

# Sports Liability: From Rock'em, Sock'em to Reasonableness?

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# Sports Law?



- Duty
- Assumption of Risk
  - implied
  - contractual (waiver)



# Duty

- occupiers duties
- regulatory, administrative
  - volunteer organizations v. for profit
- general common law

# Implied Assumption of Risk

- Volenti non fit injuria
  - “to a willing person, injury is not done”
- known as “Voluntary assumption of Risk”



# Voluntary Assumption of Risk - Implied

- No Duty?
  - no need to take care to one who consents

# Voluntary Assumption of Risk - Implied

- No Breach?
  - Qualifying the nature of the defendants duty to take care

# Voluntary Assumption of Risk - Implied

- The risk that a reasonable person would consider the plaintiff to have assumed
  - not every risk
  - boxer's fist vs. crowbar
  - rules vs. breach of rules?
  - Golden rule?

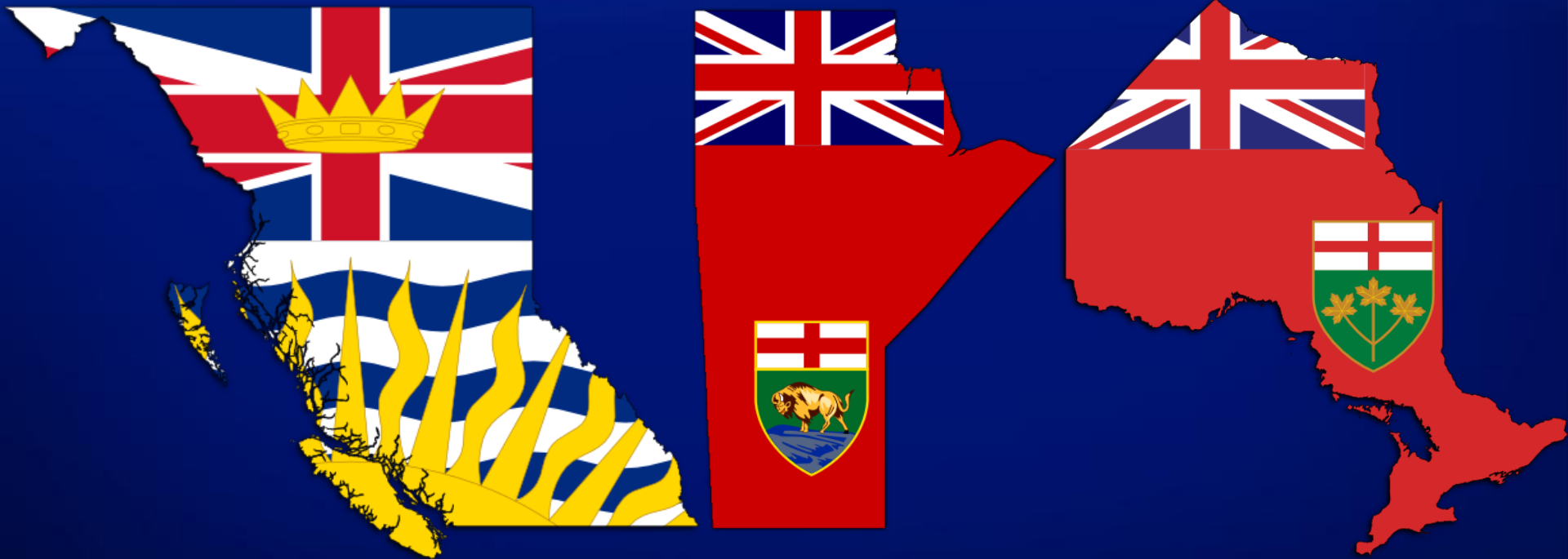




# Hockey



# Voluntary Assumption of Risk - Implied



# Voluntary Assumption of Risk - Implied

- *Agar v. Canning* [1965] 54 W.W.R. 302 (Man QB)



# Voluntary Assumption of Risk - Implied

- *Agar v. Canning*
- The Facts
  - *‘Defendant body-checked plaintiff... Plaintiff..hook[ed] him with his stick and ...hit defendant a painful blow on the back of the neck. Defendant...stopped, turned, and holding his stick with both hands, brought it down on plaintiff's face, hitting him with the blade between the nose and right eye...Plaintiff fell to the ice unconscious and the game terminated at that point.’*

# Voluntary Assumption of Risk - Implied

- *Agar v. Canning*
- The Analysis
  - *‘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. It would be inconsistent with this implied consent to impose a duty on a player to take care for the safety of other players corresponding to the duty which, in a normal situation, gives rise to a claim for negligence. Similarly, the leave and licence will include an unintentional injury resulting from one of the frequent infractions of the rules of the game.’*
- Golden rule
- Even if rules broken

# Voluntary Assumption of Risk - Implied

- *Agar v. Canning*
- The Test
  - But a little reflection will establish that some limit must be placed on a player's immunity from liability...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.
- Two aspects: intent, serious injury

# Voluntary Assumption of Risk - Implied

- *Agar v. Canning*
- The Conclusion
- *'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.'*

# Voluntary Assumption of Risk - Implied

- Ontario follows
- *Sexton v. Sutherland* [1991] O.J. No. 624 (Gen. Div.)
- hockey
  - body check
  - 13 and 15 year olds
  - kidney injury





# Voluntary Assumption of Risk - Implied

- *Sexton v. Sutherland*
- The Analysis
  - **Any contact sport will involve the risk of injury.** Some sports have a probability of injury at some time or other for a participant and there is as well the possibility of serious injury. **The rules of each game are designed to minimize that risk** of injury...
  - ...However, one must recognize that no matter how well protected the players are, or how well counsel led they may be, **there is always the risk of serious injury in a contact sport no matter how well or cleanly played.**

# Voluntary Assumption of Risk - Implied

- *Sexton v. Sutherland*
- The Test
  - ...there is still open the question of whether there need to be "a definite resolve to cause serious injury to another". I do not see the words used by Bastin J. as saying that absence of such definite resolve would be an impenetrable wall preventing liability. I would think that injuries inflicted in circumstances which show the **application of a very great force while demonstrating a reckless lack of regard as to whether serious injury was caused** would not fall within the scope of implied consent.
- action dismissed
- recklessness, serious injury

# Voluntary Assumption of Risk - Implied

- *Dunn v. University of Ottawa* [1995] O.J. No. 2856 (Gen. Div.)
- football
  - Panda game between Carleton and Ottawa
  - 225 lb linebacker spears 150 lb punt returner
  - ‘no yards’ infraction



# Voluntary Assumption of Risk - Implied

- *Dunn v. University of Ottawa*
- The Analysis
  - **‘Football is a game sometimes described as controlled violence.** There is much beauty and artistry within the context of this game, but there is also much vigorous and rough bodily contact by oftentimes large, fit men, wearing extensive protective gear. **By playing this game, those involved accept certain risks, and of course one of those risks is that an injury will occur, given the nature of the game.’**

# Voluntary Assumption of Risk - Implied

- *Dunn v. University of Ottawa*
- The Test
  - *‘Where contact is legal, within the rules of the game, no liability can attach. Even if contact is made outside the rules of the game, there can be no liability unless the player can establish that the Defendant knew he was breaking the rules, and had formed a deliberate resolve to injure or that he was reckless as to the consequences of his actions...’*
  - *‘...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. Otherwise, games such as football and hockey and indeed many other sports could never be played.’*
- Plaintiff liable
- intent, (serious) injury

# Voluntary Assumption of Risk - Implied

- *Seaton v. Gagnon* [1997] O.J. No. 3982 (Gen. Div.)
- Soccer
  - collision after the whistle, shoulder injury
- *'It is difficult to imagine much greater force in soccer than one man running at full speed deliberately into another after the play has stopped.'*
- no intent, recklessness
- *'just beyond the line of consent'*

# Voluntary Assumption of Risk - Implied

- *Nichols v. Sibbick* [2005] O.J. No. 2873 (S.C.J.)
- hockey
  - careless stick check, loss of an eye
- no intent, no liability



# Voluntary Assumption of Risk - Implied

- *Leighton v. Best* [2009] O.J. No. 2145 (S.C.J.)
- hockey
  - fight in 'gentlemen's hockey' game
- plaintiff high sticks defendant and knocks out tooth
- mutual scuffle, defendant lands punch, breaks plaintiff's jaw, found liable
  - *'Best's conduct was unusual and beyond the scope of the ordinary standards applicable in Gentlemen's Hockey. **The implied consent was to jostle, wrestle and maybe land a few harmless punches over protective gear.** Best exceeded the scope of the implied consent by **removing Leighton's helmet to land a punch of such force that there must have been an intention to injure or at least recklessness** as to the consequences of such a hard blow. Liability attaches to such conduct because of the disproportionate nature of his retaliation in circumstances where no injury to Leighton's face or mouth was expected or consented to.'*



# Voluntary Assumption of Risk - Implied

- The British Columbia approach
  - *Unruh v. Webber* (1994), 88 B.C.L.R. (2d) 353 (C.A.)
    - hockey
      - body check from behind, plaintiff quadriplegic
  - *Zapf v. Muckalt* (1996), 26 B.C.L.R. (3d) 201 (C.A.)
    - hockey
      - ‘careless’ shoulder check into boards



# Voluntary Assumption of Risk - Implied

- British Columbia
- intent or recklessness not needed
- WWRCDC test
- no intent to injure but: What would a 'reasonable competitor' have done?
- liability found in both instances

# Voluntary Assumption of Risk - Implied

- Latest word - Ontario
- *Kempf v. Nguyen* [2013] O.J. No. 1531 (S.C.J.)
  - cycling
  - The Facts
    - Becel Ride for Heart on DVP
    - experienced cyclists
    - plaintiff approaches to take advantage of the ‘draft’, begins passing defendant
    - defendant, inexplicably and carelessly, moves left
    - plaintiff crashes

# Voluntary Assumption of Risk - Implied

- *Kempf v. Nguyen*
- Analysis
  - Duty of care assumed
  - *‘Simply because there is inherent risk in an activity does not mean that there is no duty of care....the fact that a particular activity carries with it certain **inherent risks can operate to modify what constitutes reasonable care**...bearing in mind that a person engaged in activity must be taken to reasonably expect to encounter specific risks...’*

# Voluntary Assumption of Risk - Implied

- *Kempf v. Nguyen*
- Analysis, cont'd
- The Test
  - 'What is the standard of care for cyclists participating in the **Becel Ride for Heart**?'
  - 'the precise standard of care to be applied depends on the nature of the activity... **Some sports are very high risk while others are not.**'



# Voluntary Assumption of Risk - Implied

- *Kempf v. Nguyen*
- The Analysis, cont'd
- Court adopts *Unruh*
  - *'the court in Unruh set out the test to be applied when determining liability'*
  - *'the standard of care test is - what would a reasonable competitor, in his place, do or not do'*
  - *'By its nature cycling is **not a contact sport** or one that involves physical encounters with opponents such as football or rugby'*
  - a *'cardinal rule'* in cycling, *'universally known'*: no sudden movements
  - *'did not expect that participate would breach one of the **'most basic rules'***
  - *'careless act outside of risks assumed'*

# Voluntary Assumption of Risk - Express

- Waiver of liability
- *Kempf v. Nguyen*
  - signed waiver found not to apply
  - ‘*poorly drafted and confusing*’
  - did not appear to release claims against other participants

# Voluntary Assumption of Risk - Express

- Waivers Generally
  - Concept
    - agreeing to assume risk
    - analyzed as a matter of contract law
      - typically signed documents
      - sometimes accepted through purchase of a ticket





# Voluntary Assumption of Risk - Express

- Waivers Generally
  - Observations
    - no waiver is immune from challenge given right set of facts
    - will be interpreted strictly
    - waivers on behalf of minors likely unenforceable



# Voluntary Assumption of Risk - Express

- B.C. case
- Loychuk v. Cougar Mountain [2012] B.C.J. No. 504 (C.A.) leave refused [2012] S.C.C.A. No. 25
- zip line, negligence
- waiver upheld, no unconscionability

# Voluntary Assumption of Risk - Express

- Factors
  - Wording and format
    - simple, short, easy to read, single page, capital letters, bold, headings
  - Communication
    - make participant aware of waiver and legal effects
    - prominent, clear, legible signs may assist
    - No time pressures
    - No misrepresentations as to effect

# Voluntary Assumption of Risk - Express

## Factors (cont'd)

- Clearly identify parties to be covered
- Unexpected or Unusual Risks
- Exclude liability for negligence
- Sophistication of person signing
  - bringing to attention may be enough



# Voluntary Assumption of Risk - Express

- Children
  - In B.C., appears clear that parents cannot waive a child's right to sue
  - Conceptually, appears the same in Ontario
    - court approval of settlements
    - Occupiers Liability duties cannot be excluded by contracts with non-parties
- Indemnity
  - Absence of case law, however older cases suggest parental indemnities against public policy

# Sports Claims

- *Volenti* still very much part of the analysis
- However, Ontario courts importing B.C. concepts
  - early moves to notion of ‘reasonable competitor’ standard
- Nature of sport, its rules and codes, often determinative
- Express waivers still relevant and important, but far-from-bulletproof