



Whatever Happened to . . . Moore and Bertuzzi?

Peter Bowal

Introduction

Steve Moore grew up in Thornhill, Ontario. After graduating high school in 2001, he played hockey with Harvard University for a few years. In the 2003-04 season, he broke through to sign with the Colorado Avalanche of the National Hockey League (NHL), playing defense on the third and fourth lines.

In a game on February 16, 2004, he blindsided and injured Markus Naslund during play away from the puck. Naslund was the captain of the opposing Vancouver Canucks and the leading scorer in the league at the time. No penalty was called on what many thought was a cheap shot, a dangerous head shot on Naslund, who suffered a concussion and missed the next three games. Vancouver coach, Marc Crawford, was livid.

Enter Todd Bertuzzi, raised in Sudbury, Ontario. As a teenager, he stood out for the Guelph Storm of the Ontario Hockey League. After four years of playing for the OHL, he was drafted to the New York Islanders in the 1995-96 season. In addition to Vancouver, he has played on many NHL teams, including Florida, Detroit, Anaheim, Calgary and now Detroit again.

The check on Naslund turned out to have significant personal and legal repercussions for both Moore and Bertuzzi. Three weeks later, on March 8, 2004, the same teams – Colorado and Vancouver – met for another regular season game in Vancouver. During this game, Naslund’s Vancouver teammate, Todd Bertuzzi, tried several times to draw Moore into a fight. Moore refused to engage.

Bertuzzi continued to pursue Moore on the ice. Finally, Bertuzzi grabbed Moore from behind and deliberately “sucker” punched him on the side of the head. The force of this blow caused Moore to immediately fall on his face to the ice, and Bertuzzi fell on top of him. Very soon, other players piled on as the benches cleared and both teams brawled.

Moore’s face was lacerated and several vertebrae in his neck were broken. From this, Moore claimed to never have recovered sufficiently to play another minute of professional hockey.

The case is interesting in demonstrating how one event like this can give rise to private regulatory sanction from the league as well as criminal and civil liability.

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NHL Sanctions

The NHL regulates its own member teams and players so that incidents do not get out of hand and flow over into the legal system. On-ice checking and fighting are well-accepted components of the game of hockey. Fans expect strong, tough players to protect their marquee franchise stars. Fights and player bravado, in the form of venting pent-up competitive frustrations or settling accounts, help galvanize a team and re-energize its fans, especially when it is down on the scoreboard. The NHL regulates its teams and players so that incidents do not get out of hand and flow over into the legal system. It tries to keep violence at a safe level while keeping the traditions and spirit of the game.

In this case, Bertuzzi was ejected from the game and suspended indefinitely pending final league disciplinary review and sanction. He apologized to Moore at his NHL hearing. On March 11, 2004, three days after the attack, the league continued his suspension at least through the rest of that season (20 games). His team, the Canucks, was fined \$250,000. The next NHL season was suspended by a lockout and the contrite Bertuzzi was prohibited from playing overseas. Some calculated Bertuzzi’s suspension to have cost him over a half million dollars in salary and approximately \$350,000 in lost endorsements.

The NHL reinstated Bertuzzi on August 8, 2005.

Criminal Liability

One of the first criminal charges for professional hockey violence was the 1970 case of *R. v. Maki*, [(1970) 1 C.C.C. (2d) 333 at 336] in which the trial judge confirmed that hockey is not in a world apart from the general law:

Although no criminal charges have been laid in the past pertaining to athletic events in this country, I can see no reason why they could not be in the future where the circumstances warrant and the relevant authorities deem it advisable to do so. No sports league, no matter how well organized or self-policed it may be, should thereby render the players in the league immune from criminal prosecution.

This voluntary assumption of the inherent and ordinary risk of the activity is known by the Latin phrase: *volenti non fit injuria*.

On December 22, 2004, Bertuzzi pleaded guilty to the crime of assault causing bodily harm after reaching a plea bargain with prosecutors in Vancouver. He was conditionally discharged, pending one year of probation during which he was not to play in any sporting activity that Steve Moore was participating in and the completion of 80 hours of community work in Vancouver. He completed his probation and avoided a criminal record.

Civil Liability

What still remains more than nine years later is the matter of civil compensation. It appears that this will not be resolved without a trial, presently scheduled to start in April 2013.

Professional athletes are assumed to voluntarily consent to all foreseeable elements of the game. It can be said that when one plays hockey at an elite competitive level one accepts the working conditions which includes vigorous intentional physical contact. The rough and tumble nature of hockey is well known. If the players do not consent to bruising contact by signing waivers, they can be taken to impliedly consent when they voluntarily step onto the ice. This voluntary assumption of the inherent and ordinary risk of the activity is known by the Latin phrase: *volenti non fit injuria*.

It is when the contact goes beyond what might be understood as the game of hockey, that the *volenti* bar to recovery meets its limits. If a player were to kick or stomp another with his skates or beat him with his stick, that would be an actionable civil battery.

A bizarre example from the boxing ring was Mike Tyson biting off pieces of both ears of his opponent Evander Holyfield in a 1997 fight. Tyson's boxing licence was suspended for about one year and he was fined \$3 million by the State Athletic Commission. No civil or criminal action was taken, although legal grounds were present for monetary compensation and criminal punishment.

The sport of football has players charging and tackling other players as decisively as possible, yet these rugged physical contacts rarely break out into fights. If a fight between players does occur, the consequences imposed by the Canadian Football League are severe. Fighting is not taken lightly in the CFL. Why are fighting and violence more tolerated in hockey? Perhaps society accepts, indeed expects, that behaviour.

After Bertuzzi's plea to the crime, Moore filed a civil suit in Ontario against Bertuzzi, the Canucks team and its parent company. At preliminary hearings called discoveries, evidence suggested that Canucks' head coach, Marc Crawford, told his players that Moore had to "pay the price."

Accordingly, other parties have been added by cross-claims. The media are poised for a long civil jury trial this spring.

Some reports have Moore seeking \$60 million (approximately equivalent to Bertuzzi's professional hockey earnings) to compensate him for his pain and suffering, loss of professional hockey income and aggravated and punitive damages.

Nine years later, Moore says he continues to suffer from concussion-related symptoms. Bertuzzi continues to play at a high level for the Detroit Red Wings. Both men's lives have been deeply affected by that one punch to the head in March 2004 at the Vancouver hockey game.

Fighting is not taken lightly in the CFL. Why are fighting and violence more tolerated in hockey?

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