the document take reasonable steps to bring it to the attention of the signator?
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> 2. What is the scope of the release and is it worded broadly enough to cover the conduct of the defendant?
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> 3. Whether the waiver should not be enforced because it is unconscionable?

5 *Zaccardo c. Chartis Insurance Company of Canada* 2016 QCCS 398 (CanLII)

6 *Black's Law Dictionary,* 9th ed, *sub verbo* "waiver".

7 *Isildar v. Rideau Diving Supply* 2008 CanLII 29598 (ONSC) at para 634.

1. Did the Participant know what he/she was signing?

Generally, participants must be given a reasonable amount of time to review and sign a waiver before participating in the sport. When a participant is given an appropriate amount of time to review a clear and unambiguous waiver before signing it, he or she cannot avoid the implications of signing the waiver even if they did not read the waiver or did not understand it.[8]

Conversely, where the circumstances are such that the participant did not appreciate the nature of what they were agreeing to by signing the waiver, the waiver is not valid. Examples of circumstances where a court may find a waiver to be invalid include: where the waiver was signed after the participant had entered into a valid contract (i.e. it imposed additional terms to the contract)[9]; and where the waiver is not a separate document and the waiver portion of that document is not brought to the participant's attention[10].

Although a waiver often takes the form of a written document read and signed by participants, there are other forms of waivers used in sports that can be valid and effective. For example, lift tickets purchased from ski resorts often have a waiver printed on them. In order to enforce an unsigned waiver, the party seeking to rely on the waiver bears the onus of proving that sufficient steps were taken to bring the terms and conditions to the participant's attention. Courts have held that these constitute valid waivers where the resort also posted bold and visible signs bearing the same waiver language.[11]

Investigation beyond asking a client or potential client if they signed a waiver is warranted. In some cases, it may be wise to hire a private investigator to gather evidence of the signage and warning(s) available to the plaintiff at the time of the injury.

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8 See e.g. *Levita v Crew,* 2015 ONSC 5316.

9 *Trigg v MI Movers International Transport Services Ltd.,* 1991 CarswellOnt 135 at paras 15-18, [1991] O.J. No. 1548, citing *Delaney v. Cascade River Holidays Ltd.,* 1983 CarswellBC 75 at para 16, Nemetz C.J.B.C., dissenting.

10 See e.g. *Crocker* at para 36 (the plaintiff thought he was only signing an entry form because the waiver included on that form was not brought to his attention), but see *Rauhanen v Lee,* 2003 SBQB 84 at paras 20-21 (the waiver included on the entry form signed by the plaintiff was valid because the plaintiff was "not unsophisticated and was not a stranger to that sort of event).

11 See e.g. *Trimmeliti v Blue Mountain Resorts Ltd.*, 2015 ONSC 2301 at paras 75-82 (it was not clear to what extent a resort must take extra attention to bring the clauses to the attention of the participant in order for the waiver to be valid; however, the court found that the standard was not important because the defendant had taken all reasonable measure to do so).

2. Does the release cover the conduct of the Defendant?

The legal principles applicable to the interpretation of contracts are applicable to interpreting waivers and determining whether or not a waiver is valid and effective: [12]

> The law is clear that a party relying on a waiver has the onus of proving the validity of the document and any ambiguity is resolved against the party who is attempting to rely on it.... If a party is seeking to rely on a waiver to defend a claim based in negligence, the wording must be specific as to what risks and dangers in the activity would be covered.

A careful review of the language of the language in a written waiver is an essential early step when evaluating sports law cases.

Case law is not clear on whether a waiver must particularize the types of negligence covered in order to be enforceable. In *Isildar,* the court noted that the waiver specifically contemplated the types of harm which then resulted in the plaintiff's death.[13] Other Canadian courts have enforced waivers even where negligence is not specifically referenced.[14]

Further, the ambit of a waiver my not be wide enough to cover the specific conduct that caused the participant's injuries. For example, in *Leonard v. Dunn,* the participant had signed a waiver on the game sheet that purported to be a release of liability "WITH RESPECT TO ANY AND ALL INJURY, DISABILITY, DEATH…" as against the "Releasees", including "other participants".[15] The court found that the plaintiff's injuries were caused by an unprovoked and unilateral attack by another participant, which was neither within the implied risk of participating in the activity nor within the scope of the waiver as properly construed.[16]

Bear in mind that a release signed by a participant may not cover all potential defendants. For example, if the organizers of a sport have the participant sign a valid waiver, that waiver does not necessarily extend to the venue or other participants. In *Levita*, the court found

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12 *Levita v Crew,* 2015 ONSC 5316 at para 107, citing *Kempf v Nguyen*, 2013 ONSC 1977 at para 109, rev'd on other grounds 2015 ONCA 114.

13 *Isildar* at para 676.

14 See e.g. *Clarke v. Action Driving School Ltd.*, 1996 CarswellBC 1004 at para 10, [1996] B.C.J. No. 953 ("claims of every nature and kind howsoever arising" included liability for negligence).

15 *Leonard v. Dunn* 2006 CarswellOnt 5975 at para 13.

16 *Leonard v. Dunn 2006 CarswellOnt 5975* at para 21.

that the waiver would have been sufficient to constitute a complete defence for any negligence on the part of a hockey league but not for any negligence of one of the other players.[17] When reviewing waivers, it is important to consider which parties are covered and which are not.

3. Is the waiver unconscionable?

In *Isildar,* the court came to the following conclusion on unconscionability: [18]

> … an otherwise valid waiver and release of liability provision will be enforceable unless (i) the provision removes from the contract the very thing contracted for in a manner that that makes it "unfair or unreasonable" to give effect to the contract, or (ii) unless the provision sufficiently diverges from community standards of commercial morality rendering it unconscionable.

Determining whether a waiver is unconscionable requires an inquiry into the nature of the waiver itself as well as the circumstances in which the participant signs the waiver.[19] Unconscionable waivers are not likely to be found if a reasonable person would understand that the waiver covers the possibility that human error or negligence may occur; the participant is not forced to sign the waiver; and, the participant is aware of the risks inherent in the activity.[20]

Issues Specific to Minors

Minors (persons under the age of 18) do not have the ability to enter into binding waivers on their own. It is common for waivers to require the signature of a parent or guardian instead of, or in addition to, the signature of a minor participant; however, the law in Ontario is unclear as to whether a parent or guardian may effectively waive the legal rights of a minor by signing a waiver on their behalf.

In *M. v Sinclair* [21], Lerner J. considered whether a father could bind his children by agreeing to waive any right they had to a claim. Lerner J. referred to the argument as a tenuous one

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17 *Levita* at para 106.

18 *Isildar* at para 655.

19 *Knowles v Whistler Ski Corp.,* 1991 CarswellBC at paras 17-20.

20 *Isildar* at paras 685-686.

21 *M. v. Sinclair* [1980] O.J. No.209. (H Ct J), 1980 CarswellOnt 621.

but did not reach a conclusion on the point because he found that "the waiver would still fail on other grounds."[22]

Until this area of law is settled in Ontario, legal teams acting for minor participants in personal injury sports law cases should be conscious of the existence of a waiver signed by and/or on behalf of a minor, the circumstances in which the waiver was signed[23], and the effect that the waiver may have on the minor's case.

Contributory Negligence

Where a participant has not voluntarily assumed all of the risks that caused their injuries, they may, nevertheless, have engaged in risky or negligent conduct that contributed to their injuries. In such cases, courts can use the doctrine of contributory negligence to apportion liability between the plaintiff and defendant(s), thereby limiting the amount of damages that the injured party may recover. Section 3 of Ontario's *Negligence Act* reads:

> In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.[24]

The Ontario Court of Appeal has set out three ways where contributory negligence may arise:

1. the plaintiff's negligence may have been a cause of the accident in the sense that his acts or omissions contributed to the sequence of events leading to the accident;

2. although the plaintiff's negligence is not a cause of the accident, the plaintiff has put himself in a position of foreseeable harm; and,

3. the plaintiff may fail to take precautionary measures in the face of foreseeable danger.[25]

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22 *M. v. Sinclair [1980] O.J. No.209* at para 19.

23 Applicable considerations include the considerations applicable to waivers signed by adult participants but also the age of the minor participant and their understanding of the inherent risks of the activity and the effect of signing the waiver.

24 *Negligence Act*, RSO 1990, c N.1, s 3.

25 *Zsoldos v. Canadian Pacific Railway,* 2009 ONCA 55 at para 54.

A court may find that a participant was contributorily negligent in a sports law case if they failed to wear proper safety equipment or to take other precautionary measures where it was reasonable to have done so. In *Evans v. Toronto (City)*, the plaintiff was found contributorily negligent for 25% of her injuries for not wearing a bicycle helmet and failing to check the interior of a car to see if someone was about to exit as she rode by.[26]

Courts may also find that a participant was contributorily negligent if he or she engaged in risky conduct when the risk of danger was foreseeable, and did so without taking adequate precautions. In *Dhaliwal v. Premier Fitness Clubs Inc.,* the court apportioned 50% of the liability to the plaintiff after he attempted to operate a vertical leg press machine with wet shoes, despite knowing that doing so was dangerous and without first taking appropriate measure to dry his shoes.[27]

When evaluating a sports law personal injury file, it is critical to ensure awareness of all the circumstances surrounding the client's injuries. A weighing of the risks known to the client is important to shed light on whether, and to what degree, a client may have contributed to their own misfortunes. Teams should be especially alert when the client is experienced in the sport and likely to have knowledge of relevant risks and appropriate risk mitigation techniques.

Forum

A civil action is not always the proper or preferable avenue by which to pursue compensation for a client injured while participating in a sporting activity or event. Similarly, parallel procedures or processes involving the circumstances that resulted in a participant's injuries may affect the development and/or outcome of a participant's action. It is important to be aware of any alternative or additional forums and how the availability or existence of other proceedings may affect a potential civil action.

Labour Law is one example of an area of law with which personal injury sports law may overlap. In a recent decision, the British Columbia Supreme Court dismissed the lawsuit of a former professional football player against the commissioner of the CFL and various clubs that make up the league, including his former clubs. The player alleged that he sustained

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26 *Evans v. Toronto (City)* 2004 CarswellOnt 4721 at paras 26-27.

27 *Dhaliwal v. Premier Fitness Clubs Inc.* 2012 ONSC 4711.

multiple sub-concussive and concussive hits while playing in the league and that he was permitted to play with displaying the ongoing effects of concussion. As a CFL player, the plaintiff was subject to a collective bargaining agreement between the CFL Players Association and the League. The lawsuit was dismissed because the judge found that the complaints raised by the player could only be resolved through the grievance and arbitration process provided for in the collective bargaining agreement and, therefore, the BCSC had no jurisdiction to hear the claim.[28]

Criminal or other punitive procedures do not prevent a plaintiff from commencing a claim; however, these other types of proceedings may have significant impacts on the development and outcome of a civil action. For example, if a participant in a hockey league is injured after being assaulted or attacked by another player on the ice, the other player may be charged with some form of assault under the *Criminal Code*.[29]

Members of personal injury teams are likely familiar with the difficulties that can arise in trying to obtain certain documents and evidence in motor vehicle collision cases while charges are pending against a defendant. Similarly, obtaining necessary evidence can be impeded or delayed by other proceedings or investigations in Personal Injury Sports Law cases. The entire team should be aware of any applicable limitation periods that may be affected by the delay in obtaining necessary information or evidence and take steps to ensure that a client's legal rights are not prejudiced by any delay that is beyond their control.

Conclusion

This paper identified and discussed some considerations that may arise in personal injury sports law cases. The important take away is that the relevant considerations vary with the specific circumstances of each case and even between cases involving the same sport or activity. Each new case requires careful and thorough investigation to determine whether any of the considerations discussed in this paper, or any other unique considerations, may be applicable. It is critical that the relevant details are gathered as quickly as possible, preserving the evidence that was available to your client at the time the injury occurred.

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28 *Bruce v. Cohon*, 2016 BCSC 419 at paras 92-94.

29 See *R. v. MacIsaac*, 2015 ONCA 587.