

Plaintiff Suffers Blow: Punch to Face in Amateur Ice Hockey Game Found to be Not Reasonably Foreseeable

Hockey | Litigation | Litigation & Dispute Resolution | Sports Law | Torts

22 July 2021

Ice hockey is governed by rules which penalize certain physical infractions, including cross-checking, fighting, hitting from behind, and hitting to the head. These rules are necessary to ensure that the inherently fast-paced and physical sport remains safe for participants. Nevertheless, unauthorized violent on-ice incidents contrary to the rules and spirit of the game do occur, and at times result in players sustaining injuries of varying degrees, including long-term and severe injuries. Depending on the nature of the conduct, the aggrieved party may pursue a negligence action, as was the case in a recent Indiana decision, *Rizzo v. Midwest Training and Ice Center, Inc.*, 21A-CT-126 (“*Rizzo v. Midwest Training and Ice Center*”). This decision will be compared to last year’s Ontario Superior Court of Justice decision in *Casterton v. MacIsaac*, 2020 ONSC 190 (CanLII) (“*Casterton*”).

On 6 September 2015, Joseph Rizzo (“Rizzo”) and Nicolas Wedster (“Wedster”) participated in an amateur ice-hockey game at Midwest Training & Ice Center Inc. (the “Venue”) in Dyer, Indiana. The amateur league is incorporated under USA Hockey rules, which prohibit fighting. Similarly, the Venue had established penalties for fighting, ranging from a one-game suspension for a participants’ first transgression to a three-game suspension for a subsequent transgression.

The case stemmed from an incident in the third period of a tied game when Rizzo received a roughing penalty for body checking an opposing player. Upon serving his minor penalty, Rizzo returned to the ice and became engaged in a net-front battle with a forward from the opposing team. While this battle was ensuing, Wedster charged across the ice and forcefully body checked Rizzo from behind, causing Rizzo to fall. When Rizzo stood up, Wedster punched him in the eye, causing Rizzo’s retina to detach. Several corrective surgeries were required to remedy this injury. Despite multiple surgeries, Rizzo sustained permanent injuries as a result of the blow.

In March 2016, Rizzo sued the Venue in Lake Superior Court, alleging that the Venue was negligent in failing to provide Rizzo “protection against third party criminal attacks when he was on [its] premises”.

In July 2020, the Venue filed a motion for summary judgment, arguing that it did not have a duty to protect Rizzo from Wedster’s “unforeseeable” criminal conduct.

In response, Rizzo argued that Wedster’s conduct was foreseeable as there was “ongoing conflict” between the teams during the game and because Wedster had been involved in a fight at the Venue during a game just a few months before the present incident.

The trial court entered summary judgment in favour of the Venue, finding that the “nature of the physical contact that took place in this instance could not have been ... foreseen or prevented by [Midwest Training]” and therefore, “Midwest Training did not have a duty to take precautions to protect [Rizzo] from the type of harm that occurred to him”.

Rizzo appealed.

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

Plaintiff Suffers Blow: Punch to Face in Amateur Ice Hockey Game Found to be Not Reasonably Foreseeable

The Court of Appeals' analysis in *Rizzo v. Midwest Training and Ice Center* regarding whether the Venue owed a duty to Rizzo concerned both the broad type of harm suffered by the plaintiff and the broad type of plaintiff.

The court affirmed that the broad type of harm suffered by the plaintiff was a punch to the face, and that the broad type of plaintiff was an amateur hockey player.

Justice Tavitas held that "while hockey games – like bars or parties – may be a common atmosphere for aggression ... we do not believe sports facilities hosting amateur leagues have reason to foresee a fight of this nature". Although Wedster had no game-related reason to approach Rizzo and punch him in the face causing serious injury, Justice Tavitas highlighted Rizzo's admission that "a deliberate and unprovoked physical assault is not a rough-and-tumble injury from the accepted nature of the game" and that generally, "matches do not involve violent attacks causing permanent injury". In light of this, the court found that Rizzo presented no evidence that "Wedster exhibited behaviour during the hockey game that would have made his behaviour foreseeable to the Venue".

The court found that the record was not suggestive of a "random act of aggression outside the normal course of hockey participation", especially when considering that there was "no indication of continuing anger after Rizzo's penalty which preceded the incident". Therefore, it was "wrong to suggest that Midwest Training should have taken this to be anything more than a normal foul in a hockey game; we cannot find that the harm suffered by Rizzo out of the blue is foreseeable". To conclude otherwise would "impose a duty on such facility operators any time there is foul or other aggressive game maneuver".

As Wedster's action was not foreseeable, the court held that Midwest Training did not have a duty to protect Rizzo from an "unforeseeable and unfortunate act".

The Court of Appeals upheld the trial court's decision.

Analogous fact scenarios have come before courts in Canada.

Most recently, in *Casterton* the Ontario Superior Court of Justice found the defendant hockey player liable for throwing a blindside hit to the opponent plaintiff's face in an amateur men's league hockey game. Justice Gomery found that the blindside hit was intentional, reckless and "outside the bounds of fair play" and thereby negligent. In making this finding, Her Honour applied classic standard of care principles that were adopted by the British Columbia Court of Appeal in *Unruh (Guardian ad litem of) v. Webber*, 1994 CanLII 3272 (BCCA) at para. 29:

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 risk 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.

In *Kempf v. Nguyen*, 2015 ONCA 114, Justice Laskin, in dissent, commented that the conduct in contact sports becomes unacceptable only when it is malicious, out of the ordinary or beyond the bounds of fair play.

In *Levita v. Crew*, 2015 ONSC 5316, although there was ultimately no finding of liability, Justice Firestone stated at para. 80 that in hockey the standard of negligence applied to determine whether the defendant was liable.

Justice Gomery adopted the foregoing reasoning, which represented a departure from the judicial reasoning in previous analogous cases including *Nichols v. Sibbick*, 2005 CanLII 23685 (ONSC) where findings of intent and recklessness were respectively required to prove negligence.

In *Dunn v. University of Ottawa*, 1995 CarswellOnt 3170 (not available on CanLII), Justice Cumming stated:

Even if contact is made outside the rules of the game, there can be no liability unless the player can establish that the defendant knew he was breaking the rules and framed a deliberate resolve to injure or that he was reckless as to the consequences of his actions.

Justice Gomery affirmed her departure from the prior case law by stating that "even if I concluded that the hit was neither intentional or reckless ... MacIsaac would be liable for Casterton's injuries because he failed to meet the standard of care applicable to a hockey player in the circumstances".

Justice Gomery described the incident as follows:

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

MacIsaac intentionally skated at high speed towards Casterton from an angle where his approach could not be seen. He positioned his arms and drew up his body in such a way as to maximize bodily contact, causing a collision between MacIsaac's shoulder and forearms and the lower half of Casterton's face. Casterton did not anticipate the check and, as such, made no moves to protect himself or attempt to avoid the collision. Each player admitted that, if Casterton's theory of how the collision occurred were accepted, this was a blindside hit.

Each amateur player who testified agreed that blindside hits were absolutely prohibited. They had no place in recreational play, or in any hockey game.

Although Justice Gomery's decision in *Casterton* may have expanded the law of tortious liability in sports cases in *Casterton*, it remains unclear whether conduct beyond a "blindside hit" will constitute a "random act of aggression outside the normal course of a hockey game", or when conduct will reach the level of "malicious, out of the ordinary or beyond the bounds of fair play". In *Casterton* it is noteworthy that the defendant was assessed a 10 minute gross misconduct penalty and was penalized for intent to injure.

It is also noteworthy that *Casterton* did not involve an action against the arena operators.

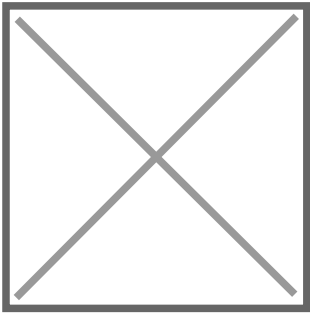
Even with a broader standard of liability, it would likely remain difficult for an injured amateur hockey participant in Ontario to establish liability on a facility for failing to protect him or her from the conduct of other participants, including illegal hits. Like in *Rizzo v. Midwest Training and Ice Center*, an arena operator here will not necessarily be in a position to foresee when an individual player's conduct will fall below the requisite standard of care in a hockey game. In order to establish liability against an arena operator, the litigant would likely be required to establish that the operator had a duty to actively referee the users of their facility. As well, the injured litigant will be required to carefully review any contracts entered into between the facility and the participants or recreational leagues, including any waiver of liability agreements. As seen in another recent decision, *Arksey v. Sky Zone Toronto*, 2021 ONSC 4594 (CanLII), waiver of liability clauses play a significant role in limiting claims against the operators of recreational sports facilities.

Considering the popularity of amateur ice hockey in Canada and the inevitability of illegal hits during play, Canadian litigants will need to keep in mind the relatively unexplored threshold of "beyond the bounds of fair" when deliberating whether to pursue legal action against an opponent, as well as the issues of foreseeability and waiver of liability clauses should they also wish to seek recovery against an arena operator. A PDF version is available to download [here](#).

If you have a [litigation matter](#) and are in need of legal advice, please do not hesitate to contact [Stephen Thiele](#), at 416.865.6651, sthiele@grllp.com, or [James Cook](#) at 416.865.6628, jcook@grllp.com, or [Michael Lauricella](#) at 416.865.8256, mlauricella@grllp.com.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

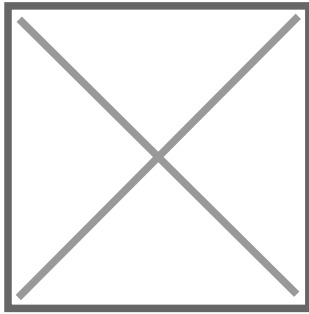
Authors



Stephen A. Thiele

Partner

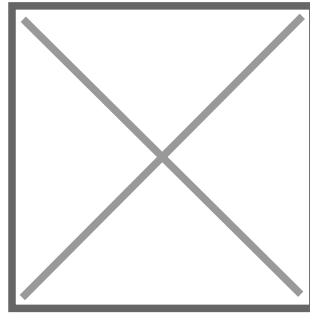
416.865.6651
sthiele@grllp.com



James R.G. Cook

Partner

416.865.6628
jcook@grllp.com



Michael Lauricella

Associate

416.865.6670
mlauricella@grllp.com