

BRIEFING NOTE

Court of Appeal confirms carelessness test for liability in recreational sport

In *Cox v. Miller*¹, the British Columbia Court of Appeal upheld the trial judge's decision to award damages to compensate a plaintiff for injuries sustained as a result of a negligent tackle executed by the defendant during a recreational soccer match.

The trial decision was noteworthy because the standard of care that was applied meant the threshold for a finding of liability was lower than in other provinces. In particular, Justice Baker determined that in the context of amateur sport, the B.C. jurisprudence established liability could arise from mere carelessness if the careless conduct fell outside the risks assumed by a reasonable competitor. Other provinces apply the recklessness standard.

Our briefing note on the trial decision can be found [here](#).

Issues on Appeal

The appellant sought to have the decision overturned on the basis that the trial judge erred in principle in her articulation and application of the standard of care.

The specific grounds for appeal were:

- (i) The trial judge erred in law by incorrectly articulating the standard of care;
- (ii) The trial judge erred in law in her application of the standard of care; and
- (iii) The trial judge committed palpable and overriding error in finding him liable in negligence.

The Appellant's principal submission was that the judge erroneously concluded that mere carelessness in the execution of an otherwise permissible slide tackle is capable of grounding negligence.

Disposition

The Court unanimously dismissed the appeal. Reasons for judgment were given by the Honourable Mr. Justice Fitch.

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(i) Correct Standard of Care

The appellant submitted that the judge erred with respect to the standard of care because she:

- (1) Accepted and acted on the proposition that, in a case of this kind, a plaintiff in British Columbia must only establish carelessness on the part of the defendant to establish liability; and
- (2) Erred in finding that mere carelessness in the execution of a permissible tackle could give rise to negligence.

The Court rejected this argument, finding that the trial judge correctly adopted the standard of care established by previous appellate authority, which not only establishes carelessness as the standard of care, but also establishes that the careless conduct must fall outside the risks assumed by the reasonable competitor.

Since the trial judge applied the carelessness standard *and* determined whether the appellant's conduct fell outside the risks a player in the league might reasonably take, the judge correctly considered both parts of the test.

In dismissing this ground for appeal, the Court identified the following "insurmountable problems" with the appellant's position:

- (1) The tackle was not, as the appellant suggested, permitted by the rules of the game, nor was it found by the judge merely to be careless. It was found to be dangerous;
- (2) There was no authority for the appellant's broad proposition that a play permitted by the rules of the game, no matter how dangerously executed and regardless of the context in which the game is being played, can never give rise to liability in negligence;
- (3) Acceptance of the appellant's proposition would give the rules of play a near determinative role in the analysis;
- (4) The judge's factual findings, when viewed in the context of the evidence as a whole, support her ultimate conclusion that the appellant's actions were reckless and dangerous.

Since the trial judge expressly concluded the tackle fell outside the risks the defendant might reasonably have taken and was not permissible, the appellant's submission that the judge erred in concluding that the careless execution of an otherwise permissible tackle was fundamentally misconceived. Fitch JA criticized the essence of the appellant's principal argument in the following terms:

Respectfully, it appears to me that the appellant has advanced a straw-man argument, divorced from the judge's factual findings. Put bluntly, the issue he seeks to have resolved in this case—whether mere carelessness in the execution of a permissible defensive play made attracts liability in negligence—does not arise on the factual findings made by the judge.

Accordingly, the Court dismissed this ground for appeal without determining that specific question.

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(ii) Correct Application of the Standard of Care

The Court also rejected the proposition that the trial judge erred in her *application* of the standard of care. The appellant's position was that the determinative issue was not whether the tackle was careless, but rather whether the appellant *intended* to "play the man", not the ball.

The Court rejected this argument because:

- (1) There was no legal significance to the distinction between a permissible tackle undertaken in a manner that creates an unreasonable risk of harm, and an impermissible tackle;
- (2) Whether the appellant was attempting to play the ball or not, the manner in which he executed the tackle was contrary to the rules of the game and properly attracted a penalty;
- (3) What the appellant was intending to do when he executed the tackle is not the focus of the inquiry – the issue the judge was obliged to decide is not what the appellant was thinking (or not thinking) when he tackled the respondent from behind but, rather, what a reasonable competitor, in his place, would do or not do.

Following that analysis, the Court dismissed the appellant's submission that a defending player in a soccer game is immune from liability for negligence if there is a possibility they will contact the ball in executing a slide tackle, no matter how remote that possibility is, or how dangerous execution of the tackle will be to an opposing player.

(iii) No Palpable and Overriding Error

Finally, the Court found no merit to the argument that the trial judge erred in determining that the tackle was dangerous and impermissible according to the FIFA rules.

Analysis

The Court of Appeal unanimously upheld the trial judge's determination that in the circumstances giving rise to the plaintiff's injury (a dangerous and impermissible tackle), the standard of care is one of carelessness.

However, the court left unanswered the appellant's principal question on appeal – whether mere carelessness in the execution of a *permissible* defensive play attracts liability in negligence – because it was not an issue arising from the decision under appeal, given that:

- (1) The recklessness standard would have been satisfied in any event; and
- (2) While slide tackles are generally permissible, the execution of this slide tackle was not permissible and was outside the risks a player in the league might reasonably be expected to take.

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Restricting the question of the applicable standard of care to *permissible* tackles meant this ground for appeal was misconceived. While the Court confirmed that carelessness was the correct standard in law, the question of whether it is the appropriate standard in principle was not available for determination and remains a matter of debate.

However, as well as confirming the carelessness standard, the decision also clarifies the circumstances in which the carelessness standard will be engaged, namely when the defendant's conduct creates a risk that the plaintiff could not reasonably have been expected to accept.

In particular, the decision establishes that B.C. courts will presume not only that a player does not accept the risk of injury arising from certain foul play that is inherently impermissible, but also conduct that would otherwise be permissible, but has been executed in an impermissible manner. Fitch JA provided this helpful analogy:

...open ice body checking is permitted in hockey. However, liability in negligence may flow if the body check is executed in a manner that exposes an opponent to an unreasonable risk of harm—a risk the opponent could not reasonably be expected to assume by participating in the game, having regard to contextual factors including the speed and level at which the game is played. A hockey player is no more immune from liability because body checking is permitted than is a driver who executes a lawful left turn in a manner heedless of the safety of others.

Equally, the court's analysis presumably means there would likely be no liability for injuries caused by players inadvertently committing minor or inconsequential fouls because although the conduct is impermissible, the risk of injury in such circumstances is likely a risk players willingly accept.

Comment

If a participant plays in a way that creates a risk their fellow participant could not reasonably have been expected to accept, ought that player escape liability for his opponent's injury on the basis that it was caused by "mere" carelessness and not recklessness?

Arguably, if the player wants to avoid liability, they ought to play by the rules (or at minimum avoid foul play that creates unreasonable risk). That appears to be the approach taken by the B.C. courts, but not elsewhere in Canada.

If the appellant wanted to provoke the Court of Appeal into discussing and determining whether this *ought* to be the approach in B.C., rather than whether it is simply the correct approach as a matter of law based on current precedent, it appears the facts of the case would have required the appellant to ask: "is mere carelessness in the execution of an *impermissible* tackle sufficient to give rise to liability?"

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In the event, the appeal appears in some ways more significant for what it did not decide, than what it did decide. In particular, anyone hoping that the Court of Appeal would revoke the carelessness standard for one of recklessness, such that a defendant in B.C. could argue he was “merely” careless and therefore not liable, will likely be disappointed.

However, the appeal decision does highlight the importance of the other aspect of the standard of care test, namely that the impugned conduct fall outside the risks a player might reasonably be expected to take. That second part of the test likely prevents the mischief that appeared to be of most concern to the appellant: liability arising merely from careless conduct (and the prospect of litigation being commenced by any player who is injured by an opponent in any context).

If the appellant remains motivated to seek a change in the law, it will have to seek leave to appeal to the Supreme Court of Canada. Given some of the public policy concerns engaged by the imposition of liability in amateur sport, it is plausible that leave would be granted. The Supreme Court of Canada’s intervention would also bring the benefit of greater consistency between the provinces.

However, for now at least, participants in recreational sport in B.C. would be well advised to avoid taking unreasonable risks in their pursuit for glory. After all, it is only a game.

ⁱ 2024 BCCA 3

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