

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	
	)	For the Plaintiff:
JOSEPH ST. LAURENT	)	V. Bargaen
	)	
Plaintiff,	)	For the Defendant:
	)	M.G. Finlayson ✓
	)	
-and-	)	
	)	
LARRY BARTLEY,	)	
	)	Judgment Delivered:
Defendant.	)	April 15, 1998

KENNEDY, J.

[1] This claim arises out of an injury to the plaintiff, Joseph St. Laurent ("St. Laurent") caused by the defendant, Larry Bartley ("Bartley") during a hockey game.

[2] The parties played for opposite teams in a league known as the "Labatt's Super No-Contact Hockey League". The League consisted of top-flight non-

professional hockey players with an age minimum of 27, Bartley and St. Laurent were both in their mid-thirties.

[3] Labatt's sponsored two teams, one known as "Labatt's Blue" and the other, "Labatt's Lite". The Blue division, in which both the plaintiff and defendant played, comprised the superior players in the senior industrial league in Winnipeg. All players in the league were competitive, aggressive and experienced who each paid approximately \$500.00 per year for ice time to play regularly in the league.

[4] While the league was described as "No-Contact Hockey", the description was misleading. The evidence revealed that during the games, the players, wearing full hockey equipment, including a mandatory helmet, often involved aggressive bodily contact. Only one of the players on the plaintiff's team, known as the "Winnipeg Wreckers" wore a protective mask or visor. The plaintiff and defendant were both experienced players with St. Laurent being described by the referee as tough and more aggressive than Bartley, who he said played hard but not aggressive. St. Laurent was a defenceman whose job was to muscle players off the puck and be physically aggressive in the corners.

[5] Both parties played primarily for recreational purposes but took a competitive interest in playing the game to win. Non-contact meant to St. Laurent

no hitting, cross-checking or crashing opposite players into the boards. Fighting, though it occurred, was penalized by a three game suspension for the first incident and a five game suspension for the second. A third incident resulted in expulsion from the league.

[6] The teams on which the plaintiff and the defendant played were the top teams in the league and the game in which the injury occurred was an important one leading to first place standing and a buy into the play-offs.

[7] The atmosphere in most of these games involved the use of rough language between the players, (referred to as "trash talk"), in which profanities and insulting language were exchanged.

[8] St. Laurent admitted, in cross-examination, that play was fast, physical and highly competitive. Pushing and shoving, clutching and grabbing, along with body checking to the extent that other players were rubbed out on the boards, was common. The game also included instances of slashing and hooking, and in the course of the season there were instances of fighting somewhere between two to five games per season, when players actually threw down their gloves and engaged in physical, typical hockey style fist fights.

[9] St. Laurent acknowledged that injuries were incurred from time to time, including black eyes, cut lips and nosebleeds in the course of the fights. Each team also had their strong-arm players or "enforcers", and although St. Laurent did not refer to them as enforcers, he acknowledged that there were certain players who would stand up to and protect the lesser players. St. Laurent also acknowledged that slashing, hooking and cross-checking did occur periodically. He was further reminded that on discovery he also acknowledged that butt-ending also occurred.

His responses on his examination for discovery were as follows:

Q You were aware when you agreed to play in this league and indeed when you walked onto the ice or stepped onto the ice on March 7, 1995 that things like slashing, hooking, cross-checking, fighting sometimes occurred in that league?

A Yes.

Q And the same would be true for spearing?

A Yes

Q And the same would be true for butt-ending?

A Yes.

[10] Bartley's account of the type of league did not differ significantly with St. Laurent. He also described it as highly competitive, one in which you had to have good skills and be strong and aggressive. He also indicated that there were a

variety of penalties in each game and when they encountered the Wreckers, in particular, the games were particularly hard-fought contests.

[11] The evidence of most witnesses in this case corroborates more or less the highly competitive, strong, aggressive nature of this league and in particular, the teams for which the parties played.

[12] Prior to the incident giving rise to this litigation, neither player had any personal animosity towards the other, and neither player had a reputation of taking frequent penalties or was known as a troublesome player.

[13] Both St. Laurent and Bartley agree the injury sustained by St. Laurent was unintentional. Bartley testified he did not intend the injury to St. Laurent's eye and St. Laurent, to his credit, testified that when the incident occurred he did not think that Bartley intended to inflict any injury. He said "It never entered my mind he was "butt ending" me." Commentary after the game among the players as well did not suggest that Bartley had any intent to injure, nor did anyone express the view that the incident in any way as a departure from play in a regular game.

### The Play Leading Up to the Injury

[14] St. Laurent was a defenceman for the "Wreckers" and Bartley was a left handed centreman for the "Shooters". The game leading to the finals was played on March 7, 1995 at the Highlander Curling Club, and approximately five minutes into the third period the puck was shot into the Wreckers' zone on the right side. St. Laurent looked for a man to take on his side and the puck in the corner was shot to the left side, Bartley and St. Laurent went for the puck, which eluded both of them. During this race for the puck they were bumping each other and both players skated to within seven or eight feet of the Wreckers' goalie, while the puck was in the corner being fought over by two or three players. The puck squirted loose and one of the Wreckers' players picked it up heading towards the Shooters' end in a virtual two on one. Bartley, according to St. Laurent, followed the play and when the puck cleared forward St. Laurent skated behind him. Profanity was exchanged between the parties, with St. Laurent being behind Bartley, putting his stick around his waist to slow him down. While St. Laurent was hooking Bartley around the waist to impede his progress the two exchanged "trash talk". St. Laurent was approximately two to three feet behind Bartley. Both players were slowly skating or gliding down the ice.

[15] While hooking Bartley around the waist and proceeding slowly up the ice, St. Laurent says that Bartley lifted up his stick with approximately three inches showing at the top of the handle. As St. Laurent was slowing him down, Bartley raised his stick hitting St. Laurent with the butt-end at shoulder level. St. Laurent said that it felt like a brick and he dropped to his knees.

[16] Bartley's account of what happened is not significantly dissimilar in that the parties were both following the play slowly, with St. Laurent hooking him at the waist. Bartley acknowledged he was being followed and he said he swung back in an attempt to knock St. Laurent away. Bartley testified his intention was not to retaliate for being struck in the groin while he and St. Laurent were in front of the net, but to keep him away from doing it again and to give him some space. St. Laurent acknowledged having his stick between Bartley's legs, (a common action for defencemen when trying to keep the centremen off balance) in front of the net but denies forcefully hitting him in the groin causing him to fall to his knees for a moment.

[17] As he was being followed Bartley says he thought he had better do something. He testified he meant to swing and bat St. Laurent away and his intention was not to injure St. Laurent, nor did he intend to butt-end him.

[18] The referee, who had considerable experience in referring these games, testified he saw the entire play when he was alongside the parties, and gave his accounting of the incident. He said when St. Laurent fell to his knees he called a delayed penalty, which in turn gave time for the Wreckers' goalie to head for the bench for an additional forward. The referee's observation of the incident at the moment it happened was not of such a nature as to immediately stop the game. The referee called a "roughing" penalty, but later when he observed blood, it became an automatic "match" penalty and Bartley was required to leave the game. Bartley's actions were not seen by the referee as an intention to injure.

[19] There was conflicting evidence between the referee who saw the entire incident, and two Wreckers' players, including the goalie and the Wreckers' defencemen. Their description of what happened differed to the extent that they described the swinging of the stick as a "butt-ending" maneuver, while the referee testified that he observed Bartley striking St. Laurent with his left hand, rather than his stick. The referee believed St. Laurent was struck with Bartley's glove. He described Bartley's motion as he was along side of both players as turning at the waist in a punching motion. He heard Bartley's trash talk as he was being impeded by St. Laurent, saying "f-----g let me go", and he hit him with his left hand. On either account, the blow led to the serious and unfortunate the loss of the plaintiff's eye, requiring a replacement with an ocular prosthesis.



[20] Bartley's action clearly warranted a penalty, but in my view it cannot be described as an action outside the expected physical nature of the game. The referee who had referred 400 games in this league over 6-7 years said, "I've seen it before.....common occurrence....looked quite innocent, didn't even know if he was hurt". The act of turning and batting St. Laurent away was initially called by the referee as a roughing penalty and it was not seen as an intentional butt-ending penalty. It is, however, clear that Bartley's actions of batting at St. Laurent were a rule violation.

[21] Penalties of this nature occur in hockey and these types of violations are not unexpected. The referee further indicated that there are a variety of penalties called from time to time including hooking, tripping, slashing spearing, high sticking and butt-ending. All of these penalties in unforeseen circumstances could lead to serious injury without an intent to injure but with the clear intent to do the act causing the penalty. There were, however, other options open to Bartley at the time. He could have skated away from St. Laurent. The maneuver of swinging and batting St. Laurent away was not an acceptable maneuver, and was intentional to the extent he intended to give himself some room. It was not, an intentional act to "butt-end" St. Laurent if that in fact occurred. The injury was accidental and within the risks assumed in the game.

[22] The focus of this case quite easily turns on the accidental nature of the injury, caused by a "penalty-getting" act of roughing when Bartley attempted to knock St. Laurent away from impeding him and hooking him at the waist as he was trying to get to the play. Bartley also testified that St. Laurent had hit him between the legs in the groin while in front of the net. St. Laurent denies he hit Bartley in the groin, but he does admit to having his stick between Bartley's legs. To reconcile this evidence, it is possible that the hit to the groin, in the skirmish in front of the net, occurred and went unnoticed as anything other than the interference St. Laurent was trying to inflict on Bartley. On the other hand, given the nature of the game, Bartley may well have been struck, and this was, as he said, on his mind as he was being pursued up ice by St. Laurent giving rise to swinging his stick around in an attempt to knock, or bat, St. Laurent away.

[23] The question for the court is, did Bartley's maneuver amount, as the plaintiff alleges, to negligence attracting liability and damages for the resulting injury or was the action, within the nature of the risks players in this league accept when they play in a league described above?

[24] The principles of law pertaining to sports injury incurred during the course of a game are articulated in the often followed decision of *Agar v. Canning* (1966)

54 WWR 302. At page 304, after considering the facts which coincidentally involved a player losing an eye at the instance of an opposing player, states:

Hockey necessarily involves violent bodily contact and blows from the puck and hockey sticks. A person who engages in this sport must be assumed to accept the risk of accidental harm and to waive any claim he would have apart from the game for trespass to his person in return for enjoying a corresponding immunity with respect to other players.

....

The conduct of a player in the heat of the game is instinctive and unpremeditated and should not be judged by standards suited to polite social intercourse.

....

But a little reflection will establish that some limit must be placed on a player's immunity from liability. Each case must be decided on its own facts so it is difficult, if not impossible, to decide how the line is to be drawn in every circumstance. But injuries inflicted in circumstances which, show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of the implied consent. I have come to the conclusion that the act of the defendant in striking plaintiff in the face with a hockey stick, in retaliation for the blow he received, goes beyond the limit marking exemption from liability.

(underlining mine)

[25] In *Temple v. Hallem et al* (1989) 58 Man.R. (2d) p. 54, Huband J.A. in speaking for the court in a case of injury which incurred in a softball game, referred to the earlier decision of *Agar v. Canning* and Huband, J.A. interpreted the decision at p. 56 in the following language:

Even if a league rule was violated, it would not necessarily give rise to liability. The case of *Agar v. Canning* (1966), 54 W.W.R. (N.S.) 302, suggests that only a

deliberate violation of the rules calculated to do injury will give rise to civil liability. Otherwise people who engage in sport are assumed to accept the risk of accidental harm.

(underlining mine)

[26] Huband, J.A. then quoted the foregoing paragraph from the *Agar* decision.

[27] The actions of Bartley were not actions intended to injure. Though it may have been a departure from the rules of the game to attempt to knock or bat St. Laurent away, Bartley's actions were not calculated to do injury.

[28] In the *Agar* decision the court found that, in similar circumstances, the defendant stopped, turned and holding his stick with both hands brought it down on the plaintiff's face, hitting him with the blade between the nose and the right eye, resulting in the loss of an eye. In that decision, the finding of the court was clear that the actions of the defendant were in retaliation for hooking and hitting the defendant, with a painful blow in the back of his neck.

[29] The circumstances here, though similar, did not result from the kind of deliberateness described in the *Agar* decision. The deliberateness of the defendant's actions were not aimed at injuring the plaintiff but merely to deter his pursuit.

[30] I accept the argument that Bartley swung to the right with his stick in an attempt to bat St. Laurent away. Bartley may not have appreciated the closeness of St. Laurent, as he testified, and may have accidentally hit him with the end of his stick or with his glove. As Bartley was skating forward with St. Laurent pursuing him, one can only conjecture that if St. Laurent were leaning forward in an attempt to hook, Bartley, Bartley's, stick end may have accidentally struck St. Laurent's eye. Bartley's intention however may only have been to bat him with the blade of his stick below the waist.

[31] Adding to the unintentional nature of the occurrence was the linesman's evidence that the damaging blow was not caused by the stick, but by Bartley's left glove. There was no evidence that Bartley stopped and turned with the deliberateness of the defendant in the *Agar* decision, and therefore his act cannot be categorized as a deliberate violation of the rules calculated to injure St. Laurent.

[32] In other decided cases involving injuries sustained in hockey where liability results, all appeared to involve an intentional injurious move resulting in serious bodily harm.

[33] In *Dunn v. University of Ottawa* (1995) O.J. No. 2856, a case of an injury sustained in a football game, the court there was able to conclude that the actions

of the defendant, Lussier, showed a clear resolve to cause injury. The defendant, knowing the opposite player was within the five-yard protective zone, put his head down, fully intending to make contact with the plaintiff in a spearing motion with his helmet. In concluding that there was liability, the court found that this intentional act was not within the ambit of risks accepted by players and concluded that the defendant was liable.

[34] In *Unruh v. Webber* (1994) 88 B.C.L.R. (2d) 353, the court found that although the body check from behind was intentional, the serious bodily harm incurred was not. The court found that the defendant was reckless and that the plaintiff had not accepted the risk of an illegal check from behind. The Court of Appeal followed the trial court's reasoning as an accurate summary of the law as follows at pp. 367 and 368:

The element of risk to the extent it is normally accepted as part and parcel of the game by reasonable competitors, acting as reasonable men of the sporting world is one of the circumstances that may be considered under the standard of care issue.

....

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 this need, the amount of body contact and the stresses in the sport, as well as the risks 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.

[35] In the *Unruh v. Webber* decision the court concluded that Webber had acted recklessly and liability followed.

[36] In the decision of *Zapf v. Muckalt* (1995) 26 C.C.L.T. (2d) p. 61, the court reviewed the considerations raised in the *Webber* decision (*supra*) and concluded that the actions of the defendant towards the plaintiff were intentional. The findings there were, at p. 79:

I conclude that a reasonable competitor, approaching another from the rear at a high speed near the boards, would not administer a check that he knew or ought to have known was likely to hit a portion of Zapf's back.

Given the standard of play expected in this league, and the overwhelming emphasis placed on the prohibition against checking from the rear in the area of the boards, it is unacceptable to make contact in the manner in which it was done here....He cannot be negligent, reckless or careless in the check. By administering a check to Mr. Zapf's back in these circumstances, Mr. Muckalt was at worst reckless, at best careless. Either is sufficient to found liability in all the circumstances of this case.

[37] As the case suggests, for liability to exist, intention, recklessness or negligence must be shown on the defendant's part. In the case at Bar the actions of the defendant, though warranting a penalty, were not intentionally administered, nor in the circumstances of the play did they fall into the category of recklessness or carelessness as set forth in *Zapf*.

[38] In *Roy v. Canadian Oldtimers Hockey Assn.* [1994] B.C.J. No. 1644, the court considered the principles in *Unruh and Webber* and other decisions (*Colby v. Schmidt* (1986) C.C.L.T. 4). In *Unruh* the defendant was found liable when struck in the jaw with an elbow in the course of a rugby game. The trial judge found the defendant's actions were unusual and beyond the scope of ordinary standards in a rugby game. In *Roy v. Canadian Oldtimes Hockey Assn.* although the rules prohibited bodily contact, the court found that the intentional contact with the plaintiff, causing injury, fell within the risks of the type of game being played. The judge concluded:

The evidence before me is that the contact between the plaintiff and the defendant even though deliberate and meriting a penalty, was contact of the kind which the plaintiff should reasonably have expected. It was contact of the kind to which he consented by playing. This is so, even though the contact was six feet from the boards.

[39] The result in this case necessarily turns upon the nature of this game and the expectations of the players. At the outset, the facts satisfied me that this is not a "no contact" game in the real sense. The parties showing the aggressiveness and physical requirements to play this game necessarily incurred risks. The game involved penalties and the parties expected the occasional fight to take place based upon the history of their previous encounters. The actions of the defendant in this case, although attracting a penalty, were only an intention to bat the plaintiff away from aggressive interference with his play. The incidence of either being hit with



the defendant's glove or the end of the stick, was incidental only to knocking the plaintiff off stride and unintentional in respect to inflicting the kind of injury which accidentally occurred, as serious as it was.

[40] In the circumstances of this contest, while the defendant's actions justified the roughing call made by the linesman, it was nevertheless a course of conduct which I find did not fall below the standard of a reasonable competitor in his place. In reaching that conclusion I have taken into account the nature of the match itself and the level of aggressiveness within the league.

[41] The accident was unfortunate and it carried severe consequences for the plaintiff, but its occurrence, absent any intention to deliberately injure the opposing player, is one of the risks that players in this particular league undertook.

[42] The quantum of damages applicable to the injury for the loss of an eye and the attendant impact it has had on the plaintiff, are not seriously in dispute. The plaintiff who worked as a driver for a local company, was unable to work for a period of time after the accident with a determined loss of income agreed upon by the parties. He eventually returned to work for the same company at a slightly higher rate of pay, in a somewhat better position. He testified he still participates in hockey but no longer plays baseball or tennis. He is able to drive a car but can no

longer maintain a class five licence which he does not need in view of his job change. The plaintiff suffers the embarrassment of the prosthesis which, he says was more critical at the beginning when his children did not want to look at him.

[43] Jewers J. of this court in the decision of *Rajotte v. The City of Winnipeg* 51 *Man. R. (2d)* 23, reviewed a number of decisions dealing with the loss of an eye and concluded that the range was between \$35,000-\$55,000.00 in 1988. In the circumstances of that case he set the damages at \$40,000.00. One must consider the economic changes since then and in the circumstances of this case I fix the general damages at \$60,000.00.

[44] The parties agree to costs of medical reports and medical costs.

[45] There is a dispute respecting the calculation of loss of income which I calculate as follows:

Expected 1995 Earnings:		\$19,125.00
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**Actual Loss**

¾ of \$19,125.00:	\$14,343.75	
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Less Employment Insurance:	9,908.00*	<b><u>\$4,435.00</u></b>
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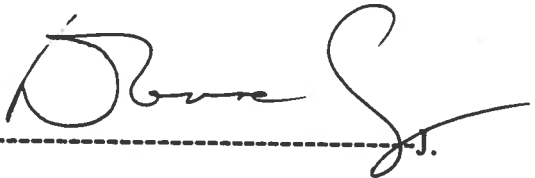
\* The above figure was taken from 1995 tax return of the plaintiff and

contained in Exhibit #8.

[46] The Plaintiff has not proven any sustainable loss pertaining to his entitlement to education upgrading as his current position pays slightly higher than the position he had prior to the incident. Neither is there any basis for an amount payable to a spouse who first and foremost, is not a party to these proceedings and no evidence has been advanced under this heading.

[47] The total amount of damages had there been liability would necessarily have carried pre-judgment interest according to the *Queen's Bench Act*.

[48] The action is dismissed with costs.



\_\_\_\_\_ J.