

October 2017

Rewriting Hockey's Unwritten Rules: Moore v. Bertuzzi

Patrick K. Thornton

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Civil Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Patrick K. Thornton, *Rewriting Hockey's Unwritten Rules: Moore v. Bertuzzi*, 61 Me. L. Rev. 205 (2017).
Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol61/iss1/8>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

REWRITING HOCKEY'S UNWRITTEN RULES:
MOORE V. BERTUZZI

Patrick K. Thornton

- I. INTRODUCTION
- II. THE MOORE-BERTUZZI INCIDENT
- III. THE MOORE-BERTUZZI LAWSUITS
- IV. PARTICIPANT V. PARTICIPANT LIABILITY IN PROFESSIONAL HOCKEY
- V. PARTICIPANT LIABILITY IN OTHER SPORTS
- VI. CONCLUSION

REWRITING HOCKEY'S UNWRITTEN RULES: *MOORE V. BERTUZZI*

Patrick K. Thornton*

I. INTRODUCTION

The word “enforcer” or “hockey goon” does not appear in the 2007–2008 National Hockey League (NHL) rulebook.¹ However, every player and coach knows the meaning of those words.² Hockey has always had its share of enforcers or “goons” that have protected star players.³ Steve Moore,⁴ former Harvard captain,⁵ and his parents have sued NHL tough-man Todd Bertuzzi,⁶ the Vancouver Canucks, and the partnership that owned the Canucks for an on-ice incident that occurred between Moore and Bertuzzi on March 8, 2004.⁷ Dedicated hockey fans have followed the lawsuit, but with the “incident” now over four years old many have forgotten about the vicious nature of the hit Bertuzzi rendered on Moore.⁸ Much of the discussion

* Patrick K. Thornton has taught sports law at the University of Houston, South Texas College of Law and Rice University. He is an Associate Professor of Business Law at Houston Baptist University where he is the Faculty Advisor for the MBA Program in Sports Management. Professor Thornton would like to thank Canadian sports lawyer Jeff Citron for his valuable input in this article as well as noted Houston, Texas sports and entertainment attorney Michael Flint. An earlier outline of this article appears at bizofhockey.net and is available at http://www.bizofhockey.com/?option=com_content&view=article&id=61&Itemid=1.

1. See generally NATIONAL HOCKEY LEAGUE, OFFICIAL RULES 2007–2008 (2007), available at <http://www.nhl.com/ext/0708rules.pdf> [hereinafter OFFICIAL RULES].

2. See David Shoalts, *The Code in All Its Glory*, GLOBE AND MAIL (Toronto), Mar. 21, 2007, at S3; see also R. v. Ciccarelli, 54 C.C.3d 121 (Ont. Dist. Ct.), available at 1988 WL 871051. In that case, the court acknowledged that Dino Ciccarelli's function on his team was that of a goal-scorer and not that of an enforcer. *Id.* at ¶ 30. The court found Ciccarelli guilty of assault and he was sentenced to one day in jail and a \$1,000 fine. *Id.* at ¶¶ 27, 43.

3. See generally BERNSTEIN ROSS, THE CODE: THE UNWRITTEN RULES OF FIGHTING AND RETALIATION IN THE NHL (2006); see also Michael McCarthy, *The Fight Game: NHL's Rules of Engagement*, USA TODAY, Apr. 5, 2007, available at http://www.usatoday.com/sports/hockey/nhl/2007-04-04-fighting_n.htm?loc=interstitialskid; Ira Berkow, *How to Cage Hockey Goons*, N.Y. TIMES, Dec. 6, 1986, at 153.

4. For a full biography of Steve Moore, see CBCSports.ca, *Indepth: The Bertuzzi Incident: A Look at Todd Bertuzzi and Steve Moore*, <http://www.cbc.ca/sports/inddepth/bertuzzi/bios/> (last visited Jan. 15, 2009) (“Moore has become a dependable checker who isn't opposed to dropping the gloves . . . from time to time.”) [hereinafter Bios].

5. John Paul Morosi, *JONNIE ON THE SPOT: Bertuzzi's Dirty Hit on Moore Inhuman*, HARVARD CRIMSON: ONLINE EDITION, Mar. 11, 2004, <http://www.thecrimson.com/article.aspx?net:358136>. Moore graduated from Harvard with a degree in Environmental science. See also Bios, *supra* note 4. He turned down a more lucrative scholarship offer from the University of Michigan to play hockey with his brother at Harvard. *Id.*

6. Bios, *supra* note 4 (“It's a mixture of grit and talent that's made him one of the most popular, and detested, players in the league.”). A survey of 343 NHL players named Bertuzzi the fourth “most physically intimidating player” in the NHL. Kostya Kennedy, *SI Players NHL Poll*, SPORTS ILLUSTRATED, Mar. 27, 2006, at 35. Zdeno Chara, at 6' 9" and 260 pounds, was first. *Id.*

7. Statement of Claim, *Moore v. Bertuzzi*, (Ont. Super. Ct. Feb. 14, 2006), available at http://www.cbc.ca/bc/news/060215_bertuzzi.html.

8. For a video of the incident, see <http://www.youtube.com/watch?v=F29RV9RGrVY> (last visited Sept. 23, 2008).

circulating around the Moore lawsuit has been that of hockey's unwritten rule dealing with enforcers and hockey's code of retaliation.⁹ Steve Moore's lawsuit challenges hockey's unwritten rules dealing with fighting and retaliation.

Moore's civil lawsuit has been frowned upon by some players. The outcome of the lawsuit could set the boundaries for future play in the NHL. Consider a sport where physically fit athletes are moving on skates at more than 20 miles an hour,¹⁰ wielding large wooden or metal sticks,¹¹ and all vying for a 1 inch frozen piece of vulcanized rubber¹² that has the ability to travel at more than 100 miles per hour.¹³ In addition, all of this activity takes place on a rock hard sheet of ice, 200 by 85 feet, with boundaries made of boards and glass.¹⁴ Whoever controls the puck also controls his future. A player could gain worldwide notoriety, obtain a lucrative contract, and eventually be presented with Lord Stanley's Cup.¹⁵ Simply put, a lot is at stake.

II. THE MOORE—BERTUZZI INCIDENT

The dispute between Moore and Bertuzzi had its roots in a February 16, 2004 game between the Colorado Avalanche and the Vancouver Canucks. During the game Steve Moore aggressively checked the Canucks captain, Markus Naslund,¹⁶ who as a result of the hit, received a concussion and left the ice bleeding from his forehead.¹⁷ Naslund subsequently missed three games due to his injuries.¹⁸ No penalty was called on Moore and the NHL opted not to take any action against him for the incident.¹⁹

The next scheduled game between the two teams was March 3, 2004. Leading up to the match, several Canucks made statements to the effect that they would retaliate against Moore.²⁰ In fact, the threats became so well known that NHL Commissioner Gary Bettman and Executive Vice President and Director of Hockey Operations of the

9. See DallasNews.com, Violence in Hockey: The Gloves Are Off, <http://www.dallasnews.com/sharedcontent/dws/spe/2004/nhlviolence> (last visited Jan. 15, 2009) (interactive multimedia look at the history of fighting in hockey).

10. Nicola Joyce, *Too Many Men On The Ice?: Why Criminal Prosecutors Should Refrain From Policing On-Ice Violations In The NHL*, HARV., JOHN M. OLIN CENTER FOR L. ECON. AND BUS. FELLOWS' DISCUSSION PAPER SERIES, Apr. 2007, available at http://www.law.harvard.edu/programs/olin_center/ (citing Exploratorium.edu, Science of Hockey: Skating, <http://www.exploratorium.edu/hockey/skating2.html> (last visited Jan. 17, 2009)).

11. OFFICIAL RULES, *supra* note 1, at 13.

12. *Id.* at 22.

13. Joyce, *supra* note 10, at 3 (citing Exploratorium.edu, Science of Hockey: Shooting the Puck, <http://www.exploratorium.edu/hockey/shooting1.html> (last visited Jan. 17, 2009)).

14. OFFICIAL RULES, *supra* note 1, at 11.

15. NHL.com, The Stanley Cup, <http://www.nhl.com/cup/cup.html> (last visited Jan. 15, 2009).

16. Naslund is a fifteen-year veteran of the NHL. NHL.com, Player Card: Markus Naslund, <http://www.nhl.com/ice/player.htm?Id=8458530> (last visited Jan. 15, 2009).

17. ESPN.com, NHL's Leading Scorer was Dealt 'Cheap Shot', <http://sports.espn.go.com/nhl/news/story?id=1737491> (last visited Jan. 15, 2009). At the time of the hit Naslund was the leading scorer in the NHL. *Id.*

18. *Id.*

19. CBCSports.ca, Canucks Lose Naslund For a Week, <http://www.cbc.ca/sports/story/2004/02/17/naslund-hit0217.html> (last visited Jan. 15, 2009). The Vancouver Canucks won the February 16, 2004, game 1 – 0. *Id.*

20. George Vecsey, *N.H.L. Must Crack Down On Threats*, N.Y. TIMES, Mar. 11, 2004, at D1. The Canucks Brad May said he placed a bounty on Moore but later said his comments were made in jest. *Id.*

NHL, Colin Campbell, attended the game.²¹ Notwithstanding the “trash talking” that occurred before the game, no retaliation took place against Moore.²² Bertuzzi later stated: “Games will come, and situations will present itself [sic].”²³

The final regular season game between the two clubs was played just five days later, on March 8, 2004, in Vancouver, British Columbia. Steve Moore’s parents were watching the game from their home in Ontario.²⁴ The NHL’s Director of Officiating contacted game officials during the first intermission and warned them about possible retaliation against Moore.²⁵ During the game, the Avalanche took a 5–0 lead on a goal by Steve Moore.²⁶ In the final period, with the score 7–2 in favor of the Canucks, Bertuzzi confronted Moore.²⁷ Bertuzzi tried to encourage him to fight, but Moore merely skated away and refused to fight Bertuzzi.²⁸ Bertuzzi continued to follow Moore the length of the ice and halfway back up the ice in the opposite direction.²⁹ Bertuzzi finally struck Moore from behind driving him to the ice face first.³⁰

Moore remained unconscious on the ice for some time and was taken to the hospital.³¹ He sustained massive injuries as a result of the assault including spinal fractures, spine ligament injuries, a closed head injury, facial lacerations and abrasions, loss of consciousness, and loss of memory.³² Moore has not played in the NHL since the incident. Bertuzzi was suspended the rest of the season because of his actions.³³ Bertuzzi was also baned for playing hockey in Europe by the International Ice Hockey Federation.³⁴ Bertuzzi’s team, the Vancouver Canucks, were fined \$250,000 by the

21. *Id.*

22. The game ended in a 5 – 5 tie. *Id.* “Trash talking” has become an issue at both the amateur and professional level. For further discourse on trash talking, see Frank Deford, CNNSI.com, Inside Game: Talking Trash Sports, http://sportsillustrated.cnn.com/inside_game/deford/news/1999/08/04/deford/ (last visited Jan. 15, 2009); George Vecsey, *The Familiar Feel of Trash-Talking*, N.Y. TIMES, Sept. 26, 2003, at D1; *NFL Trash Talking: Caught Yapping*, SPORTS ILLUSTRATED, Oct. 23, 2006, at 39.

23. Morosi, *supra* note 5.

24. *Moore Files Suit vs. Bertuzzi in Canada*, ROCKY MOUNTAIN NEWS, Feb. 16, 2006, available at http://www.rockymountainnews.com/drmn/nhl/article/0,2777,DRMN_23920_4471227,00.html.

25. CBCSports.ca, InDepth: The Bertuzzi Incident: Timeline, <http://www.cbc.ca/sports/indepth/bertuzzi/timeline> (last visited Jan. 15, 2009) [hereinafter Timeline]. See also Mike Brehm, *NHL Sits Bertuzzi for Remainder of Season*, USA TODAY, Mar. 11, 2004, available at http://www.usatoday.com/sports/hockey/nhl/canucks/2004-03-11-bertuzzi-suspension_x.htm.

26. ESPN.com, Game Recap: Moore Hit from Behind, Knocked Out, <http://sports.espn.go.com/nhl/recap?gameId=240308022> (last visited Jan. 15, 2009).

27. Timeline, *supra* note 25.

28. *Id.* Todd Bertuzzi is 6’ 3” and weighs 231 pounds and Steve Moore is 6’ 2” and weighs 205 pounds. *Id.*

29. *Id.*

30. *Id.*

31. Game Recap: Moore Hit from Behind, Knocked Out, *supra* note 26.

32. Press Release, Vancouver Coastal Health, Steve Moore’s Doctors Provide Update on Condition of Hockey Player (Mar. 10, 2004), available at http://www.vch.ca/news/docs/2004_03_10_steve_moore.pdf.

33. Rick Westhead, *Bertuzzi Suspended for Season and Playoffs*, N.Y. TIMES, Mar. 12, 2004, at D1. The NHL eventually reinstated Bertuzzi after a seventeen-month suspension. Jason Diamos, *N.H.L. Reinstates Bertuzzi After 17 Months*, N.Y. TIMES, Aug. 9, 2005, at D1. The NHL did not play the 2004–2005 season due to a labor dispute. *Id.* Bertuzzi came back to the NHL at the beginning of the 2005–2006 season. *Id.* He missed thirteen regular season games and seven playoff games. *Id.*

34. *Canuck Bertuzzi Barred From Playing in Europe*, L.A. TIMES, Dec. 18, 2004, at D-5.

league.³⁵ After the incident, NHL Commissioner Gary Bettman stated, “The message we’re sending is that this is not part of our game, it has no place in our game and it will not be tolerated in our game.”³⁶ The suspension cost Bertuzzi an estimated \$500,000 in salary and \$350,000 in endorsements.³⁷

Bertuzzi was charged with assault by Canadian authorities and eventually pleaded guilty to “assault causing bodily harm” on December 22, 2004, in British Columbia.³⁸ Steve Moore gave a victim impact statement detailing how the incident changed his life.³⁹ Bertuzzi received a conditional discharge in the criminal case and was ordered not to play in any sporting event in which Steve Moore was participating.⁴⁰ Additionally, Bertuzzi was ordered to perform eighty hours of community service.⁴¹ Todd Bertuzzi expressed remorse regarding his conduct:

I wish that day had never happened. . . . I had a lot of sleepless nights trying to think of things I’m a firm believer in second chances. . . . If we’re going to go through life not giving anyone second chances what kind of life are we going to have around here? People make mistakes in life. I was under the microscope and on TV when my mistake happened. If I’m going to sit here and keep getting ridiculed about it, how are we ever going to give someone a second chance to become better or to change situations?⁴²

III. THE MOORE—BERTUZZI LAWSUITS

After the incident Bertuzzi said he attempted to contact Moore at the hospital.⁴³ Moore did eventually respond to Bertuzzi by filing a civil lawsuit in Colorado against him and several other defendants including Vancouver Canucks forward Brad May, former Canucks coach Marc Crawford, former Canucks general manager Brian Burke, the Canucks team, and the partnership that owned the team, Orca Bay Sports and

35. Westhead, *supra* note 33.

36. *Id.* In addition, Bettman stated, “I’ve always taken the view that [fighting] is a part of the game and it rises and lowers based on what the game dictates.” ESPN.com, Bettman Worried About Player Safety and Injury, <http://sports.espn.go.com/nhl/news/story?id=281373> (last visited Jan. 16, 2009).

37. Diamos, *supra* note 33.

38. See Reason at Sentence, *R. v. Todd Bertuzzi*, File No. 158150-1, 2004 B.C.P.C. 0472, para. 3 (Dec. 22, 2004), available at http://www.provincialcourt.bc.ca/judgments/pc/2004/04/p04_0472.htm; see generally Jennifer Marder, *Should The Criminal Courts Adjudicate On-Ice NHL Incidents?*, 11 SPORTS LAW. J. 17 (2004); see also Tracey Oh, *From Hockey Gloves To Handcuffs: The Need For Criminal Sanctions In Professional Ice Hockey*, 28 HASTINGS COMM. & ENT. L.J. 309 (2006).

39. For the full text of Moore’s Impact Statement, see CTV.ca, Steve Moore’s Victim Impact Statement, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1103806928681_237 (last visited Jan. 19, 2008).

40. *Bertuzzi*, 2004 B.C.P.C. 0472, paras. 54, 59.

41. *Id.* para. 61. See generally John Timmer, *Crossing the (Blue) Line: Is the Criminal Justice System the Best Institution to Deal with Violence in Hockey?*, 4 VAND. J. ENT. L. & PRAC. 205 (2002).

42. CBCSports.ca, Bertuzzi Back on Ice, Wishes Moore Well, http://www.cbc.ca/sports/story/2005/08/16/Bertuzzi_Olympic_camp20050816.html (last visited Sept. 26, 2008) [hereinafter Bertuzzi Back on Ice].

43. Mike Brehm, *Bertuzzi Hit Prompts Police Probe*, USA TODAY, Mar. 9, 2004, available at http://www.usatoday.com/sports/hockey/nhl/avalanche/2004-03-09-moore-injury_x.htm.