

Dealing With Violence As A Legal Issue

Hilary Findlay, a lawyer, and Rachel Corbett, a risk management consultant, are founders and directors of the Centre for Sport and Law. They are regular contributors to Coaches Report.

In the last issue, we discussed the topic of violence in sport from the criminal law perspective, specifically in the context of a charge of assault. An increasing number of violent acts occurring during competitive sport events are being addressed using “tort law.” As opposed to our criminal law, which is a matter between the public at large (that is, the state represented by the crown prosecutor) and the person accused of a criminal offence, this area of law deals with a wrong or injury done to one person by another and for which the injured party may seek compensation from the other party for such injuries.¹

Just as the state may charge a person with a criminal assault, an injured party may bring an action against another person for civil assault. A civil assault involves a deliberate use, or threat of use, of force against another person. A kick, a punch, or a stick swung at another person on purpose is an assault. It doesn’t matter that the individual did not mean to cause the exact damages or even that the intended target was actually another person—“the illegal intent and the final contact are what count.”²

An individual can also bring a civil claim for negligence. Negligence is distinguished from an assault by the notion of “intention.” In an assault (whether criminal or civil), the perpetrator must be shown to have “intended” the violent act. In a negligence case, the fact the act was not intended is not relevant. The fact that the perpetrator’s conduct failed to meet a certain “standard of care” is typically sufficient to make out a case of negligence, assuming the other elements of negligence can be met.³

What is important to both kinds of actions is the issue of consent. As was discussed in the previous article, in the context of an assault (whether criminal or civil), the person alleging that an assault took place must show that the injured party did not consent to the violent act (or perhaps to the level of violence that took place). In the case of negligence, consent is not part of the proof of the misconduct, but it is a full and complete defence to a finding of negligence.

It is possible for the victim to have consented to the violent act that led to the injury. In the case of negligence, this is the defence of *volenti non fit injuria* (“harm does not come to one who consents”). In the case of assault, it goes to the very definition of the act as being acceptable or not. The question is, of course, as in the case of criminal assault, what was consented to in the particular circumstances.

In the case of *Dunn v. University of Ottawa*, the court accepted that by participating in the intercollegiate game of football, Dunn, a punt returner, had consented to a certain degree of violence, but that consent covered only what might be reasonably expected under the circumstances.

In that decision, Mr. Justice Cunningham wrote:

“Not every breach of the rules, by any stretch of the imagination, will result in a finding of negligence within the context of a game such as football. Such non-

compliance is but one factor in any judicial determination. Only when there is a deliberate intention to cause injury or a reckless disregard for the consequences of one's actions in an uncontrolled and undisciplined manner will a finding of negligence result."

The court found that while a punt returner consents to being hit hard by a tackler, he does not consent (and in this instance the player did not consent) to "being head butted or speared in the face by an onrushing 225-pound linebacker while in that vulnerable position [that is, looking up tracking the ball within the five yard no-tackle zone.]" The court found that the actions of the defendant fell far below the standard that might reasonably have been expected of, or accepted by, a university football player.

If either the assault or the negligence is proven, who should be held responsible for the wrongdoing? Clearly the party committing the wrongful act. But in a tort action, it is not uncommon for some parties to be held responsible for the conduct of others. Parents can be held responsible for the conduct of their children, sport organizations can be held responsible for the negligent conduct of their employees or volunteers, and coaches can be held responsible for the conduct of their athletes.

In *Dunn v. University of Ottawa*, the coach of the defendant's team, as well as the university, were also sued. The plaintiff alleged that the coach "failed to prevent his staff and players from embarking upon unreasonably dangerous activities during the course of a football game" and that the university, as the employer of the coach, was liable for the coach's negligent actions. The court examined the coach's responses to past incidents of violent activity and, in this instance, found that the coach had taken reasonable steps to deal with unruly actions and "trash-talking." The court did point out that "[w]ithout any doubt, at the university intercollegiate level, it is the responsibility of the coach to encourage and teach fair play and good sportsmanship. The game is played to win, but it is not played to win at all costs" [emphasis added].

The court found that while there might well be circumstances under which a coach could be held responsible for the actions of a player, this case was not one of them.

Those in positions of authority within a sport organization need to be concerned about their own actions, but also about the conduct of those for whom they have some responsibility including program participants, coaches, and officials. The level of violence one sees in many competitions has as much to do with coaching technique and attitude and officiating behaviour as it has to do with the actions of a handful of players. Ultimately, the coach may be responsible for the "tone" set by those controlling the competition.

1. There are a number of important differences between a criminal action and a tort, or civil, action. Most notably, the level of proof is different (the criminal "beyond a reasonable doubt" as opposed to the lower "balance of probabilities" of the civil action) and the onus of proof rests with the state, or Crown, in the criminal action and with the injured party in the civil action.

2. John Barnes. 1996. *Sports and the Law in Canada*. (Toronto: Butterworth) p. 272.

3. The four elements of negligence are: a duty of care is owed; the duty imposes a certain standard of care; an injury or damage occurs; and the damage or injury is as a result of a breach in the standard of care.