The perception of head injuries in sports has undergone a sea change with advancements in research of traumatic brain injuries and related long-term effects. Galvanized by headline-making stories, including recollections of former player’s of the debilitating symptoms they live with, public attention has also been drawn by litigation commenced against sports organizations, teams, and even manufacturers of sporting equipment. As a result, the conversation is rapidly shifting from whether there is a link between injuries to the head suffered in sports and long-term health effects, to what should be done to protect players and how an organization can address liability if they fail to adequately do so.

The science and the law surrounding concussions and other brain injuries in sports is still evolving. Lawsuits against the NFL, the NCAA, and NHL have settled before going to trial. There is no definitive case in Canadian law clarifying exactly when, how, and to what extent a sports organization might be liable for head injuries suffered by its players. However, existing law provides some guidance to project how sports organizations might be held liable and, more importantly, what steps can be taken to limit that risk.

In this article, we will focus on the law of negligence, and look at each of its elements in turn to identify areas where an organization can take steps to limit its risk. Liability of a sports organization for negligence requires proof of three basic elements: there was a duty of care owed to the injured party by the organization, the organization failed to meet the requisite standard of care, and there was a provable loss resulting from that failure.
Duty of Care

Given the role most sports organizations play in regulating the conduct of the game, including setting and implementing safety protocols, detailing the rules of the game, and monitoring player conduct, there is little debate that, in most instances, sports organizations will owe a duty of care to players. This has already been accepted by multiple courts in Canada.\[1\]

Standard of Care

The more difficult question, however, is what steps must be taken by sports organizations to satisfy this duty. The law has regularly recognized that the standard of care owed is a reflection of the surrounding circumstances. In the context of sports, players are presumed to accept and consent to the "inherent" risks of playing sports.\[2\] In other words, a player may not be able to sue for injuries suffered in the regular course of competing in a sport, even if they would have been able to in other circumstances. The standard of care owed will vary depending on the type of sport and its inherent risks.

Participants in sporting activities where there is a foreseeable risk of harm are presumed to have accepted the risk of incidental harm in the course of play and to waive any related claims. The foreseeability of risk varies by sport - football is different from basketball, which is different from golf. The assessment of what fits within the scope of "accepted" risk will vary depending on the nature of the game, the degree of competitiveness, the level of skill, and even more contextual factors such as the conduct of the parties at the time the injury occurred.

While participants are presumed to have waived liability for injuries that fall within the normal course of a sporting event, this waiver may not cover liability for injuries suffered as a result of aggravated or intentional conduct.\[3\] This is an important distinction for assessing liability, as brain injuries suffered during the regular rigors of a game will be treated differently from injuries resulting from premeditated or predatory hits that run counter to the rules of the game or the training provided.

Whether brain injuries fall within the scope of inherent risk in a sporting activity remains unclear at law. The issue of what sports organizations or teams knew about brain injuries in the past and how such injuries were treated sat at the heart of litigation filed against the NFL, NHL, and NCAA. However, the settlements reached on those respective matters means a court has not issued decisions on those questions. Furthermore, even if a court had provided clarity, the fact remains the issues in those proceedings were about injuries suffered in the past. The newly arisen public awareness of the additional health risks of brain injuries means participation by athletes in sports now will likely involve a different consideration of whether they consented to
the risk than for athletes of the past.[4]

The question of what obligations a sports organization must meet to fulfill its duty of care is determined by the scope of responsibilities it maintains or ought to maintain over the conduct of the sport.[5] To the extent that an organization has control or influence over training, concussion protocols, or baseline testing, the question of liability will take into account the quality of that standard-setting. Where the organization has control over the quality of instruction provided to the participants, this will also affect liability.[6]

Incorporating best practices that follow the most current medical advice, and rigorously enforcing protocols intended to identify concussion symptoms using professionals who are accredited within the province to do so, are practical ways in which an organization can reduce its risk. The law does not expect perfection in the standard of care, but it does demand best efforts where a duty is owed.

The resulting loss

Once a duty is recognized, and it is demonstrated that there was a failure to meet it, the injured party must still establish that failure led to, or contributed to, their loss. This can be a challenging obstacle in the context of concussions. To establish liability at law, a complainant must establish a link between head trauma suffered while playing the sport to those injuries. These are often complex medical and factual determinations that vary significantly from case to case. While there is an increasing body of scientific work linking brain injuries to debilitating and chronic issues such as chronic traumatic encephalopathy (CTE) and dementia, delay between the initial head injury and when symptoms manifest can be an obstacle for establishing causation.

Conclusion

The law surrounding liability for concussions remains unsettled, creating challenges for plaintiffs seeking to recover damages for injuries. However, that does not relieve responsibility from sports organizations in the interim. To mitigate liability and protect their players, organizations must proactively address their duty of care. Organizations should seek medical and legal advice to ensure they are meeting the standard of care required for their players. While their efforts need not be perfect, organizations cannot escape liability by begging ignorance any longer.

Footnotes

[1] See, for instance, Forestieri v Hernandez, 2015 BCSC 249 at paras 37-40; see also Dunn v
[4] See Unruh v Webber, [1994] 5 WWR 270 (BCCA) at para 31 for additional discussion of how to delineate the scope of inherent risk a player is presumed to consent to.

Related Entertainment & Sports Law

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