

**DECEMBER 2013 EXAM AND COMMENTARY**

*Faculty of Law, McGill University*

**EXTRA-CONTRACTUAL OBLIGATIONS / TORTS**

2013-2014

Professor S. Van Praagh

**Mid-term Exam (20% of final grade), 9 December 2013**

**QUESTION ONE** (One hour and 30 minutes, 100%)

As the summer of 2013 came to a close and you started your study of the law of civil wrongs in your ECO's/Torts course, there was news of a major (\$756 million) settlement between the National Football League in the United States and past professional football players suffering the consequences of head injuries incurred over their careers. As the fall term wound down, and you began to review what you had learned over the semester, a related story hit the news. On Monday, November 25<sup>th</sup> – a day La Presse labeled “une journée noire” for the Commissioner of the National Hockey League and the 30 owners of hockey teams throughout North America – a claim was filed on behalf of ten retired hockey players against the League. All ten suffer neurological health problems, which they claim are the result of repeated hits to the head during hockey games. The lawsuit points to the negligence of the NHL in not taking preventive actions in a timely and effective way. In a comment to the media, one of the ex-players included in the group of claimants said that he and others were kept in the dark about the risks of concussions and many former NHL players are now suffering from debilitating head injuries (post-traumatic stress syndrome, sustained depression, headaches, and dizziness, memory loss and, in some cases, Alzheimer's disease and dementia).

Among other things, the suit claims the following (remember these are allegations that would have to be proved in court):

- The NHL knew or should have known about scientific evidence that players who sustain repeated head injuries are at greater risk for illnesses and disabilities both during their hockey careers and later in life.
- Even after the NHL created a concussion program to study brain injuries affecting NHL players in 1997, the league took no action to reduce the number and severity of concussions during a study period from 1997 to 2004. "Plaintiffs relied on the NHL's silence to their detriment," the suit says.
- The league didn't do anything to protect players from unnecessary harm until 2010, when it made it a penalty to target a player's head.

"The NHL's active and purposeful concealment of the severe risks of brain injuries exposed players to unnecessary dangers they could have avoided had the NHL provided them with truthful and accurate information and taken appropriate action to prevent needless harm," the lawsuit says. The suit also alleges that the league continues to contribute to injuries today, by refusing to ban fighting and body-checking, and by employing "enforcers" whose main job is to fight or violently body-check opponents. And the lawsuit accuses the league of promoting a "culture of violence," in which players are praised for their fighting and "head-hunting" skills.

Quebec neuropsychologist Louis de Beaumont, North American specialist in sport-related concussions, was quoted by La Presse as follows: “Si j’étais avocat, j’estimerais qu’il y a matière à poursuite à compter du moment où la science a démontré hors de tout doute les dangers des commotions cérébrales sur les hockeyeurs. Cette preuve a été démontrée clairement pour la première fois en 2011 lorsqu’on a disséqué et découvert de larges plaques séniles dans le cerveau des trois durs à cuire (“tough guys”) décédés dans un intervalle de quelques mois.”

On the day that the lawsuit was filed, the League’s Deputy Commissioner, Bill Daly, issued the following statement: “While the subject matter is very serious, we are completely satisfied with the responsible manner in which the league and the players’ association have managed player safety over time, including with respect to head injuries and concussions. We intend to defend the case vigorously and have no further comment at this time.”

More NHL players have added their names to the original ten; by December 1<sup>st</sup>, Sportsnet.ca was reporting more than 200 players were potentially involved. Canadian hockey personality Don Cherry had the following to say: “I feel sorry for the guys, you know some of the guys maybe got whacked a little, but it’s a money grab as far as I’m concerned.”

One of your old friends from high school, Béatrice, has heard that you are now a law student and finds you on Facebook. Her father, Maurice, is a fifty-five year-old retired NHL player who suffered severe depression for a couple of decades and, five years ago, began to suffer from what doctors diagnosed as early onset Alzheimer’s disease. The family was aware of the risk of the disease, given the fact that other aunts and cousins had also suffered Alzheimer’s at an unusually young age. Now, lawyers are calling and urging your old friend’s father to consider joining the lawsuit against the NHL, and Béatrice wants to better understand the issues. Her dad played rough hockey from the age of ten, and started in the NHL at a time when helmets weren’t mandatory. He played in the NHL (for the Montreal Canadiens and the Vancouver Canucks) for ten years (1978-1988), after which he continued to play amateur hockey.

You explain to your friend that, as a first year law student, you feel far from prepared to give solid advice, but that there are indeed issues raised by the lawsuit with which you are familiar and have substantial and critical understanding. You notice that the theme of the first issue in 2014 of the McGill law school paper, the Quid Novi, is “Law and Real Life”, and you decide to write a piece that merges the news of the lawsuit and the personal story that Béatrice has shared with you about her father. You tell the student editors that your contribution will illustrate how an integrated study of the law of civil wrongs leads to a concrete appreciation and critical assessment of the potential impact of extra-contractual liability on real people’s lives, and you plan to send your published essay to Béatrice.

In your essay, you use Maurice’s story to discuss, first, the challenges in establishing wrongdoing on the part of the National Hockey League, and, second, the challenges in establishing a causal link between that wrongdoing and the neurological injuries. In both parts, you keep in mind that the League will probably deny all responsibility, saying it did nothing wrong and that causation cannot be shown. Given the fact that you have not yet studied the impact and relevance of a victim’s own behaviour or choices, you leave any discussion of that aside. Write the essay for the Quid.

## COMMENTARY

Inspiration for the exam obviously came from headlines in the news in late November 2013 about the claim filed against the National Hockey League by retired professional hockey players throughout North America. Given the hockey concussion exercise with which we had started our discussion of the law of civil wrongs at the beginning of the school year, the news story seemed tailor-made to this year's class! The facts provided and alleged in the lawsuit invited discussion of two main issues: the source of potential liability (ie fault/negligence) on the part of the NHL, and the challenge of showing a causal connection between that fault and reported neurological injury tied to repeated concussions.

Right from the start, notice some key features of the way in which the exam is drafted and what it asks you to do. The context of the National Hockey League and hockey teams throughout North America lets you know that analysis of the 'rules' in any one jurisdiction or even system/tradition is not what's at stake: this is a real-life example of cross-boundary law and discussion that nicely puts your integrated, transsystemic study to use. Further, the hockey players have obviously already consulted lawyers as the claim was framed and filed, and the allegations are aimed at various aspects of wrongdoing on the part of the League and team owners and the ways in which ex-players are now suffering from depression, memory loss etc. You're invited to use the facts, issues, and claims provided, rather than to start with an individual story from which you 'identify' the issues.

Finally, you are asked to take into account a personal story of a friend's father, whose hockey trajectory is probably typical of other ex-players his age, and to use the fact that he has been contacted to join the lawsuit as inspiration for a critical essay on "law (of civil wrongs) and 'real life'". Follow the guidelines given to you, and use the required Quid Novi format to your advantage. Notice in particular the emphasis on 'challenges' in establishing wrongdoing and 'challenges' in establishing causal link, the fact that you are to leave aside any impact of a victim's own behaviour/choices on analysis of liability, and the fact that you are not specifically asked to analyse the chances for success in litigation were Maurice to bring a case in extracontractual liability. Indeed Maurice's situation may be particularly weak, but you can still talk about the general claim and its repercussions, and the lessons to be learned from a focus on an individual like Maurice.

With respect to the source of potential liability, you are invited to focus on the direct responsibility of the NHL for its own wrongdoing or failure to provide appropriate care. In other words, the general question will be whether the NHL acted reasonably – as required under 1457 of the CcQ or the tort of negligence. Here, identify what the League is alleged to have done wrong: failing to take concrete preventative action, failing to pay attention to evidence on the risk of long-term illness as a result of head injuries incurred in play, failing to introduce any new rules before 2010. The claim refers to 'active concealment' of information, and promotion of a 'culture of violence'. All of these aspects can be subject to a discussion of 'reasonableness' and, at the same time, an analysis of the precautions needed in light of foreseeable and substantial risk. As many of you realized, simply asking whether it's 'reasonable' to fail to avoid concussions due to violent play on the ice isn't enough. The issue of time (and the fact that there was an extended study period prior to establishing the connection between repeated concussions

and serious longterm brain injury) has to be discussed. So too does the nature of the defendant. That is, there may be a competing set of rules/norms/expectations within professional hockey in North American that indicates a particular content of 'reasonable behaviour'. It may be appropriate to compare to other professional sports organizations (eg. football); it may also be possible to try a 'fraught with obvious risk' argument. But both will be difficult – and, as many of you pointed out, will be met by arguments tied to the specific nature and norms of NHL hockey. Some of you showed how there were elements of expertise, custom and explicit policy rules all tied up in this example (ie that it doesn't easily fall precisely within the ambit of any one case we looked at, and thus illustrates a particularly difficult challenge for the 'reasonableness' standard). [Sources: Bolton v Stone, Carroll Towing, Cannon, Labelle, ter Neuzen, Roberge, Waldick v Malcolm]

Many of you considered the possibility of vicarious liability on the part of the League or owners – that is, it's players ('enforcers') who do the hitting all within the parameters of their job, so why not turn to their employers if someone gets hurt? Note that the issue that would be difficult here is that of wrongdoing on the part of the individual players. That is, would it be possible to label 'wrongful' the actions that are exactly what is seen as part of the game? Note that the repercussions of doing so would perhaps capture all the players as 'wrongdoers', which seems counter-intuitive, and is probably the reason that the actual lawsuit doesn't go in this direction. It also demands particular attention on one incident (or, slightly more broadly, wrongdoing by one individual) leading to a victim's repeated concussions, and therefore a defined link between specific players. [Sources: Bushey, LeHavre, Bazley and Jacobi, 1463, Keating]

The second major challenge – put into stark relief in Maurice's case itself – is that of factual causal link. That is, we know professional hockey and concussions are linked, and we know concussions and Alzheimer's are linked...But how difficult is it to link wrongdoing on the part of the NHL in not preventing concussions (through equipment, rules etc) and the specific illnesses suffered by ex-players years after they experienced concussions in professional play? Here, as most of you noted, the fact that Maurice (like most other players) started playing rough hockey at a young age and didn't initially wear a helmet means that he may well have suffered numerous concussions before joining the NHL, and definitely before awareness of brain injury in professional contact sports began to rise. Further, just to make things more complicated, family members (who ostensibly didn't play hockey!) have suffered early Alzheimer's.

The issue of causal connection against the backdrop of this case invited you to compare this situation to ones which we discussed in class, to notice that it doesn't quite fit precisely and easily with any one case you already know, and to illustrate your understanding of the kinds of factors that make the determination of causation difficult or even impossible. Many of you made the nice point that the fact that we have clear scientific proof of a link between rough play in hockey (repeated concussions) and serious neurological injury only in 2011 doesn't mean that we can't find causation for the purposes of legal action prior to that date. Remember that the wrongdoing of the NHL (if established) need not be the sole cause of the suffering of the hockey players, including Maurice. Concussions incurred during the 'wrongful' period of NHL play might indeed be combined with the effect of concussions incurred before or after. We just have to be convinced that it is more probable than not that concussions incurred at the time in which the NHL was behaving wrongfully resulted in the harm that materializes much later. Of course,

that is not easy. Prior to 2011, we might say that, like in McGhee, there was inherent uncertainty in establishing the trajectory from multiple concussions to Alzheimer's, for example. Further, genetic tendency to Alzheimer's counts as a possibly causal factor that makes identification of the connection between NHL wrongdoing and that same Alzheimer's impossible. Some of you suggested that the hits could make detection of early Alzheimer's more difficult; some of you worried about identification of the wrongdoer (although note that going after the League instead of a particular team makes that somewhat easier). The crucial thing to note was that a clear justification has to be provided for labeling a problem one of 'causal uncertainty'. Finally, the other thing to be careful about is taking one mechanism identified in an uncertainty case (eg reversing the burden of proof, drawing an inference) and thinking it could easily be applied here. As some of you pointed out, Clements warns against any easy avoidance of the need to establish a causal link...and Maurice's case obviously invites that warning. [Sources: Barnett, St Jean, Clements, McGhee, Snell, Weinstein re mass torts]

After canvassing the challenges found in this example in showing wrongdoing and causation for the purposes of establishing responsibility in private law, there was lots of room for you to reflect on the potential and limits of extracontractual liability. Some of you made connections to our discussion of residential schools and the ways in which law and (Canadian) society can respond to harms suffered in the past. Some of you thought about the benefits of a compensation scheme that would provide support for past hockey players; on the other hand, some of you pointed out that this particular context is different than other situations we've seen in that the players participated and were paid for playing what is now recognized (but arguably always known) as harmful hockey. Others pointed to the 'deep pockets' of the NHL, while also asking under what circumstances it might be appropriate to ask for compensation in the absence of wrongdoing. In general, this was an invitation to return to aspects of the foundational readings and commentary that you have found interesting as a backdrop to our investigation of particular issues in the law of civil wrongs, and to make links between a concrete forum/example and critical analysis of the assumptions, shape, and implications of extracontractual liability. [Sources: Conaghan and Mansell, Viney, Cane, Calabresi, Keating, Trigger]

How to learn from the December exam:

You will see individual comments and notes on your own exam, and on the marking sheet which accompanies it. If I assessed your work as falling between two grades (eg. B/B-), you received the higher grade. Read over your exam together with the comments above and sample exam answers provided. The reason that I have given you four examples of strong answers is to remind you that there isn't only one 'right' way to do well. An excellent answer to an exam question integrates insightful understanding of relevant sources and principles of law with persuasive arguments and clearly presented ideas and reflections. Ask yourself whether you made an outline, thought through the objectives of the question, showed your ability to integrate sources and approaches, presented your ideas clearly and convincingly, and, above all, did what you were asked to do.

In light of your own exam, review the ways in which you prepare for class discussion and the ways in which you follow up and put together the material. Have you consulted secondary sources in the library – on your own or with others? Have you discussed tricky issues with

peers? Have you taken advantage of optional Q and A sessions and tutorials? Have you tried out your understanding by working through hypothetical problems or stories in the news? Are you finding ways to work with two major legal traditions, without repeating unnecessarily or overlooking distinctive structural differences? Are you relying too heavily on past summaries, without ensuring that you have worked through the issues on your own? Have you practiced expressing yourself and the way in which you can think through problems in light of what you have learned?