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Ontario man liable for hockey punch despite bankruptcy case

Damages survive bankruptcy, appeal court rules

JOHN SCHOFIELD

The Court of Appeal for Ontario has ruled that an Ontario man who went bankrupt in 2011 is still liable for damages awarded when he punched an opponent in a 2004 recreational hockey game, breaking his jaw in three places.

In their March 18 decision in *Leighton v. Best* [2015] O.J. No. 1338, Appeal Court Justices Peter Lauwers, C. William Hourigan and Gladys Pardu unanimously agreed that the motion judge erred in a September 2013 decision when he concluded that the respondent, Matthew Best, did not intend to inflict bodily harm when he punched Randy Leighton towards the end of the 2004 hockey game in Sundridge, Ont., just south of North Bay.

Best should not have to suffer "this life long penance for what was one punch," Superior Court Justice James A.S. Wilcox wrote in his 2013 motion, concluding that damages for a single punch in the heat of the moment should not survive bankruptcy.

In writing for the Appeal Court, Justice Lauwers noted that, for the damage award to survive bankruptcy under section 178(1) (a.1)(i) of the *Bankruptcy and Insolvency Act*, the respondent must have intended for the punch to cause bodily harm.

"The inference that the respondent intended to cause significant bodily harm is inescapable," Justice Lauwers wrote. "The respondent pulled off the appellant's helmet during a recreational hockey game. The force of the punch sent a six feet and two inch tall, 225 pound man to his knees and broke his jaw in three places...The punch was delivered in retaliation for a high



Belcourt

stick by the appellant, which the trial judge found was not deliberate."

Counsel for Best had argued that, while he may have been reckless, he had no intent to cause bodily harm.

The Appeal Court decision echoed the 2009 trial decision by Superior Court Judge Robert Riopelle, who awarded Leighton just over \$41,000 for damages, about \$10,000 in interest, and approximately \$35,000 for costs. No criminal charges were laid as a result of the incident.

For the first two years after the trial, Best's wages were garnished to pay off the award, said Midland, Ont.-based lawyer Lisa Belcourt, who represented Leighton at trial and during the appeal. But in August 2011, she added, Best declared personal bankruptcy and said he would need a court order stipulating that the award would survive bankruptcy, which led to the 2013 motion hearing.

"There are certain debts that Parliament has said you don't get to walk away from," said Toronto civil litigation lawyer Kevin Toyne. "It's something that, at least in my experience, is not always considered at the outset of litigation."

Legislators have allowed some awards to survive bankruptcy to serve certain social policy objectives, said Stephanie Ben-Ishai, a professor at Osgoode Hall Law School and an expert on insolvency. Surviving damages include those awarded as a result of intentional bodily harm or wrongful death from physical or sexual assault, student loans, spousal or child support, and debts or liabilities incurred through fraud.



Kevin Toyne
Lawyer

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most consumer bankruptcies in Canada are handled by bankruptcy trustees, who typically have accounting backgrounds.

Ben-Ishai characterized the decision as a straightforward application of section 178 of the act that hinged not on bankruptcy issues, but whether or not a punch in the context of a hockey game was intentional infliction of harm.

Belcourt said the motion judge's September 2013 decision in *Leighton* was influenced heavily by a similar 2013 motion judgement in *Dickerson v. 1610396 Ontario Inc.*, which released a London, Ont., man who declared bankruptcy from paying court-awarded damages of more than \$1 million for punching a man once and leaving him with permanent brain damage. In October 2013, however, the Court of Appeal for Ontario ruled that the damages in *Dickerson* should survive bankruptcy. If the motion judge in *Leighton* had had the benefit of that Appeal Court decision, he probably would have decided differently, said Belcourt.

In personal injury cases, the ability to collect on damages is always a key concern for the plaintiff's counsel in deciding whether to pursue litigation, said Belcourt. Knowing if the award will survive bankruptcy is an important consideration, she added — especially in sports injury cases, which typically do not trigger insurance coverage. In sports such as hockey, she added, there is implied consent to some roughness, although the punch in *Leighton* far exceeded that.

For a defendant, said Belcourt, the potential for damages to survive bankruptcy could persuade the perpetrator to spend the money on litigation in an effort to minimize the award.

While the average client may not be aware that certain damages survive bankruptcy, lawyers need to know, said Toyne.

"The client really depends on us to look out for their best interests," he added. "If you go to all the trouble of getting a judgment that doesn't survive bankruptcy, your client effectively has a worthless piece of paper. If it's something a lawyer has not turned his or her mind to, it can really have an impact."

By comparison, she added, the list of surviving debts in the U.S. is much longer and "very much interest group-driven," which has helped give rise to an active, consumer bankruptcy bar in the United States. By comparison,

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