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"Sport is a preserver of health."
- Hippocrates

BICYCLING: PUT THE PEDAL TO THE MEDAL

With the Pan Am Games have just begun in Toronto many athletes have now descended upon the city to participate in the events they love. Some of these events may involve risk of physical injury to the participants; but of course, such a concern is usually not at the forefront of an elite athlete's mind as he or she strives for that medal. Nonetheless, injuries do happen, and sometimes such injuries could be attributed to the direct actions of competitors. If one athlete decides to bring a tort action against another in Ontario, either party may require that the case be decided by a jury pursuant to s.108(1) of the Courts of Justice Act. However, when assessing liability under the circumstances of such an organized sporting event, various complications are bound to arise, such as the implications of a waiver agreement signed by the participants. A recent decision of the Court of Appeal for Ontario discusses when such a scenario may be too complex for a jury.

The case of *Kempf v. Nguyen* (2015) ONCA 114, involved a charity bicycle race in 2008 to benefit the Heart and Stroke Foundation. The plaintiff was seriously injured when his front wheel was clipped by the defendant's back wheel during the race following a sudden change in direction by the defendant. The defendant amended his statement of defence just before the trial to plead that the plaintiff had voluntarily assumed the risk of the ride by signing a waiver agreement before the race. At the opening of the trial (which was for liability only), the plaintiff moved to strike the jury notice. The trial judge agreed based on the reasoning that the jury would be confused by the implications of the waiver signed by the plaintiff, especially in light of the defendant's plea of *volenti non fit injuria*. At the end of the trial, the judge found the defendant to be responsible for the plaintiff's injuries but did not address the defendant's plea of contributory negligence.

The plaintiff took the position that even if the defence of *volenti* was reserved for the trial judge, the jury would still be unable to understand the limited use they could make of the waiver. The defendant argued that an appropriate charge to the jury by the judge could provide the jury with the necessary tools to understand the manner in which

the waiver could be used in a determination of liability. The defendant also argued that the motion to strike the jury notice was premature and could be renewed if problems arose during the trial. The trial judge found that by pleading the defence of *volenti*, the defendant was essentially seeking of declaratory relief, which was not to be determined by a jury pursuant to s. 108(2) of the *Courts of Justice Act*. She found that the jury could be prone to interpreting the waiver and its legal effect instead of determining the issue of liability, so the jury had to be dismissed.



- Wrestling with Expert Evidence: Medal Winner or Participant?
- Disqualified on Appeal
- Practice, Practice, Practice: Pre-Event Preparation and Training