ROBITAILLE and MICHAEL ROBITAILLE ENTERPRISES LTD. v. VANCOUVER HOCKEY CLUB LIMITED

Supreme Court, Esson J.

Heard — June 4-8, 11-15, 18-22 and 25-30, 1979.
Judgment — December 18, 1979.

Negligence — Duty and standard of care — Duty of hockey club to take reasonable care to prevent players from suffering undue or unnecessary risk of injury.

Negligence — Duty and standard of care — Not negatived by existence of collective bargaining agreement.

Negligence — Defences — Contractual relationship between parties — No bar to liability in negligence.

Damages — Exemplary and aggravated damages — Negligence action — Conduct of defendant — Nominal or modest award inappropriate.

Master and servant — Liability of master for injuries to servant — Defences — Common employment — Over-ruled by s. 87 of the Workers' Compensation Act.

Master and servant — The relationship — Nature and existence — Servant of one as servant of another — Contract of employment between employee's personal corporation and employer — Control of employee's activities by employer.

Master and servant — Liability of master for injuries to servant — Defences — Duty of care not negatived by existence of collective bargaining agreement.

Master and servant — The relationship — Distinction from independent contractor — Hockey team doctors held to be employees.

R., a hockey player, was employed by a hockey club under a standard players' contract made between R.'s personal corporation, R. Ltd., and the club. As part of the services rendered players, the club undertook to provide medical care for matters related to their employment, and in fact players were discouraged from consulting their own doctors with respect to these matters. A shoulder injury had given persistent difficulty to R. and the club doctors had resolved that R.'s problems were "all in his head".

After R. suffered a minor spinal contusion, during a game, his complaints were ignored by the club's medical team in the belief that his complaints were not genuine. Had reasonable attention been paid to his welfare, R. would have had a full medical examination immediately, his injury would have been discovered, and he would not have played in a game a week later in which the injury was severely aggravated, resulting in permanent disability. R. sued the hockey club, alleging that the disability was caused by the neglect of the club to obtain proper care and medical treatment for him.

Held — Judgment for plaintiff.

There was a prima facie duty of care. It was within the reasonable contemplation of the club that carelessness on its part was likely to cause damage to R.

The existence of a collective bargaining agreement between the bargaining agent for the owners and the bargaining agent for the players did not affect the duty of care imposed by the general law. There was nothing in the collective agreement that touched on liability for breach of duty of care. The agreement was not entered into pursuant to any legislation; there was no certification in force in any jurisdiction.

The doctrine of common employment, under which the employer was not liable for the negligence of fellow employees, has been over-ruled by s. 87 of the Workers' Compensation Act.

The release in the standard players' contract did not apply because:

(a) The "Player" under the contract was R. Ltd., not R.;

(b) The scope of the release was co-extensive with the subject matter of the clause, namely, inability to play hockey for the balance of a season; and

(c) The clause was inconsistent with a term of the collective bargaining agreement, which governed in the case of inconsistency.

The fact that there was a contractual relationship between the parties did not bar liability in negligence. The contract did not provide for obligations assumed nor exclude responsibility for failure to perform.

The fact that the contract was with R. Ltd. and not R. did not prevent a duty of care being owed to R., even if that duty was not independent or unconnected with the contract. Control of R.'s acts lay with the club. There was a direct contractual link in that R. guaranteed the performance of the contract by R. Ltd. and covenanted to perform the services on behalf of R. Ltd.

The extent of the duty was not just to provide adequate medical staff but also to ensure that players did not suffer undue or unnecessary risk of injury.

Not only the doctors but also the coaching staff, for whom the club was unquestionably vicariously liable, were negligent.

The doctors were employees and thus the club was vicariously liable for their actions. The club had the power of selecting, controlling and dismissing them. The doctors were supplied as part of the services rendered to R., the services were supplied to further the club's business purposes, and there was substantial control asserted by the club. The degree of control need not be complete to establish vicarious liability.

The club breached its duty of care in failing to react reasonably to R.'s complaints and symptoms, in failing to provide appropriate medical care and in putting pressure on him to ignore his injuries. That breach caused damage.

An award of exemplary damages was appropriate on the ground that the negligence in this case consisted of a course of conduct deliberately undertaken and persisted in that was directed solely against R. The club's conduct was high-handed, arrogant and displayed a reckless disregard for R.'s rights. A modest award under this head was inappropriate since the club's conduct and the harm that resulted struck at R.'s physical and mental health, his professional standing, pride and virtually everything he valued most, and the geographical limits of the stigma left by the club's conduct extended throughout North America.

Cases considered

Anns v. Merton London Borough, [1978] A.C. 728, [1977] 2 All E.R. 492 — applied.

Aynsley v. Toronto Gen. Hospital, [1968] 1 O.R. 425, 66 D.L.R. (2d) 575, varied [1969] 2 O.R. 829, 7 D.L.R. (3d) 193, which was affirmed (sub nom. *Toronto Gen. Hospital Trustees v. Matthews*), [1972] S.C.R. 435, 25 D.L.R. (3d) 241 — followed.

Bahner v. Marwest Hotel Co. (1970), 69 W.W.R. 462, 6 D.L.R. (3d) 322, affirmed 75 W.W.R. 729, 12 D.L.R. (3d) 646 (B.C.C.A.) — distinguished.

Can. Ironwkrs. Union. v. Internat. Assn. of Bridge, etc., Wkrs., [1973] 1 W.W.R. 350, 31 D.L.R. (3d) 750, affirmed 45 D.L.R. (3d) 768 (B.C.C.A.) — considered.

Cassell & Co. v. Broome, [1972] A.C. 1027, [1972] 1 All E.R. 801 (H.L.) — applied.

Eagle Motors (1958) Ltd. v. Makaoff, [1971] 1 W.W.R. 527, 17 D.L.R. (3d) 222 (B.C.C.A.) — distinguished.

Garrard v. Southey (A.E.) & Co., [1952] 2 Q.B. 174, [1952] 1 All E.R. 597 — applied.

Hillyer v. St. Bartholomew's Hospital (Governors), [1909] 2 K.B. 820 (C.A.) — referred to.

Hôpital Notre-Dame de l'Espérance v. Laurent; Théoret v. Laurent, [1978] 1 S.C.R. 605 — considered.

Jarvis v. Internat. Nickel Co., 63 O.L.R. 564, [1929] 2 D.L.R. 842 (S.C.) — distinguished.

Kaytor v. Lion's Driving Range Ltd. (1962), 40 W.W.R. 173, 35 D.L.R. (2d) 426 (B.C.) — distinguished.

McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718, [1975] 5 W.W.R. 444, 75 C.L.L.C. 14,277, 54 D.L.R. (3d) 1, 4 N.R. 618 — distinguished.

Mersey Docks and Harbour Bd. v. Coggins & Griffiths (Liverpool), [1947] A.C. 1, [1946] 2 All E.R. 345 (H.L.) — applied.

Nunes (J.) Diamonds Ltd. v. Dom. Elec. Protection Co., [1972] S.C.R. 769, 26 D.L.R. (3d) 699 — distinguished.

Pretu v. Donald Tidey Co., [1966] 1 O.R. 191, 53 D.L.R. (2d) 504, affirmed 53 D.L.R. (2d) 509n (C.A.) — considered.

Rookes v. Barnard, [1964] A.C. 1129, [1964] 1 All E.R. 367 (H.L.) — referred to.

Rosen and Morren v. Swinton and Pendlesbury Borough Council, [1965] 1 W.W.R. 756, [1965] 2 All E.R. 349 (D.C.) — applied.

Schneider v. New York Telephone Co. (1937), 292 N.Y.S. 399, 13 N.E. 2d 47 (C.A.) — distinguished.

Sealand of Pac. Ltd. v. Robert C. McHaffie Ltd., [1974] 6 W.W.R. 724, 51 D.L.R. (3d) 762 (B.C.C.A.) — distinguished.

Sisters of St. Joseph of the Diocese of London v. Fleming, [1938] S.C.R. 172, [1938] 2 D.L.R. 417 — followed.

Staple v. Winnipeg (1956), 18 W.W.R. 625, 5 D.L.R. (2d) 751, affirmed 19 W.W.R. 672, 5 D.L.R. (2d) at 759 (Man. C.A.) — applied.

Surrey v. Carroll-Hatch and Associates Ltd., 14 B.C.L.R. 156, [1979] 6 W.W.R. 289, 10 C.C.L.T. 226 (C.A.) — followed.

Syndicat Catholique des Employés de Magasins v. Paquet Ltée., [1959] S.C.R. 206, 18 D.L.R. (2d) 346 — distinguished.

Vancouver Block Ltd. v. Empire Realty Co. Ltd.; Wilkeshire Invts. v. Read Jones Christofferson Ltd., B.C.C.A., 10th June 1979 (not yet reported) — considered.

Western Union Telegraph Co. v. Mason (1929), 22 S.W.R. 2d 602 (Kentucky C.A.) — distinguished.

Statutes considered

Contributory Negligence Act, R.S.B.C. 1960, c. 74 [now the Negligence Act, R.S.B.C. 1979, c. 298].

Prejudgment Interest Act, 1974 (B.C.), c. 65 [now the Court Order Interest Act, R.S.B.C. 1979, c. 76], s. 2.

Workers' Compensation Act, 1968 (B.C.), c. 59 [title re-en. 1974, c. 101, s. 1(1); now the Workers Compensation Act, R.S.B.C. 1979, c. 437], s. 87 [am. 1974, c. 101, s. 1(2); now s. 104].

Authorities considered

MacGregor on Damages, 13th ed. (1972), pp. 220, 231.

[Note up with 8 C.E.D. (West. 2nd) *Damages*, ss. 79, 80; 15 C.E.D. (West. 2nd) *Master and Servant*, ss. 3, 4, 39; 16 C.E.D. (West. 2nd) *Negligence*, s. 3; 13 Can. Abr. (2d) *Damages*, VII; 23 Can. Abr. (2d) *Master and Servant*, I, 1, b; I, 2, b; VI, 1, a; VI, 2, a; VI, 2, c; 30 Can. Abr. (2d) *Negligence*, I, 3, a; I, 3, i; I, 5, a.]

ACTIONS by individual plaintiff for damages for personal injuries suffered as a result of defendant's negligence and by corporate plaintiff for compensation payable under contract.

J. N. Laxton and *K. P. Young*, for plaintiffs.
D. B. Kirkham and *D. G. Fredricksen*, for defendant.

(Vancouver No. C782249)

18th December 1979. ESSON J.:—

[Editor's summary: Following a detailed review of the evidence, His Lordship stated his conclusions of facts:

(Drs. Piper, Loomer and Lough, referred to in the conclusions, were the team doctors. Dunn was the trainer and the general manager was Maloney. Hughes was the president of the club and Dr. Tirmansen was the plaintiff's psychiatrist.)

CONCLUSIONS OF FACT

I will now summarize the conclusions of fact which, based upon the whole of the evidence, I have made:

1. The defendant undertook to supply to its players all medical care reasonably required by them to treat injuries and guard against aggravation of injuries. To that end, it employed the medical team consisting of the trainer, three physicians employed on a part-time or retainer basis, and also had available the services of opposing teams' club doctors at games away from Vancouver.

2. Players were expected to report all injuries to the trainer and were expected, in relation to all medical matters related to their employment as players, to avail themselves of the services of the club doctors. Players were expected (and expect) to play with minor pains and injuries — the working definition of "minor" being any condition which is not recognized as creating an undue risk of permanent injury. The pressures of the system militate in favour of resolving doubts as to whether an injury is minor in favour of the player continuing to play unless the injury is such as to render him ineffectual.

3. The governing criterion in these matters is: What is best for the team? If playing tonight's game creates a risk of aggravating the injury to the point of putting the player out of action for a number of games, the decision will generally be that he should sit out the game, although such a decision will not readily be made if the game is one of particular importance. It is a matter of balancing the potential damage to the team from the player not playing this game against the potential damage to it from a protracted or permanent disability. In these matters, the interests of the team are, in large part, the same as those of the players. But where they are not, the general attitude of all concerned, including the players, is that the team's interest should prevail.

4. The decision as to what matters were to be referred to the club doctors was, in theory, for the trainer to make. In practice, he decided what matters should be mentioned to the doctors — the decision whether the doctors should become actively involved was made jointly between the doctor and the trainer.

5. Although there was no specific rule against it, players were discouraged from consulting physicians other than the club doctors for any matter related to their employment.

6. By 1st January 1977 the defendant's management and medical team had concluded that Robitaille's complaints of physical injury and pain were not genuine but were merely a symptom of emotional or mental problems. Dr. Piper was totally committed to that view. Dunn was less committed but was greatly influenced by it and by the fact that it was held by his superiors. Drs. Loomer and Lough, who were not directly involved with Robitaille in the relevant period, were at least aware of the attitude and did not dissent. The attitude was strongly held by the president and general manager, who was also the coach until 22nd December 1976. Kurtenbach, his successor as coach, accepted the prevailing view when he took over.

7. On the road trip in the period 1st to 9th January, Robitaille suffered continuously from pain in the neck, arm and shoulder area, which was at least partially caused by pressure on nerve roots. Those pains and related symptoms of stiffness were reported to Dunn and Kurtenbach. The complaints were sufficiently different from what had gone before to cause some concern, at least to Dunn.

8. On 2nd January 1977 in the game with New York Rangers, Robitaille noted the first symptoms of a spinal cord disorder. These were mild and transient, likely indicating no more than a concussion. These symptoms, insofar as they caused difficulty to Robitaille in getting off the ice, were seen by Dunn, and the sensations felt by Robitaille were mentioned to him but not in a distinct way and no particular attention was paid to them.

9. Robitaille was "seen" by club doctors in New York and Atlanta. Their examinations were not directed to possible neurological problems. That in New York was cursory in the extreme. That in Atlanta was less so but was not a true physical examination so much as a kind of placebo or comfort blanket designed to calm Robitaille's supposed psychosomatic concerns. On the team's return to Vancouver, Dunn reported to Dr. Piper what he recalled of the problems on the trip, probably with no reference to cord symptoms. He requested an immediate examination of Robitaille, but was put off by Dr. Piper with a vague promise that someone would see him at the game on 12th January, a promise that was not kept.

10. In the game of 12th January, Robitaille suffered a minor contusion of the spinal cord, the symptoms of which included leg

weakness and loss of coordination, which must have been noticed by Dunn and by members of the defendant's management and a club doctor, but which were ignored to the point of Dr. Piper walking past Robitaille in the dressing room without paying any attention to him.

11. The acute symptoms of that contusion cleared in a matter of hours, but residual symptoms of weakness and clumsiness persisted for some days. Robitaille sought no further assistance from the defendant's medical team, partly because his condition, although remaining troublesome, improved somewhat in the week after 12th January, but primarily because he concluded, in light of what had occurred up to 12th January that assistance would not be forthcoming and that it would be against his best interests to complain any further.

The plaintiff did not consult his own physician or seek any other outside assistance with respect to his pains and injuries in the period 1st to 19th January and, after 12th January, he said very little to Dunn or anyone else connected with the defendant about them. In so acting, he was influenced by his knowledge that his complaints were not being taken seriously and his fear of doing anything which would tend to enhance his reputation as a malingerer.

12. The check by Owcher on 19th January aggravated the injury suffered on 12th January and caused permanent cord damage, which the earlier one had not. As a consequence, the plaintiff is permanently disabled.

13. Had reasonable attention been paid to Robitaille's welfare, he would have had a full medical examination, including a neurological examination, prior to the game of 12th January. That not having been done, had reasonable attention been paid to the injury sustained on 12th January, he would have had a full examination immediately thereafter, which would have disclosed the existence of cord contusion and, as a result, he would not have been exposed to potential aggravation of that injury by playing on the 19th.

14. The lack of attention to Robitaille's complaints of injuries was caused by the attitude that his problems were all in his head.

LIABILITY ISSUES — THE CLAIM IN TORT

The plaintiff's case is founded upon the general law of negligence. The defendant, he says, was under a duty to exercise reasonable care to ensure the safety, fitness and health of its players. It breached that duty by its failure to provide a safe system and, whether or not the system was adequate, by failing to act reasonably in dealing with the plaintiff's complaints and injuries.

No authority has been cited which deals with any factual situation remotely resembling that in this case. I therefore go to first principles as enunciated in *Anns v. Merton London Borough*, [1978] A.C. 728, [1977] 2 All E.R. 492. Lord Wilberforce, in a speech concurred with by three other Law Lords, said at pp. 751-52:

"Through the trilogy of cases in this House — *Donoghue v. Stevenson*, [1932] A.C. 532 (H.L.), *Hedley Byrne & Co. v. Heller & Partners*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.), and *Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004, [1970] 2 All E.R. 294 (H.L.), the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht* case, per Lord Reid."

The first question, in my view, must be answered in the affirmative. As between the plaintiff and the defendant, there was a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the defendant, carelessness on its part was likely to cause damage to the plaintiff. A prima facie duty of care therefore arose. I now go on to consider the second question, i.e., were there any considerations which ought to negative or to reduce or limit the scope of duty? In relation to this question, the defendant has raised a number of issues which, it says, provide answers to the plaintiff's case.

The first issue raised by the defendant is based upon the collective bargaining agreement between the NHL, as bargaining agent for the owners, and the players' association, as bargaining agent for the players. There have been some revisions of that agreement since 1975 but none which are relevant.

The agreement was not entered into under the authority of any legislation. There is no certification in effect in any jurisdiction.

The collective bargaining agreement is quite comprehensive in that it deals with and governs many aspects of the relationship between owners and players. Article IX deals with salary, awards and standard players' contracts. It provides for a minimum salary and fixes certain bonus provisions, but also provides, in art. 9.03, that nothing in the agreement prevents individual negotiations between a player and club with respect to salary. The same article requires each player to enter into the form of standard players' contract set out in the agreement and provides that the collective agreement governs in the event of any inconsistency between it and a provision of the players' contract. Both the contract entered into by the plaintiff with the Buffalo club in 1974, and that entered into between the defendant and the plaintiff company in 1975, are in the form of the standard players' contract.

There is nothing in the wording of the collective agreement which touches on liability for breach of the duty of care. Article 9.08 deals with certain rights of players who have suffered disabling injuries, but does not expressly or impliedly exclude liability in tort — nor does any other provision of the agreement.

So far as the evidence indicates, all players are members of the association, although membership in the association appears to be voluntary.

The submission for the defendant is that, because of the existence of the collective bargaining agreement, the common law is "irrelevant", i.e., no rights or duties can arise out of the employer/employee relationship except such as are spelled out in the collective agreement. This submission is based upon two decisions of the Supreme Court of Canada: *Syndicat Catholique des Employés de Magasins v. Paquet Ltée*, [1959] S.C.R. 206, 18 D.L.R. (2d) 346; and *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, [1975] 5 W.W.R. 444, 75 C.L.L.C. 14,277, 54 D.L.R. (3d) 1, 4 N.R. 618.

Both cases deal with unions certified as exclusive bargaining agents under provincial legislation. In the *Syndicat Catholique* case, it was held that, to the extent of the matters covered by the collective agreement, freedom of contract between master and servant was abrogated and there was no room left for private negotiation.

In the *McGavin* case, it was held that the common law rules of repudiation and fundamental breach of contract did not apply to collective agreements entered into under legislation imposing the duty to bargain collectively. In the result, employees who had struck illegally and had thus, under common law rules of contract, repudiated the contract were nevertheless held entitled to rely upon its terms to recover severance pay.

It is doubtful that these decisions have any application to collective agreements to which the concept of certification under labour legislation does not apply. There is, in any event, nothing in the decisions which would indicate that the duty of care imposed by the general law is eliminated or affected by the existence of a collective agreement, even one entered into by a certified bargaining agent. If the defendant's proposition is right, the result is that an employer is not under any duty of care to his employees where the relationship between him and his employees is governed by a collective bargaining agreement. Only clear words could justify the conclusion that that result was intended by the legislature.

The second submission of the defendant is that, if there was any negligence which caused injury to the plaintiff, such negligence consisted of errors or omissions by fellow employees and is thus not something for which, because of the doctrine of common employment, the defendant can be held liable. This submission fails because that antediluvian rule of law was long ago laid to rest by the legislature. The relevant section of the Workers' Compensation Act, 1968 (B.C.), c. 59 [title re-en. 1974, c. 101, s. 1(1); now the Workers Compensation Act, R.S.B.C. 1979, c. 437], is s. 87 [am. 1974, c. 101, s. 1(2); now s. 104], which reads in part as follows:

"87. A worker shall be deemed not to have undertaken the risks due to the negligence of his fellow-workers".

The next submission by the defendant is that the plaintiff has, by the terms of the standard players' contract, released the defendant from any liability arising in tort.

The submission rests upon the fourth subparagraph of cl. 5 of the standard players' contract. The specific wording relied upon is:

"It is also agreed that if the Player's injuries resulting directly from playing for the Club render him, in the sole judgment of the Club's physician, unfit to play skilled hockey for the balance of the season or any part thereof, then during such time the Player is so unfit, but in no event beyond the end of the current season, the Club shall pay the Player the compensation herein provided for *and the Player releases the Club from any and every additional obligation, liability, claim or demand whatsoever*."

It is common ground that the defendant has paid to the plaintiff company the compensation "provided for" to the end of the season in which he was injured. The defendant contends that the plaintiff has thus released it from any other claim, including those sought to be put forward in this action. That argument runs into the difficulty that it is the company, not Robitaille, which is "the Player" referred to in the release. Another answer to this submission is that the subject matter of the clause is inability to play hockey for the balance of the season in which the player is injured or any part of that season. The scope of the release must be intended to be co-extensive with the scope of the subject matter and thus would not affect the claim in this action, there being no claim in respect of that period of time.

Furthermore, the quoted provision is inconsistent with art. 9.08 of the collective bargaining agreement, which sets out the rights of a player disabled by an injury sustained while playing hockey. It provides that the player is entitled to receive his remaining salary for the remaining stated term of his contract. It covers all the ground covered by the quoted provision in the standard form contract, but covers a wider ground and provides more rights to the player. By art. 9.03, where there is an inconsistency, the collective bargaining agreement is to govern. There is no release provision in the collective bargaining agreement.

In Robitaille's case, the amount payable to him under art. 9.08 of the collective agreement would, as it happens, be the same as the amount payable under cl. 5 of the standard players' contract because the "expiration date of the fixed terms of contract" (the language of art. 9.08) was the same date as the "end of the current season" in the language of cl. 5 of the players' contract. But, as the two provisions are inconsistent and as that in the collective agreement governs, the payment made must be deemed to have been under that agreement and therefore could not bring the release provision into effect.

The next submission for the defendant is closely related. That is that, because there is a contractual relationship between the plaintiff and the defendant, there can be no liability for negligence unless the negligence can properly be considered "an independent tort unconnected with the performance of the contract". Again, for the purposes of this submission, the defendant seeks to treat the plaintiff as if he were the party to the contract and, again, I will assume that without deciding that it is appropriate to do so.

This proposition is based upon what was said in *J. Nunes Diamonds Ltd. v. Dom. Elec. Protection Co.*, [1972] S.C.R. 769 at

777-78, 26 D.L.R. (3d) 699, where Pigeon J., in giving judgment for the majority of the Supreme Court of Canada, said:

"Furthermore, the basis of tort liability considered in *Hedley Byrne* [supra] is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as 'an independent tort' unconnected with the performance of that contract, . . . This is specially important in the present case on account of the provisions of the contract with respect to the nature of the obligations assumed and the practical exclusion of responsibility for failure to perform them."

The facts of that case were entirely different from those of the present case. Here, there are no provisions of the contract with respect to the nature of the obligations assumed and no exclusion of responsibility for failure to perform them. The scope of the *Nunes* decision was explained recently by the Court of Appeal in *Surrey v. Caroll-Hatch and Associates Ltd.*, 14 B.C.L.R. 156, [1979] 6 W.W.R. 289, 10 C.C.L.T. 226 (C.A.). In giving judgment for the court, Hinkson J.A. said at p. 176:

"The decision in *J. Nunes Diamonds Ltd. v. Dom. Elec. Protection Co.*, supra, does not prevent the court from finding Church liable for negligence as well as for the breach of contract in the present circumstances. In the *Nunes* case, the parties had by their contract agreed on the extent of the liability of the defendant in the event a breach of contract occurred. In those circumstances, it was held that it was not appropriate to rewrite the terms of the agreement between the parties to impose a greater liability than that agreed upon between the parties. However, it is clear that a party to a contract may, because of the relationship established thereby between the parties, assume common law duties in addition to the obligations imposed by the contract. When such a duty is not performed, it is not then open to the negligent party to attempt to avoid the consequences of his negligence by invoking the contract if its terms do not limit the liability."

Those words, in my view, are applicable to the present case. The defendant, because of the relationship established between it and the plaintiff, assumed common law duties additional to the obligations imposed by the contract. The contract does not, by its terms, limit such liability. It is therefore not open to the defendant to attempt to avoid the consequences of its negligence by invoking the contract.

The next submission for the defendant is that it owes no duty to the plaintiff. For the purposes of this submission, the defendant relies

upon the fact that the contract is between the plaintiff company and the defendant, i.e., that the plaintiff is not a party to the contract. From that it is said to follow that the defendant can owe no duty to the plaintiff unless it arises independent of and unconnected with the contract. No authority is cited for that proposition, but it is said to be the converse of the rule laid down in *Sealand of Pac. Ltd. v. Robert C. McHaffie Ltd.*, [1974] 6 W.W.R. 724, 51 D.L.R. (3d) 702 (B.C.C.A.).

It was there held that, in the circumstances of that case, the individual defendant owed no duty of care to the plaintiff owner while doing design work for the corporate defendant in carrying out its contract with the plaintiff. The contract was not one to provide personal services. Nothing said in the decision touches upon the question of what rights, if any, the employee would have had against the owner had he been injured while doing the work.

The principles applicable to that question are to be found in: *Mersey Docks and Harbour Bd. v. Coggins & Griffiths (Liverpool)* [1947] A.C. 1, [1946] 2 All E.R. 345 (H.L.); and *Garrard v. Southey (A.E.) & Co.*, [1952] 2 Q.B. 174, [1952] 1 All E.R. 597.

The question, where the employee's contract is with one employer and he was injured while doing work for another, is whether the latter had the authority to control the manner of the execution of the employee's act out of which the injury arose. Here, the control of the relevant acts of the plaintiff, being his activity as a hockey player out of which the injury arose, lay with the defendant.

Those cases were ones in which a person, whose contract of employment was with a "general employer", was injured while performing services for the "special employer" under a contract between the general employer and the special employer. The factual pattern differs in that here the relationship between the plaintiff and the defendant was not temporary or casual and also because there was a direct contractual nexus between the defendant and the plaintiff, who personally guaranteed the performance of the contract and who personally covenanted that he would perform on behalf of the plaintiff company those services which it had agreed in the contract to supply to the defendant. Those distinctions make the rule as stated in the two cases more clearly applicable than it is to the facts of those cases where the relationship between the temporary employer and the employee was relatively casual and not the subject of any express agreement between them.

The next submissions to be considered are those relating to the team doctors. One submission is that, if the defendant owed any duty to the plaintiff, it was only to provide a medical staff capable of providing reasonable medical care, and the defendant, if it did that, could have no responsibility in law for any errors or omissions by the doctors. A related submission is that there is no liability for any negligent acts of the team doctors because they were independent contractors rather than employees. I am inclined to think that this is the same proposition stated in two ways but I will deal with it as argued.

The short answer to the first submission is that the duty which lay upon the defendant was not simply to provide an adequate medical staff. It was a duty to take reasonable care to ensure that its players did not suffer any undue or unnecessary risk of injury from the inevitable hazards of the game. The obligation to provide medical care was only one facet of that duty. The cases cited by the defendant on this point are: *Jarvis v. Internat. Nickel Co.*, 63 O.L.R. 564, [1929] 2 D.L.R. 842 (S.C.); *Schneider v. New York Telephone Co.* (1937), 292 N.Y.S. 399, 13 N.E. 2d 47 (C.A.); and *Western Union Telegraph Co. v. Mason* (1929), 22 S.W.R. 2d 602 (Kentucky C.A.).

Those cases are clearly distinguishable. They deal with the liability of an employer, generally in a "company town" situation, who provides the services of a physician to the employees and their families as a fringe benefit. In *Jarvis,* the only Canadian case cited, the medical services were provided for a condition not in any way related to the employee's work. Plaintiff's counsel may be right in suggesting that even that case would be decided differently today in light of the fact that it is based upon *Hillyer v. St. Bartholomew's Hospital (Governors),* [1909] 2 K.B. 820 (C.A.), a decision which has been disapproved of by the Supreme Court of Canada in later decisions dealing with the liability of hospitals for the acts and omissions of physicians and nurses.

I turn now to the submission that the doctors are independent contractors for whose negligence the defendant is not vicariously liable. Even if that is right, that would not be conclusive in favour of the defendant because the plaintiff alleges that it was not only the doctors who failed to exercise reasonable care. He relies also on the negligence of the management's coaching staff and trainer, for all of whom the defendant is unquestionably vicariously liable.

There is, nevertheless, some significance to the question whether the doctors are, in law, employees of the defendant and I will there-

fore deal with the submissions in that regard. First, I will outline the facts relevant to this issue.

The purpose of retaining the club doctors was to provide services which the club had undertaken to provide to the players and which they were expected to use. Those services were mainly related to the treatment of injuries sustained in playing hockey and avoiding aggravation of such injuries, although they could include treatment of any condition which would affect the fitness of the players. The club doctors are a recognized institution. For instance, the standard players' contract, in cl. 5, refers to "a physician selected by the Club" and then later in several places to the "Club's physician". The opinion of the club's physician can, under the contract, have serious consequences. For instance, if, in his sole judgment, a player is not in good physical condition, the club can suspend him without compensation.

Dr. Piper, Dr. Loomer and Dr. Lough were retained prior to the 1976-77 season as a result of a decision by Mr. Maloney to dispense with the services of the club doctors who had performed that role for a number of years. His purpose was to improve the level of medical care by employing younger and more highly qualified physicians. He got in touch with Dr. Piper, who had been recommended to him. Dr. Piper suggested his partner, Dr. Loomer, and Dr. Lough as suitable persons to round out the team. The arrangements with respect to the terms of employment were settled between Maloney and Dr. Piper.

The major consideration passing to the doctors, all of whom were keen hockey fans, almost certainly was the opportunity to become "insiders" in a professional sports organization and to practise the developing specialty of "sports medicine". The material benefits were modest. Those agreed to at the commencement of employment included four season's tickets, free parking and access to the lounge, maintained by the defendant primarily for the entertainment of the press. The question of monetary remuneration was left unresolved at that point but was settled at the end of the season at the sum of $2,500 for each doctor. The doctors undertook that at least one, and if possible two, of them would be present at each game, that one of them would be present in the dressing room before the game, between periods and after the game, and near the bench during the game to attend to injuries or give advice as the need arose. It was understood that the doctors would attend to a player whenever requested by the trainer — that applied both to dressing room attendances and to attendances at the doctors' offices.

The services rendered by the club doctors were rendered primarily on the defendant's premises. The defendant retained a measure of control as to how the doctors performed their services. Two examples may be given. At some point during the season, Maloney decided that the doctors were spending too much time in the dressing room and ordered them to spend less time there. The doctors understood that they were to go on the ice to treat an injured player only if called for by the trainer.

The medical equipment was supplied by the defendant and made available in the "medical room" on the defendant's premises. The trainer decided which players should be attended to by the doctors and participated in the decision as to when attendances would take place. The defendant's management and trainer participated actively in reaching decisions on such questions as what treatment should be given and whether and when surgical operations should take place. It was a term of the arrangement that the club agreed that, if a doctor ruled a player not fit to play, that decision would be accepted; but even those decisions, in practice, were made in consultation with the trainer and coach.

The primary responsibility of the doctors was recognized as being to the club. That was true even where the treatments involved office consultation and operations. It was only in the event of an office consultation that there was any regular documentation on such matters as the diagnosis made or the treatment and advice given. The doctors recognized an obligation to advise the club of their conclusions and advice. The players were sometimes advised of those matters, the decision as to what they should be told generally being made by management or the trainer.

Where there were office consultations or operations, the system was for the orthopaedic surgeons to document their findings and treatment in a letter addressed to Dr. Lough, who was referred to as the "primary care physician". This was largely a matter of form in that Dr. Lough in most cases did not see the player and had nothing to do with the treatment. A primary care physician was included in the medical team, apparently to preserve the niceties of medical etiquette by having him, in form, "refer" the patient to the specialists and receive a report from them. A copy of the report was, as a matter of course, sent to the defendant to the attention of Mr. Dunn. The player did not receive a copy of the report. It was considered to be the responsibility of Dunn and the club management to decide what, if anything, should be communicated to the player as to the contents of the report.

The doctors generally rendered their services in the dressing room without specific charge, although charges were occasionally made for consultations in the dressing room where that involved a longer than usual attendance. The doctors rendered accounts to the medical services association for the account of the player for office consultations and other "non-dressing room" services. This is the only regular part of the arrangement in respect of which the doctors acted as if the players were their patients. It was an arrangement which was convenient for all concerned in that there was no financial detriment to the player and the doctor got his usual fee with no cost to the club.

Both counsel relied upon a line of cases related to the question of the vicarious liability of hospitals for the negligence of doctors. Those cases are somewhat distinguishable in that in most, if not all of them, the issue was whether the surgeon was in the employment of the hospital or the patient. Here, it is not seriously suggested that the club doctors were in the employ of the plaintiff — the assertion rather is that they are merely independent contractors of the defendant. Nevertheless, the cases are useful in establishing the criteria applied by the courts in determining whether the hospital or other party employing the doctor is vicariously liable for negligence.

The case most relied upon by the plaintiff is *Aynsley v. Toronto Gen. Hospital*, [1968] 1 O.R. 425, 66 D.L.R. (2d) 575, varied [1969] 2 O.R. 829, 7 D.L.R. (3d) 193, which was affirmed (sub nom. *Toronto Gen. Hospital Trustees v. Matthews*), [1972] S.C.R. 435, 25 D.L.R. (3d) 241. It was there held that the principles laid down with respect to hospitals and nurses in *Sisters of St. Joseph of the Diocese of London v. Fleming*, [1938] S.C.R. 172, [1938] 2 D.L.R. 417, are applicable to physicians even in the operating theatre. It was held that the liability of the hospital for negligent acts or omissions of the physician vis-à-vis a patient depends primarily upon the particular facts of the case, particularly as to the services which the hospital undertakes to provide and the relationship of the physician and surgeon to the hospital. In the *Sisters of St. Joseph* case, Davis J. quoted [*Moore v. Palmer* (1886), 2 T.L.R. 781 at 782 (C.A.)] with approval, and applied the following test for determining whether the relationship is one of master and servant for the purpose of determining whether there is vicarious liability (p. 187):

"The tests were, Who had the power of selecting, of controlling, and of dismissing?"

In *Toronto Gen. Hospital Trustees v. Matthews*, supra, the Supreme Court of Canada adopted what was said by the Court of Appeal of Ontario, which, in turn, had concurred in the conclusion as stated by the trial judge in the following words [p. 439], which appear at p. 437:

"Since, in my view, he was an employee of the hospital and supplied as part of its services to the patient . . . I hold the hospital is vicariously liable for his negligence."

The defendant relies primarily upon two decisions, one by the Supreme Court of Canada and one by the Court of Appeal of Manitoba. They are: *Hôpital Notre-Dame de l'Espérance v. Laurent; Théoret v. Laurent*, [1978] 1 S.C.R. 605; and *Staple v. Winnipeg* (1956), 18 W.W.R. 625, 5 D.L.R. (2d) 751, affirmed, 19 W.W.R. 672, 5 D.L.R. (2d) at 759.

In the *Hôpital Notre-Dame* case, the hospital was held not to be vicariously liable under the law of Quebec, which was said, on p. 614, to be identical on this point to the common law. The basis upon which it was held that the hospital was not the employer was, as stated at p. 611 in the judgment of Pigeon J.:

" . . . this was in fact a situation where the doctors who chose to attend were really independent professionals to whom the hospital merely provided an opportunity to establish relations with patients who came to seek their services."

Applying the tests in those cases to the facts here, I find that the doctors were employees of the defendant and that it was vicariously liable for their negligence. The defendant had the power of selecting, of controlling and of dismissing. The doctors were supplied as part of the services rendered to the plaintiffs. That service was supplied to further the defendant's business purposes. The measure of control asserted by the defendant over the doctors in carrying out their work was substantial. The degree of control exercised need not be complete in order to establish vicarious liability. In the case of a professional person, the absence of control and direction over the manner of doing the work is of little significance: *Rosen and Morren v. Swinton and Pendlesbury Borough Council*, [1965] 1 W.L.R. 756, [1965] 2 All E.R. 349 at 351 (D.C.).

I can now answer the second question posed by Lord Wilberforce in *Anns v. London Borough of Morton*, supra. I conclude that there are no considerations which negative or reduce or limit the scope of the duty of care owed to the plaintiff. There was a breach of

that duty in failing to react reasonably to the plaintiff's complaints and symptoms, in failing to provide appropriate medical care and in putting pressure upon him to ignore his injuries. That breach of duty caused damage. From that, it follows that the defendant is liable in negligence.

The plaintiff relied heavily upon contentions of defective system. In general, I found the system for providing care to be a reasonably good one. The structure and organization of the medical team is basically the same as that which prevails throughout the NHL. In including three highly-qualified physicians, the defendant's medical team was better served than most. Dunn's abilities as a trainer were above average. The failure of the system was in its application to the plaintiff's particular circumstances.

However, two of the points relied on by Mr. Laxton are worthy of mention. These are failure to keep records of dressing-room attendances and the question whether the club doctors have a conflict between their duty to the players and their duty to the club.

The absence of record-keeping was conceded by at least two of the club doctors to be a flaw in the system, creating a risk of symptoms being overlooked. Dr. Loomer believes that, in the United States, club doctors do keep records, the differing approach apparently resulting from greater awareness on the part of American doctors of the hazards of litigation. However that may be, there is no evidence that the American club doctors who saw Robitaille made any records. There was no causal relation between the failure to keep records and the plaintiff's injury because the problem was not lack of information — it was failure to keep an open mind and assess it objectively. But if that explanation for failure to give proper treatment had not been established, it might have been reasonable to infer that it resulted from the absence of a proper record of complaints and symptoms.

The failure to act objectively, the plaintiff argues, is a direct result of the close relationship between the club and the doctors. There is some truth in that. The doctors, by their terms of employment, have a responsibility to the club. That creates a tendency for them to resolve doubts in favour of keeping players in the line-up. The same tendency results from their interest as fans. The safeguard against that is the discipline of medical training and tradition — the ethical requirement of placing the patient's interests first. It is the doctors' responsibility to maintain a proper balance.

It may well be that, in many ways, the players are better served by doctors who take an enthusiastic interest in the club than they would be by independent doctors. I am not prepared to find that, as a matter of system, the balance is not a reasonable one. In this case, the requisite degree of objectivity was not maintained. That was a failure of the system, but it does not, by itself, establish that it was negligent to employ such a system.

[*Editor's summary: His Lordship then proceeded:*

(1) To find that Robitaille was contributorily negligent to the extent of 20 per cent in not acting reasonably to protect his own health and well-being;

(2) To review various terms in the standard players' contract and a supplementary agreement, to hold that the club had discharged its responsibility to Michael Robitaille Enterprises Ltd. under the contract and to dismiss that company's action for compensation under the contract; and

(3) To evaluate damages of $360,000 in Robitaille's favour for loss of opportunity to earn income and $40,000 for pain and suffering and loss of enjoyment of life.

His Lordship then turned to the question of exemplary damages and stated:]

EXEMPLARY, PUNITIVE AND AGGRAVATED DAMAGES

For convenience I will refer to this as the claim for exemplary damages. I will refer later to the question as to what distinction, if any, should be made between the three terms.

The first question is whether exemplary damages can be awarded where liability arises from negligence. The only authority cited which touches directly upon that question is *Kaytor v. Lion's Driving Range Ltd.* (1962), 40 W.W.R. 173, 35 D.L.R. (2d) 426 (B.C.) (Aikins J.). It was there held that no such damages may be awarded against a defendant guilty of negligence only. The plaintiff submits that the rule therein stated is not applicable to the facts of this case, particularly in light of what has been said in some later authorities.

The facts of that case were that the defendants' dog, which they knew to be extremely vicious, attacked the plaintiff after getting loose by breaking his chain. The argument for exemplary damages was based upon the defendants' knowledge that the dog was vicious and the casual and unconcerned attitude of at least one of them to the risk created by keeping the dog. The defendants had not intended that the

dog should get loose and acted to stop the attack as soon as one of them became aware of it. As negligence was admitted, there is no finding as to the nature of the negligence, but presumably it was the failure to make sure that the dog could not get loose.

The following passages state the law as Aikins J. found it to be [p. 178-80]:

"The above quotation from *Mayne & McGregor* [on Damages, 12th ed. (1961), p. 207] states expressly the proposition that exemplary damages may only be awarded where the conduct of the defendant merits punishment and, by implication, it states a limitation on this general proposition, the limitation being that exemplary damages will not be awarded where the defendant's conduct is simply such as to merit punishment; there must be, as well, some element of intent on the part of the defendant to cause the injury or to do the act which results in injury. . . . In general the authorities show that, in order to attract exemplary damages, the act of the wrongdoer must have been consciously directed against the person, reputation, or property of the plaintiff. . . .

"In my view, in order for exemplary damages to be awarded against a person, the act done by that person must not only be such an act as itself merits punishment, but it must also be an act intentionally directed to the person or property injured."

In that case, there could be no suggestion that the negligence of the defendant was directed against the plaintiff or that there was any intent to do the act which resulted in the injury. That, of course, is so in most actions arising out of personal injury caused by negligence. The plaintiff is entitled to recover if the defendant reasonably should have foreseen that his want of care could cause harm to the plaintiff. Rarely is the defendant shown to have had any particular knowledge of the plaintiff or any intent with respect to him.

In that respect, this case is quite different. The negligence here consisted in a course of conduct, deliberately undertaken and persisted in, which was directed solely against the plaintiff. There was no intention to cause the injury, but there clearly was intention to do the act which resulted in the injury, an act intentionally directed against the plaintiff because, as Dr. Piper put it, that was the way he was best treated.

On that basis, I find that the relationship of the parties was such that this case is an exception to the rule that exemplary damages may not be awarded for a negligent act. In the peculiar circumstances

here, the actions of the defendant fall within the general rules as stated in the *Kaytor* case.

Furthermore, it may no longer be part of the law of British Columbia that there must be intent on the part of the defendant to cause the injury or to do the act which results in injury. It would seem to follow from the judgment of the majority of the Court of Appeal in *Vancouver Block Ltd. v. Empire Realty Co. Ltd.; Wilkeshire Invts. Ltd. v. Read Jones Christoffersen Ltd.*, 10th June 1979 (not yet reported), that the only matter which needs to be considered is the conduct of the defendant.

In that case, the trial judge found that the plaintiff suffered pecuniary loss from the defendant's trespass but, while critical of the conduct of the defendants, dismissed the claim for exemplary damages on the ground that it was not proved that the conduct in question displayed a callous arrogance as distinct from, say, stupidity or neglect of duty. The Court of Appeal found that there had been no pecuniary loss and no basis for compensatory damages of any kind. The majority (Nemetz C.J.B.C. and Carrothers J.A.) went on, however, to award exemplary damages in the amount of $25,000 on the ground that the defendants had adopted a "somewhat casual way" of informing the plaintiff of the particulars of the work which they proposed to carry out on the plaintiff's property during excavation and construction. It was held that the defendants' disregard of and insensitivity to the rights of the plaintiff constituted "highhandedness and reckless inadvertence", warranting an award of exemplary damages. The case mainly relied upon is *Pretu v. Donald Tidey Co.*, [1966] 1 O.R. 191, 53 D.L.R. (2d) 504, affirmed 53 D.L.R. (2d) 509n, a decision of Brook J. of the Ontario High Court [Appellate Division]. The general rule, as stated at p. 196 of that judgment, is:

"When may exemplary or punitive damages be awarded? In actions for damages for tort, the Court may take into account matter of aggravation and may award exemplary damages where the conduct of the defendant has been malicious or high-handed."

That decision would seem to broaden the range of cases in which exemplary damages may be awarded. No reference is made to intent. Nor does it appear from the facts, which are set out most extensively in the dissenting judgment of McFarlane J.A., that there was any intent on the part of the defendants to create the plaintiff's mistaken impression as to the permanence of the work which was the basis for the finding of trespass. The adoption of the term "reckless inadvertence" might be taken as establishing that exemplary damages could

now be awarded even for ordinary negligence. I do not, however, rely upon these words to reach the conclusion that exemplary damages should be awarded here. Indeed, reckless inadvertence may be a less applicable term than others since the conduct of the defendant was not inadvertent, although the result was unintended.

To employ some of the criteria most often used, the conduct of the defendant can fairly be described as high-handed, arrogant and as displaying a reckless disregard for the rights of the plaintiff. The management and medical team of the defendant convinced themselves that they knew what was best for him and, having done so, pursued their wrongheaded course oblivious to the obvious fact that, if their "treatment" was wrong, the results could mean disaster for his health and career. In carrying through their chosen treatment, they showed a callous disregard for his feelings and his well-being — they ignored the dictates of common decency as well as commonsense.

This was not the conduct of ordinary employees. Therefore, the question whether exemplary damages should be awarded simply on the basis of vicarious liability does not arise. It was top management — the president and the general manager — who decided upon and played the major part in implementing the course of action.

That course was adopted in the face of the best advice available. During October, Hughes and Maloney both visited Dr. Termansen to get his assessment of Robitaille. He said that Robitaille's problem would not prevent him from playing, that he wanted to play. It is now obvious that that message was rejected and that, when Robitaille shortly thereafter suffered a physical injury, Maloney and his superiors decided to deal with it in their own way, on the assumption that the mental problem was causing him to fake physical injury. At that point, they were also acting contrary to Dr. Piper's opinion, for it was he who ordered Robitaille to stay out of a game because of the shoulder injury. But, shortly thereafter, he came around to their point of view.

There is evidence linking Maloney's superiors to these decisions. In September, Hughes took an active part in conveying messages to the press. He went to Termansen in October. It appears from Maloney's statement to McColl in March that the pressure was "coming from the top". No witness was called who could speak directly to what did go on between Maloney and his superiors. In those circumstances, it is a reasonable inference that Maloney had the full approval of the president for his course of action and, in the latter stages, had orders to escalate the pressure.

I hold therefore that exemplary damages can be awarded for negligence of the kind established here and that the defendant's conduct was such as to justify such an award. The remaining question is that of amount.

Awards for exemplary damages in Canada have generally been modest. The largest British Columbia award to which I was referred was that in *Can. Ironwkrs. Union v. Internat. Assn. of Bridge, etc., Wkrs.*, [1973] 1 W.W.R. 350, 31 D.L.R. (3d) 750, affirmed 45 D.L.R. (3d) 768 (B.C.C.A.), where damages of $30,000 were awarded against the defendant union which had, by illegal acts, forced the plaintiff union out of business. The damages in that case were considered to be compensatory as well as exemplary or aggravated.

There are two well-known cases in which exemplary damages were awarded to individuals. They are: *Bahner v. Marwest Hotel Co.* (1970), 69 W.W.R. 462, 6 D.L.R. (3d) 322, affirmed 75 W.W.R. 729, 12 D.L.R. (3d) 646 (B.C.C.A.); and *Eagle Motors (1958) Ltd. v. Makaoff*, [1971] 1 W.W.R. 527, 17 D.L.R. (3d) 222 (B.C.C.A.). In the latter case, the Court of Appeal reduced a jury award of $5,000, including exemplary damages, to $2,500 for the following reasons [p. 531]:

" . . . the assault caused no physical injury and the imprisonment was only for a matter of minutes. It occurred in a room in which there were only the respondent and the three employees of the appellant and there was no element of public disgrace or humiliation such as there was in *Bahner v. Marwest Hotel Co.*"

In the *Bahner* case, an action for false imprisonment, the plaintiff was awarded $3,500, including aggravated or punitive damages. That case was similar to *Eagle Motors* in that, although the plaintiff was the victim of outrageous behaviour by the hotel employees and police officers, he suffered no physical injury and no lasting harm of any kind.

In that respect, this is an entirely different case. The risk created by the defendant's behaviour, and the harm which resulted, was something which struck at the plaintiff's being — at his physical and mental health, his professional standing and pride and virtually everything he valued most. That harm was a foreseeable result of the defendant's behaviour, which was high-handed and arrogant as well as negligent. It is possible that, had the defendant acted reasonably, the plaintiff's hockey career would nevertheless have ended in January 1977. It had to end sometime. Whenever the end came, the plaintiff

could reasonably have expected to retire as an active player with honour and respect. By reason of the defendant's behaviour, the end came in circumstances of humiliation and dishonour — he was stigmatized as a misfit and a quitter who had let the side down. The geographical limits of that stigma are not those of Vancouver or British Columbia — they extend throughout North America.

In those circumstances, I consider that the modest, hardly more than nominal by 1979 standards, amounts awarded in *Eagle Motors* and *Bahner* would not be appropriate. The case, in some ways, is more like *Cassell & Co. v. Broome*, [1972] A. C. 1027, [1972] 1 All E.R. 801, in which the House of Lords refused to interfere with a jury award of £15,000 compensatory and £25,000 punitive damages. There, the thrust of the defamation was that the plaintiff, a distinguished naval officer, had been guilty of cowardice and failure to obey orders and had thus been responsible for the abandonment and subsequent destruction of the convoy, an incident which came to be regarded as one of the most shameful in the proud history of the Royal Navy. In fact, he had acted with courage in following orders.

The cases, of course, are very different. There was in *Broome* no question of personal injury. The defendants acted on a cold-blooded calculation that defaming Captain Broome would be a profitable exercise and that, no doubt, was a major element in the large award. There is no analogy in that respect. But there is a basic element of similarity in that the tortious action created a foreseeable risk of causing a serious and permanent injury to the individual's pride and self-respect as well as, in this case, his physical well-being.

In the *Vancouver Block* case, supra, $25,000 was awarded as exemplary damages in a case where the defendants' conduct included no element of intent and where no harm of any kind was done to the plaintiff. That may indicate a more liberal approach to fixing exemplary damage awards than has prevailed in the past. What was said there may, on the other hand, have been intended only to apply where no compensatory damages are awarded. Furthermore, as appears from the dissenting judgment, the decision on exemplary damages was made without hearing argument on that issue. I propose to be guided by the approach to damages followed in the *Bahner* and *Eagle Motors* cases, making due allowance for the different circumstances and the deterioration in the value of the dollar over the last ten years; I fix $35,000 as the award for exemplary damages.

To this point I have referred only to exemplary damages and have used that term as if it was synonymous with punitive and aggravated. I think that exemplary is synonymous with punitive. But clearly aggravated means something different. Aggravated damages are not given to punish the defendant but as extra compensation to the plaintiff for the injury to his feelings and dignity, particularly where the injury to him has been increased by the manner of doing the injury: *Rookes v. Barnard*, [1964] A.C. 1129, [1964] 1 All E.R. 367 (H.L.), and MacGregor on Damages, 13th ed. (1972), p. 220.

The circumstances of this case would justify an award of aggravated damages. There is the element of damage to the plaintiff's feelings, to his pride and self-respect. There is also the fact that the wrongful conduct of the defendant, by robbing him of the chance for retirement with honour, has caused additional pecuniary loss. Almost certainly, had the plaintiff had the blessing of organized hockey and the benefit of the opportunity for business contacts, which is part of the system, he would not have been left so much to his own resources in seeking employment. The award which I make can, then, be considered as being of aggravated as well as exemplary damages.

Another consideration is that, in assessing exemplary damages, it is proper to take into consideration the conduct of the defendant after the injury: MacGregor on Damages, p. 231.

At trial, it was virtually conceded that, in the period after 19th January, the plaintiff was inexcusably maligned and mistreated. I make no additional award on that basis but mention it as an additional ground supporting the award for exemplary and aggravated damaged.

I should, however, make it clear that I give no effect to the contention on behalf of the plaintiff that the court should, in assessing damages, have regard to the conduct of the defendant and its legal advisers in the defence of the action, including the conduct of the trial. There is no merit in that contention. The action was defended in an exemplary manner. If vigour sometimes led to asperity, that was largely as a matter of self-defence, the conduct of the plaintiff's case lacking neither vigour nor asperity.

Plaintiff's counsel submitted that an additional amount should be awarded to provide for investment counselling fees. The evidence would not, in my view, justify any award under that head.

JUDGMENT

The action of the plaintiff Michael Robitaille Enterprises Ltd. is dismissed with costs. I hold, for the purpose of taxation, that no more than one trial day was occupied with the evidence and argument relating to that action.

The plaintiff Michael Robitaille will recover, subject to the division of liability, damages as follows:

Loss of opportunity to earn income	$360,000
Pain and suffering and loss of enjoyment of life	40,000
Exemplary and aggravated damages	35,000
Total	$435,000

As between the plaintiff Michael Robitaille and the defendant, fault is apportioned pursuant to the Contributory Negligence Act, R.S.B.C. 1960, c. 74 [now the Negligence Act, R.S.B.C. 1979, c. 298], as follows:

Against the plaintiff:	20 per cent
Against the defendant:	80 per cent

Costs will follow the event, subject again to the apportionment of liability.

Prejudgment interest is fixed at 8¾ per cent to 31st December 1978 and 11 per cent thereafter. No interest will be recovered on the sum of $185,000, which I hold, for the purposes of s. 2 of the Prejudgment Interest Act, 1974 (B.C.), c. 65 [now the Court Order Interest Act, R.S.B.C. 1960, c. 76], represents pecuniary loss arising after the date of judgment.

Action allowed for individual plaintiff; action dismissed for corporate plaintiff.

SHELMAR FURNITURE LTD. v. VANCOUVER

Supreme Court, Gould J. [In Chambers]

Heard — December 7, 1979.
Judgment — January 16, 1980.

Municipal corporations — Powers — Extent of provincial authority — Early closing and Sunday observance — No authority in municipal council to enact Sunday-closing by-law.

Sunday observance — Provincial regulatory legislation — Municipal corporation without jurisdiction to regulate Sunday shopping.

The city council of the respondent city adopted a resolution suspending the business licences of the petitioner for a period of one week. The reason given by the respondent for this action was that, by conducting its business on Sunday, the petitioner was "committing an act of gross misconduct" by violating the provisions of the Lord's Day Act and thereby gaining an unfair competitive advantage. The petitioner applied to have the resolution quashed.

Held — Resolution quashed.

Council's stated reason for adopting the resolution does not bear up under scrutiny. Had council sought to close down any and all violators of the Lord's Day Act, its allegations of "gross misconduct" might have been convincing. However, the evidence revealed that the purported suspension of the petitioner's licence was merely one part of a complex and selective pattern of Sunday store-hour regulation. The respondent is without jurisdiction in that field.

Cases considered

Lieberman v. R., [1963] S.C.R. 643, 41 C.R. 325, [1964] 1 C.C.C. 82, 41 D.L.R. (2d) 125 — referred to.

Statutes considered

Lord's Day Act, R.S.C. 1970, c. L-13, ss. 4, 16.

Vancouver Charter, 1953 (B.C.), c. 55, ss. 275, 279A(2) [en. 1957, c. 85, s. 17].

[Note up with 16 C.E.D. (West. 2nd) *Municipal Corporations*, ss. 25, 43; 20 C.E.D. (West. 2nd) *Sunday Observance*, s. 19; 28 Can. Abr. (2d) *Municipal Corporations*, VIII, 1, a, iii, C; 37 Can. Abr. (2d) *Sunday Observance*, II, 2, c.]

APPLICATION to quash resolution of city council suspending petitioner's business licence.

S. B. Stewart, for petitioner.
T. R. Bland, for respondent.

(Vancouver No. A791937)