

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Alan D. MacInnes
Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett

BETWEEN:

DERRICK MILES HENDERSON)
)
(*Plaintiff*) *Appellant*)

- *and* -)
)

ERNEST ELDER, COACH OF THE)
MAYNERDS ELECTRIC 13A WHEAT)
KINGS)
(*Defendant*) *Respondent*)

G. R. Clay
for the Appellant

- *and* -)
)

B. R. Bowley and
A. W. Challis
for the Respondents

CANADIAN HOCKEY ASSOCIATION)
INC. CARRYING ON BUSINESS AS)
HOCKEY CANADA, MANITOBA)
AMATEUR HOCKEY ASSOCIATION)
INC. CARRYING ON BUSINESS AS)
HOCKEY MANITOBA, BRANDON)
YOUTH HOCKEY ASSOCIATION INC.,)
RODNEY BATSON, MANAGER OF THE)
MAYNERDS ELECTRIC 13A WHEAT)
KINGS, THE PARENT OR PARENTS OR)
GUARDIAN OR GUARDIANS OF A)
PLAYER OF THE MAYNERDS)
ELECTRIC 13A WHEAT KINGS)
UNKNOWN OR UNASCERTAINED)
)
(*Defendants*))

Appeal heard and
Decision pronounced:
May 1, 2017

On appeal from *Henderson v Canadian Hockey Association Inc et al*,
2016 MBQB 51

MACINNES JA (for the Court):

[1] The plaintiff appeals from a judgment dismissing his action against the defendant Elder (the defendant).

[2] On February 10, 2002, the plaintiff was refereeing a Peewee A level hockey game in Brandon, Manitoba. One of the teams was made up of 12-year-old players and the other team, coached by the defendant, was made up of 13-year-old players.

[3] The plaintiff claims that, during the second period of the game, he was moving up ice following the play when he was involved in a collision with an unidentified player coming off the bench in the course of changing “on the fly” as the game continued. As a result, the plaintiff fell to the ice and suffered injury.

[4] The plaintiff sued a number of persons and entities but, by the time of trial, his action was against only the defendant and the unnamed parents or guardians of the unidentified player. The unidentified player was never named a party to the action. No evidence was led to establish a duty of care or any breach of such duty on the part of the parents or guardians of the unidentified player, nor were there any allegations of vicarious liability against them. Accordingly, the trial judge (the judge) dismissed the action against the unnamed parents/guardians and proceeded to consider only the plaintiff’s action against the defendant.

[5] The judge correctly noted that there was no evidence of any intent on the part of anyone to cause harm to the plaintiff. She identified the real issue in the case as whether a hockey coach can be held liable for damages arising from the unintentional conduct of an unidentified 13-year-old hockey

player with a referee in the course of a hockey game.

[6] The judge was asked to determine the issue of liability only; damages having been severed by agreement. After a thorough consideration of the evidence and the relevant law, the judge dismissed the plaintiff's action against the defendant.

[7] The plaintiff raised seven issues on appeal. Issue number one was the plaintiff's assertion that the judge erred in refusing to permit the plaintiff to call an expert witness. Issues two through seven raise separate arguments of error by the judge in the findings of fact and credibility which she made in the course of her judgment and in her refusal to apply *Cook v Lewis*, [1951] SCR 830, and reverse the onus of proof to require the defendant to establish the absence of negligence on his part.

[8] As to the judge's refusal to hear from the intended expert, it is our view that she made no error. The plaintiff proposed to call a witness who had vast experience as a referee, both in hockey and football, to give opinion evidence as to the obligations and expectations of a referee in the course of refereeing a hockey game.

[9] The *Mohan* criteria are well-known (see *R v Mohan*, [1994] 2 SCR 9). Without enunciating them, it is clear that the intended evidence was offside the first *Mohan* criterion, namely that of relevance. There was no issue in the trial as to the conduct of the referee. Rather, the claim was brought by the referee alleging negligent conduct on the part of the defendant. If expert evidence were required, and we do not say that it was, it should have been as to the conduct of the coach against whom the action was brought, not in respect of the referee who was the plaintiff.

[10] As regards issue four, it does appear that the judge misstated herself in para 35 of her reasons when she wrote that the plaintiff admitted that neither the unidentified 13-year-old player nor the coaches were negligent in the manner in which they conducted themselves. There was no such admission.

[11] Notwithstanding, she wrote in para 35 that there was no suggestion that either the unidentified player or the defendant deliberately attempted to injure the plaintiff, nor was there any allegation of recklessness or carelessness on the part of anyone.

[12] As regards the points raised in issues two, three, five, six and seven, the findings and conclusions of the judge were well supported by the evidence before her and by the law upon which she relied in reaching her conclusion.

[13] In our opinion, the judge concluded correctly that there was no evidence of negligence, carelessness or intent to injure on the part of the unidentified player or the defendant and that, while the result for the plaintiff and his family was indeed an unfortunate outcome, he failed to meet the onus upon him of establishing liability.

[14] In our view, there is no basis whatsoever for appellate intervention and the appeal is dismissed with costs.

MacInnes JA

Cameron JA

Burnett JA
