

CANADA / JUDGMENT

Miller v. Cox

2023 BCSC 349

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Supreme Court of British Columbia

DECIDED

9 March 2023

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2022 BCSC 349 Miller v. Cox

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Miller v. Cox,

2023 BCSC 349

Date: 20230309

Docket: S1912654

Registry: Vancouver

Between:

Jordan David Miller

Plaintiff

And

Karl Cox

Defendant

Before: The Honourable W.A. Baker

Reasons for Judgment

Counsel for Plaintiff:

S. Wheeldon

Counsel for Defendants:

C. Cordick

M. Li

Place and Date of Trial:

Vancouver, B.C.

November 14-16, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 9, 2023

Table of Contents

Introduction. 3

Issues. 3

Facts. 3

Analysis. 4

Standard of care. 4

Evidence at trial 6

Jordan David Miller 7

Matthew Wright 8

Tyler Atkinson. 10

Alexander Robinson. 11

Panayiotis Vohalis. 12

Karl Cox. 14

Michael Robinson. 15

Paul Silny. 16

Findings and Disposition. 17

Introduction

- [1] Jordan David Miller, the plaintiff, was a member of a North Vancouver recreational soccer team who was injured during a game by a tackle executed by the defendant, Karl Cox. The soccer match took place on May 22, 2018 at the Windsor Soccer Field in North Vancouver. Mr. Miller seeks damages for the injuries he sustained as a result of the tackle.

Issues

- [2] The parties agree that Mr. Miller suffered a grade 3 dislocation of the right acromioclavicular joint as a result of Mr. Cox's tackle.
- [3] The parties also agree that damages, if liability is established, should be assessed at \$100,000, plus costs and disbursements, and health care costs in the amount of \$3,764.11.
- [4] The only issue at trial is whether Mr. Miller's injuries arose as a result of Mr. Cox's negligence.

Facts

- [5] Mr. Miller had played organized soccer for more than 20 years at the time of the May 22, 2018 soccer match. He is 5'8" and weighed approximately 165 pounds in the summer of 2018.
- [6] Mr. Cox also played organized soccer as a youth and an adult. He is 5'11" and weighed between 200 and 210 pounds around the time of the soccer match incident.
- [7] Mr. Miller joined the Millar's North Shore Soccer League (the "Millar's Soccer League"), a recreational soccer league which organizes and operates in North Vancouver. Mr. Miller's soccer team did not hold practices, and the Millar's Soccer League did not keep statistics or hold playoffs.
- [8] On May 22, 2018, Mr. Miller and Mr. Cox were playing on opposite teams in a soccer match hosted by the Millar's Soccer League. The match was held at the Windsor Soccer Field in North Vancouver.
- [9] The referee for the game was Mr. Panayiotis Vohalis. Mr. Vohalis enforced modified FIFA rules during the game. The only modification to the FIFA rules during the match was that unlimited substitutions were permitted. Slide tackles were permitted under the FIFA rules used throughout the match.
- [10] If the referee considers a tackle inside the 18-yard box to be careless, reckless, or with excessive force, the referee may award a penalty shot against the player's team.
- [11] During the game, Mr. Miller was approaching the opposing goal with possession of the ball. Mr. Cox slide tackled Mr. Miller causing him to fall forward, injuring his shoulder.
- [12] Mr. Vohalis penalized Mr. Cox with a yellow card as a result of the tackle. He also gave Mr. Miller's team a penalty shot due to the tackle.

Analysis

Standard of care

[13] The plaintiff submits that there is a divide in Canada with respect to how different provinces assess the degree of carelessness and the state of mind of the defendant when determining legal fault in sports negligence claims. As summarized in Lorne Folick, Michael Libby, & Paul Dawson, *Sports and Recreation Liability Law in Canada* (Toronto: Thomson Reuters, 2017), at 285-286:

the "west coast" approach considers whether the actions of the defendant comport with what a "reasonable competitor" would do in the circumstances. Put another way, a plaintiff need only establish carelessness on the part of the defendant to establish liability. However, courts in Manitoba, Ontario, and New Brunswick have taken a different approach.

This approach stems from the oft-cited hockey case of *Agar v. Canning*. There, the Manitoba Queen's Bench (affirmed by the Court of Appeal) found that although a person who engages in a sport like hockey must be assumed to accept some risk of accidental harm:

[I]t would be inconsistent with this implied consent to impose a duty on a player to take care for the safety of other players corresponding to the duty which, in a normal situation, gives rise to a claim for negligence. Similarly, the leave and license will include an unintentional injury resulting from one of the frequent infractions of the rules of the game.

More recently, in the Ontario case of *Levita v. Crew*, the court concluded that the defendant player, although "clearly overly aggressive", had not acted maliciously or "out of the ordinary or beyond the bounds of fair or expected play" when he had checked from behind. The defendant had shown a lack of care, considering that the plaintiff was close to the boards, but in the court's view, "a lack of carefulness falls short of the creation of an unreasonable risk of harm."

The practical result of this difference in views between provinces means, quite simply, that an injured hockey player in British Columbia faces a much less substantial burden of proof of an actionable injury than does a similar player in other provinces. It will be sufficient in the former case to simply show a failure to adhere to the relevant standard of care, while in the latter, intentional conduct (or at least recklessness) is required.

[14] I accept this statement from the text as an accurate description of the difference between the development of the law in British Columbia as against other provinces. As a result, caselaw developed in provinces like Manitoba and Ontario, relied on heavily by Mr. Cox in this case, must be applied with caution in British Columbia.

[15] While injuries can and do occur when people play sports, players cannot be said to have consented to the risk of all injuries they may suffer merely by virtue of their participation in the sport. As summarized in *Forestieri v. Urban Recreation Ltd.*, 2015 BCSC 249:

- [42] The law recognizes that an athlete consents only to what is reasonable conduct from his or her opponent, as measured after all the relevant circumstances are taken into account. First among those circumstances will be the rules governing the game in which the injury occurred. See, for example, *Colby v. Schmidt*, [1986] B.C.J. No. 3248 at para. 15 (S.C.); *Unruh (Guardian of) v. Webber* (1994), 88 B.C.L.R. (2d) 353 (C.A.) at paras. 29-30; *Zapf v. Muckalt* (1996), 26 B.C.L.R. (3d) 201 at para. 16 (C.A.).
- [16] The element of risk, to the extent it is normally accepted as part of the game by reasonable players, is a circumstance to be taken into account. The British Columbia Court of Appeal in *Unruh (Guardian ad litem of) v. Webber*, 88 B.C.L.R. (2d) 353, 1994 CanLII 3272 (C.A.) at para. 29, adopted the following statement of the standard of care in sporting events:

The standard of care test is - what would a reason-able competitor, in his place, do or not do. The words "in his place" imply the need to consider the speed, the amount of body contact and the stresses in the sport, as well as the risks the players might reasonably be expected to take during the game, acting within the spirit of the game and according to standards of fair play. A breach of the rules may be one element in that issue but not necessarily definitive of the issue.

[Emphasis in original.]

- [17] In *Zapf v. Muckalt*, 26 B.C.L.R. (3d) 201, 1996 CanLII 3250 (C.A.) the British Columbia Court of Appeal addressed the appellant's argument that liability could only be found if he exhibited a reckless disregard for the plaintiff's safety or intended to cause him harm. Referencing *Unruh* and *Herok v. Wegrzanowski* (7 October 1985), Vancouver CA003074 (B.C.C.A.), the Court held:
- [16] On the two occasions that this Court addressed the topic, it has rejected the narrow approach to the standard of care where only intentional or reckless infliction of harm will ground liability and left it to the trial judge, on his or her appreciation of the evidence, to decide what risks are assumed and what a reasonable competitor would do in the circumstances of each case.
- [18] There was no serious challenge taken by Mr. Cox to the assertion that players owe a duty of care to other players. What is at issue in this case is whether Mr. Cox breached that duty of care owed to Mr. Miller. Did Mr. Miller suffer injuries as a result of acceptable, reasonable conduct by Mr. Cox in executing a slide tackle, or was Mr. Miller injured as a result of conduct on the part of Mr. Cox that was outside the risks which a reasonable competitor would assume in the game.

Evidence at trial

- [19] The central question in this case is what constitutes reasonable conduct during the May 22, 2018 soccer game.

- [20] Mr. Cox argues that the FIFA rules, which applied during the match, allowed for slide tackles, and that Mr. Miller assumed the risk of injury from a slide tackle when he agreed to play in the match. Mr. Cox argues that he did not intend to injure Mr. Miller, and did not perform the slide tackle recklessly or in an unsafe manner. Mr. Cox argues that the contact that occurred between him and Mr. Miller during the slide tackle was the kind of contact that Mr. Miller could have reasonably anticipated in a game applying the FIFA rules that permit slide tackles.
- [21] In determining whether the slide tackle undertaken by Mr. Cox was to be reasonably expected in this game, I will review the evidence of the witnesses and the parties.

Jordan David Miller

- [22] Mr. Miller was an experienced soccer player. As a teenager he was a starter on the B.C. provincial soccer team. He played the midfield and forward positions. He acknowledged that soccer can be a physical sport, where players can be in contact with each other, and where injuries can occur.
- [23] Mr. Miller testified that in the summer of 2018 he was playing in the Millar's Soccer League. Mr. Miller agreed that some players on the team were skilled, but said that some players were not very skilled. It was a recreational team with mixed levels of ability, where the players were just out for exercise and fun.
- [24] Mr. Miller acknowledged that slide tackles were permitted in the Millar's Soccer League. He described a slide tackle as a situation where a defending player tries to take the ball by sliding towards the ball with their feet forward.
- [25] Mr. Miller testified that he remembers the following facts:
- he was approaching the 18-yard box, dribbling with the ball in front of him on his right foot;
 - he was a fast player and was getting ready to shoot on the goal;
 - he did not see Mr. Cox coming towards him before the impact, and he was unable to brace for impact;
 - Mr. Cox approached him from behind on his left side; and
 - he felt both of Mr. Cox's legs contact him on his upper calf behind his knee.
- [26] Under cross-examination, Mr. Miller described the tackle as Mr. Cox taking out both his legs. Mr. Miller said Mr. Cox came in from behind, and hit Mr. Miller's legs with both of his legs, not just his feet. The hit was high on Mr. Miller's legs. Mr. Miller described it as a "scissoring motion", and said that the tackle by Mr. Cox was not a recreational soccer tackle. Under cross-examination, Mr. Miller disagreed that a tackle of this kind was a risk he accepted when playing in this recreational league.

- [27] Mr. Miller said Mr. Cox was nowhere close to the ball, which was on Mr. Miller's right foot as he was in the midst of shooting for the goal. The impact was severe, and Mr. Miller was thrown forward face first into the ground. He did not have time to put his hands out in front of himself to break his fall.
- [28] Mr. Miller said Mr. Cox was out of control and aggressive in his tackle. Mr. Miller says that for a recreational league, Mr. Cox's action in tackling him was unfair and dangerous. He felt Mr. Cox was trying to hurt him. Mr. Miller testified that a tackle involves an attempt to take the ball with your feet. However, Mr. Cox had no ability to touch the ball with his feet as Mr. Miller's body was between Mr. Cox and the ball. Mr. Miller agreed under cross-examination that he had experienced slide tackles before, but stated the tackle executed by Mr. Cox was not a slide tackle which could be expected as part of the game in this recreational league.
- [29] Mr. Cox received a yellow card from the referee for the tackle. Mr. Miller testified that Mr. Cox improperly hit him from behind, and was trying to take out Mr. Miller as a player rather than trying to touch the ball. For these reasons, Mr. Miller felt Mr. Cox should have received a red card for the tackle.

Matthew Wright

- [30] Mr. Matthew Wright was a player on Mr. Miller's team in the summer of 2018. He agreed that the level of play was very recreational. Mr. Wright played soccer for 25 years. While he no longer plays, he is certified to coach players up to the age of 12.
- [31] Mr. Wright testified that a slide tackle is done when the defender has clear sight of the ball, and attempts to get the ball away from the opposite player using the toe of their shoe. He said a slide tackle can be dangerous when the ball is not the primary point of contact, when the opposite player is unsuspecting because the defender is coming in from behind or the side, or where the foot is raised higher than the ball.
- [32] Under cross-examination, Mr. Wright agreed that slide tackles can be mistimed so the defender is not able to touch the ball. He agreed that this is a normal part of the game, and that fouls are commonly called for slide tackles.
- [33] Mr. Wright described the tackle. He was midfield on the offensive side when the tackle occurred, about 30 yards away from the incident. Under cross-examination, he agreed that the referee was closer to the tackle than he was. Mr. Wright saw Mr. Miller on a clear break, lining up to shoot with the ball on Mr. Miller's right side, when Mr. Cox took Mr. Miller out from behind. Mr. Wright described the tackle as a violent slide tackle, and it looked to him like Mr. Cox was attempting to wipe out Mr. Miller. Mr. Wright said Mr. Miller could not see Mr. Cox come up behind up before the tackle occurred. He saw Mr. Cox use both legs in the tackle. Mr. Wright said Mr. Cox was not in control of his body during the tackle.

- [34] Mr. Wright said Mr. Cox did not hit the ball, and did not come close to the ball because Mr. Miller's body was between Mr. Cox and the ball. Under cross-examination, Mr. Wright was unshaken in this evidence, stating that there was zero chance Mr. Cox could see the ball when he attempted the tackle.
- [35] Mr. Wright disagreed with the yellow card issued by the referee. He felt the tackle was outside the rules of the game, as there was no attempt to play the ball and the tackle was dangerous. Under cross-examination, Mr. Wright stated he felt the tackle was malicious.

Tyler Atkinson

- [36] Mr. Tyler Atkinson played on Mr. Miller's team in the summer of 2018. He described the league as a recreational league for men. He said that some players were good, some players learned the game later in life, and some players just came for the beer. They did not practice, nor did they have play-offs.
- [37] Mr. Atkinson agreed that slide tackles were permitted if they were fair and within the rules of the game. He described a permitted slide tackle as one where the defender goes directly for the ball and not the player. He said the defender must use only one foot during the slide tackle, and the opposite player must be able to see the tackle coming. Tackling a player from behind is not permitted. He agreed slide tackles can be dangerous, and explained that is the reason for all the rules around slide tackles.
- [38] Under cross-examination, it was put to him that FIFA rules do permit slide tackles from behind. While Mr. Atkinson agreed, he also stated that such tackles are only permitted when it is safe to do so, and the tackle performed by Mr. Cox was not safe. Mr. Atkinson acknowledged that slide tackles can be dangerous, and stated that the chance of injury is "much, much, much" lower if the tackle is executed within the rules of play. He agreed that a player being tackled can fall over, but stated the defender still needs to go for the ball first, which did not happen in this case.
- [39] Mr. Atkinson saw Mr. Cox tackle Mr. Miller. Mr. Atkinson was watching from the side of the field when the tackle happened. He saw Mr. Miller with the ball, standing on his left leg and winding up to take the shot with his right foot. Next, he saw Mr. Cox tackle him from behind. He did not see Mr. Cox connect with the ball. He said Mr. Miller could not see the tackle coming. He agreed that the tackle was dangerous.
- [40] Under cross-examination, Mr. Atkinson did not agree that Mr. Cox's tackle was simply mistimed. Mr. Atkinson stated that Mr. Cox was overly aggressive.
- [41] Mr. Atkinson said the tackle was not within the rules of play. He thought Mr. Cox should have received a red card for the tackle instead of a yellow card. He felt so strongly about what happened, that he wrote a letter of complaint to the Millar's Soccer League, describing the tackle as dangerous and complaining that Mr. Cox was too aggressive for the recreational league.

Alexander Robinson

- [42] Mr. Alexander Robinson played on Mr. Miller's team in the summer of 2018. He described the Millar's Soccer League as a recreational beer league. Mr. A. Robinson has played soccer for most of his life.
- [43] Mr. A. Robinson agreed that slide tackles were permitted in the FIFA rules used by the league. He described a slide tackle as a maneuver where a defender leaves his feet to try to win the ball by sliding in. He said the maneuver can be performed safely if the defender uses appropriate positioning to get at the ball without contacting the player, and the defender keeps his feet and cleats down. It can be dangerous if the defender comes in on a dangerous angle, such as from behind, or when a defender contacts the player before the ball.
- [44] Mr. A. Robinson was on the field at the time of the tackle. He was about 8-10 feet diagonally behind Mr. Miller's left shoulder. He saw that Mr. Miller was in possession of the ball, dribbling towards the goal at a fast speed. He saw Mr. Cox come across the defence. By the time Mr. Cox reached Mr. Miller, he was behind Mr. Miller on less than a 45-degree angle on Mr. Miller's left side. Mr. A. Robinson saw Mr. Cox swing through the back of Mr. Miller.
- [45] Mr. A. Robinson said he saw Mr. Cox's left leg go between the ball and Mr. Miller, and make contact with Mr. Miller's upper leg. He saw Mr. Cox's right leg come up behind and hit the back of Mr. Miller's leg, in a scissoring motion. He saw Mr. Cox's legs on either side of Mr. Miller's legs.
- [46] Mr. A. Robinson said Mr. Cox did not touch the ball. The ball had been 1-2 feet off of Mr. Miller's right foot at the time of the tackle. Mr. A. Robinson said that Mr. Cox did not have a chance of winning the ball, based on the two players' relative speeds.
- [47] Under cross-examination, Mr. A. Robinson agreed that it was possible that Mr. Cox was trying to go for the ball, but he said there was no chance he would have been successful in actually getting the ball. He did not agree it was a malicious hit.
- [48] Mr. A. Robinson said the tackle was not within the rules. He observed that Mr. Cox made contact with Mr. Miller and not the ball. Under cross-examination, Mr. A. Robinson did not agree that Mr. Cox's tackle was a usual slide tackle in the league games.

Panayiotis Vohalis

- [49] Mr. Panayiotis Vohalis was the referee on the field when Mr. Cox tackled Mr. Miller. He was 71 years old at the time of trial, and has a wealth of experience in soccer. He played soccer for 35 years, coached for 30 years, and has been a referee for 25 years. In recent years, he has refereed between 500 and 600 games a year. He has been a referee for the Millar's Soccer League for 20 years.

- [50] Mr. Vohalis enforces FIFA rules in the Millar's Soccer League. He agreed slide tackles are permitted. He described permitted slide tackles as where the defender puts his feet to the ball, not making contact with the other player. He said the defender is to make contact with the ball, and must have his studs down and not straight out. A safe slide tackle comes from the side and slides into the ball.
- [51] Mr. Vohalis agreed that slide tackles can be dangerous when the defender comes through with his studs up and does not play the ball, or when the defender hits the back of a player's legs. A slide tackle from behind is very dangerous, as is a slide from a player's blind spot. A slide tackle through both legs is dangerous, as the defender loses control of their body.
- [52] Mr. Vohalis stated that if the defender's feet are at the level of the other player's calf or knee while executing a slide tackle, this is reckless because it endangers the other player.
- [53] Mr. Vohalis saw Mr. Cox slide tackle Mr. Miller. He saw Mr. Miller with the ball getting ready to shoot. He saw Mr. Cox come across from behind Mr. Miller's left side and tackle into Mr. Miller's legs. Mr. Vohalis described the tackle as very reckless. Mr. Cox came in fast, sliding with his feet up. Mr. Cox hit the back of Mr. Miller's legs with his ankles. Mr. Cox did not hit the ball, and did not come close to hitting the ball.
- [54] Mr. Vohalis gave Mr. Cox a yellow card for the tackle. He testified that he considered giving Mr. Cox a red card, but decided to give Mr. Cox the benefit of the doubt. He felt it could be possible that Mr. Cox was attempting to play the ball. Nevertheless, Mr. Vohalis also testified that it was not possible for Mr. Cox to get to the ball because Mr. Cox got the back side of Mr. Miller's left leg. The ball was shielded from Mr. Cox by Mr. Miller's body. While Mr. Cox may have been trying to get to the ball, Mr. Miller's body was in the way. Mr. Vohalis thought Mr. Cox just took out Mr. Miller, and not the ball.
- [55] He testified that the tackle was not within the rules of play. He considered Mr. Cox's actions to be reckless. Mr. Vohalis agreed that Mr. Cox's conduct met the definition of reckless found in the FIFA rules, namely, "reckless is when a player acts with disregard to the danger to or consequences for an opponent and must be cautioned."
- [56] Under cross-examination, Mr. Vohalis agreed that a red card is given for the worst conduct, which requires a player to be ejected from the game. The kinds of conduct which would typically cause Mr. Vohalis to issue a red card are swearing, pushing in the face, throwing a punch, spitting and kicking. He agreed that if he considered Mr. Cox's conduct to be violent, he would have ejected him from the game.
- [57] Under cross-examination, Mr. Vohalis stated he was 10-12 yards away from the tackle when it occurred, and he had a clear view of the tackle. He agreed that if Mr. Cox had gone in with his cleats up, Mr. Cox would have received a red card. He also agreed that if he thought Mr. Cox was deliberately trying to hurt Mr. Miller, then Mr. Cox would have been issued a red card.

Karl Cox

- [58] Mr. Karl Cox played soccer from the time he was 5 or 6 years old. He grew up in Ireland and played in the premier youth league there until he was 17. He then stopped playing soccer for approximately 10 years, until he moved to Canada in 2010. He usually played in an urban recreation league, and only played in the Millar's Soccer League for the 2018 summer. He agreed the Millar's Soccer League was less competitive than his usual league, although the players were younger and faster.
- [59] Mr. Cox agreed that slide tackles from behind were not allowed. He said that slide tackles on an angle from the back are a grey area, and the referee will decide if it is a foul.
- [60] In the May 22, 2018 match, Mr. Cox testified he was playing left back. Mr. Cox testified that he approached Mr. Miller from Mr. Miller's right, on an angle from behind. Mr. Cox testified that he kicked the ball before he connected with Mr. Miller. He said he slid on his left leg with his right leg outstretched. He said he went in with one foot and his cleats were not up. He did not recall whether Mr. Miller had control of the ball when he tackled him.
- [61] Mr. Cox says he made contact with the ball, then with his momentum he collided with Mr. Miller, and Mr. Miller fell over and hurt himself. Under cross-examination, Mr. Cox stated the "ground hurt Mr. Miller". He said Mr. Miller tripped and hurt himself during standard game play.
- [62] Mr. Cox recalled he struck Mr. Miller's lower leg with the lower part of his right leg. He does not recall striking the back of Mr. Miller's leg.
- [63] Under cross-examination, Mr. Cox agreed that in a slide tackle, the defender is supposed to kick the ball first, and is supposed to keep one foot on the ground while sliding and kicking. Mr. Cox was equivocal about whether sliding with two feet was more dangerous, and did not agree that a player would lose control as they dove to the ground in a slide. Mr. Cox said he was in control of his body at all times.
- [64] Mr. Cox agreed that a slide tackle can be dangerous, and that there is a risk to injuring other players when performing a slide tackle. Mr. Cox agreed that a slide tackle that took out someone's legs and knocked them over could hurt the other player. He agreed that a slide tackle that takes out both legs is more dangerous than one where the defender hits the ball. Mr. Cox agreed that it is safer for the defender to come from the side where the other player can see him. He agreed that it was more dangerous if the other player cannot see the defender and brace for impact.
- [65] Under cross-examination, Mr. Cox agreed that it was not acceptable to take out a player when there was no chance for the defender to get the ball. He agreed that it was possible he was in Mr. Miller's blind spot when he came in for the tackle. Mr. Cox said both of his feet were on the ground during the tackle. Mr. Cox agreed his body contacted Mr. Miller's body. Mr. Cox stated he did not know if he took out both of Mr. Miller's legs.

Michael Robinson

- [66] Mr. Michael Robinson played on Mr. Miller's team in the summer of 2018.
- [67] Mr. M. Robinson was standing on the side lines around the halfway line at the time of the tackle. He remembers seeing Mr. Miller with the ball, the slide tackle, and Mr. Miller falling forward. However, he has no recollection of how the players contacted each other.
- [68] When asked in direct examination if he saw how Mr. Cox ran in on the tackle, he said he did not remember it all. He just remembered the tackle and Mr. Miller falling forward.
- [69] Mr. M. Robinson then said his recollection was that Mr. Cox slide tackled Mr. Miller on an angle from Mr. Miller's right side, going across Mr. Miller as if moving across the face of the goal. He said it seemed like a possibility that Mr. Cox could have contacted the ball. Under cross-examination, Mr. M. Robinson agreed that he did not know if Mr. Cox struck the ball, or even came close to striking the ball. Mr. M. Robinson also agreed that there were other witnesses closer to the tackle, and with respect to how the tackle actually happened, he would defer to those witnesses.
- [70] When asked if it looked like Mr. Cox was "taking out the man or the ball", Mr. M. Robinson repeated that he did not see the actual contact between the players.
- [71] Under cross examination, Mr. M. Robinson agreed that in a slide tackle the defender is supposed to hit the ball first, with his foot on the ground. He agreed that when a player slides on the ground, the player loses some element of control. He agreed that a slide tackle that takes out both legs has a higher risk of injury, and that a slide tackle from behind is dangerous.

Paul Silny

- [72] Mr. Silny played on Mr. Cox's team in the summer of 2018. He played soccer since he was a child, and played at the university level in Ireland before moving to Canada. Mr. Silny confirmed that the level of play in the league was intermediate, with strong and weak players.
- [73] Mr. Silny was playing at the time of the tackle, and was located in the mid field, about 8-10 metres from the tackle. He described the tackle as a last-ditch tackle by Mr. Cox, who was the last defender. He agreed it was a foul, and a tough tackle. He said Mr. Cox was behind and to the left of Mr. Miller. The ball was in front of Mr. Miller, and Mr. Cox came from behind Mr. Miller's left shoulder. He believed Mr. Cox's left leg extended out in front of Mr. Miller trying to sweep for the ball, hitting the side and front of Mr. Miller's left leg. He thought it was possible that Mr. Cox's trailing (right) leg may have hit the back of Mr. Miller's leg. Mr. Silny did not agree that the tackle was a "scissor" tackle. Instead, he said that Mr. Cox's trailing leg may have hit Mr. Miller. He did not agree that a scissor tackle, where both legs are slammed together, was plausible given the speed at which the parties were running.

- [74] Mr. Silny believed Mr. Cox was trying for the ball, and not trying to take out Mr. Miller as a tactic. When asked if Mr. Cox had a chance of getting to the ball, Mr. Silny said there was not a high probability of getting the ball, and it was much more likely Mr. Cox would instead hit Mr. Miller. He agreed that Mr. Cox did not contact the ball in this tackle, as Mr. Cox caught Mr. Miller before he could reach the ball. He again described Mr. Cox's actions as a desperate last-ditch effort. Mr. Silny said the slide tackle he saw Mr. Cox execute was not outside his normal expectations for the game. He said there was hard contact on the foul, and it was something he had seen take place many times before. The only thing unusual in this tackle was the injury Mr. Miller sustained.
- [75] Under cross-examination, Mr. Silny agreed that in a slide tackle, the higher the foot, the more risk of injury. He also agreed that a slide tackle from behind a player with the ball is more risky because the player is not aware the slide tackle is coming. He agreed that a slide tackle from the opposite player's blind spot is also more risky because the player is not aware, and the risk of injury is greater. He agreed that Mr. Cox was in Mr. Miller's blind spot when he executed the tackle, and that Mr. Cox got the man and not the ball. He agreed that when Mr. Cox was running fast and slides, he would lose control of his body. Mr. Silny agreed that because Mr. Cox was running fast and sliding towards Mr. Miller, Mr. Cox took out Mr. Miller.

Findings and Disposition

- [76] With the exception of Mr. Cox, I find all of the witnesses to be straightforward and credible. Some of the witnesses were closer to the tackle and had a better view of the incident. Nevertheless, the consistency of their evidence allows me to find, based on a balance of probabilities, the central facts in this case.
- [77] Although Mr. M. Robinson thought Mr. Cox approached Mr. Miller from the right, he did not have a good view of the tackle, did not actually see how the players collided, and agreed that the evidence of the other witnesses closer to the incident should be preferred. Therefore, while I find Mr. M. Robinson to be a credible witness with respect to matters he had direct knowledge of, I reject his evidence regarding the mechanics of the tackle as being unreliable.
- [78] With respect to the tackle itself, I entirely reject the evidence of Mr. Cox. His testimony is diametrically opposed to the six witnesses who had a clear view of the tackle. I find his testimony to be self-serving and wholly unbelievable. Mr. Cox testified that he executed the tackle from Mr. Miller's right side, that he extended his right leg forward to hit the ball, that he did make contact with the ball, and that Mr. Miller simply tripped over Mr. Cox in the ordinary course of play. To paraphrase the trial court in *Unruh v. Webber*, 98 D.L.R. (4th) 294, 1992 CanLII 1121 at para. 15 (B.C.S.C.), if Mr. Cox's account were true, his tackle may well have been acceptable soccer. But given the account of the incident by the other witnesses, the account given by Mr. Cox is simply not to be believed.

- [79] While the referee did not issue a red card for Mr. Cox's conduct, I am satisfied that is not determinative of liability. It is merely one factor to consider. Given how equivocal Mr. Vohalis was in his decision to issue the yellow card, and not the red card, I do not place much weight on the fact that no red card was issued.
- [80] I find Mr. Miller has established, on a balance of probabilities, that the mechanics of the tackle occurred as follows:
- a) Mr. Miller was running fast towards the goal, and was just approaching the 18-yard box with control of the ball, on his right foot. He was just getting ready to kick the ball towards the goal moments before being tackled.
 - b) Mr. Cox ran up behind Mr. Miller on Mr. Miller's left side. He was approaching on an angle from behind, and was in Mr. Miller's blind spot.
 - c) Mr. Miller did not see Mr. Cox.
 - d) Mr. Cox lifted both his legs off the ground in an attempt to execute a slide tackle. His left leg went in front of Mr. Miller's legs, and his right leg came up behind Mr. Miller's legs. He struck Mr. Miller slightly below Mr. Miller's knees.
 - e) The effect of Mr. Cox's tackle was that both of Mr. Miller's legs were taken out from under him and, with the speed he was travelling, Mr. Miller fell face first into the ground, very hard, and was unable to put his hands out to stop him. He severely injured his right acromioclavicular joint in the fall.
 - f) There was no possibility of Mr. Cox reaching the ball, as the ball was ahead of Mr. Miller's right foot, and Mr. Miller's body was between Mr. Cox and the ball.
- [81] I find that Mr. Cox's actions were dangerous and reckless, and were outside the conduct a player would reasonably expect in this recreational league, made up of players of all different skill levels. While slide tackles were permitted, there is no question that the execution of this slide tackle was outside the accepted rules of play. All the witnesses before me acknowledged that slide tackles are permitted and injuries are a part of the game. However, I find that the players in this league did not consent to dangerous and reckless conduct, such as that undertaken by Mr. Cox, which carries with it the risk of severe injury.
- [82] I find Mr. Cox was negligent when he attempted to execute the slide tackle in the manner that he did. He knew that slide tackles that take out both the legs of another player could result in injury to the other player. He agreed it was not acceptable to take out a player when there was no chance of getting the ball. He knew it was possible that he was in Mr. Miller's blind spot, and it was more dangerous if the player with the ball cannot see the defender coming in for a tackle. I find Mr. Cox was well aware of the risk of injury to Mr. Miller in undertaking the tackle as he did. He nevertheless decided to proceed with what Mr. Silny described as a "last-ditch tackle", striking Mr. Miller from behind, and taking out both of Mr. Miller's legs, with both of his own legs, when there was no possibility of him reaching the

ball. His actions resulted in serious injury to Mr. Miller, for which he is liable.

[83] Total damages are awarded to Mr. Miller in the agreed amount of \$103,764.11, plus costs and disbursements.

[84] If the parties wish to make submissions on costs, they may do so in writing within 30 days of this judgment. If I receive no submissions on costs, I award costs to Mr. Miller at Scale B.

"W.A. Baker J."

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Prepared on 29 October 2026 · Esheria