

CIVIL MOCK TRIAL

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

DONALD BRASHEAR
PLAINTIFF

AND

MARTY MCSORLEY
DEFENDANT

(Issue: Is Marty McSorley liable for personally injuring Donald Brashear?)

CLERK: Order in the court, the Honourable Mister/Madam Justice _____
presiding.

[Everyone stands as the judge enters the courtroom.]

JUDGE: You may be seated.

[Everyone sits, except the clerk.]

CLERK: The case of Brashear vs. McSorley, my Lord/Lady.

[Clerk sits.]

JUDGE: Thank you. Are all parties present?

[Plaintiff's counsel stands.]

**PLAINTIFF'S
COUNSEL:**

Yes, my Lord/Lady. I am _____ and these are my co-counsel
_____. We are acting on behalf of the
plaintiff Donald Brashear in this matter.

*[Please note that this statement can be adjusted depending on the number of
lawyers for each side.]*

[Plaintiff's counsel sits; defendant's counsel stands.]

**DEFENDANT'S
COUNSEL:**

Yes, my Lord/Lady. I am _____ and these are my co-counsel
_____. We are acting on behalf of the
defendant, Marty McSorley, in this matter.

[Again, statement can be adjusted depending on number of lawyers.]

[Defendant's counsel sits.]

JUDGE: Thank you. Good day ladies and gentlemen of the jury. I begin with some general comments on our roles in this civil trial. Throughout these proceedings, you will act as judges of the facts and I will act as the judge of the law. Although I may comment on the evidence, you are the only judges of evidence. However, when I tell you what the law is, my view of the law must be accepted.

There is a basic principle that is fundamental to your role as jurors. In this case, there is a requirement of proof on a balance of probabilities which means evidence that has more weight and is more probable must be accepted.

There is a basic rule requiring that you decide this case on the balance of probabilities. That means if you take all the evidence and one party is more correct or right than the other then that party would be successful. If the plaintiff's case is more correct, then the defendant will be found to be liable and at fault. If the defendant is more correct, then the case would be dismissed. There is also a rule regarding personal injury. The plaintiff has to prove that the defendant is responsible for the injuries sustained before a decision can be reached. I now ask the plaintiff's counsel to present his case.

[Plaintiff's counsel stands.]

PLAINTIFF'S COUNSEL: Ladies and gentlemen of the jury, I will be representing Mr. Donald Brashear, the plaintiff in this case.

We intend to prove that the defendant in this case, Marty McSorley, was negligent, as he was reckless of the consequences of his ruthless assault on my client on February 21, 2000, in the Canucks vs. Bruins game at GM Place.

My client was seriously injured, and to prove this negligence we intend to call Mr. Brashear; the referee that night, Mr. Brad Watson, who witnessed the assault; and Dr. Rui Avelar, who will testify about Mr. Brashear's serious injuries. We now wish to call our first witness, Donald Brashear.

[Donald Brashear takes the stand and remains standing while he is taking the oath.]

CLERK: Do you swear that the evidence you shall give shall be the truth, the whole truth and nothing but the truth so help you God?

BRASHEAR: I do.

CLERK: Please state your full name and spell your last name for the record.

BRASHEAR: My name is Donald Brashear, B-R-A-S-H-E-A-R.

JUDGE: Please be seated. Go ahead counsel.

[Donald Brashear sits.]

PLAINTIFF'S COUNSEL: Mr. Brashear, please tell the court what happened on the evening of February 21, 2000.

BRASHEAR: I was playing a game for the Canucks against the Boston Bruins in GM Place.

PLAINTIFF'S COUNSEL: Was Mr. McSorley playing in that game?

BRASHEAR: Yes he was.

PLAINTIFF'S COUNSEL: Do you see Mr. McSorley in court today?

BRASHEAR: Yes he is sitting right over there. *(Points to Marty McSorley.)*

PLAINTIFF'S COUNSEL: Let the record show that the witness pointed to the defendant. Did you get into a fight with Mr. McSorley early in the game?

BRASHEAR: McSorley and I got into a fight. We both threw a punch, but the referee broke us up pretty quickly. After serving our penalties we just continued playing.

PLAINTIFF'S COUNSEL: What else happened in the game with Mr. McSorley?

BRASHEAR: McSorley wanted to fight again but I refused and skated away from him.

PLAINTIFF'S COUNSEL: What happened next?

BRASHEAR: I was skating and I heard somebody skate up behind me. The last thing I can remember is an intense pain on the side of my head.

PLAINTIFF'S COUNSEL: Do you know what caused the pain?

BRASHEAR: Yes, McSorley hit me with his stick.

PLAINTIFF'S COUNSEL: Were you wearing a helmet?

BRASHEAR: Yes, I was wearing a standard issue NHL helmet.

PLAINTIFF'S COUNSEL: And how long were you in the hospital?

BRASHEAR: I was in the hospital for two days but could not play hockey for 3 weeks.

PLAINTIFF'S COUNSEL: What injuries did you receive?

BRASHEAR: I had cuts to my head and a concussion. I also have problems remembering things sometimes.

PLAINTIFF'S

COUNSEL: How much did you lose as a result of the incident?

BRASHEAR: You mean my salary?

PLAINTIFF'S

COUNSEL: I mean everything.

BRASHEAR: Well it cost me with the Canucks. I lost quite a bit of my salary and about \$750,000 in total for my medical costs, therapy, my wages, and loss of potential endorsements. I also have recurring pain and I have had to hire legal representation.

PLAINTIFF'S

COUNSEL: You felt pain on the side of your head didn't you?

[Defendant's counsel stands.]

DEFENDANT'S

COUNSEL: Objection my Lord/Lady! Please ask my friend to refrain from leading the witness.

[Defendant's counsel sits.]

PLAINTIFF'S

COUNSEL: My Lord/Lady, I am not leading on an essential element such as identification of the accused but on an undisputed fact.

JUDGE: Objection sustained. Please rephrase your question.

PLAINTIFF'S

COUNSEL: Where did you feel pain?

BRASHEAR: There was a sharp pain on the side of my head.

PLAINTIFF'S

COUNSEL: Did Mr. McSorley hit you from behind?

BRASHEAR: Yes, McSorley took a cheap shot. I couldn't see him coming and he whacked me with his hockey stick.

PLAINTIFF'S

COUNSEL: Thank you. No further questions my Lord/Lady.

[Plaintiff's counsel sits.]

JUDGE: Does the defence wish to cross-examine this witness?

[Defendant's counsel stands.]

DEFENDANT'S

COUNSEL: Yes my Lord/Lady. Is it correct that you couldn't see who hit you?

BRASHEAR: Yes.

DEFENDANT'S

COUNSEL: How are you so sure that it was Mr. McSorley then?

BRASHEAR: People told me and I saw a video of the hit.

DEFENDANT'S

COUNSEL: Did you feel any pain in your shoulder?

BRASHEAR: I had hit some Bruins pretty hard earlier in the game. My shoulder was a little sore but that was the norm.

DEFENDANT'S

COUNSEL: So it's possible that Mr. McSorley was just trying to hit your shoulder?

BRASHEAR: No, he hit my head and it looked like it was on purpose.

DEFENDANT'S

COUNSEL: Did you and McSorley have a fight earlier in the game?

BRASHEAR: Yes.

DEFENDANT'S

COUNSEL: Is it true that you started the fight?

BRASHEAR: Yes, I did.

DEFENDANT'S

COUNSEL: Do you understand that fighting is part of the game of hockey?

BRASHEAR: Yes I do, but you cannot attack from behind and hit people's heads with hockey sticks.

DEFENDANT'S

COUNSEL: When you check someone, do you do it with all your might?

BRASHEAR: Yes I do, but with a reasonable amount of force and not with a hockey stick.

DEFENDANT'S

COUNSEL: Is it reasonable and acceptable to check someone by hitting them on the upper back?

BRASHEAR: Yes it is reasonable, but he used his hockey stick and hit me on my head.

DEFENDANT'S

COUNSEL: Haven't you used your stick to push or grab hold of other players?

BRASHEAR: On a few occasions.

DEFENDANT'S

COUNSEL: You were just lucky you didn't miss the body and hit somebody's head weren't you?

BRASHEAR: Well, no. I am careful how I use my stick.

DEFENDANT'S

COUNSEL: Haven't you been injured in hockey games before?

BRASHEAR: Yes I have been injured before but never this seriously.

DEFENDANT'S

COUNSEL: Were you or were you not playing three weeks later?

BRASHEAR: Yes I was but I still lost money on endorsements and medical expenses.

DEFENDANT'S

COUNSEL: Doesn't your health insurance or the Canucks cover the cost of your injuries?

BRASHEAR: Well, yes, but I still don't get paid if I don't play. The insurance doesn't pay my salary.

DEFENDANT'S

COUNSEL: Mr. Brashear, is it true that you did not pay for any medical expenses? I remind you that you are under oath.

BRASHEAR: I suppose so.

DEFENDANT'S

COUNSEL: At that time were you wearing a faulty helmet which could not be properly fastened?

BRASHEAR: No, it was McSorley's hit that made my helmet faulty.

DEFENDANT'S

COUNSEL: You have been in hundreds of fights in the NHL haven't you?

BRASHEAR: Yes.

DEFENDANT'S

COUNSEL: You consent to fight all the time don't you? It's part of the game?

BRASHEAR: Clean hits and fair fights are part of the game, not hitting from behind with hockey sticks.

DEFENDANT'S

COUNSEL: Is it true that you have no lasting injuries?

BRASHEAR: No, I have recurring pain and other problems.

DEFENDANT'S

COUNSEL: What other problems?

BRASHEAR: Just what my doctor told me.

DEFENDANT'S

COUNSEL: The doctor whom you are paying?

PLAINTIFF'S

COUNSEL: Objection.

DEFENDANT'S

COUNSEL: Withdrawn, my Lord/Lady. That completes my cross-examination.

[Defendant's counsel sits.]

JUDGE: Thank you counsel. Mr. Brashear, you are excused. You may call your next witness.

[Donald Brashear leaves the witness box; plaintiff's counsel stands.]

PLAINTIFF'S

COUNSEL: We call Brad Watson, my Lord/Lady.

[Brad Watson takes the stand and remains standing for the oath.]

CLERK: Do you swear that the evidence you shall give shall be the truth, the whole truth and nothing but the truth so help you God?

WATSON: I do.

CLERK: Please state your full name and spell your last name for the record.

WATSON: Brad Watson, W-A-T-S-O-N.

JUDGE: Please be seated. Go ahead counsel.

[Brad Watson sits.]

PLAINTIFF'S

COUNSEL: Mr. Watson, where were you on the night of February 21, 2000?

WATSON: I was the referee at the game between the Vancouver Canucks and the Bruins at GM Place.

PLAINTIFF'S

COUNSEL: Did you see Mr. Brashear and Mr. McSorley there?

WATSON: Yes they were playing.

PLAINTIFF'S

COUNSEL: Do you see the two players in court today?

WATSON: Yes. They are over there. *[Points at Donald Brashear and Marty McSorley.]*

PLAINTIFF'S

COUNSEL: Let the record show the witness has identified the plaintiff and the defendant, my Lord/Lady.

PLAINTIFF'S

COUNSEL: Did anything unusual happen during this game?

WATSON: Well, early in the game I saw Brashear and McSorley fighting. They both punched each other in the head several times before the fight was broken up.

PLAINTIFF'S

COUNSEL: Then what happened?

WATSON: Later in the game McSorley challenged Brashear to another fight but Brashear refused and skated away from him. McSorley skated after him until he caught up with him.

PLAINTIFF'S

COUNSEL: What did Mr. McSorley do next?

WATSON: McSorley raised his stick and hit Brashear very hard on the side of his head.

PLAINTIFF'S

COUNSEL: Was Brashear able to defend himself?

WATSON: No! McSorley struck him from behind. He had no time to defend himself.

PLAINTIFF'S

COUNSEL: Did you see anything else?

WATSON: Yes, one last thing. Brashear's helmet flew off and he hit his head, very hard, on the ice. He was unconscious and bleeding.

PLAINTIFF'S

COUNSEL: Thank you Mr. Watson. No further questions my Lord/Lady.

[Plaintiff's counsel sits.]

JUDGE: Does the defence wish to cross-examine this witness?

[Defendant's counsel stands.]

DEFENDANT'S

COUNSEL: Yes my Lord/Lady. Did you have a clear view of the incident?

WATSON: I did. They were right in front of me and I was sort of expecting more fighting from the two of them so I was watching carefully.

DEFENDANT'S

COUNSEL: Did Brashear and McSorley fight earlier in the game?

WATSON: Yes.

DEFENDANT'S

COUNSEL: Is it not common for hockey players to check other players as hard as they can?

WATSON: Yes, but not on the side of the head and with their sticks.

DEFENDANT'S

COUNSEL: Is it not common for a player to check a player by hitting them on the upper arm or upper back?

WATSON: Yes, but like I said before, McSorley checked him on the side of his head.

DEFENDANT'S

COUNSEL: Fighting between two players is common, is it not?

WATSON: Yes, but in my career I have never seen anyone get this badly hurt. The stick did a lot of damage.

DEFENDANT'S

COUNSEL: No further questions my Lord/Lady.

[Defendant's counsel sits.]

JUDGE: Thank you counsel. Mr. Watson, you are excused. You may call your next witness.

[Brad Watson leaves the witness box; plaintiff's counsel stands.]

PLAINTIFF'S

COUNSEL: We call Dr. Avelar my Lord/Lady.

[Dr. Avelar takes the stand and remains standing to take the oath.]

CLERK: Do you swear that the evidence you shall give shall be the truth, the whole truth and nothing but the truth so help you God?

AVELAR: I do.

CLERK: Please state your full name and spell your last name for the record.

AVELAR: Dr. Rui Avelar, A-V-E-L-A-R.

JUDGE: You may be seated. Go ahead counsel.

[Dr. Avelar sits.]

PLAINTIFF'S

COUNSEL: Doctor, what are your qualifications?

AVELAR: I am a qualified medical doctor and have been practicing medicine for over 25 years. I specialize in sports medicine and have contracts with several NHL teams. I help them in their training and I take care of their medical problems.

PLAINTIFF'S

COUNSEL: Where were you on February 21, 2000?

AVELAR: I was at the Canucks/Bruins game here in Vancouver.

PLAINTIFF'S

COUNSEL: What happened that night?

AVELAR: During the game I was called to attend Donald Brashear. He was lying on the ice unconscious.

PLAINTIFF'S

COUNSEL: Do you see Donald Brashear here today in court?

AVELAR: Yes. *[Points to Donald Brashear.]*

PLAINTIFF'S

COUNSEL: Let the record show that the witness identified the plaintiff my Lord/Lady.

What did you do when you arrived on the ice?

AVELAR: I examined a wound to the side of his head which was bleeding.

PLAINTIFF'S

COUNSEL: Please proceed.

AVELAR: Well, we took him to the hospital where I examined him again.

PLAINTIFF'S

COUNSEL: What do you think caused this wound?

AVELAR: It is my medical opinion that the injury was caused by a hockey stick. There was a tremendous amount of force used.

PLAINTIFF'S

COUNSEL: How serious were his injuries?

AVELAR: He sustained a level 3 concussion which is quite serious. His skull was knocked around and his scalp had a deep cut. He required 42 stitches.

PLAINTIFF'S

COUNSEL: Were the injuries serious enough to keep him off the ice?

AVELAR: Yes indeed. For any ordinary concussion the standard NHL procedure is to miss a few games. With an injury the severity of Mr. Brashear's more action was needed. I ordered him to refrain from playing for about 3 weeks.

PLAINTIFF'S

COUNSEL: Thank you Dr. Avelar. No further questions my Lord/Lady.

[Plaintiff's counsel sits.]

JUDGE: Does the defence wish to cross-examine this witness?

[Defendant's counsel stands.]

DEFENDANT'S

COUNSEL: Yes my Lord/Lady. Is hockey a tough sport where everyone gets hurt?

AVELAR: Yes it is, but Mr. Brashear was quite injured. Over the course of twenty-five years I have seen many hockey related injuries but very few have been as serious as Mr. Brashear's.

DEFENDANT'S

COUNSEL: Many of the injuries you see are results of players fighting, are they not?

AVELAR: Yes, but this was not a fair fight because he got hit from behind.

DEFENDANT'S

COUNSEL: Have you treated lots of players with cuts and bruises to the head because of fighting?

AVELAR: Yes, but this is one of the most serious yet.

DEFENDANT'S

COUNSEL: Could the injury be caused by his head hitting the ice?

AVELAR: No, in my opinion it was caused by him being hit by the stick.

DEFENDANT'S

COUNSEL: Are you saying Dr. Avelar that there is no chance of his injury being caused by the ice?

AVELAR: I suppose there is a chance, but it's very unlikely.

DEFENDANT'S

COUNSEL: My Lord/Lady, that completes my cross-examination.

[Defendant's counsel sits.]

JUDGE: Thank you counsel. Dr. Avelar, you are excused. You may call your next witness.

[Dr. Avelar exits the witness box; plaintiff's counsel stands.]

PLAINTIFF'S COUNSEL: My Lord/Lady, that completes the plaintiff's case.

[Plaintiff's counsel sits.]

JUDGE: I now call upon the Defendant's Counsel to make their opening statement and to proceed with their case.

[Defendant's counsel stands.]

DEFENDANT'S COUNSEL:

Good day ladies and gentlemen. I'm sure that you all know that hockey is a sport of roughness and physical contact. Nobody can totally control it. Physical contact is simply part of the game. Every hockey player knows that, from time to time, they are bound to be in a fight with another player and they accept that as part of the game, that is, they consent to the fights.

Prior to the incident on February 21, 2000, Donald Brashear had been involved in many fights. Earlier in the game, he had fought with Mr. McSorley. Later on, Mr. McSorley was just trying to get Mr. Brashear to fight. The blow to the head was not intentional. Mr. McSorley was trying to hit Mr. Brashear on the arm in order to get him to turn and fight. Unfortunately, he accidentally struck him a little higher causing him to fall.

The reason Mr. Brashear lost consciousness was not due to the blow to the head, but to the fact that he was wearing a defective helmet. The helmet was missing a major strap and padding on the inside that keeps your helmet on your head and protects the skull. Therefore, the helmet did not protect Mr. Brashear when he fell to the ice. The ice, not Mr. McSorley's hockey stick, caused Mr. Brashear's injuries.

When Brashear lost consciousness, he was not seriously hurt and was back playing within weeks.

We will call Mr. McSorley, Wayne Gretzky and Don Cherry to give evidence in our case. Now we will call our first witness, Marty McSorley.

[Marty McSorley takes the stand and remains standing while he is taking the oath.]

CLERK: Do you swear that the evidence you shall give shall be the truth, the whole truth and nothing but the truth so help you God?

McSORLEY: I do.

CLERK: Please state your full name and spell your last name for the record.

McSORLEY: Marty McSorley, M-C-S-O-R-L-E-Y.

JUDGE: You may be seated. Go ahead counsel.

[Marty McSorley sits.]

DEFENDANT'S

COUNSEL: How many seasons have you played hockey?

McSORLEY I have played for 17 years.

DEFENDANT'S

COUNSEL: Have you ever seen an incident such as the one that happened on February 21, 2000?

McSORLEY: I have seen many players accidentally struck in the head by sticks; in fact, it even happened to me.

DEFENDANT'S

COUNSEL: Did you and Brashear fight earlier in the game?

McSORLEY: Yes, he started that one.

DEFENDANT'S

COUNSEL: Did you fight again?

McSORLEY: I tried to get him to fight me again.

DEFENDANT'S

COUNSEL: How?

McSORLEY: I skated up behind him and tried to turn him around with my stick.

DEFENDANT'S

COUNSEL: What happened?

McSORLEY: I only meant to hit him in the upper arm, but I accidentally hit him in the head. I just wanted to try to make him fight me again.

DEFENDANT'S

COUNSEL: Did you mean to hit him in the head?

McSORLEY: No. It was an accident.

DEFENDANT'S

COUNSEL: Did you hit him hard?

McSORLEY: Not really. I probably caused him to fall, but I'm sure I didn't hit him hard enough to cause his concussion. That was the ice.

[Plaintiff's counsel stands.]

PLAINTIFF'S

COUNSEL: Objection my Lord/Lady. The witness is not qualified to give an expert medical opinion on the cause of my client's injuries.

[Plaintiff's counsel sits.]

DEFENDANT'S

COUNSEL: My Lord/Lady, Mr. McSorley was present at the incident. He is an expert on what happened there.

JUDGE: Mr. McSorley is not a medical expert. Objection sustained. The jury will disregard the witness's last comment.

DEFENDANT'S

COUNSEL: What happened when he fell?

McSORLEY: His helmet wasn't properly done up. It came off before he hit the ice. He hit his head hard on the ice.

DEFENDANT'S

COUNSEL: Do you feel sorry for hitting Brashear in the head?

McSORLEY: Yes I do. I didn't know I hit him that hard.

DEFENDANT'S

COUNSEL: No further questions.

[Defendant's counsel sits.]

JUDGE: Does the plaintiff wish to cross-examine this witness?

[Plaintiff's counsel stands.]

PLAINTIFF'S

COUNSEL: Yes my Lord/Lady. You've been playing hockey for 17 years now is that correct?

McSORLEY: Yes.

PLAINTIFF'S

COUNSEL: How many fights do you think you have been in during the course of your career?

McSORLEY: I don't know. I can't really give you a number.

PLAINTIFF'S

COUNSEL: Would you say that a couple of hundred is a reasonable number?

McSORLEY: Yeah, it's probably around a couple of hundred.

PLAINTIFF'S

COUNSEL: You're pretty experienced at fighting then?

McSORLEY: I guess you could say that.

PLAINTIFF'S COUNSEL: Doing it for 17 years you must win most of your fights.

McSORLEY: Most of them.

PLAINTIFF'S COUNSEL: Did you win the first one on February 21, 2000?

McSORLEY: No. Brashear got me.

PLAINTIFF'S COUNSEL: Did that make you mad? Losing a fight on national television?

McSORLEY: It happens.

PLAINTIFF'S COUNSEL: Do you mean losing a fight or getting mad enough to batter Mr. Brashear with a hockey stick?

McSORLEY: It was an accident.

PLAINTIFF'S COUNSEL: My Lord/Lady, that completes my cross-examination.

[Plaintiff's counsel sits.]

JUDGE: Thank you counsel. Mr. McSorley, you are excused. You may call your next witness.

[Mr. McSorley leaves the witness box; defendant's counsel stands.]

DEFENDANT'S COUNSEL: We call Wayne Gretzky.

[Wayne Gretzky takes the stand and remains standing while he is taking the oath.]

CLERK: Do you swear that the evidence you shall give shall be the truth, the whole truth and nothing but the truth so help you God?

GRETZKY: I do.

CLERK: Please state your full name and spell your last name for the record.

GRETZKY: Wayne Gretzky, G-R-E-T-Z-K-Y.

JUDGE: You may be seated. Go ahead counsel.

[Wayne Gretzky sits.]

DEFENDANT'S

COUNSEL: Are you a good friend of Mr. McSorley?

GRETZKY: Yes, we played hockey together in Edmonton and Los Angeles.

DEFENDANT'S

COUNSEL: How long have you known the defendant for?

GRETZKY: Too many years to count.

DEFENDANT'S

COUNSEL: How many games have you played with him?

GRETZKY: Probably hundreds.

DEFENDANT'S

COUNSEL: Have you ever seen Mr. McSorley intentionally attack another player on the ice?

GRETZKY: Sure, but it was fair checks and the occasional fight.

DEFENDANT'S

COUNSEL: So it's reasonable to expect some physical contact?

GRETZKY: It is hockey. There's quite a bit of contact and all the players partake in it. It's not like Mr. Brashear didn't expect any fighting.

DEFENDANT'S

COUNSEL: Have you seen the video of Mr. McSorley hitting Mr. Brashear?

GRETZKY: Yes.

DEFENDANT'S

COUNSEL: What would you say happened?

GRETZKY: McSorley was trying to touch Brashear's body with his stick. He missed and struck his head instead. It was just an unfortunate accident.

DEFENDANT'S

COUNSEL: In your opinion, was the incident just part of the game?

[Plaintiff's counsel stands.]

PLAINTIFF'S

COUNSEL: Objection, my Lord/Lady. The witness is not entitled to give his opinion.

[Plaintiff's counsel sits.]

DEFENDANT'S

COUNSEL: Mr. Gretzky has been playing hockey for many years. Surely he would be an expert on the game.

JUDGE: Objection overruled. Mr. Gretzky is an expert on hockey. You may answer the question.

GRETZKY: Every player knows that they will get into fights; they accept it as part of the game. This incident was no different from the fight between McSorley and Brashear earlier in the game.

DEFENDANT'S COUNSEL: Thank you. No further questions.

[Defendant's counsel sits.]

JUDGE: Does the plaintiff wish to cross-examine?

[Plaintiff's counsel stands.]

PLAINTIFF'S COUNSEL:

Yes my Lord/Lady. Do you feel that unlimited, unrestricted violence of any sort should be allowed in the sport of hockey?

GRETZKY: No.

PLAINTIFF'S COUNSEL:

Why not?

GRETZKY: The players are there for the game, not to reenact battle.

PLAINTIFF'S COUNSEL:

Was what McSorley did an act of unacceptable violence?

GRETZKY: No, it is not something that happens a lot, but it should be allowed.

PLAINTIFF'S COUNSEL:

Have you ever hit someone like McSorley did?

GRETZKY: No. I am a small guy and not a fighter.

PLAINTIFF'S COUNSEL:

Where do you draw the line between acceptable and unacceptable violence?

GRETZKY: I think an injury that permanently causes damage is unacceptable.

PLAINTIFF'S COUNSEL:

My Lord/Lady, that completes my cross-examination.

[Plaintiff's counsel sits.]

JUDGE: Thank you counsel. Mr. Gretzky, you are excused. You may call your next witness.

[Wayne Gretzky leaves the witness box; defendant's counsel stands.]

DEFENDANT'S

COUNSEL: We call Don Cherry.

[Don Cherry takes the stand and remains standing for the oath.]

CLERK: Do you swear that the evidence you shall give shall be the truth, the whole truth and nothing but the truth so help you God?

CHERRY: I do.

CLERK: Please state your full name and spell your last name for the record.

CHERRY: Don Cherry, C-H-E-R-R-Y.

JUDGE: You may be seated. Go ahead counsel.

[Don Cherry sits.]

DEFENDANT'S

COUNSEL: Mr. Cherry, what is your background in professional hockey?

CHERRY: I used to be a player and then a coach. Now, I'm a NHL game commentator.

DEFENDANT'S

COUNSEL: What do you think of fighting in hockey?

CHERRY: I think hard checking and fights have always been an important part of the game and every player accepts it.

DEFENDANT'S

COUNSEL: Did you see the accident between Mr. Brashear and Mr. McSorley on February 21, 2000 in Vancouver?

CHERRY: Yes I did.

DEFENDANT'S

COUNSEL: What did you see?

CHERRY: Early in the game I saw Brashear start a fight with McSorley. Brashear won. Later on McSorley tried to get into another fight by attempting to hook Brashear with his stick.

DEFENDANT'S

COUNSEL: What happened next?

CHERRY: McSorley hit Brashear on the head, probably by mistake. Brashear went down.

DEFENDANT'S

COUNSEL: Did you do anything at that time?

CHERRY: Yes. After the accident I picked up Brashear's helmet and noticed it could not be properly fastened.

DEFENDANT'S

COUNSEL: Was the helmet faulty?

[Plaintiff's counsel stands.]

PLAINTIFF'S

COUNSEL: Objection my Lord/Lady. That is a leading question.

[Plaintiff's counsel sits.]

JUDGE: Sustained. Please rephrase your question counsel.

DEFENDANT'S

COUNSEL: Is a helmet that could not be properly fastened standard issue?

CHERRY: No. It would be faulty and extremely dangerous. If it came off, you wouldn't have any protection.

DEFENDANT'S

COUNSEL: Did you see Brashear's head hit the ice?

CHERRY: Yes.

DEFENDANT'S

COUNSEL: Did he have his helmet on?

CHERRY: No.

DEFENDANT'S

COUNSEL: Is this incident just part of the game?

CHERRY: It sure is.

DEFENDANT'S

COUNSEL: Thank you. No further questions.

[Defendant's counsel sits.]

JUDGE: Does the plaintiff wish to cross-examine?

[Plaintiff's counsel stands.]

PLAINTIFF'S

COUNSEL: Yes my Lord/Lady. You are in favor of violence and fighting in hockey?

CHERRY: Yes.

PLAINTIFF'S

COUNSEL: Any violence?

CHERRY: Obviously there is a limit.

PLAINTIFF'S COUNSEL: Perhaps when a player gets hit over the head with stick and suffers major injuries?

CHERRY: It was the helmet.

PLAINTIFF'S COUNSEL: Mr. Cherry, are you an expert on hockey helmets?

CHERRY: No.

PLAINTIFF'S COUNSEL: Then how can you be so sure that it was a faulty helmet and not the force of the blow?

CHERRY: I've seen enough helmets in my lifetime.

PLAINTIFF'S COUNSEL: Are you an expert on injuries to the head?

CHERRY: No.

PLAINTIFF'S COUNSEL: Are you an expert on concussions?

CHERRY: No.

PLAINTIFF'S COUNSEL: My Lord/Lady, that completes my cross-examination.

[Plaintiff's counsel sits.]

JUDGE: Thank you counsel. Mr. Cherry, you are excused. You may call your next witness.

[Don Cherry leaves the witness box; defendant's counsel stands.]

DEFENDANT'S COUNSEL: My Lord/Lady, that completes the case for the defendant.

[Defendant's counsel sits.]

JUDGE: Thank you. Are you prepared to begin closing statements?

[Plaintiff's counsel and defendant's counsel both stand.]

DEFENDANT'S COUNSEL: We are my Lord/Lady.

[Defendant's counsel sits.]

**PLAINTIFF'S
COUNSEL:**

Yes, my Lord/Lady. Ladies and gentlemen of the jury. We all understand that fighting and physical contact are involved in the sport of hockey; however, the severe assault of McSorley against our client Donald Brashear exceeded the highest acceptable limits of violence tolerated in the game. It was clear that McSorley had purposely hit him with a hockey stick from behind. Evidently, McSorley aimed at Brashear's head.

The injury that kept Brashear out of the Canucks' lineup for three to four weeks was caused by the blow of the stick to the side of his head. Hitting the ice also made an impact but this was not the cause of the injury.

This act of violence was a precedent setting incident in the National Hockey League. My client was slashed with a hockey stick, with malicious intent and on purpose. The hockey stick was viciously swung at and hit the side of Mr. Brashear's head. The resulting injury was measured and Mr. Brashear suffered a grade 3 concussion. This caused my client severe misery and caused him to miss some of the hockey season. The defendant was reckless of the consequences of his act and should be found liable for his negligence. He did not exercise reasonable care!

My client is claiming a sum of \$750,000.00 in damages. This is for pain and suffering endured from the incident including but not limited to loss of wages for the period of not playing, loss of potential endorsements, intensive doctor care, physical therapy, ongoing pain and suffering, long term side effects, and medicine. We are also asking for court costs.

[Plaintiff's counsel sits; defendant's counsel stands.]

**DEFENDANT'S
COUNSEL:**

Ladies and gentlemen of the jury, as you all know violence and extreme fighting are both part of the game of hockey. Donald Brashear has played hockey for many years and he has been involved in hundreds of fights. Brashear has stated that in most of them he has been victorious. Earlier in the game of February 21, 2000 Brashear and McSorley had fought and the fight was started by Brashear.

The hit by McSorley was accidental; McSorley was only trying to spark his team because they were down 4 to 0. McSorley attempted to check Brashear on the upper arm so he could get him to stop and start fighting. The injury happened because Brashear's helmet was not fastened properly and it was missing padding on the inside. If the helmet was properly fastened I doubt that the concussion would have occurred.

Ladies and gentlemen, even if you find in favor of the plaintiff, you must consider what damages he is entitled to. In my submission, he is not entitled to the amount the plaintiff claims.

The plaintiff is claiming \$750,000. That is an outrageous claim. I suggest that the most he is entitled to is no more than \$70,000.

Mr. Brashear was in the hospital for only 2 days and missed a few games. He had no lasting injuries whatsoever and is back playing now. Mr. Brashear would probably not even have had a concussion if he had worn a proper helmet.

[Defendant's counsel sits.]

JUDGE: Ladies and gentlemen of the jury. You are judges of the facts in this case. You are to determine what the facts are by understanding the evidence of each witness. You must also decide whether the witness is reliable and trustworthy.

You should discuss all issues between yourselves and be prepared to be flexible and tolerant of differing opinions. You must decide this case on a balance of probabilities which means you have to decide which party's version of the events, the plaintiff's or the defendant's, is more probable than the other. Your verdict does not have to be unanimous; any 6 jurors can agree on a verdict.

If you find in favor of the plaintiff you must also decide the amount of money that the defendant must pay the plaintiff.

Were the injuries to the plaintiff caused by the defendant's negligence, and if yes, at what amount do you assess the total damages the defendant should pay to the plaintiff?

I now ask that you start your deliberations.

[Jury leaves the courtroom for deliberations. Plaintiff, defendant, and counsel stand out of respect for the jury.]

JUDGE: Thank you counsel. We will now adjourn until the jury returns with their verdict.

CLERK: Order in the court. This court stands adjourned for the verdict of the jury.

[Everyone stands while the judge leaves the courtroom.]

CLERK: Order in the court.

[Everyone stands while the judge enters the courtroom.]

JUDGE: You may be seated. Madam/Mister Registrar, has the jury reached a verdict?

[Everyone sits.]

CLERK: They have my Lord/Lady.

JUDGE: Sheriff, please bring the jury in.

[Plaintiff, defendant, and counsel stand out of respect for the jury.]

CLERK: Mr./Madam Foreperson, have you reached a verdict?

[Foreperson stands.]

FOREPERSON: Yes we have.

CLERK: Do you find the defendant, Marty McSorley, liable or not liable for the injuries sustained by the plaintiff, Donald Brashear?

FOREPERSON: We find the defendant, Marty McSorley, liable in negligence for the injuries sustained by the plaintiff, Donald Brashear, and order the defendant to pay the plaintiff damages in the amount of \$_____.

OR

We find the defendant, Marty McSorley, not liable in negligence for the injuries sustained by the plaintiff, Donald Brashear.

[Foreperson sits.]

JUDGE: The defendant shall pay the plaintiff damages in the amount of \$_____ and also pay the plaintiff's legal costs.

OR

The case is hereby dismissed. The plaintiff shall pay the defendant's legal costs.

Ladies and gentlemen of the jury, we thank you for acting as jurors in this matter. Both society and the law benefit from your contribution. In return, I hope you have found it to be an interesting and rewarding experience.

CLERK: This court stands adjourned. Order in the court.

[All rise as the judge exits the courtroom.]