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Newsletter

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"A hockey rink is not a lawless zone"

On February 1, 2016, the Superior Court of Quebec rendered its decision in the matter of *Zaccardo* v. *Chartis Insurance Company of Canada,* 2016 QCCS 398 (CanLII), granting Andrew Zaccardo ("**Andrew**") and his family $8M in damages resulting from a violent body check during a Midget AA ice-hockey game.

At first glance, this decision sets a precedent in sports liability and stands out by the importance of the damages granted. However, is it really the case?

Civil liability and the assessment of the facts

Plaintiff Andrew sued defendant Ludovic Gauvreau-Beaupré ("**Ludovic**"), Hockey Québec and Hockey Canada, and their insurer Chartis Insurance Company of Canada ("**Chartis**") for $6.6M. In addition, Andrew's mother, father and brother claimed damages respectively in the amounts of $1M, $350,000 and $50,000.

During the proceedings, plaintiffs withdrew their claim against Hockey Québec and Hockey Canada given the measures taken by both organisations to ban this type of violation of the playing rules.

In his decision, Justice Daniel Payette noted that "a hockey rink is not a lawless zone" [our translation]. The basis for the claim for bodily harm suffered in the course of a sports event in Quebec remains article 1457 of the *Civil Code of Quebec*, which sets out the general rules for extra-contractual civil liability. The standard of conduct which Ludovic had to follow was therefore that of the reasonably prudent and diligent hockey player placed in the same circumstances.

The Court noted that the assessment of liability must be done in light of the circumstances of each case, and is not simply based on the existence of an infringement of the playing rules governing the sport in question. Even if they are not objective norms established by the legislator, playing rules prohibiting this type of physical contact nevertheless constitute an important factor, which the Court must take into account in its assessment of reasonable conduct and of fault.

The judge also emphasized the fact that a person participating in any given sport accepts its risks, but only the risks that are *inherent* to the sport, foreseeable and reasonable given the activity. Checking from behind is categorically forbidden by Hockey Québec and Hockey Canada, the sports federations which oversee, organise and promote ice hockey. Justice Payette cited several excerpts from the rules and regulations issued by Hockey Québec and Hockey Canada, and referred to bulletins and educational videos published by these organisations from 2005 to 2010, which specifically addressed the issue of checking from behind, as elements of awareness campaigns aimed at eliminating this behaviour from ice-hockey. The judge concludes that checking from behind is *not* an inherent risk of ice hockey.

Regarding the assessment of the facts, we note that plaintiffs insisted that they were not alleging intentional fault on Ludovic's part, specifically in order to avoid the application of the exclusion for intentional acts clause set out in the insurance policy issued by Chartis.

Moreover, apart from the testimonies of Andrew, Ludovic and the game referee, it is a video of the event taken by a parent/spectator which allowed the judge to conduct a sequence by sequence analysis.

The judge concluded that Ludovic had committed a deliberate act, although not premeditated. He deliberately breached the rules of the game, even more so given that he had already been penalized two years prior for another check from behind. Contrary to what he claimed, it was not an act committed in the heat of the action since Ludovic had enough time and space to stop, change his trajectory or ease the impact.

The Court concluded as follows: "Ludovic's behaviour constitutes a fault in that, in these specific circumstances and in light of the evidence submitted, he did not act as a prudent and diligent player would have acted" [our translation]. His fault was the cause of the damages suffered by the plaintiffs.

The quantum of damages

Andrew's case stands out due to the seriousness of the injuries suffered: he was 16 at the time of the event and became quadriplegic as a result.

The quantum of damages granted substantially exceeds the amount of $4M awarded in two cases which were heard by the British Columbia Court of Appeal and were both cited by Justice Payette for their similarities with Andrew's case and their application of similar criteria for liability (see *Unruh (Guardian of)* v. *Webber*, 1994 CanLII (BC CA) and *Zapf* v. *Muckalt*, 1996 CanLII 3250 (BC CA)).

In Andrew's case, the defence admitted the quantum of damages and the Court did not have to break down or explain the amounts granted, except to specify that they included interest, additional indemnity and the expert fees.

Some may argue that the $6,6M granted to Andrew, and the $1M granted to his mother Anna Marzella, significantly exceed the ceiling for *non-pecuniary* losses set in 1978 by the *Andrews, Arnold and Thornton* trilogy[1] of the Supreme Court of Canada. The Supreme Court had established that a global amount must be set for all *non-pecuniary* losses and set the ceiling at $100,000 for uniformity and foreseeability reasons, in order to avoid exceedingly high compensation and a hike in insurance premiums. In 1981, the Supreme Court allowed the ceiling to be indexed; in July 2015, the ceiling was equal to $326,678.

It must however be noted that a significant portion of the amounts granted are destined to cover *pecuniary* losses related to Andrew's care, and his loss of future income.

Conclusion

The defence has appealed the decision, alleging in particular that the judge erred in refusing to consider that the risk of a body check, even contrary to the rules and regulations, is a risk that plaintiff knew could arise in the circumstances and was therefore part of the risks he accepted in choosing to take part in this sport. As such, according to the defence, civil liability must be assessed "in the context of the sport in question, a contact sport in which body contact is not only tolerated, but allowed" [our translation].

The Court of Appeal will therefore have the opportunity to clarify the standard of civil liability to be applied in this context.

Regardless of the outcome of the appeal, given the media attention it obtained, this decision will raise the players' awareness of the danger and tragic consequences of such actions, and remind them that it not only constitutes an infraction with regards to the sport, but may also be considered a civil fault which can give rise to substantial damage awards.

1. *Andrews* v. *Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, *Arnold* v. *Teno*, [1978] 2 S.C.R. 287 and *Thornton* v. *School Dist. No. 57 (Prince George) et al.*, [1978] 2 S.C.R. 267.

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