

Violence in Sport—It's Your Responsibility, Too

Hilary Findlay, a lawyer, and Rachel Corbett, a risk management consultant, are founders and directors of the Centre for Sport and Law. They are regular contributors to *Coaches Report*.

This is the first of a two-part column on the legal parameters of violence in sport. Part one focuses on a criminal law perspective. Part two will look at the issue from a civil (or tort) law perspective.

Why might this information be useful and important to the coach? In the case of *Dunn v. University of Ottawa*¹ (which will be discussed in detail in the second part of this column), the Court clearly stated that “[w]ithout any doubt ... it is the responsibility of the coach to encourage and teach fair play and good sportsmanship. The game is played to win, but it is not played to win at all costs.” In any event, there is widespread agreement that the incidence of violence in amateur sport is increasing and is unacceptable. On his or her own, the coach has the greatest potential to influence behaviour and attitudes “on the field.”

Applying criminal sanctions to excessively violent acts during the course of a competition is not a new thing. The June 26, 1907, edition of the *Toronto Star* carried a front-page story describing how second baseman Tim Flood of the Toronto Baseball Club was jailed for 15 days for an attack on an umpire. Today, the frequency of criminal charges being applied does seem to be increasing, particularly in amateur sport events.

The two key elements in establishing an assault are an intention to inflict force and lack of consent by the victim to the force.

Consent to the force is a full defence to a charge of assault. Determining what it is a person consents to is very often the most vexing part of any assault matter. We casually accept the notion that when one participates in a sport, one accepts the risk of being injured. In fact, that is typically the argument of defence counsel in a criminal trial. But the question is, what risk did the person consent to? All risks? Limited risks? Indeed, can an individual consent to any kind or degree of violence? In *R. v. Jobidon*,³ the Supreme Court of Canada said fighting is unlawful, even where the victim of the fight consents to such activity. In that decision, however, the Court expressly stated that its decision did not reflect on “the legality of properly conducted games and sport.”

The law does, however, impose some limits on consent in sport cases. Two criminal cases are of particular help in determining the standard of consent.

In *R. v. Cey*,³ the court stated that some forms of intentionally applied force will clearly fall within the scope of the rules of the game and will be recognized as having implied consent. Very violent forms of force, clearly beyond the ordinary norms of conduct, will not be recognized by the courts as legitimate forms of conduct and no consent will be recognized. In determining whether the conduct complained of exceeds the scope of an acceptable level of implied consent, the court in *Cey* set out a number of objective criteria through which consent could be determined. The list included the setting of the game, whether the game was part of league play and the nature of such a league, the age of the players, conditions

under which the game is played, the extent of force employed and, finally, the degree of risk and probability of serious harm occurring. Underlying the issue of consent for this court was the risk of injury and the severity of any potential injury. The reasoning in Cey was applied in the subsequent case of R. v. Leclerc.⁴

In Leclerc, the position of the court was that participants give implied consent to those assaults that are inherent and reasonably incidental to the normal playing of the game in the particular context of the game. It went on to say:

“The weight of judicial authority appears to be that a player, by participating in a sport such as hockey, impliedly consents to some bodily contact necessarily incidental to the game, but not to overtly violent acts, all of which should be determined according to objective criteria.

Conduct that evinces a deliberate purpose to inflict injury will generally be held to be outside the immunity of the scope of implied consent in a sports arena. The ultimate question of implied consent, as in R. v. Cey, is whether the cross-checking or push of the complainant across the neck in close proximity to the boards was so inherently dangerous as to be excluded from the implied consent [emphasis added].”

In R. v. Ciccarelli,⁵ applying the standard established in both Cey and Leclerc, the court set out the test of consent as follows: “[There is] such a high risk of injury and distinct probability of harm as to be beyond what, in fact, the players commonly consent to, or what, in law they are capable of consenting to.”

The court then went on to apply the criteria described in Cey and, based on previous decisions and the circumstances of that case, provided more detailed points to consider in the analysis:

- ❑ Nature of the game—Was it an amateur or a professional league? Competitive? Contact or non-contact?
- ❑ Nature of the act(s) and surrounding circumstances—Was the act common or uncommon? Did it occur away from the play or after the whistle? What degree of force was applied?
- ❑ Degree of risk—Was serious injury possible or probable?
- ❑ State of mind—Was there an intention to inflict injury? Was the act done in retaliation or to intimidate?

In the three hockey cases just described, the courts recognized that even where a particular level of violence is expected, and indeed may have been consented to, it may be so inherently dangerous as to preclude such consent.

Sport organizations have the ability to make rules to govern themselves and their activities. Where this does not happen, the courts, albeit reluctantly, will step in. The cases discussed here give sport organizations some insight into the limits of violent activity acceptable from a public policy perspective and some parameters for determining those limits.

It is incumbent upon coaches to create a safe environment for all athletes and to ensure the activities of the game reflect the values and ethics of sport and the sport organization. One way of doing this is to use the direction provided by the courts to determine and control the level of violent behaviour that may be appropriate or desirable in any particular competitive situation.

1. (1995), Unreported Decision of the Ont. Ct. of Justice (Gen. Div.), Docket No. OJ2865.

2. (1988) 45 C.C.C. (3d) 176, 67 C.R. (3d) 183, 30 O.A.C. 172 (S.C.C.).
3. R. v. Cey, (1989), 48 C.C.C. (3d) 480, [1989] 5 W.W.R. 169, 75 Sask. R. 53 (C.A.), is a hockey case in which Cey cross-checked the victim from behind into the boards, causing facial injuries, a concussion, and whiplash. The defence argued the victim consented to being checked that way by stepping on the ice.
4. R. v. Leclerc, (1991) 7 C.R. (4th) 282, 4 O.R. (3d) 788, 67 C.C.C. (3d) 563, 50 O.A.C. 232 (C.A.), is a case involving a recreational no-contact hockey league. Leclerc, the accused, was attempting to retrieve the puck from an opposing player in the other player's end. There was a collision on the boards as Leclerc hit the other player in the back with his hockey stick. The other player suffered a dislocation of a portion of the cervical spine and was permanently paralyzed from the neck down.
5. R. v. Ciccarelli, (1989), 54 C.C.C. (3d) 121 (Ont. Dist. Ct.), is a case involving a professional hockey game during which Ciccarelli, using his stick, struck the victim in the head three times.