Brendan F. Morrison
416-865-3559
bmorrison@litigate.com

October 19, 2015

Court Rules Hockey Strategy Outside Bounds of Judicial Notice

The hockey season is once again upon us. Across the country, from water coolers to dressing rooms, Canadians have returned to their winter status as experts in the basic principles of our beloved sport. As the season began, the Court of Appeal for Ontario also weighed in on the conversation, releasing a decision that ruled that conclusions about hockey strategy must be supported by actual evidence.

In R v. MacIsaac, 2015 ONCA 587, the Court set aside an assault conviction, finding that the trial judge had improperly engaged in what it determined to be "speculative reasoning" about the way in which a recreational hockey game had unfolded.

The case concerned an alleged assault in the closing seconds of a non-contact men's league hockey game in Ottawa. Gordon MacIsaac, an engineering student and defenceman for the Tiger-Cats, collided with Drew Casterton, a kinesiologist and member of the opposing Pirates. Mr. Casterton suffered lacerations to his face and a concussion and lost two front teeth.

Mr. MacIsaac was charged with one count of aggravated assault and was ultimately convicted following trial. Central to the determination of guilt was the issue of whether the collision was an unavoidable accident or a deliberate blindside hit.

In rejecting the defence evidence and convicting Mr. MacIsaac, the trial judge made a number of findings that were based purely on her own personal understanding of the flow of play in a game of hockey, including that:

- It was not logical that the accused's team would play three defencemen in the last minute of the game when they were losing by two goals;
- The accused, being a defenceman, would not have gone deep into the offensive zone with the hope of scoring a goal;
- If he truly intended to win control of the puck, the accused would have had much greater control of his speed than he purported to have had; and
- The complainant must not have had possession of the puck at the time, since, if he had, he would have kept his

head up and avoided the collision.

On appeal, Justice Hourigan found that the trial judge repeatedly engaged in "impermissible speculation," taking judicial notice of matters relating to hockey strategy that were far from obvious facts. The Court confirmed that "a trial judge ought not to supplement and supplant the evidentiary record, except in very limited situations where taking judicial notice is permitted". Here, crucial conclusions about hockey strategy were made in "an evidentiary vacuum".

The Court of Appeal set aside the trial judge's findings and declared that "hockey strategy is not a proper subject for judicial notice", the principle that allows a court to accept notorious facts without the requirement of proof:

> From the sports pages to social media, it is abundantly clear that reasonable Canadians often disagree about what constitutes a rational hockey strategy in a given situation. Nor is there any source of indisputable accuracy by which to settle these disagreements.

In addition to clarifying the bounds of judicial notice, the MacIsaac decision ushers in the 2015-2016 hockey season with a blow to arm-chair sports fans who hold our views to be clear and obvious truths.

For more ways in which hockey is shaping the law, see: Personal injury award for intentionally inflicted bodily harm survives bankruptcy.