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IT'S NOT JUST HOCKEY GAMES WHERE THE FISTS FLY

Richards Buell Sutton Insurance Law Newsletter

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Sports invoke the passion of their players, fans and spectators. Unfortunately, we are seeing an increase in the trend of passion supplanting reason and sportsmanship. In British Columbia youth sports are gaining attention for adult coaches tripping young teenagers and parent altercations arising in the stands. Alberta, for the 2012-2013 hockey season, expanded its "Respect in Sport" program to require at least one parent of an enrolled child to take the "parent program" as a pre-condition to a child's eligibility to play. When sporting events go awry criminal charges and/or lawsuits often arise. For insurers of sporting organizations a key question is who will be liable when these incidents lead to injury?

The recent case of *Charland v. Cloverdale Minor Baseball Association and Wheeler*, 2013 BCSC 488 provides a reminder of the keys to refuting liability in sports matters.

Factual Background

The individual parties each had children who umpired Pee Wee baseball games for the defendant baseball association. Mr. Wheeler's son was scheduled to umpire a game but arrived late and was sent home by Mr. Charland who had already called one of his sons to fill in. After hearing what occurred from his son, Mr. Wheeler went to the game and spoke with Mr. Charland about the way Charland had confronted his son. An altercation ensued during the fathers' discussions and the police were called.

The trial judge found that the initial conversation between these parents was calm but it escalated after Mr. Charland used profanity directed toward Mr. Wheeler. Profanities were exchanged but, despite this, the trial judge determined that Mr. Wheeler then walked away. Mr. Charland mistakenly interpreted the escalated conversation as an invitation to fight and used words to the effect of "I'll get you later". A fist fight then ensued and the police were called to the scene.

Ruling

The trial proceeded as between the combatants only. The claims against Cloverdale Minor Baseball Association were discontinued prior to trial. In determining liability the court distinguished the torts of assault and battery. The tort of assault is creating the apprehension of imminent harmful or offensive



contact while the tort of battery is the actual striking of a person or violence. Next the court reviewed consent and self-defence – the two key defences for individuals. If a person consents to a fight, that is a defence to the torts of assault and battery. A person may also act in self-defence, however, the amount of force they use must be reasonable. Using excessive force will remove the protection afforded by the defences of consent and self-defence. The trial judge found Mr. Charland’s statement to the effect of “I’ll get you later” indicated consent to a fight and his injury claims against Mr. Wheeler were dismissed.

Other Considerations

While the claim against the Cloverdale Minor Baseball Association was discontinued before trial, past case law has considered when such organizations will be vicariously liable for the actions of individuals. The Supreme Court of Canada has determined that to make out a successful claim for vicarious liability, plaintiffs must demonstrate at least two things:

1. the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate.
2. the tort is sufficiently connected to the tortfeasor’s assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise.

The factors that inform the analysis of the relationship between organizations and individuals include the following:

- Did the enterprise afford the employee or individual with the opportunity to abuse his or her power?
- To what extent may the wrongful act have furthered the organization’s aims (and hence be more likely to have been committed by the individual)?
- To what extent was the wrongful act related to friction, confrontation or intimacy inherent in the organization’s enterprise?
- What is the extent of power on the individual in relation to the victim?
- What is the vulnerability of potential victims to the wrongful exercise of the individual’s power?

Where an organization exercises significant control over an individual or their actions, or where an individual is connected to an organization and their actions further the organization’s aims or culture a risk of vicarious liability is created. Conversely a weak connection between the individual and organization or actions conflicting with an organization’s purpose or policies reduce this risk.

Practical Considerations For Insurers

At the claims handling stage multiple issues should be considered when assessing liability in sports related



intentional tort claims:

1. Consider whether the injured party consented to the activity and whether the alleged tortfeasor's use of force was excessive.
2. For claims against organizations, gather their constituting documents and policies. Usually these documents take the form of constitutions, by-laws, operating policies and guidelines and mission statements. Ask if the tortfeasor's actions further or conflict with the organization's stated aims.
3. Gather the contracts, guidelines, educational and certification requirements and like documents related to the relationship between the tortfeasor and sporting organization. Ask if the conduct could be deemed as authorized and, more importantly, the degree of control the organization has over the individual. Past disciplinary procedures and decisions of the organization will be relevant on the issue of control.
4. Where multiple, related organizations are named, consider each organization's legal, executive and asset structure. Ask if these distinct entities are operated by different individuals or one related organization.
5. To assess the expected standard of care, obtain information on the general rules and laws of the game.

At the underwriting stage insurers are well advised to conduct a detailed review and analysis of a sporting organizations constituting documents, procedures, executive meeting minutes, member enrolment forms and other like documents with a view to assessing the potential of vicarious liability for intentional torts.

Attention given to these issues will allow insurers to better assess risk and handle claims when they inevitably arise.