

Violence in Hockey: A Social and Legal Perspective

By

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Abstract

The ongoing debate with regards to the regulation of violence in hockey is analysed through a legal and social perspective. The main research question touches on whether the law has a role to play in such regulation and how violence can be properly addressed in order to ensure the health and safety of all participants. There is a culture of hockey violence that creates an environment that is tolerable of excessive violence. This thesis addresses excessive violence and considers the player perspective with interview data and vignette research. Interview participants include hockey players at different levels of play. This research demonstrates at what point the law should intervene to regulate hockey violence and makes relevant suggestions on potential improvements in the regulation of violent behaviour in hockey. The goal is to create a framework for criminal courts that face cases of hockey violence.

Keywords

Hockey, Violence, Hockey Violence, Sports, Sports Law, Criminal Law, League Self-Regulation, Culture, Consent, Criminal Prosecution, Fighting, Social Control

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Violence in Hockey: A Social and Legal Perspective

Introduction

On January 1st, 2011, I attended a National Hockey League (NHL) game between two rival teams. The Toronto Maple Leafs faced off against the Ottawa Senators as part of the Battle of Ontario. Our seats were located in the lower bowl of Scotiabank Place. With seats two rows from the ice and right next to the Maple Leafs' bench, we could not possibly get closer to the action. The two teams have a special rivalry seeing as they are both located in the province of Ontario and their fans are spread across the region. A home game for the Senators often means plenty of Maple Leafs fans in the crowd. On this night, fans of both teams were equally present to cheer for their respective teams. It was no secret to these fans that a fight between the teams' enforcers would likely take place as it did every time these clubs met. The fans were not disappointed. Colton Orr, a known tough guy for Toronto, fought a total of three times in this game with the crowd cheering louder with each brawl. Orr dropped the gloves twice against Senators' fourth liner Chris Neil. During their second go around, I was lucky enough to witness the fight happening directly in front of me. I could hear Orr's fist strike Neil's face and vice versa. I could hear the players yell obscenities at each other. I could hear and feel their bodies crashing against the glass separating us from the ice. These two teams often talk about the hatred that has developed through rivalry¹ and the rivalry was evident on this night. I use the word lucky to describe this experience because, as my brother told me after the game, "some people go to games their whole lives waiting for something like that to happen". The fight ended when the

¹ Jonathan Willis, "Maple Leafs-Senators Rivalry Really One-Sided", Sportsnet (April 12, 2015) online: <<http://www.sportsnet.ca/hockey/nhl/maple-leafs-senators-rivalry-really-one-sided/>>.

referees got in between the two players, but the energy gained from the fistcuff was felt everywhere. The fans all over the arena were still cheering. The players next to us on the bench were all on their feet banging their sticks against the boards, seemingly giving their approval of the fight in support of their teammate who was being led to the penalty box. This experience has taught me one important detail about hockey fans: they thrive on violence.

This kind of enthusiasm surrounding hockey and violence is often tolerated due to the societal benefits of sports. Sports are an integral part of society as they are widespread across communities everywhere. They are a part of cultural and national identity. They are a source of entertainment, recreation, and social activity, and it is a way to make a living for professional athletes. The sport of hockey, for example, is the national winter sport of Canada, and it represents many Canadian values. Hockey players compete with skill, heart, and a touch of physicality. All those involved in the sport often celebrate the physical aspect of the game. The leagues profit from the physical nature of the sport since it sells tickets. Many fans want to see players hit each other and fight for the puck. The coaches often encourage players to use their bodies as an advantage to get control of the puck, and wear their opponents down. The media will portray such acts as great skill and truculence of the players. They show replays of big hits and knockout fights to draw the attention of viewers. Socially speaking, this is not problematic since it is a controlled environment and most potentially violent acts are within the rules of the game, whether the formal written rules or the unwritten customs of the game. But legally speaking, many acts that take place on the ice are assaultive in nature. For instance, a fistfight that takes place on the ice in the course of a hockey game is seen as acceptable and tolerable. Yet, if it takes place on the streets, it is an illegal assault subject to criminal prosecution.

The main question in this text will thus address the reasons for tolerating excessive violence in commercialized and professional hockey. A closer look at the regulation of hockey will indicate what kind of social control methods can be adopted to curb violent acts. A distinction will be made between formal and informal control. A prime example of formal control is the legal system. The justification for legal intervention is based on the assumption that participating voluntarily in contact sports does not automatically imply consent to all violence. However, professional hockey leagues have mechanisms of informal control in place to deal with on-ice conduct. As such, the legal system rarely intervenes. This thesis will examine the issues relating to the relationship between league self-regulation and the intervention of judicial courts in the affairs of hockey leagues. Both social and legal perspectives present one common question: what is too much violence? The determination of when a hockey player no longer consents to bodily contact is a question of degree that both society and the law have difficulty answering. With consideration to the social problem of hockey violence, the cultural and gender ideologies contributing to notions of violence, the impact of serious injuries, and the various mechanisms of social control, this thesis will address the obstacles of controlling hockey violence while protecting the integrity of the game.

The player perspective is a significant feature of this study and will assist in the determination of the kind of conduct that should be susceptible to criminal prosecution. Interviews were conducted with seventeen hockey players at different levels: university, junior A and the Ontario Hockey League (OHL). The interviews followed a vignette approach whereby the players were presented with fifteen scenarios of hockey violence. They were then asked what they believed the consequences should be in the given scenario and who should be liable for the injuries sustained in the incidents presented in the vignettes. These players clearly indicated that

intent to injure and the severity of the injury are essential variables in the determination of the criminal mindset. This suggests a starting point for the determination of what constitutes too much violence. The interviews concluded with several open-ended questions with the goal of allowing the players to define hockey violence and potential consequences in their own words. Very few respondents suggested that the law should never intervene, thereby conveying that there is such a thing as too much violence. The player perspective further suggests that league self-regulation is preferable to legal intervention. However, a sweeping majority of the respondents indicated that the law should intervene at some point to regulate the most excessive cases of hockey violence. As will be discussed throughout this paper, there is a fine line between legitimate and illegitimate violence. This remains a grey area in the law, and the respondents attempted to shed some light on it. As we will conclude, only the exceptional and rare cases of hockey violence should be subjected to the formal control of the law according to the player perspective. There are many factors that play into the legal decision to prosecute a hockey player for on-ice conduct. Each case is decided on its own facts since every act of hockey violence is different. The player perspective clearly shows that each hit and every case is unlike the next one, and the case law on this topic also shows a preference for a careful and objective examination on a case-by-case basis.

Chapter 1

1 « The Social Issue of Hockey Violence »

Sports play a significant role in society. According to Schot, it encourages determination, sportsmanship, increased fitness, and relaxation. It can also be associated with social interaction and the development of relationships.² It equally provides entertainment for those who watch sports. At times, the fan experience can be just as intense as those who participate.³ Vigorous sports are thus accepted by players and fans alike because of their social utility in providing exercise and entertainment. They provide a social benefit and value that is deemed worthy of tolerating behaviour that might be unlawful anywhere else.⁴ The entertainment factor is furthered by the ability to see sports anytime, whether it is on television or on the Internet. Consequently, athletes are exposed and their “words and actions have become a prominent component of public discourse and cultural notions of acceptable conduct”.⁵ Athletes become idolized for their sporting abilities, and inherently violent sports become the athlete’s arena for rule-controlled environments in which they can act with aggression. Despite the risk of injury, these sports continue to exist because their advantages seemingly outweigh the risks associated with potential excessive violence.⁶

Similarly, figurationalists Elias and Dunning suggest that people tend to feel constrained when social life is highly controlled and organized. They contend that sports provide activities in

² Natasha Schot, “Negligent Liability in Sport” (2005) 1 Sports Law eJournal 1 at 1.

³ Richard B. Perelman, “Violence in Professional Sports: Is It Time For Criminal Penalties?” (1982) 2 Loy LA Ent LJ 75 at 76.

⁴ J. Paul McCutcheon, “Sports Violence, Consent and Criminal Law” (1994) 45 N. Ir. Legal Q. 267 at 282.

⁵ Jeff Yates & William Gillespie, “The Problem of Sports Violence And The Criminal Prosecution Solution” (2002-2003) 12 Cornell Journal of Law and Public Policy 145 at 150-151.

⁶ John Barnes, *The Law of Hockey* (LexisNexis Canada, 2010) at 204.

which rules are shaped to foster emotion and excitement, without disrupting the social order of society, from the participant's point of view.⁷ As articulated by Trichka, "[u]nder the guise of the athletic competition, the individual is freed from the anxiety, guilt, and control which must normally be maintained in other life circumstances".⁸ More specifically, the rules in any sport must be fairly relaxed as to allow exciting action, but not so much that they permit uncontrolled violence and other forms of deviance. Elias and Dunning contend that when rules are too relaxed, sports can become sites for reckless and dangerous actions that can affect players' health and even social order. But when the rules are too constrained, the sports are boring and people lose interest.⁹ The challenge is thus to strike a balance and maintain it. The figurational approach focuses on the link between interpersonal conduct and the structure of society. It seeks to understand the structure and history of our tolerance to things in the human world.¹⁰ In application to sports, Elias and Dunning would argue that sport serves a distinctive function. This relates to the way in which sports leagues are able to showcase violence as part of the game. This violence is seen a withdrawal from every day life where acts of physical aggression and violence are normally illicit.¹¹ In other words, sports are seen as a different world from that of everyday life. As such, there are levels of violence that is accepted in hockey because sports are valued in society and the social benefits outweigh the risks of violence. However, there are levels of violence that could be perceived as being so egregious that they go beyond what is part of the game, according to the rules or customary norms of the game. The fine line between the two can be difficult to pinpoint.

⁷ Norbert Elias and Eric Dunning, *Quest for Excitement: Sport and Leisure in the Civilizing Process* (Oxford: Blackwell, 1986) at 150-174.

⁸ Robert E. Trichka, "Violence in Sport: Criminal Assault or Part of the Game?" (1993) 3 J Legal Aspects Sport 88 at 88.

⁹ Elias and Dunning, *supra* note 7 at 150-174.

¹⁰ Jay Coakley, *Sports in Society: Issues and Controversies* (New York, NY: The McGraw-Hill Companies, 2008).

¹¹ Elias and Dunning, *supra* note 7 at 150-174.

Violence is broadly defined as the use of excessive physical force, which can cause injury.¹² With regards to hockey, it is often associated with conduct that falls outside the rules of the game.¹³ Several sociologists¹⁴ have adopted four types of violence initially developed by Michael Smith to categorize the different levels of violence that exists and to provide a framework for understanding player violence. The first category is brutal body contact. This includes the regular body contact that is expected in a sport and accepted by the athletes as part of the game. For example, collisions, hits, and bodychecks are commonplace in hockey and accepted by the hockey world. This type of conduct is not considered illegal, and coaches often encourage it. The second category of violence is borderline violence, which includes acts that are outside the rules of the game, but within the customs of the sport. The fistfight in hockey is a prime example. The offending players will be penalized on the ice by the referee but no additional punishment is normally applied. This type of violence can sometimes attract public attention and pressure to increase the severity of the penalty. The third category is quasi-criminal violence. This includes conduct that violates the rules of the game, the customs of the game, and even state laws. Examples include cheap shots, late hits, sucker punches, and any action that endangers the player's body in a flagrant way. The leagues will normally impose supplemental discipline for this type of violence. Finally, the fourth type of violence is criminal violence. As stated by Coakley, "[t]his includes practices that are clearly outside the law to the point that athletes condemn them without question and law enforcement officials may prosecute them as crimes. Examples are assaults during a game that appear premeditated and severe enough to kill

¹² Coakley, *supra* note 10 at 196.

¹³ Anneliese Nelson, "Where, Where and Why does the State Intervene in Sport: A Contemporary Perspective" (2005) 7 Sports Law eJournal 1 at 10.

¹⁴ Coakley, *supra* note 10 at 198; Kevin Young, *Sport, Violence and Society* (Oxon: Routledge, 2012) at 19.

or seriously maim a player”.¹⁵ Similarly, Clarke defines illegitimate violence as assaultive behaviour that goes beyond what is part of the game and involves intent to injure and a subsequent injury.¹⁶ Criminal and illegitimate violence is quite rare, but it is this type of violence that will most likely attract the attention of police and prosecutors. Importance is given not only to the rules of the game but the customs of the game. It is possible to define some violence as acceptable in hockey because the players subculturally accept this conduct as part of the customs of the sport. In other words, what is perhaps viewed as excessive and unreasonable violence to some outsiders, the hockey world sees no issue with aggressive and violent behaviour on the ice because they have always behaved this way. In fact, competition is socially learned behaviour.¹⁷ Athletes are taught from the beginning of their hockey careers how to hit and be hit, and that intimidating opponents and using force to get what they want is favourable and should not be avoided. Consequently, these hockey players learn that being tough is an acceptable strategy and showcasing this strength will help them get noticed by the bigger leagues and perhaps help further their careers as athletes.¹⁸ As such, it can be difficult for a hockey player to know the difference between a legal aggressive play and a dangerous illegitimate form of conduct. They were conditioned to play aggressively and the line between acceptable and unacceptable conduct can be easily blurred. The players put a lot of heart in their game, which often results in emotional intensity and high tempers. As a result, minor scuffles can easily turn into bench-

¹⁵ Coakley, *supra* note 10 at 199.

¹⁶ C. Antoinette Clarke, “Law and Order on the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting Events” (2000) 32 *Ariz. St. LJ* 1149 at 1153.

¹⁷ *Ibid* at 1158.

¹⁸ *Ibid.*; Young, *supra* note 14 at 18.

clearing brawls.¹⁹ It can thus be difficult to distinguish the intent of the players in the heat of the game.

Another argument for criminal intervention is based on the belief that when violence is accepted in the hockey arena, it becomes socially accepted outside the sports context. One perspective presented by Oh is the “cultural spillover theory”.²⁰ This theory contends that the more violence is accepted in sports and the media, the more likely that violence will ‘spill over’ in other social settings.²¹ It sends a message to young athletes that using violent techniques is acceptable. It also instills in children that aggressiveness is a desirable trait that should be used to their advantage.²² Professional hockey players are role models to young individuals who watch the sport and ultimately follow their example in their own style of play. Minor hockey leagues, such as the OHL, have adopted a style of play that resembles the NHL in the sense that it allows body checks and fighting. This encourages young players to use strength and force as a hockey skill.²³ As children learn to model the behaviour of the professional hockey players, they adjust their attitudes according to the observation that society has a special tolerance for violent behaviour on the ice.²⁴ They realize that an assault on the ice during the course of a hockey game does not result in similar sanctions as an assault committed outside the sports arena. This sends the message that the law is not applicable in sports. As previously mentioned, fighting in hockey is tolerated and often encouraged, but a similar fight off the ice would most surely result in a

¹⁹ Tracey Oh, “From Hockey Gloves to Handcuffs: The Need for Criminal Sanctions in Professional Ice Hockey” (2005-2006) 28 *Hastings Comm & Ent LJ* 309 at 313.

²⁰ *Ibid* at 322.

²¹ *Ibid* at 322-323.

²² Matthew P. Barry, Richard L. Fox & Clark Jones, “Judicial Opinion On The Criminality of Sports Violence in the United States” (2005) 15 *Seton Hall Journal of Sports and Entertainment Law* 1 at 8.

²³ J.C.H. Jones & Kenneth G. Stewart, “Hit Somebody: Hockey Violence, Economics, the Law, and the Twist and McSorley Decisions” (2002) 12 *Seton Hall J Sport L* 165 at 175-176.

²⁴ This differs from the figurational approach, which contends that sports allow a healthy environment for participants to foster emotion and excitement in a rule-controlled environment. Rather, the cultural spillover theory suggests that excessive violence encourages young players to increase the level of physicality in order to play like professional players in ways that go beyond what is acceptable and tolerable in a minor hockey environment.

criminal charge.²⁵ As indicated in *R v Jobidon*,²⁶ sports have a social utility; so violent conduct is less assaultive in nature as opposed to a fistfight in the parking lot of a bar. Yet, hockey players continue to fight and young athletes continue to imitate the behaviour of their role models. And once young players learn how to use violence as a skill, they are often encouraged by their coaches to continue to play in that manner,²⁷ which ultimately contributes to the subcultural notions that violence is acceptable.

A central question in this thesis is whether hockey violence warrants judicial intervention. The law has already intervened in several cases, but it remains a grey area with little indication as to how it should be handled or whether it is even needed. There is some difficulty when involving the law due to the contradicting views surrounding hockey violence and whether it belongs in the criminal courts. In other words, is hockey violence a crime? Moreover, those who agree that hockey violence constitutes a criminal act have great difficulty defining the crime.

In order to help determine whether hockey violence is a crime and whether or not it belongs in the courts, Barry, Fox and Jones surveyed hundreds of judges across the United States to gain insight on their attitudes on the criminal and legal status of violence in sports.²⁸ The majority of the judges concluded that sports violence is a significant social problem, due to its influence on youth athletes. It is believed that violence spreads when parents and children see professional athletes behave violently and nothing happens. So the courts must intervene to put an end to the violence. One of the judges pointed out that there are inherent risks in contact sports such as hockey and football. But some athletes can cross the line of acceptable violence.

²⁵ Charles Harary, "Aggressive Play or Criminal Assault? An In Depth Look at Sports Violence and Criminal Liability" (2001-2002) 25 Colum JL & Arts 197 at 204.

²⁶ [1991] SCJ No 65, [1991] 2 SCR 714 [*Jobidon*].

²⁷ Richard B. Horrow, "Violence in Professional Sports: Is It Part Of The Game?" (1982) 9 J Legis 1 at 3.

²⁸ Barry et al., *supra* note 22 at 17.

And that line is difficult to pinpoint.²⁹ When the line of acceptable violence is crossed, it often results in serious injuries to some players. Despite the grey area surrounding this fine line, player injuries are an important factor in the determination of what type of conduct is part of the game and what goes beyond the inherent risks assumed by the players. In fact, most of the hockey players interviewed for this thesis indicated that injury is an essential variable in determining whether or not the violent conduct causing injury was really a part of the game. This can be problematic if the presence of a serious injury becomes the determining factor. The focus should be on the act as opposed to the consequences. In other words, the intention to commit a criminal act is more important than the damages it may cause. It is possible for a criminal act to be committed without consequence, yet it remains an illegal act. For example, drunk driving is a criminal act regardless of consequence. An individual who drives a vehicle under the influence and makes it home safely is just as guilty of drunk driving than someone who might have hit a pedestrian on the way home. The consequences are thus viewed as an aggravating factor.

1.1 « Player Injuries »

A large number of athletes miss several games every year due to injuries sustained in violent incidents on the ice.³⁰ The extent to which athletes consent to injury is a prominent issue in sports litigation. While it is accepted that hockey players consent to the reasonably foreseeable injuries that may arise by voluntary participating in hockey games, there are some risks that are potentially unknown to the players. As Brad Maxwell, a ten-year veteran of the NHL, has said, “[w]e knew hockey could damage our bodies physically, but never expected it could damage us

²⁹ *Ibid* at 18.

³⁰ Horrow, *supra* note 27 at 1.

mentally and lead to a host of cognitive and neurological conditions years after we left the game”.³¹ While severe, career-ending injuries are not that frequent, the injuries are cumulative. Minor injuries and short term damage is standard in the game of hockey. A player who suffers a multitude of injuries throughout his career could face long term effects long after he retires. As of January 10th, 2015, a total of eighty-seven NHL players are injured and not playing hockey. Of those eighty-seven players, seventy are on injured reserve.³² A team can place an injured player on the injured reserve list if he is expected to be unable to perform his duties for a minimum of seven days due to an injury, illness, or disability.³³ There are thirty teams in the NHL, with each team allowed a maximum of twenty-three roster players. This means that these eighty-seven injured players represent twelve percent of current active NHL players. At the end of the 2014-2015 NHL season, there were one hundred and six players on the injured list.³⁴ Some players are on long-term injured reserve, which means they could miss an entire season or several seasons. It could also mean they will never return to the NHL. For instance, Chris Pronger, an 18-year veteran of the NHL and future hall-of-famer, has not played in the NHL since December 2011 due to post-concussion syndrome. And it is speculated that he may never play hockey again.³⁵ Accordingly, the consequences of hockey injuries can be costly for players and teams alike.

³¹ Brad Maxwell, “NHL Must Address History of Brain Injuries”, Star Tribune (January 7, 2015) online: <<http://www.startribune.com/opinion/commentaries/287857521.html>>.

³² TSN.ca, “NHL Injuries”, (January 27, 2015) online: <<http://www.tsn.ca/nhl/injuries>>.

³³ National Hockey League, *Collective Bargaining Agreement Between National Hockey League and National Hockey League Player’s Association* (February 15, 2013) online: <http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf> [CBA] at Article 16.11(a).

³⁴ TSN.ca, “NHL Injuries”, (April 12, 2015) online: <<http://www.tsn.ca/nhl/injuries>>.

³⁵ NHL.com Staff, “Report: Flyers’ Pronger ‘never going to play again’”, NHL (October 15, 2013) online: <<http://www.nhl.com/ice/news.htm?id=686848>>.

Players like Pronger must also deal with the repercussions of head injuries long after their careers are over since concussions are a fairly common injury in hockey. Individuals who have suffered one or two concussions become more susceptible to concussions, and the more risk he or she faces at sustaining permanent brain damage.³⁶ Some have also linked concussion issues as a leading cause of suicide. Some post concussion effects can include attention disorders; memory issues; sleep disruption; headaches and dizziness; sensitivity to light; personality change; social decline; and other psychological problems.³⁷ The sport of football, for instance, which is well known for its violent nature, has seen a number of former professional players commit suicide. In February 2011, former National Football League (NFL) player Dave Duerson committed suicide and asked in a note that researchers study his brain after his death.³⁸ The following year, Junior Seau took his own life. Seau was a veteran of the NFL having spent 20 years playing professional football. It was reported that he might have suffered as many as 1,500 undiagnosed concussions during his NFL career.³⁹ Following his suicide, the examinations of his brain tissue showed evidence of “chronic traumatic encephalopathy” (CTE), despite the fact that he had never been diagnosed with a concussion during his career. At age forty-three, Seau’s brain was in the condition of a 90 year old brain with Alzheimer’s disease.⁴⁰ CTE is a degenerative brain disease that can only be diagnosed after death. It is often linked to athletes who suffer frequent hits to the head. It has recently been reported that it might be possible to diagnose CTE in living

³⁶ Hanna Kong, “For The Love of The Game: Trading Money for Brain Cells” (2013) 2 *Miss Sports L Rev* 115 at 118.

³⁷ *Ibid* at 120.

³⁸ Geoffrey Christopher Rapp, “Suicide, Concussions, and the NFL” (2012-2013) 8 *FIU L Rev* 123 at 128.

³⁹ *Ibid*.

⁴⁰ André Douglas Pond Cummings, “Junior Seau, Head Trauma, and the NFL’s Concussion Problem” (2013) 2 *Miss Sports L Rev* 45 at 47.

patients.⁴¹ An American neurosurgeon conducted a study on twenty living subjects where he concluded that he was able to detect CTE. Despite several criticisms from the medical community, this type of testing can benefit professional athletes who want to know the extent of their head injuries.

Such problems also persist in the NHL. Hockey teams are often seen employing tough players who are known as “enforcers”. These enforcers are expected to fight in support of their team. For instance, a former NHL enforcer, Derek Boogaard, suffered the same injuries as a professional fighter during his hockey career.⁴² He broke his nose, jaw, hand, and teeth several times during his career. He wore sunglasses, complaining that he was sensitive to light, and he took pills to help with the pain. Before his death, his friends noticed a change in personality, whereby he became childlike and suffered from extreme loneliness. He died at the age of 28 from an accidental drug and alcohol overdose while dealing with a concussion. It was later reported that he suffered from an advanced case of CTE.⁴³ Boogaard’s family subsequently filed a lawsuit against the NHL for wrongful death stating that the league was to blame for the former NHL player’s brain damage.⁴⁴ With the new possibility of detecting CTE in living patients, some hockey players have shown interest in undergoing the test. The goalie for the Toronto Maple Leafs, James Reimer, wrestled with the question of finding out if he has CTE despite the lack of a cure, and ultimately determined that he would still like to know. As a player with a history of

⁴¹ Rick Westhead, “A possible breakthrough on testing CTE”, TSN (February 19, 2015) online: <<http://www.tsn.ca/talent/medical-breakthrough-prompts-talk-of-testing-active-nhlers-for-cte-1.210725>>.

⁴² Kong, *supra* note 36 at 116-117.

⁴³ *Ibid* at 117.

⁴⁴ CBC Sports, “Derek Boogaard’s family files lawsuit against NHL”, (12 May 2013) online: <<http://www.cbc.ca/sports/hockey/nhl/derek-boogaard-s-family-files-lawsuit-against-nhl-1.1337272>>.

concussions,⁴⁵ Reimer stated that, “the more knowledge you have about your medical situation, the better. It helps you make more informed decisions. If you have a torn ankle, you want to know how badly torn it is. Same with your brain, if it’s damaged, you want to know how bad”.⁴⁶ Furthermore, a retired Maple Leafs player, Darryl Sittler indicated that having a baseline for determining the extent of head injuries could help the league improve the safety of the game.⁴⁷ This development of testing for CTE on living patients, if proven to work, will certainly affect the way the leagues and players approach legal recourse. Some players might be hesitant to receive the CTE test knowing that there is no cure for it. However, with such medical testing available to the athletes, it will be difficult for players who refuse the test to later blame the league for their head injuries and cumulative damage. Some players might be concerned with finding out they have CTE for fear that it might prevent them from securing insurance coverage or workers’ compensation, or even an NHL contract. Certain teams might perceive a player suffering from CTE as a liability risk, which in turn leaves the player unemployed.⁴⁸ Therefore, as this medical breakthrough progresses, it will be important for everyone in the hockey world to weigh the advantages and the risks of CTE and determine the best approach to maintain the safety and health of the athletes.

When it comes to injuries sustained during a violent in-game incident, league administrators and athletes often have opposing views. The Commissioner of the NHL has suggested that there is not a whole lot of data available on head injuries so they cannot act

⁴⁵ Mike Zeisberger, “Another Scare for Maple Leafs’ James Reimer”, The Toronto Sun (October 12, 2014) online: <<http://www.torontosun.com/2014/10/12/another-scare-for-maple-leafs-james-reimer>>.

⁴⁶ Westhead, *supra* note 41.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

against violent hits and dangerous plays in hockey.⁴⁹ Similarly, the Commissioner of the NFL, Roger Goodell claims that a key point in managing concussions relies on the athletes and their ability to self-report their symptoms following an injury,⁵⁰ and once even suggested that the culture of football must be changed in order to promote a setting where players are more comfortable in protecting their own health.⁵¹ It will be interesting to see if CTE testing can produce further data for professional sports leagues to use in the maintenance of player safety. It might aid the leagues in promoting a safer environment for their players instead of subjecting them to excessive violence and placing the onus on the athletes.⁵² Some athletes might be reluctant to self-report their symptoms for fear of being taken out of the game and losing their roster spot to someone else.

It has been suggested that teams might jeopardize the health of their players to make sure they stay in the game. For instance, Herbert argues that doctors employed by the team can be influenced by their employers to send players back out into the game sooner than they should.⁵³ Some athletes have said that team doctors sometimes dismiss their physical injuries as psychological issues and send them back out onto the field or the ice.⁵⁴ Maxwell has discussed this issue and questioned the efficiency of the medical services in the league. He considered the fact that he has suffered several concussions during his career but the team doctors never told him to take time off:

I suffered at least three or four concussions in my NHL career, and many other head hits, but I never missed substantial playing time because of these serious brain injuries. Team doctors never suggested that I receive a medical evaluation or take some time off. After those times

⁴⁹ Kong, *supra* note 36 at 132.

⁵⁰ J. Brad Reich, “When “Getting Your Bell Rung” May Lead to “Ringing Your Bell”: Potential Compensation for NFL Player Concussion-Related Injuries” (2012-2013) 12 Va Sports & Ent LJ 198 at 219.

⁵¹ John G. Culhane, “Not Just The NFL: Compensation, Litigation, and Public Health in Concussion Cases” (2012-2013) 8 FIU L Rev 5 at 12.

⁵² Reich, *supra* note 50 at 219.

⁵³ Teresa Herbert, “Are Player Injuries Adequately Compensated?” (2000) 7 Sports Law J 243 at 244.

⁵⁴ *Ibid.*

when I'd had my "bell rung," my only treatment was to wait it out — which often meant a few line shifts, not days or weeks to let my brain heal.⁵⁵

If a player sustains a serious injury, such as Maxwell describes, there should be methods in place to properly deal with them. And without proper laws on safety and concussions, it is unlikely that leagues will change their current practices. These practices have in fact resulted in total medical costs upwards of two billion dollars per year in Canada.⁵⁶ While head injuries are a major problem in various violent sports, it is possible that "by addressing a problem publicized in one sport, these laws may end up reducing the overall incidence of concussions simply by drawing attention to problems in other sports that may have long been overlooked".⁵⁷ In other words, by addressing the problem of head injuries in hockey, it could have a spillover effect into other sports and ultimately reduce the number of serious sports injuries.

Some literature on the topic of sports violence puts further emphasis on player safety and injuries. Donaldson, Asbridge and Cusimano conducted a study on the effects of body checking and other violent acts in hockey.⁵⁸ They realized that body-checking incidents in the NHL were the cause of many devastating injuries. The NHL has adopted certain rules in order to minimize the risk of injury and improve player safety⁵⁹ but this study shows that these rules are essentially ineffective without consistent enforcement. The authors investigated concussions that occurred in three consecutive NHL regular seasons in order to evaluate the impact of the league rules

⁵⁵ Maxwell, *supra* note 31.

⁵⁶ Barnes, *supra* note 6 at 200.

⁵⁷ Culhane, *supra* note 51 at 16.

⁵⁸ Laura Donaldson, Mark Asbridge and Michael D. Cusimano, "Bodychecking Rules and Concussion in Elite Hockey" (2013) 7 PLOS One 1.

⁵⁹ For example, in 2011, the NHL adopted a new concussion protocol in order to properly deal with players suspected of having a concussion. These players are now forced to leave the game with the team physician and be examined in a quiet room. Before this protocol, the player was simply examined on the bench during the game. See Dan Rosen, "New Concussion Protocol goes into effect tonight", NHL.com (March 16, 2011) online: <<http://www.nhl.com/ice/news.htm?id=556289>>.

regarding body checking.⁶⁰ They studied injury reports and they did a retrospective cross-sectional analysis of NHL as well as OHL games, which involved 2211 hockey players from both leagues.⁶¹ They collected data by taking a look at penalty calls in the course of ten randomly selected weeks. They also studied player statistics and concussion reports from the leagues during those ten weeks.⁶² Donaldson et al. came to an interesting conclusion: most NHL concussions resulted from behaviour within the rules of the game.⁶³ Coakley came to a similar conclusion when he stated that 90 percent of serious injuries occur within the rules of the game.⁶⁴ This conclusion raises the question of how violence can be minimized using criminal law if most injuries are taking place after a legal act. In other words, athletes are playing according to the rules of the game, yet devastating injuries are still occurring.

Donaldson et al. concluded that body checking was the most common cause of concussions and concussion like symptoms. Similarly, Coakley is under the impression that brutal body contact, which includes regular body contact such as a legal full body check, is the most difficult type of violence to control.⁶⁵ Players continue to hit each other dangerously despite the fact that the NHL and the OHL have rules in place to prevent devastating hits from happening, such as rules that disallow hits to the head, elbowing, and charging. So these authors concluded that rules could have no effect unless they are enforced.⁶⁶ As long as team owners and league officials do not have proper incentive, they have no reason to control their violent players.⁶⁷ Donaldson, Asbridge and Cusimano suggest that third parties like insurance companies

⁶⁰ *Ibid* at 1.

⁶¹ *Ibid* at 1-2.

⁶² *Ibid* at 2.

⁶³ *Ibid* at 3.

⁶⁴ Coakley, *supra* note 10 at 209.

⁶⁵ *Ibid*.

⁶⁶ Donaldson et al., *supra* note 58 at 5.

⁶⁷ Coakley, *supra* note 10 at 210.

and sponsors should get involved in order to reinforce league regulations. This could be beneficial seeing as insurance companies are the ones who will be responsible for compensating an injured athlete, especially following a civil lawsuit. Nonetheless, player injuries are a serious consequence to violent behaviour in hockey, a game that creates a culture that is tolerable of violence.

1.2 « The Culture of Hockey and Violence »

The participants in the subculture of hockey share unique behaviours, language, and values. It is evident that an essential aspect of any world is the culture that is created among its participants. Culture often refers to beliefs, behaviours, objects, and other characteristics that are necessary in a specified world. People are able to define themselves through a culture's shared values, language, customs, norms, rules, products, and organizations. Within the social world of hockey, the athletes are resocialized and, consequently, their attitudes are subject to transformation based on the environment they find themselves in. According to some authors, this creates a culture regarding violence that frames in-game violence as non-criminal and socially unthreatening, which supports a tolerance for violence.⁶⁸ In fact, since players subculturally accept most forms of violence, not much concern is given to the athletes that suffer harm from the consequences.⁶⁹

Before the culture of violence can be addressed, it is important to highlight how the cultural roots of hockey influences the individuals who participate in the sport. For instance, when looking at the big picture, one can see that hockey is a part of Canadian culture, which

⁶⁸ Michael Atkinson and Kevin Young, *Deviance and Social Control in Sport* (Champaign: Human Kinetics, 2008) at 171.

⁶⁹ Michael Atkinson, *Deconstructing Men and Masculinities* (Don Mills, ON: Oxford University Press, 2011) at 138.

means there are several Canadian values found in hockey. Canadians invented the game, they regulated it, and they attached cultural meanings to it. Canadian Parliament even made hockey Canada's national winter sport in the *National Sports of Canada Act*.⁷⁰ The national sports are thought to exemplify all the traits of Canadian character. In other words, hockey is meant to spread ideas of what it means to be Canadian.⁷¹ For some, hockey is an expression of the ability of Canadians to survive in a land of snow and ice, long winters, and vast open spaces.⁷² For others, the physical component of the game is the essence of Canadian hockey.⁷³ Whitson and Gruneau describe the cultural setting of Canadian hockey as follows:

Hockey is our game; it expresses something distinctive about how we Canadians have come to terms with our unique northern environment and landscape; it is a graphic expression of "who we are"; the game's rough masculinity is a testament to the distinctive passion and strength of the Canadian character; we are better at it than anyone else in the world; and the National Hockey League is the pinnacle of the game.⁷⁴

International competition further contributed to ideas that hockey was ultimately Canadian. After all, Canadian hockey players had the passion, skill, and physicality that were needed to be the best in the world.⁷⁵ For example, the 1972 Summit Series between Canadian NHL players and the Soviet national team took place as a result of the debate surrounding Canadians and their place within international hockey.⁷⁶ Canada won that series, thanks to a last minute goal by Paul Henderson. A goal that "united Canada",⁷⁷ and made Henderson a national

⁷⁰ SC 1994, c. 16.

⁷¹ Kristi A. Allain, "Kid Crosby or Golden Boy: Sidney Crosby, Canadian National Identity, and the Policing of Hockey Masculinity" (2005) 46 *International Review for the Sociology of Sport* 3.

⁷² David Whitson & Richard Gruneau, *Artificial Ice: Hockey, Culture, and Commerce*. Peterborough, ON: Broadview Press, 2006.

⁷³ Michael Robidoux & Pierre Trudel, "Hockey Canada and the Bodychecking Debate in Minor Hockey" In David Whitson & Richard Gruneau (eds) *Artificial Ice: Hockey, Culture, and Commerce*. Peterborough, ON: Broadview Press, 2006.

⁷⁴ Whitson and Gruneau, *supra* note 72 at 4.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Lance Hornby, "Paul Henderson's Goal Brought Canada Together", *The Toronto Sun* (September 1, 2012) online: <<http://www.torontosun.com/2012/09/02/paul-hendersons-goal-brought-canada-together>>.

hero. More recently, over 16 million Canadians⁷⁸ tuned in to see Sidney Crosby score the golden goal at the 2010 Winter Olympics in Vancouver. Crosby was a national hero that day, and will likely always be remembered as such. Anything less than a gold medal on Canadian soil was simply unacceptable.

But what does it mean to be a Canadian hockey player? It has been suggested that these players “are polite, humble, gentlemen off the ice, and warriors who are willing to battle on the ice”.⁷⁹ For Adams, if hockey is the identity of Canadians, then life in Canada is primarily masculine and white.⁸⁰ The masculine character of the stereotypical Canadian hockey player is a result of sports being a male-dominated social world, where women are considered to be qualified athletes only when they perform like men. More specifically, being qualified to be an athlete in the social world of sports often means possessing characteristics of masculinity.⁸¹ Sports have often constructed men as strong, physical, and active while women were expected to be weak, passive, and taking part in domestic affairs.⁸² When women play sports, they become strong and no longer represent that ideology. Coakley believes that the real issue regarding gender ideologies is that women who play sports are often criticized for not being as good as men. For example, “[women] play hockey, but they don’t check or fight as in the NHL”.⁸³ Atkinson and Young speak of hegemonic masculinity to explain how it constructs the male

⁷⁸ Houpt, Simon, “Paul Henderson’s Summit Series-Clinching Goal United Canada”, *The Toronto Sun*. (February 24, 2014) Online: <<http://www.torontosun.com/2012/09/12/hendersons-goal-united-canada>>.

⁷⁹ Allain, *supra* note 71 at 4.

⁸⁰ Mary-Louise Adams, “The Game of Whose Lives? Gender, Race, and Entitlement in Canada’s “National” Game” In Whitson, David and Richard Gruneau (eds). 2006. *Artificial Ice: Hockey, Culture, and Commerce*. Peterborough, ON: Broadview Press at chapter 3.

⁸¹ Coakley, *supra* note 10 at 246-247.

⁸² Kevin B. Wamsley, “The Public Importance of Men and the Importance of Public Men: Sport and Masculinities in Nineteenth Century Canada” In Kevin Young and Philip White (eds), *Sport and Gender in Canada* (Don Mills, ON: Oxford University Press, 2007) at 84-85.

⁸³ Coakley, *supra* note 10 at 245.

identity as one with strength, courage, dominance, emotional detachment, and authority.⁸⁴ Those male athletes who wish to reproduce hegemonic standards of masculinity often use violence to demonstrate their strength and dominance over others. In fact, it can be argued that athletes learn how to use violence and aggression since childhood to prove their manhood.⁸⁵ According to Atkinson, certain codes of masculinity can explain some of the violent conduct that takes place in sport.⁸⁶ It is partly due to the dominant social position of men being embedded into the cultural practices of certain sports.⁸⁷ However, not all men typically attain the ideal masculine traits, including many hockey players. This creates a “dangerous cultural ideal in sports”⁸⁸ since the culture of hockey creates an atmosphere “where masculinity in its hegemonic form is both subculturally valued and commercially showcased”.⁸⁹ This atmosphere often leads male hockey players to use their bodies as weapons⁹⁰ in a setting where physical injury is already very common. Considering that sports make masculine values appear so natural, like the fostering of male bonding and male authority,⁹¹ it is logical to think of sports as a subculture that preserves gender ideologies.

On his CBC program *Coach's Corner*, Don Cherry is often shown encouraging hockey players to be more physical and he praises those who show traits of hegemonic masculinity. He often discusses the importance for players to fight and be aggressive in order to help the team win games.⁹² More recently, Cherry blamed ‘nerds’ for the lack of fighting in the NHL.⁹³ By

⁸⁴ Atkinson, *supra* note 69 at 136; Atkinson and Young, *supra* note 68 at 172.

⁸⁵ Varda Burstyn, *The Rites of Men: Manhood, Politics, and the Culture of Sport* (Toronto, ON: University of Toronto Press, 1999) at 164.

⁸⁶ Atkinson, *supra* note 69 at 134.

⁸⁷ *Ibid* at 136-137.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*.

⁹⁰ *Ibid*.

⁹¹ Coakley, *supra* note 10 at 202-203.

⁹² Allain, *supra* note 71 at 15; Daniel J. Zajda, “A True Home Field Advantage: A Striking Coincidence in the Criminal Prosecutions of Professional Athletes for In-Game Violence” (2011) 18 *The Sports Lawyers Journal* 1 at 4.

nerds, Cherry presumably means those who do not believe that fighting has a place in hockey. As a result, Cherry suggests that they are to blame for all the injuries sustained by star players this season. Since there are substantially less enforcers in the league, there is no payback and no one to fear while on the ice.⁹⁴ This discussion occurred shortly after star player Patrick Kane suffered a fractured left clavicle. Cherry's argument was that despite the fact that you cannot have fighting all the time, the simple idea that the enforcers are there is enough to prevent players from attacking star players, like the Kane incident where he was cross-checked and suffered the fracture.⁹⁵ This type of mentality from coaches and players alike often results in the potential for excessively violent behaviour in the course of a hockey game. It can be said that there is a belief system among hockey players and coaches that aggressiveness and violence can be used as a tactic to win games. But what happens when a player refuses to fight or does not subscribe to the mainstream belief system? It has been suggested that the support for aggressiveness and tolerance of violent behaviour creates barriers for the athletes who do not agree that violence is a part of the game.⁹⁶ The support for enforcers in the NHL also puts a number of tough guys at risk of serious injury. While the argument that star players need protection is warranted, seeing as more and more skilled players will be targeted if there are no consequences, the view that more enforcers are needed on the ice is a dangerous tactic. It has happened many times where the enforcers of two opposing teams drop the gloves and serious injuries occur as a result of the fight.⁹⁷ If the presence of enforcers was limited to protecting star players, it seems logical that

⁹³ Sean Fitz-Gerald, "Don Cherry blames 'nerds' for lack of fighting in NHL, says Toronto Maple Leafs would be respected if they fought", National Post (February 28, 2015) online: <<http://news.nationalpost.com/sports/don-cherry-blames-nerds-for-lack-of-fighting-in-nhl-says-toronto-maple-leafs-would-be-respected-if-they-fought/>>.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Atkinson, *supra* note 69 at 139.

⁹⁷ Bruce Arthur, "Colton Orr Remnant of NHL's Enforcer Past", The Toronto Star (April 9, 2015) online: <<http://www.thestar.com/sports/hockey/2015/04/09/colton-orr-remnant-of-nhls-enforcer-past-arthur.html>>;

Cherry's point regarding tough guys on the ice might be valid. However, the use of enforcers will likely always result in staged fights, namely fights that occur immediately off a faceoff or early in the game with no previous conflict,⁹⁸ and serious injuries to the players hired simply to throw punches. This type of violence might be difficult to regulate since male players, who comprise the entire NHL, and minor leagues such the CHL and AHL, seemingly view this type of conduct as legitimate.

According to Messner, the tendency to use violence in sports is learned behaviour. He interviewed hockey players and concluded that men appear to be predisposed to violent behaviour and to view aggression as legitimate and natural.⁹⁹ Similarly, Theberge states that the use of skill and force in sports is a feature of masculine identity. In constructing a profile of players' athletic identities, Theberge suggests that women were viewed as fragile and weak¹⁰⁰ compared to male athletes, who are not expected to "cry, whine, wince, complain, or back down in the face of a physical challenge".¹⁰¹ Body contact is much more limited in women's hockey, whereas men's hockey allows more room for aggression and violent behaviour.¹⁰² As a result, men are more inclined to be aggressive on the ice because the rules of the game allow them to play as such. As Messner states, "for most of the men whom I interviewed, successful competition within the rule bound structure of sport was [...] the major basis of their relationship with the world, and thus their identities. Aggression "within the rules", then is considered

Canadian Press, "Montreal Canadiens Enforcer George Parros suffers second fighting-related concussion of the season", *The National Post* (December 16, 2013) online: <<http://news.nationalpost.com/sports/nhl/montreal-canadiens-enforcer-george-parros-suffers-second-fighting-related-concussion-of-the-season>>.

⁹⁸ Nicholas Goss, "The NHL Should Never Ban Fighting, but Staged Fights Have No Place in the Game", *The Bleacher Report* (March 8, 2013) online: <<http://bleacherreport.com/articles/1558792-the-nhl-should-never-ban-fighting-but-staged-fights-have-no-place-in-the-game>>.

⁹⁹ Michael A. Messner, "When Bodies are Weapons: Masculinity and Violence in Sport" (1990) 25 *International Review for Sociology of Sport* 203 at 205.

¹⁰⁰ Nancy Theberge, "It's Part of the Game": Physicality and the Production of Gender in Women's Hockey" (1997) 11 *Gender and Society* 69 at 69.

¹⁰¹ Atkinson, *supra* note 69 at 138.

¹⁰² Theberge, *supra* note 100 at 73.

legitimate and safe”.¹⁰³ As will be shown in the discussion of relevant case law, the rules of the game play an important role in determining what violent conduct is acceptable and consented to by the participants.

1.3 « Social Relations »

The player’s identity is only one factor that can contribute to violence in hockey. The different social relations between the player and others within the world can also be a factor. Whether it’s the influence of the league on the teams; the coaches on the players; or the media and fans on the players, there is pressure to play well from many sources. A primary example is the influence of the coach on the players. Coaches play a significant role in how players behave on the ice. They are known to encourage aggression and often support violent conduct in a game when a team is in need of a competitive edge. It is common for coaches to raise the emotional intensity of their players, especially during pre-game preparation.¹⁰⁴ For example, in 1982, a hockey player named Paul Mulvey was encouraged by his coach to fight an opposing player. Mulvey refused to fight and was subsequently threatened by his coach that if he did not fight, he would never play another game for the team again. The player did not fight and, not only did he never play for the team again, he never played another game for any team in the NHL.¹⁰⁵ Mulvey was then known to other players in the league as a player who would not stand up for his teammates. Further, former NHL President Clarence Campbell has once stated that players are under a lot of

¹⁰³ Messner, *supra* note 99 at 209-210.

¹⁰⁴ Clarke, *supra* note 16 at 1160.

¹⁰⁵ Harary, *supra* note 25 at 203; Oh, *supra* note 19 at 317-318.

pressures from teammates and fans to stand up for their teams and fight. If they refuse to do so, they are often labeled as “cowards”.¹⁰⁶

It has also been suggested that once players learn the skill of how to use violence as an advantage, coaches and teammates will often pressure them to continue to behave violently. In fact, “in a game in which players literally fight for the puck, aggressiveness and violence are part of any player’s learned repertoire of hockey skills”.¹⁰⁷ In addition, when coaches ask their players to use aggression and to play rough, players often understand this to mean they can do whatever it takes to eliminate an opponent.¹⁰⁸ For example, when Todd Bertuzzi filed his statement of claim following a civil lawsuit from Steve Moore, Bertuzzi claimed that his coach encouraged him to retaliate against Moore.¹⁰⁹ A few years prior to the Bertuzzi incident, another player, Marty McSorley, who was involved in a criminal matter against an opponent, Donald Brashear, declared that his coach instigated the altercation.¹¹⁰ In fact, the court recognized that when McSorley’s coach ordered him to go onto the ice with twenty seconds left in the third period, McSorley knew that it was a clear message to go after Brashear. McSorley thus had two reasons to fight Brashear: (1) to follow his coach’s orders; and (2) to give his team some pride to take into the next game.¹¹¹ This demonstrates the importance of social relations within the world of hockey. It suggests that if a player is pressured by his coach and teammates to be aggressive, it is likely that he will give in to this pressure.

¹⁰⁶ Horrow, *supra* note 27 at 2.

¹⁰⁷ Robidoux and Trudel, *supra* note 73 at 102.

¹⁰⁸ Horrow, *supra* note 27 at 3.

¹⁰⁹ Patrick K. Thornton, “Rewriting Hockey’s Unwritten Rules: Moore v. Bertuzzi” (2009) 61 *Maine Law Review* 205 at 210-211.

¹¹⁰ Harary, *supra* note 25 at 203-204.

¹¹¹ *R v McSorley*, [2000] BCJ No 1993, 2000 BCPC 116 [*McSorley*] at para 86; See page 59 of this text for the facts and reasoning of the court in *McSorley*.

A hockey player also faces pressure from other sources, such as media and the fans. The media often portrays violence as an attractive feature of hockey. It supports the notion that any violent behaviour that takes place on the ice is not criminal, which is customary in the subculture of hockey. It also suggests that violence enhances the marketability of hockey.¹¹² It is often argued that hockey leagues promote violence to increase attendance and profits. Maxwell shares this belief and stated that

[t]he NHL condones and promotes brutality in a way like no other sport. Only the NHL allows — even encourages — players to fight each other and put their health and safety on the line. The league believes that skill and athleticism go hand in hand with violence — and in fact has glorified it and used it as a marketing tool.¹¹³

This idea that the NHL encourages violence is likely based on the assumption that fans have a taste for violence and, consequently, violence attracts larger crowds.¹¹⁴ League administrators are less inclined to reduce violence when big crowds and more fans equal larger revenue streams. Self-regulated leagues might find themselves in a position where they choose not to punish violent conduct too harshly since it could potentially impede on their financial stakes.¹¹⁵ For example, some research has shown that a larger rink size would reduce the amount of fighting in hockey since there would be less overcrowding on the ice.¹¹⁶ However, the NHL is not interested in enlarging the rink size since it would mean taking out many lower bowl seats in the arena. Less seats means less revenue generating ticket sales.¹¹⁷ In fact, ice rinks are much larger outside North America. European hockey rinks are about two-hundred feet long and

¹¹² Horrow, *supra* note 27 at 3.

¹¹³ Maxwell, *supra* note 31.

¹¹⁴ Jones, J.C.H., Stewart, K.G. & R. Sunderman, “Blood Sports and Cherry Pie: Some Economics of Violence in the National Hockey League” (1993) 52 *American Journal of Economics and Sociology* 63.

¹¹⁵ Barry et al., *supra* note 22 at 15; Oh, *supra* note 19 at 317.

¹¹⁶ Oh, *supra* note 19 at 318.

¹¹⁷ *Ibid.*

ninety-eight feet wide¹¹⁸ whereas North American ice rinks are two-hundred feet long and eighty-feet wide.¹¹⁹ The width of the North American rink is thus about eighteen feet smaller. It is said that hockey played on this smaller rink is much faster and quick decisions must be made in order to make skilled plays and avoid big hits.¹²⁰ The larger rink size is normally attributed to a less physical game because players have more time to make plays. On smaller ice pads, players commonly crash into each other, and players use their big bodies to their advantage.¹²¹ It may be this is what makes hockey so popular in North America. As one reporter once stated about the violent nature of hockey, “how did hockey come to this place? How did the game come to be this way? Truth is [...] it has always been this way. And maybe, just maybe, that’s why we like it. Maybe we like a little blood with our beer and our popcorn [...]”¹²² And if spectators enjoy the fights, why punish the players for participating in conduct that brings in revenue for the team owners? However, this theory ignores the idea that despite the NHL losing fans if it became less violent, it could also attract new ones who currently do not like the game due to its excessive levels of violence. Hockey leagues in other regions, such as European hockey, are still very successful despite its lower levels of violence. Despite the fact that their North American counterparts occasionally deride them for not being “tough enough”, the sport is still very popular in regions where the ice pads are larger.

Public opinion can also influence the attitudes of others in the world of hockey. If the media, fans, and the league itself want to keep violence in the game, it could influence the way

¹¹⁸ Kontinental Hockey League, KHL, SHL, JHL Official Rule Book (2013) online:

<http://en.khl.ru/documents/rules/KHL_official_rulebook_2013-2014_eng.pdf> at Rule 101.

¹¹⁹ National Hockey League, *Official Rules 2014-2015*, online: <<http://www.nhl.com/nhl/en/v3/ext/rules/2014-2015-rulebook.pdf>> [Rule Book] at Rule 1.2.

¹²⁰ Michael G. Morreale, “Zacha Making Transition to North America Look Simple”, NHL.com (December 11 2014) online: <<http://www.nhl.com/ice/news.htm?id=743383>>.

¹²¹ *Ibid.*

¹²² Adams, *supra* note 80.

courts handle sports violence cases.¹²³ The attitude of the courts could, in turn, influence the outlook of the players. In other words, it is possible that the players do not view their violent acts as criminal assaults since courts are not taking action to deter this type of behaviour. If the courts began to take sports violence cases more seriously, it is possible that hockey players would adopt a different mentality and behave less violently on the ice. However, the courts have shown some interest in reducing the violence that has become so common in the game of hockey. For example, the court in *R v Cicarelli*¹²⁴ stated that “violence in hockey must be curbed”.¹²⁵ Further, in *R v Bertuzzi*,¹²⁶ the court declared that assaults occurring during a hockey game are violent, and violence will not be tolerated in Canadian society.¹²⁷ If a greater number hockey violence cases eventually end up in criminal court, it is reasonable to believe that these precedents will be followed and an effort will be made to reduce the violence. In recent years, the courts have received some cases that touch on hockey violence and the need to curb such conduct. The next section will review the internal sanctioning methods of the NHL and the possibility of criminal prosecution with consideration given to the *Criminal Code* and case law.

¹²³ Gilles Létourneau & Antoine Manganas, “La tolérance des droits pénal et sportif, source de violence dans les sports” (1976) 17 *Les cahiers de droit* 741.

¹²⁴ [1989] OJ No 2388, 54 CCC (3d) 121 [*Cicarelli*].

¹²⁵ *Ibid* at para 8.

¹²⁶ [2004] BCJ No 2692, 2004 BCPC 472 [*Bertuzzi*].

¹²⁷ *Ibid* at para 3.

Chapter 2

2 « Social Control »

Social control establishes the norms of social life. It includes the definition for deviant behaviour and the responses to it, such as prohibition, accusations, punishment, and compensation.¹²⁸ According to Black, law is social control, but so is etiquette, custom, ethics, and so on. Social control can be found anywhere individuals are holding each other to certain standards.¹²⁹ It is a quantitative variable in the sense that one community can have more than another. This can predict and explain the behaviour of individuals in different settings based on the amount of social control since “[s]ocial control explains the conduct of people in organizations, neighborhoods, public places, and face to face encounters”.¹³⁰ Furthermore, absence of social control explains deviant behaviour. Essentially, a setting where social control is greater in quantity, the less likely a crime will be committed.

The NHL, as a heavily regulated organization, is already subjected to less formal law. Since it has an informal social control mechanism in place to deal with the behaviour of its members, it follows that less formal law will be found in this setting. According to Black, this type of setting which subjects individuals to more social control from everyday actions gives them a certain degree of immunity from the law. He uses the example of a soldier.¹³¹ A soldier is subjected to the rules and regulations of the military, which controls his actions as a soldier. Similarly, the NHL has a Rule Book which regulates the behaviour of an NHL hockey player.

¹²⁸ Donald Black, *The Behavior of Law* (New York, NY: Academic Press Inc., 1976) at 1-2.

¹²⁹ *Ibid* at 105.

¹³⁰ *Ibid* at 106.

¹³¹ *Ibid* at 110.

With respect to Black's theory of social control as a variable aspect of social life, it is reasonable to suggest that such a hockey player is somewhat immune from the law due to the fact that he is subjected to the social control of the league.

It has been argued that the law should protect its citizens against violence no matter where it happens, even if it takes place in the sports arena and the league can sanction it internally. In fact, the state has interest in protecting citizens from harm and antisocial behaviour.¹³² This view is based on the assumption that participating voluntarily in a contact sport does not automatically imply consent to all forms of violence in the sport.¹³³ However, it has been difficult under current law to define the crime of sports violence since there is a fine line between tolerable and intolerable levels of violence.¹³⁴ There's no denying that sports have inherent risks of violence and aggression. Hockey leagues have internal social control mechanisms in place to deal with in-game violence, but it can be argued that self-regulation is not sufficient. A common argument is that formal law does have a certain role to play in the regulation of hockey violence and player injuries. The degree to which the law should intervene is, however, very contested. The ideal solution would be for it to intervene solely after internal social control methods have been exhausted ineffectively.¹³⁵ It leaves the difficult task of determining what mixture of legal and internal self-regulation is best to deal with excessive violence. The following sections will examine the viability of league self-regulation and the likeliness of intervention by the criminal justice system.

¹³² Paul J Farrugia, "The Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law" (1996-1999) 8 Auckland U L Rev 472 at 473.

¹³³ Jones and Stewart, *supra* note 23.

¹³⁴ Jeffrey Standen, "Assumption of Risk in NFL Concussion Litigation: The Offhand Empiricism of the Courtroom" (2012-2013) 8 FIU L Rev 71.

¹³⁵ Farrugia, *supra* note 132 at 486.

2.1 « League Self-Regulation »

The players must obey the rules of the game all while respecting the legal standards imposed by society. Most rule violations are dealt with by the league's internal system of regulation. The NHL has developed rules and regulations to be followed by all the players.¹³⁶ In-game rule violations are subjected to penalties by the referees. The most common penalty is a minor penalty of two minutes in the penalty box.¹³⁷ It leaves the team short-handed for the duration of the penalty or less if the opponents score a goal. Other penalties include a major penalty of five minutes for more serious rule violations, including fighting.¹³⁸ The referees also have discretion to impose a misconduct, where the offending player is ejected from the game for ten minutes,¹³⁹ or a game misconduct where the player is ejected for the balance of the game.¹⁴⁰

Internal league rules play a large role in determining what are legal and illegal actions in hockey games. For example, the NHL considers 'roughing'¹⁴¹ and 'fighting'¹⁴² to be clear violations of the game. The league imposes penalties for these acts when their players commit them on the ice, yet neither action is entirely banned from the game.¹⁴³ It is clear that hockey's formal rules allow for some violence to take place in the way the referees allow players to drop their gloves and throw punches at each other. If the NHL did not want fighting in the game, the

¹³⁶ Rule Book, *supra* note 119.

¹³⁷ *Ibid* at Rule 16.1: "For a minor penalty, any player, other than a goalkeeper, shall be ruled off the ice for two (2) minutes during which time no substitute shall be permitted".

¹³⁸ *Ibid* at Rule 20.1.

¹³⁹ *Ibid* at Rule 22.

¹⁴⁰ *Ibid* at Rule 23.

¹⁴¹ *Ibid* at Rule 51.1: "Roughing is a punching motion with the hand or fist, with or without the glove on the hand, normally directed at the head or face of an opponent. Roughing is a minor altercation that is not worthy of a major penalty to either participant".

¹⁴² *Ibid* at Rule 46: "A fight shall be deemed to have occurred when at least one player punches or attempts to punch an opponent repeatedly or when two players wrestle in such a manner as to make it difficult for the Linesmen to intervene and separate the combatants"; Rule 46.14: "A major penalty shall be imposed on any player who fights".

¹⁴³ Gregory Schiller, "Are Athletes Above The Law? From A Two Minute Minor To a Twenty-Year Sentence: Regina v Marty McSorley" (2003) 10 Sports Law Journal 241.

referees would immediately separate the players. Instead, the referees are given a lot of discretion in the penalties they choose to impose on the players who fight. The Rule Book expressly states that the referees must consider the degree of responsibility of the players for starting the fight or for persisting to continue to fight when they impose a penalty under Rule 46.¹⁴⁴

The league also identifies supplementary disciplinary procedures for more severe rule violations that take place on the ice. The punishment normally consists of fines and suspensions.¹⁴⁵ The power of the NHL to punish a player for violating the game rules stems from the consent of the players through the standard player's contract (SPC) and the collective bargaining agreement (CBA). More specifically, section 18 of the SPC¹⁴⁶ indicates that the player and the team they are signing with are legally bound by the league rules and any subsequent CBA that has been entered into by the parties. Section 4 of the SPC also states that the team can establish rules, which govern the conduct of the players, and such reasonable rules will form part of the SPC. For any violation of these rules, the team can impose a penalty, such as a suspension or a fine that would be deducted from the player's salary. Further, Article 18 of the CBA regulates all supplementary discipline for on-ice conduct that is in violation of the league rules. Article 18.1 indicates that such discipline may take the form of a fine or suspension. Article 18.2 specifically stipulates that conduct prohibited by the league rules can be subjected to supplemental discipline, "including the use of excessive and unnecessary force and reckless acts resulting in injury".¹⁴⁷ It is noteworthy that the league recognizes the impact of injury in the CBA, but it does not define what is unnecessary force or reckless acts. The CBA goes on to

¹⁴⁴ Rule Book, *supra* note 119 at Rule 46.1.

¹⁴⁵ CBA, *supra* note 33 at 18.1; Karen Melnick, "Giving Violence a Sporting Chance: A Review of Measures Used to Curb Excessive Violence in Professional Sports" (1990-1991) 17 *Journal of Legislation* 123 at 124.

¹⁴⁶ CBA, *supra* note 33 at Exhibit 1.

¹⁴⁷ *Ibid* at Article 18.2.

stipulate that preliminary review may take place in order to properly investigate the situation before applying a fine or a suspension. The league can look at reports of on-ice officials,¹⁴⁸ written medical information from the team,¹⁴⁹ and hearings can be held either via telephone or in person.¹⁵⁰ If the suspension is more than four games, a formal hearing is held.¹⁵¹ The issue with these hearings is that counsel does not represent the player and he is not given much opportunity to present evidence. What is perhaps most concerning is that the victim is neither present nor represented at the hearing.¹⁵²

The CBA goes on to list several factors that can impact the final decision to impose supplemental discipline. These include the type of conduct involved, including intentional and reckless conduct and the amount of force that was used; any injuries that were sustained by the opposing player; the status of the offender, meaning a repeat offender will often receive harsher punishment; and other factors that the Commissioner of the league will deem necessary. The article also specifically states that “[p]layers are responsible for the consequences of their actions”.¹⁵³ The league fails yet again to indicate what is unnecessary and reckless conduct in the game of hockey. It considers many variables such as the amount of force and injury, but it does not define what will specifically lead to disciplinary measures.

The major issue about this system is that the league has created its own “criminal common law”¹⁵⁴ where external judicial sanction is discouraged. The league’s method of self-regulation has created an environment where certain acts of violence are punished solely by fines

¹⁴⁸ *Ibid* at Article 18.3.

¹⁴⁹ *Ibid*.

¹⁵⁰ *Ibid* at Articles 18.4, 18.8 and 18.9.

¹⁵¹ Jeffrey A. Citron & Mark Ableman, “Civil Liability in the Arena of Professional Sports” (2003) 36 U Brit Colum L Rev 193 at 228.

¹⁵² *Ibid*.

¹⁵³ CBA, *supra* note 33 at Article 18.2(a).

¹⁵⁴ Horrow, *supra* note 27 at 2.

and suspensions, which are not always an effective deterrent. The league and teams are focused on selling tickets and winning games, and it has become apparent that teams are using aggressiveness and violence as a method of winning. The result is that the league tolerates this violence and “the means used to achieve victory become less scrutinized”.¹⁵⁵ Consequently, the league becomes its own “accuser, judge, and jury in its own private system of criminal law”.¹⁵⁶ Ultimately, the issue is whether leagues should be allowed to continue to handle cases of excessive violence, or whether external intervention by criminal courts should become more commonly used as a means to curb excessive violence.

There are several arguments that have been made in favour of maintaining league self-regulation as the primary source for supplemental discipline for on-ice conduct. The main argument in favour of league self-regulation is based on the notion that the leagues are in a better position to regulate in game violations of the rules. The league knows the sport better than anyone and is thus better able to determine what constitutes reasonable conduct under any given circumstances.¹⁵⁷ As such, the league will be able to make an informed decision on all matters, which will ideally produce uniform and predictable sanctions. The league can also choose to punish players for a wider range of conduct. In other words, the league commissioner can address any act committed on the ice, including acts that could otherwise be ignored by a prosecutor.¹⁵⁸ Consequently, the players will become familiar with the league’s outlook on player standards, and the kind of behaviour that will lead to supplementary discipline.¹⁵⁹ In other words, the players become accustomed to the league’s subcultural way of doing things. It is thus

¹⁵⁵ *Ibid.*

¹⁵⁶ Melnick, *supra* note 145 at 124.

¹⁵⁷ *Ibid.*; Schiller, *supra* note 143 at 248.

¹⁵⁸ Don Eugene-Nolan Gibson, “Violence in Professional Sports: A Proposal for Self-Regulation” (1980-1981) 3 *CommEnt LS* 425 at 447.

¹⁵⁹ Melnick, *supra* note 145 at 124.

argued that the leagues are perfectly capable of regulating violent conduct because players understand the system. They will not behave in ways that will lead to serious punishment because fines and suspensions are sufficient deterrents.

Another argument which supports league self-regulation is the fact that matters will be dealt with in a much quicker fashion than if the incident was prosecuted and brought in front of a judge. It avoids congesting the courts with cases of hockey violence.¹⁶⁰ Not only are criminal prosecutions rare, but it is also argued that players are hesitant to initiate a civil lawsuit against another player who has committed a violent act against them. Horrow discussed this question with hockey players and many of them indicated they feared a lawsuit would harm their careers. Many players cited the fear of being labeled in a negative way, and a concern of being cut from the team or sent to the minors as reasons not to sue other players.¹⁶¹ Additionally, some athletes stressed the importance of keeping quiet around the time their contract was coming to an end for apprehension that it would limit their chances of signing a new deal.¹⁶² In other words, it is unclear if players would be willing participants in the judicial processes.

On the other hand, those who support external intervention through criminal prosecution give little merit to these arguments. While league sanctions such as fines and suspensions are effective in deterring some minor rule violating behaviour, it does little to control excessive violence that is criminal in nature.¹⁶³ The nominal fines and suspensions have no deterrent value when a player essentially commits a crime on the ice. The salary of a professional athlete is high, considering the minimum salary in the NHL is \$550,000 for the 2014-2015 hockey season and \$575,000 for the following season. In the final year of the CBA, the minimum salary will go up

¹⁶⁰ *Ibid.*

¹⁶¹ Horrow, *supra* note 27 at 5-6.

¹⁶² *Ibid.*

¹⁶³ Trichka, *supra* note 8 at 93.

to \$750,000 for the 2021-2022 season.¹⁶⁴ Therefore, even a player making the league minimum is still very well compensated. Considering most fines imposed by the leagues are minimal amounts of money, professional players are not likely to let fines determine how they play the game. For example, Boston Bruins forward Milan Lucic was fined \$5,000 during the 2014 Stanley Cup Playoffs for spearing an opponent.¹⁶⁵ However, Lucic's NHL salary for the 2013-2014 season was \$5,500,000.¹⁶⁶ It is difficult to imagine that five thousand dollars would be an effective deterrent when Lucic averages over \$67,000 per game during an 82 game season.

Some research has also shown that in cases where the fine was high, it was actually the team who paid the fine.¹⁶⁷ There is evidently no deterrent value in fines if the team is covering the costs for the player. The lack of deterrence is also shown in the *Bertuzzi* case. The incident between Bertuzzi and Moore took place in 2004. Upon signing a new contract with the Vancouver Canucks in 2005, Bertuzzi's salary was \$5.2 million per year.¹⁶⁸ The fact that a player who was criminally prosecuted for an on-ice incident can return to the league with such a high salary does very little to deter future acts of excessive violence. Players are not afraid to lose their careers if they were to take away the career of another player.

Often the league does not address excessive violence adequately because they encourage the use of violence to promote the marketability of the sport. As previously discussed, violence is sometimes viewed as a way to engage the spectators and add excitement to the game.¹⁶⁹ Therefore, if the league has complete control over its players, they can allow certain violent acts that are deemed to generate interest in the sport and, consequently, bring in more revenue. An

¹⁶⁴ CBA, *supra* note 33 at Article 11.12.

¹⁶⁵ The Canadian Press, "NHL Fines Boston's Lucic \$5,000 for spearing incident in playoff game", (April 19, 2014) online: <<http://www.nhl.com/ice/news.htm?id=715522>>.

¹⁶⁶ The Nation Network, "NHL Numbers", (January 28, 2014) online: <<http://stats.nhlnumbers.com/players>>.

¹⁶⁷ Gibson, *supra* note 158 at 436.

¹⁶⁸ Oh, *supra* note 19 at 324-325.

¹⁶⁹ *Ibid* at 326.

example of the interest generated by violence is shown in the media portrayal of such conduct. Media outlets often focus on violence that is occurring on the ice, and it is almost always celebrated as an acceptable aspect of the game.¹⁷⁰ And as John Barnes indicates, “[i]t is not in the public interest to delegate all disciplinary authority to internal tribunals, especially where leagues have a financial interest in promoting a violent style of play that has paid dividends in the past”.¹⁷¹ Since violence has a commercial value to sports leagues, they have an interest in encouraging the use of violence to win games as opposed to imposing harsh punishments to eliminate violence. The viability of using formal social control as a tool to regulate hockey violence will be examined in the next section. Despite the arguments favouring league self-regulation, the law can be an essential means to set the tone that excessive violence will not be tolerated.

2.2 « Criminal Law »

If it is deemed that league self-regulation is not a sufficient means to control violence, the use of criminal law can be justified on two main grounds. Firstly, athletes are not above the law and a hockey league’s internal system of control cannot supersede the laws of the land. Secondly, there is a particular need for prosecution.¹⁷² According to Baxter, there is an unofficial agreement between the NHL and the court system indicating that so long as the NHL monitors itself by settling disputes with fines and suspensions, the prosecutors will generally leave them alone.¹⁷³ However, this has not been effective in the past. It has been suggested that without the

¹⁷⁰ Melnick, *supra* note 145 at 125.

¹⁷¹ Barnes, *supra* note 6 at 224.

¹⁷² *Ibid.*

¹⁷³ Angela Baxter, “Hockey Violence: The Canadian Criminal Code and Professional Hockey” (2005-2006) 31 *Man LJ* 281 at 281-282.

intervention of criminal law, the hockey players commit crimes with impunity.¹⁷⁴ Professional athletes should not receive special treatment when they are taking part in excessively violent conduct because they have a social responsibility to act diligently. They are role models to the fans, especially children who are modeling their style of play.

Criminal prosecution would serve as a deterrent, as opposed to the slight reprimand offered by the league.¹⁷⁵ As illustrated by Oh, the league's internal rules did nothing to prevent Bertuzzi from ending Moore's career with an appalling act of violence.¹⁷⁶ Had Bertuzzi known he would be prosecuted and sentenced by a criminal court, would he have acted differently? Perhaps an imminent threat of criminal prosecution would help curb this type of behaviour in the future. That being said, criminal law should only be used in cases of excessive violence as per Smith's definition of criminal violence,¹⁷⁷ because it can be incredibly difficult to prove the intent of a hockey player for an act committed in the heat of the game. It is a fast-paced game where players have to make quick decisions. It is the contention of many hockey players that dangerous plays happen and players do not necessarily realize what they have done until the game is over. Therefore, Clarke suggests that a greater criminal mindset should be required when players are faced with disciplinary action for an act that was committed on the ice.¹⁷⁸ Hockey players are required to play with excitement and emotion, which often leads to dangerous plays that was not intended to harm anyone. In addition, players often react reflexively when playing a sport they have been playing for years. In a game that is so quick and body contact is a regular occurrence, proving intent beyond a reasonable doubt might be too difficult to ever successfully

¹⁷⁴ Gibson, *supra* note 158 at 436.

¹⁷⁵ Anna Husa & Stephen Thiele, "In The Name of The Game: Hockey Violence and The Criminal Justice System" (2001-2002) 45 Crim LQ 509 at 510.

¹⁷⁶ Oh, *supra* note 19 at 312.

¹⁷⁷ See pages 7-8 of this text.

¹⁷⁸ Clarke, *supra* note 16 at 1174.

prosecute a hockey player for on-ice violent conduct.¹⁷⁹ This leads to the conclusion that criminal prosecution would be extremely difficult since determining the intent of the player is rather challenging. By limiting criminal intervention to the excessively violent acts, it is possible to avoid congesting the courts with cases that will simply be thrown out due to inability of proving intent.

Under current law, only in exceptional and rare circumstances do cases of violence become the subject of a criminal prosecution. The reason for this is that legislation and courts have not defined what constitutes excessive violence. Oh suggests that the law should intervene in “acts that are so deviant from acceptable behaviour that they pervert the physical essence of the game”.¹⁸⁰ The physical essence relates to the skill and ability to make plays and score goals within the rules of the game. Any conduct that is not part of the game or is deemed so excessively violent that it has no place in the sport can be described as distorting the essence of the game. The threat of criminal prosecution could be effective in curbing that kind of egregious behaviour. Therefore, by properly defining what constitutes excessive violence, players will know how to conduct themselves. If a player is fully aware in what circumstances he or she may face criminal prosecution, they will likely behave less violently. As such, only conduct that is clearly outside the rules and customs of the game, and against state legislation, should be susceptible to criminal prosecution.¹⁸¹ The reason why we should not apply criminal sanction for all violations of the game is that players could misinterpret the law, and refuse to engage in conduct that is lawful for fear that it might be seen as illegal.¹⁸² As described by Elias and Dunning, sports become boring when the rules of the game are too constrained. People lose

¹⁷⁹ *Ibid.*

¹⁸⁰ Oh, *supra* note 19 at 312.

¹⁸¹ Standen, *supra* note 134 at 642.

¹⁸² *Ibid* at 637.

interest when they cannot get lost in the excitement of the game and have to stop to think of the consequences of all their actions during a hockey game. The game of hockey is inherently physical and aggressive so it would be misguided to eliminate all levels of violence from the game. However, imposing criminal sanction to players who commit serious acts of violence would still be consistent with the NHL CBA. The CBA states that “the parties do not intend to alter the basic fabric of our game”¹⁸³ when imposing supplemental discipline for on-ice conduct. It is often contended that excessive violence causing serious injuries or that have the capacity to cause serious injuries are not part of the game, as such, prosecuting such acts through the criminal justice system would not alter the basic fabric of the game of hockey.

2.2.1 « Criminal Code »

The criminal justice system facilitates the maintenance of a safe and peaceful society. It does this by ensuring public safety, enforcing laws, and protecting citizen rights. According to the rule of law, all citizens are subject to the same laws. The problem with using the law to regulate hockey violence is that it spreads across multiple jurisdictions. The NHL has teams in Canada and the United States, as well as different provinces and states. These jurisdictions likely have different laws and varying interpretations of these laws.¹⁸⁴ Canadian law is slightly more developed than American law in terms of hockey violence. In Canada, all Canadians fall under the purview of the *Criminal Code of Canada*¹⁸⁵. The *Criminal Code* penalizes acts that are considered to be contrary to public order. The sanctions range from incarceration for a certain amount of time to

¹⁸³ CBA, *supra* note 33 at Article 18.2.

¹⁸⁴ Jones and Stewart, *supra* note 23 at 168.

¹⁸⁵ RSC, 1985, c. C-46 [*Criminal Code*].

simple fines, which allow the courts to take into account a plethora of circumstances.¹⁸⁶ The purpose of sentencing in the *Criminal Code* is outlined in section 718: “[t]he fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions”.¹⁸⁷ The sentences must also target one or more objectives, including denunciation; deterrence; the separation of the offender from society; rehabilitation; the reparation for harm done to the victim or community; and the promotion of responsibility in offenders. In addition, section 718.1 indicates that a sentence must be proportionate to the gravity of the crime of the offence and the degree of responsibility of the offender. In application to hockey, the important sentencing considerations are primarily threefold: (1) whether the athlete is a danger to society; (2) the type of punishment needed to prevent future similar acts; and (3) the effect of the particular sentence on the player, the public, and the sport.¹⁸⁸

Canadian cases of hockey violence are prosecuted pursuant to the sections relating to assault. There are three types of assault: (1) common assault (Section 265); (2) assault with a weapon or assault causing bodily harm (Section 267); and (3) aggravated assault (Section 268). These sections are general intent offences. This means that the prosecutor does not have to show intent to cause serious injury to another. It is only necessary to demonstrate awareness that one is hitting the opponent. Specific intent offences such as assault causing bodily harm also requires intent to cause harm. However, as discussed below, bodily harm is very broadly defined and does not necessarily mean intent to cause serious injury. Such intent relates to the doctrine of implied consent. Generally speaking, athletes impliedly consent to the foreseeable and reasonable body

¹⁸⁶ Barnes, *supra* note 6 at 202.

¹⁸⁷ *Criminal Code*, *supra* note 185 at Section 718.

¹⁸⁸ Schiller, *supra* note 143 at 257.

contact that can occur within a given sport. However, implied consent does not apply in situations where serious injury was intended. As such, if a prosecutor can prove that the accused intended to cause a serious injury, the doctrine of implied consent does not apply and the accused will not be successful using the defense of implied consent. The defense of implied consent will be discussed further below.

Cases are occasionally prosecuted under charges of assault pursuant to Section 265(1) of the *Criminal Code*, which states that:

A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

The above section includes a basic offence of assault and several other forms, including assault with a weapon. Section 265(1)a) refers to intentionally applying force to a person without their consent. This charge carries a maximum sentence of imprisonment of five years.¹⁸⁹ Due to the issue of consent, which will be discussed further in this text, charges of assault have been very rare in the context of professional sports. Athletes who participate in hockey are generally said to have consented to the ordinary physicality of the sport.¹⁹⁰ Therefore, the most common charge of assault in hockey violence cases is that of assault with a weapon pursuant to Section 267 of the *Criminal Code*:

Every one who, in committing an assault,

- (a) carries, uses or threatens to use a weapon or an imitation thereof, or
- (b) causes bodily harm to the complainant,

¹⁸⁹ *Criminal Code*, *supra* note 185 at Section 266.

¹⁹⁰ Baxter, *supra* note 173 at 284.

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Under Section 267b) of the *Criminal Code*, the Crown must show that the accused committed the act that resulted in bodily harm to the victim. According to Section 2 of the *Criminal Code*, “bodily harm” means “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature”. This definition is somewhat problematic as it is very vague. As Baxter suggests, it does little to guide courts that are interpreting this in the context of professional sports. More guidance is thus needed in order to determine where the boundaries of criminal law lie in professional hockey.¹⁹¹ The reality is that professional hockey is an aggressive sport. Bodily contact is normal and occurs regularly. Consequently, this definition of bodily harm is very difficult to apply since it could technically be used to describe most injuries in hockey. It could include all levels of violence described by Coakly, including the first category of violence,¹⁹² which includes the regular body contact that occurs in every hockey game, such as body checks. It is clear that not all body contact in hockey is criminal in nature.

There is also a third level of assault in the *Criminal Code*. Aggravated assault is found in section 268 and states that “[e]very one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant”. While most incidents of hockey violence are prosecuted pursuant to sections 265 and 267, it is worth noting that aggravated assault pursuant to Section 268 is an option for prosecutors.

¹⁹¹ *Ibid* at 287.

¹⁹² See page 8 of this text for the full definition of brutal body contact.

Baxter also suggests the adoption of a revised definition of “bodily harm” in the *Criminal Code* to encompass the reality of professional sports.¹⁹³ The definition could also be redefined to include harm specific to the context of hockey. Other authors have also shown support for codifying rules applicable in the sports context. Barnes suggests that creating a specific criminal offence to deal with sports violence would facilitate the prosecution process. He also put forward the idea of bringing charges against the leagues and teams as promoters and instigators of violence. It would provide an incentive for teams to control the violence exercised by their players. Liability could also be imposed on notions of conspiracy, aiding or counseling.¹⁹⁴ Zajda also believes that a specific offence for sports violence would help reduce the violent incidents that are often portrayed and praised in the media. He proposes that legislation that deals with sports violence would be the only effective deterrent and would help reduce the amount of in-game violence. It could also help in creating a more uniform and consistent approach in dealing with hockey violence.¹⁹⁵ The existing case law dealing with hockey violence does provide some insight. However, it is still uncertain what is criminal in the context of professional hockey. As shown in the case law discussed in the next section, it is becoming increasingly clear that authorities are not sure how to apply the *Criminal Code* to cases of hockey violence.

2.2.2 « Case Law »

The judicial system has intervened in cases of sports violence on various occasions. Some cases have led to controversial decisions that can be viewed as somewhat irrational. Most cases ended with acquittals or very lenient sentences, which is concerning seeing as the actions of the accused

¹⁹³ *Ibid.*

¹⁹⁴ Barnes, *supra* note 6 at 226.

¹⁹⁵ Zajda, *supra* note 92 at 19.

are often very violent and led to serious injuries. Courts of different jurisdictions have interpreted the question of criminal liability in the realm of professional sports. English case law demonstrates that excessive force, which is likely to cause injury, is the primary focus of the courts. In *Bradshaw and Moore*, the English courts were concerned with determining whether the acts were within the rules of the game.¹⁹⁶ It was deemed that the rules of the game cannot make actions lawful that are unlawful according to state laws. The law of the land criminalizes every assault whether bodily harm results or not. But if the rules of the game allow for some force that could result in assault, and the athlete uses such force within the rules, it might be reasonable to conclude that he did not intend to assault and harm the opponent. It is only when the athlete intended to hurt the other player and cause serious harm in a reckless manner would the act be considered unlawful.¹⁹⁷

Other jurisdictions have dealt with similar issues. The NHL is the only professional sports league to have one of its players criminally prosecuted in the United States. In a 1975 unreported case, David Forbes was charged with assault with a dangerous weapon for attacking Henry Boucha on the ice during a professional hockey game.¹⁹⁸ During the second period, Forbes swung his stick at Boucha, which ultimately resulted in serious injuries. The stick struck Boucha in the right eye and he fell to the ice. Forbes then jumped on top of Boucha and punched him repeatedly in the head. Boucha required three surgeries to repair his eye socket. He suffered double vision for approximately eight months following this incident.¹⁹⁹ A full trial took place but the jury was unable to reach a verdict and the district attorney declined to order a retrial.²⁰⁰ The jury was divided nine to three, with the majority voting for conviction based on the severity

¹⁹⁶ McCutcheon, *supra* note 4 at 272.

¹⁹⁷ *Ibid.*

¹⁹⁸ Zajda, *supra* note 92 at 10.

¹⁹⁹ McCutcheon, *supra* note 4 at 278; Zajda, *supra* note 92 at 10; Clarke, *supra* note 16 at 1179-1180.

²⁰⁰ McCutcheon, *supra* note 4 at 278.

and permanent nature of the injuries suffered by Boucha. Whereas the three jurors voting for acquittal were convinced that the social forces behind the acceptance of violence and fighting in hockey meant that Boucha impliedly consented to the attack since fighting is a part of the game.²⁰¹ Following the criminal trial, Boucha filed a civil lawsuit against Forbes and his team for \$3.5 million dollars. A settlement was reached in a confidential meeting outside of the courts.²⁰² After the *Forbes* case, there appeared to be a reluctance to use the law to regulate sports violence cases in the United States. This is presumably due to the difficulties of proving intent beyond a reasonable doubt and establishing the limits to consent; the concern that criminal prosecution might change contact sports for the worse; and the idea that resources would be better spent on “real criminals, not athletes for on-ice/field incidents”.²⁰³ But what makes an athlete so different from others who commit similar crimes outside of the sports context? To let Forbes go due to the social forces behind the case and a hung jury suggests that professional athletes are in fact somewhat immune from the law. It indicates that they can commit crimes on the ice and can walk away without any real consequence.

In Canada, the law surrounding hockey violence cases is mixed, but it is further developed than American case law. Canada has seen a greater number of cases reach the criminal courts. The first criminal prosecution of a professional hockey player in Canada was against Wayne Maki in *R v Maki*.²⁰⁴ The players involved in the incident were both charged under section 231(2) of the *Criminal Code* for assault causing bodily harm (now section 267). The incident took place on September 21, 1969 during an exhibition game between the Boston Bruins

²⁰¹ Clarke, *supra* note 16 at 1179-1180.

²⁰² Zajda, *supra* note 92 at 10.

²⁰³ Jones & Stewart, *supra* note 23 at 185.

²⁰⁴ *R v Maki*, [1970] OJ No 1607, [1970] 3 OR 780 [*Maki*].

and the St. Louis Blues of the NHL in Ottawa, Ontario.²⁰⁵ The *Maki* decision was delivered on March 4, 1970. It was the first prosecution of this kind. The facts, as interpreted by the judge, are that Maki and Green followed the puck behind the Bruins net. The two players collided. Green then punched Maki in the face with his glove, which resulted in injury to his mouth. The referee signaled a delayed penalty.²⁰⁶ The two players then met up in front of the Bruins net where Green swung his stick at Maki and struck him on the shoulders. Maki then retaliated by swinging his stick at Green in a vertical chopping position. Green suffered a fractured skull and brain injuries. He missed the rest of the season.²⁰⁷

The judge considered the fact that the incident took place in a matter of a few seconds in a game that he noted is fast and includes regular body contact.²⁰⁸ In addition, Maki's evidence indicated that he was simply trying to protect himself when the incident occurred, and did not know he would cause serious injury to Green. The judge also observed that the referee testified that Maki did not seem angry or to have lost his temper.²⁰⁹ These facts are important because the social considerations of each case are essential in determining the intent of the accused and the gravity of the offense. The game of hockey is a fast sport where decisions must be made very quickly. With consideration given to the fact that Maki is not generally a high tempered player and he acted in self-defense, it is reasonable for a judge to decide that he is not guilty of a criminal act, which is precisely what happened. The defense attorney presented a case for self-defense, which the court accepted and eventually acquitted Maki of assault. The judge did not find beyond reasonable doubt that Maki intended to injure Green and that Maki used excessive

²⁰⁵ *Ibid* at para 1.

²⁰⁶ *Ibid* at para 4.

²⁰⁷ *Ibid* at para 5.

²⁰⁸ *Ibid* at para 7.

²⁰⁹ *Ibid* at para 9.

force in the circumstances of the case.²¹⁰ Despite the dismissal of the charge, the judge included several comments on the defense of consent and the prosecution of similar cases. The court expressly stated that if the facts of this case had not raised reasonable doubt, the judge would have convicted the accused. The defense of consent would not have been successful.²¹¹ The judge also added an interesting comment, which relates to the debate of whether the law should intervene in hockey violence cases:

Although no criminal charges have been laid in the past pertaining to athletic events in this country, I can see no reason why they could not be in the future where the circumstances warrant and the relevant authorities deem it advisable to do so. No sports league, no matter how well organized or self-policed it may be, should thereby render the players in that league immune from criminal prosecution.²¹²

This comment is compelling because the judge does not give any indication to the type of conduct that would warrant criminal intervention. The judge simply stated that criminal prosecution of professional hockey players is possible despite the league's ability to self-regulate. It was also noted that the defense of consent to bodily injury has its limitations. While the defense is applicable, it is a question of degree. The judge precisely stated that "no athlete should be presumed to accept malicious, unprovoked or overly violent attack".²¹³ More specifically,

[a] little reflection will establish that some limit must be placed on a player's immunity from liability. Each case must be decided on its own facts so it is difficult, if not impossible, to decide how the line is to be drawn in every circumstance. But injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of the implied consent.²¹⁴

In other words, despite the fact that each case must be determined on its own facts, if the prosecutor can prove that the offending player intended to cause injury to the victim, the defense

²¹⁰ *Ibid* at para 11.

²¹¹ *Ibid* at para 12.

²¹² *Ibid*.

²¹³ *Ibid* at para 13.

²¹⁴ *Ibid*.

of consent will not be successful. While the line between acceptable and unacceptable violent conduct is difficult to draw, this case shows that any intent to injure definitely crosses the line of acceptable behaviour. The judge's final statement suggested that the adoption of such a principle would be a benefit for the players, the general public, and the young children who play hockey and who look at professional athletes as role models.²¹⁵ This relates back to the social issue discussed above. The court recognized that the social impact on young players is in fact a significant issue requiring intervention from the courts. The problem, however, is that the court did not give much indication as to what circumstances can attract the attention of the authorities. The difficulty in outlining the hockey violence problem should not prevent the courts from elaborating the law on the subject. It seems as though courts are hesitant to get involved in such cases and are content with letting athletes use violence in the game without imposing consequences.

The *Green* decision was rendered on September 30, 1970, approximately seven months after the *Maki* decision. The facts of the case are the same since they relate to the same incident. Green was charged for assault against Maki when he struck Maki in the face with his glove. The judge in the *Green* case, however, took a different view of the facts. The judge observed that Green has a reputation as a well-established player in the league with nothing to prove.²¹⁶ Moreover, the game of hockey is played at high speed and players in the NHL are among the best in the world. By this very nature, players assume certain risks of injury.²¹⁷ It is interesting that the judge gave such importance to the reputation of the player. The character of the accused is not always relevant in criminal cases, yet the judge seemingly placed great importance on

²¹⁵ *Ibid* at para 14.

²¹⁶ *R v Green*, [1970] OJ No 1699, [1971] 1 OR 591 [*Green*] at para 9.

²¹⁷ *Ibid* at para 10.

Green's hockey character. The fact that Green had been in the NHL for a long time contributed to the judge's decision to acquit Green, which suggests that a professional player who knows the game well is less likely to be prosecuted for on-ice conduct.

The judge in *Green* also noted that Section 230 of the *Criminal Code* (now Section 265), which stipulates that an assault occurs without the consent of the victim, and the offending player could present consent as a defense to his actions.²¹⁸ The judge specifically stated that no hockey player steps onto the ice without consenting to bodily contact and assuming certain risks of injury.²¹⁹ Additionally, when Maki was questioned about the incident, he declared that this had happened to him hundreds of times and that it was ordinary for this to happen during a hockey game.²²⁰ This demonstrates the inherently aggressive nature of hockey and the risks associated with the game. The players at the professional level accept these risks and the court is conscious of the fact that it generally means they consent to higher levels of violence. In turn, it was deemed that Green was just protecting himself when he hit Maki.²²¹ According to the judge, Green's reaction to the spearing was simply instinctive and self-protective. In addition, it was deemed that professional hockey players consent to a significant number of assaults because the game cannot be played with its customary speed, force, and competitiveness without the acceptance of vigorous body contact.²²² Consequently, the court determined that Green had not committed an assault. The court was faced with two professional players who were at the peak of their playing careers. As such, there was no intent to injure Maki, and Green acted instinctively. Green was thus acquitted of the charge of assault.²²³

²¹⁸ *Ibid* at para 11.

²¹⁹ *Ibid* at para 12.

²²⁰ *Ibid* at para 13.

²²¹ *Ibid* at para 17.

²²² McCutcheon, *supra* note 4 at 275.

²²³ *Green*, *supra* note 216 at paras 18-22.

It can be argued that the decision to acquit Green is somewhat illogical. The judge focused on the fact that Green was a professional hockey player with a great reputation. To be a player among the best in the world such as Green suggests that he could not have possibly intended to harm his opponent but rather it was an act committed by instinct. The judge focused more on the social forces behind the case as opposed to the relevant law dealing with criminal assault.

The court did however indicate that this case was judged on its own facts and it is possible that similar situations in different circumstances could lead to a charge of assault.²²⁴ The judge had difficulty determining what these circumstances would be, “since it is assumed and understood that there are numerous what would normally be called assaults in the course of a hockey game, but which are really not assaults because of the consent of the players in the type of game being played, where do you draw the line?”²²⁵ The judge somewhat answered this question by saying that he does not envision many circumstances where a charge of common assault (Section 265) would be successful considering the nature of the game of hockey. He suggested that a charge of assault causing bodily harm (Section 267b)) might be more constructive:

I must make this comment, that given the permissiveness of the game and the risks that the players willingly undertake, I find it difficult to envision a circumstance where an offence of common assault as opposed to assault causing actual bodily harm could readily stand on facts produced from incidents occurring in the course of a hockey game played at that level. I am not talking about unprovoked savage attacks in which serious injury results. I am talking about these particular facts and these particular circumstances.²²⁶

This demonstrates yet again that acts, which cause serious injuries, could be prosecutable.

Both cases ultimately determined that a player does not consent to being maliciously attacked

²²⁴ *Ibid* at para 20.

²²⁵ *Ibid* at para 13.

²²⁶ *Ibid* at para 20.

with a hockey stick.²²⁷ However, since acquittals were handed out in both cases, it is a question of degree that must be examined on a case-to-case basis. The courts clearly indicated that professional hockey players accept certain risks each time they step out onto the ice, and this includes the possibility of getting hurt, but it should be limited to foreseeable risks that are not overtly violent or reckless.²²⁸ While the courts did not draw a dividing line between foreseeable risks and unacceptable malicious conduct, there is an implicit suggestion in *Green* that the nature of the sport would be an important factor.²²⁹ Therefore, when determining whether or not an act could be a foreseeable risk, and thus consented to by the players, one can look at the nature of the sport. The courts did this in both cases by considering such factors as the speed of the game, and the necessity of body contact to properly play the game. However, the importance of these cases is that the courts realized that there is a limit to what the players can consent to simply by participating in the sport and players can be convicted for assaults that occur on the ice.²³⁰ The judges in both cases may have taken different routes, but it led them to the same conclusions, which paved the way for subsequent decisions.

The first successful criminal prosecution of a professional hockey player was *Cicarelli*. Cicarelli was charged with assault pursuant to Section 245 (now 265) of the *Criminal Code* after hitting Luke Richardson in the head three times with his hockey stick. Richardson was a member of the Toronto Maple Leafs who was playing in an NHL game against Cicarelli's team, the Minnesota North Stars on January 6th, 1988.²³¹ The incident took place when Cicarelli, the puck carrier, was offside and drew a whistle. Richardson, who was skating towards Cicarelli to deliver

²²⁷ Horrow, *supra* note 27 at 10.

²²⁸ Jack Anderson, "Mens Sana in Corpore Sano? Violence in Sport and the Criminal Law" (1998) 6 ISLR 64 at 75-76.

²²⁹ McCutcheon, *supra* note 4 at 275.

²³⁰ McCutcheon, *supra* note 4 at 275; Farrugia, *supra* note 132 at 478-479; Clarke, *supra* note 16 at 1179.

²³¹ *Cicarelli*, *supra* note 124 at 2.

a body check, was unable to stop at the whistle and ultimately crosschecked and boarded Cicarelli. That is when the accused struck Richardson in the head area three times. As the referees separated the players, Cicarelli continued to throw punches.²³² The NHL immediately suspended Cicarelli for ten games and he was arrested for criminal assault the next day.²³³ The question before the court was to determine whether Cicarelli committed an assault pursuant to what is now Section 265(1)a) of the *Criminal Code*.²³⁴ This section creates a crime in which the Crown must prove three elements: (1) that the accused applied force intentionally; (2) that the force was applied directly or indirectly; and (3) that Richardson did not consent to the applied force.²³⁵

It was accepted by the court that Cicarelli had intentionally applied force directly to Richardson.²³⁶ This fact was not contested. The issue at hand was rather the determination of whether Richardson had consented to the application of force. The court adopted the principle found in *Jobidon* in relation to consent. The incident in this case was a fistfight between two willing participants. At the time of *Cicarelli*, the *Jobidon* decision had been published by the Court of Appeal of Ontario. It was later appealed to the Supreme Court of Canada in 1991. For the purposes of the court in *Cicarelli*, the court adopted the principle in *Jobidon* wherein “the concept of consent is limited and extends only to the application of force where bodily harm is neither caused nor intended”.²³⁷ In other words, most fights will be considered assault regardless of consent. It was however decided that there is an exception to this when it comes to sports, which touches on the fact that consent can be implied or express. The court in *Jobidon*

²³² *Ibid.*

²³³ Zajda, *supra* note 92 at 11.

²³⁴ See page 42 of this text for full Section citation.

²³⁵ *Cicarelli*, *supra* note 124 at 2.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

disallowed the use of consent as a defense since fighting is a useless activity. Therefore, a new precedent was created in relation to assault causing bodily harm in fistfights. If there is intention to cause harm, it is an assault.²³⁸ According to *Jobidon*, the court must then review the circumstances of the fight in order to determine if this precedent applies. The setting of the fight, the age of the participants, and the perceived social utility will all be factors in this determination, which touches on the importance of the social characteristics of the case. For example, consent can be given to aggressive sporting activities, “so long as the intentional applications of force to which one consents are within the customary norms and rules of the game”.²³⁹ The point being that since sports have a significant social utility, consent will be allowed as a defense in many situations involving on-ice assaults. It is thus essential to distinguish what is part of the game of hockey and consequently consented to by the players, and what does not fall under the customary norms and rules of the game.²⁴⁰

With *Jobidon* in mind, the court in *Cicarelli* also reviewed *R v Cey*,²⁴¹ which discussed the scope of consent in professional hockey. The principle in *Cey* is to determine whether the act in question carried “such a high risk of injury and such a distinct probability of serious harm as to be beyond what, in fact, the players commonly consent to, or what, in law they are capable of consenting to”.²⁴² The court additionally recognized the principle in *Green*, which was discussed above, that there is virtually no assault in hockey without bodily harm.²⁴³ The court accordingly adopted these principles and concluded that the scope of implied consent in the context of a team sport like hockey should be determined according to an objective criteria, including (1) the

²³⁸ Barnes, *supra* note 6 at 209-210.

²³⁹ *Ibid* at 210.

²⁴⁰ *Ibid* at 214.

²⁴¹ (1989), 48 CCC (3d) 480 [*Cey*].

²⁴² *Cicarelli*, *supra* note 124 at 4.

²⁴³ *Ibid*.

nature of the game; (2) the particular circumstances of the incident in question; (3) the degree of force applied; (4) the degree of risk of injury; and (5) the state of mind of the accused.²⁴⁴

Cicarelli argued self-defense in the sense that he simply tried to prevent Richardson from injuring him further,²⁴⁵ but with consideration to the criteria in *Cey*, the court determined that striking an opponent in the head with a hockey stick was not reasonable in the course of a hockey game and fell outside the scope of implied consent. It is reasonable to believe that if the court accepted Cicarelli's defense, it would implicitly give permission to the players to go after anyone who previously hit them in the game. If it results in a criminal charge, the player in question could simply argue self-defense by implying that he retaliated against him simply to avoid being attacked a second time. However, the court believed that it was time to send a message from the courts that violence is not going to be tolerated.²⁴⁶ It was concluded that despite the fact that Richardson had not been injured, such hits do have the capacity to injure, and he did not consent to the blows he received to the head.²⁴⁷ Further, while high sticks occur in hockey games and players know they might be hit in such a manner, it does not mean players accept it.²⁴⁸ Since sports do have a social utility, there is some leniency in the criminal law for acts that occur on the ice, but the message in *Cicarelli* is that a premeditated assault has no place in hockey or society, therefore can be subjected to criminal prosecution.²⁴⁹ With regard to consent, the lesson in this case is that acts that carry high risks of injury will be unlawful regardless of how often it happens in hockey.²⁵⁰ Therefore, Cicarelli was found guilty of assault and received one day of

²⁴⁴ *Ibid.*

²⁴⁵ Zajda, *supra* note 92 at 11.

²⁴⁶ *Ibid.*

²⁴⁷ *Cicarelli*, *supra* note 124 at 5.

²⁴⁸ *Ibid* at 8.

²⁴⁹ Harary, *supra* note 25 at 211.

²⁵⁰ Anderson, *supra* note 228 at 77.

incarceration and a one thousand dollar fine.²⁵¹ While the court made relevant comments on the issue of hockey violence, the penalty imposed does little to deter future acts of this kind. The court wanted to send a message that violence will not be tolerated but failed to impose a sentence that was proportionate to the crime and the message it was attempting to send.

The *Cey* decision discussed in *Cicarelli* offers more insight on the issue of consent in hockey. The incident in *Cey* involved two amateur hockey players between the ages of 24 and 28. The victim was facing the boards in attempt to retrieve the puck when the accused pushed his face into the boards. The victim suffered injuries to his face and nose. He had to be carried off the ice and taken to the hospital. He spent three days in the hospital with a concussion and symptoms of whiplash. The accused received a five-minute penalty during the game for these actions against the victim.²⁵² The trial judge reviewed the elements of the offense found in Section 245(1)(b) of the *Criminal Code*, which includes intent, applied force to the victim, and bodily harm. The trial judge ultimately determined that the accused did not intend to injure his opponent. It was not a deliberate attempt to apply greater force than what is customary in the game of hockey. In addition, the trial judge determined that the victim consented to the bodily contact due to his positive response to the question of whether or not he would continue to play the game knowing he could suffer this type of injury.²⁵³

The Crown appealed the decision of the trial judge on the basis that the judge had been misdirected. The Court of Appeal agreed and ordered a new trial based on the following interpretation. The Court of Appeal found that force was intentionally applied, as defined in

²⁵¹ *Ibid.*

²⁵² *Cey*, *supra* note 241 at 2.

²⁵³ *Ibid* at 3.

Section 245.1(1)(b) of the *Criminal Code*. The only remaining issue was consent.²⁵⁴ Consent to bodily contact can be express or implied, but the scope is limited. For example, the Court of Appeal cited an unreported 1974 case of the Saskatchewan Court of Appeal²⁵⁵ to indicate that assaults, which occur in the course of a hockey game, can be beyond the scope of consent, and ultimately be an offence under the *Criminal Code*.²⁵⁶

The Court of Appeal further noted that there is a matter of degree when it comes to the analysis of consent. The court stated that every hockey player agrees to some form of bodily contact and the risk of injury just by voluntarily playing the game. However, it is clear to the court that some actions can be so violent that “it would be perverse to find that anyone taking part in a sporting activity had impliedly consented to subject himself to them”.²⁵⁷ More specifically, an act that shows determination to cause serious injury, even with provocation, should not fall within the scope of implied consent.²⁵⁸ However, the court recognizes that players are not expected to stop themselves in the heat of a vigorous game from committing an act that would normally be considered an assault outside the arena. As such, hockey players agree to the risks of actions that are unintentional, instinctive, or reasonably expected in the game of hockey.²⁵⁹ This represents a very fine line between what is considered part of the game and what is not consented to by participating in the game. The courts are not very helpful in drawing this line, despite making pertinent observations on the topic.

The court admitted that there is difficulty in constructing a suitable framework to determine the scope of implied consent from case to case. There are two ends of the spectrum in

²⁵⁴ *Ibid* at 4.

²⁵⁵ *Ibid*.

²⁵⁶ *Ibid*.

²⁵⁷ *Ibid*. The court adopted the *Maki* precedent that “no athlete should be presumed to accept malicious, unprovoked or overly violent attack”.

²⁵⁸ *Ibid* at 5.

²⁵⁹ *Ibid*.

this analysis. There are cases of bodily contact that are within the rules of the game of hockey and sanctioned by internal measures. The hockey players reasonably consent to these actions. On the other hand, there are forms of bodily contact that go beyond the rules of the game and are so violent that they are considered as excluded from consent.²⁶⁰ The difficulty, as illustrated by the court, is determining where the actions in the middle of spectrum fall with regard to consent.

The court adopted an objective standard in order to determine whether the victim had consented to the bodily contact, which was later reiterated in *Cicarelli*. In most cases, consent is subjective matter since it refers to a state of mind. However, implied consent in the context of a team sport can take many forms since there are many players on the ice. By adopting an objective standard, the court realized the potential for a uniform application of implied consent.²⁶¹ The framework that the court ultimately created includes the examination of the following factors:

[w]hether the accused intentionally applied force to the body of the victim [...] and if the body contact at issue should be found to have been unintentional, that of course will end the matter. On the other hand, should it be found to have been intentional, the trier of fact must then move on to determine whether the Crown have negated consent.²⁶²

The court essentially determined that the trial judge did not make his decision according to this framework and failed to address the inherently dangerous and violent act that had been committed by the accused. The Court of Appeal determined that the victim could not have consented to this violent act and a new trial was ordered to the Provincial Court. However, there was one dissenting judge who believed that the appeal should be dismissed. The game of hockey involves series' of assaults that are consented to by the players. A hockey player consents to all acts that fall within the rules of the game, and recognizes that any illegal act will be dealt with

²⁶⁰ *Ibid* at 6.

²⁶¹ *Ibid*.

²⁶² *Ibid* at 6-7.

through penalties and internal sanctions. It is agreed that some acts go beyond the implied consent of the player, but according to the dissenting judge, this is not the case in this matter. He viewed Cey as acting in a way that is consistent with the game and behaviour that is ordinary in the heat of a hockey game.²⁶³

In 2000, the British Columbia Provincial Court was faced with a similar situation. Marty McSorley, a hockey player for the Boston Bruins was charged with assault with a weapon for an incident that occurred on February 21st, 2000, in Vancouver, BC.²⁶⁴ The two players involved in this incident had harassed each other throughout the game, both taking individual penalties for their actions. The incident that led to the prosecution of McSorley took place in the final seconds of the game when the score was 5-2 in favour of the accused's team.²⁶⁵ McSorley was sent onto the ice with twenty seconds left in the game and slashed an opponent, Donald Brashear, with his hockey stick. Brashear was not expecting the hit as he was attempting to retrieve the puck. The slash hit Brashear's head and he fell to the ice.²⁶⁶ Brashear's helmet was dislodged, which served no protection when he hit the ice. While Brashear was lying on the ice and bleeding profusely, McSorley continued to taunt him and encourage him to get back up. The medical evidence showed that he suffered a grand mal seizure and a grade three concussion. A grade three concussion involves confusion, amnesia, and loss of consciousness for less than five minutes. One can suffer permanent brain damage with such a concussion.²⁶⁷ Due to the injuries, Brashear could not participate in any physical activity for a month.²⁶⁸ It was said that Brashear was lucky

²⁶³ *Ibid* at 8-9.

²⁶⁴ *McSorley*, *supra* note 111 at para 1.

²⁶⁵ Zajda, *supra* note 92 at 12; Schiller, *supra* note 143 at 260.

²⁶⁶ *McSorley*, *supra* note 111 at para 30; Schiller, *supra* note 143 at 260.

²⁶⁷ Zajda, *supra* note 92 at 12.

²⁶⁸ *McSorley*, *supra* note 111 at para 59.

to have survived a slash of this kind.²⁶⁹ The day after the incident, McSorley was suspended by the NHL for the remainder of the season, which meant he missed twenty-three games and lost approximately \$72,000 in salary.²⁷⁰ This was the harshest penalty ever imposed by the NHL at the time.²⁷¹ It took three weeks of investigation by the authorities before the Crown Counsel of British Columbia laid an official charge for assault with a weapon. McSorley plead not guilty on the basis that Brashear explicitly consented to the incident.²⁷²

The question before the court was thus to determine whether the slash by McSorley, which fell outside the scope of the written rules of the game, was within the customary norms of the game and therefore impliedly consented to by the players.²⁷³ The court reviewed the incident with the help of testimony and video of the game.²⁷⁴ The court then had to review what the rules and customary norms of the game allowed in terms of body contact in order to determine the limit of consent. With consideration given to the *Cey* and *Jobidon* cases, the judge ultimately determined that the slash was too dangerous for any player to consent to it.²⁷⁵ This is partly due to the reason that Brashear was not facing McSorley when the slash occurred, therefore had no way to defend himself.²⁷⁶ Additionally, a hockey stick in this instance was deemed to be a weapon. While a hockey stick is not designed as a weapon, it can be used as such when players slash or crosscheck each other with them.²⁷⁷ According to the judge, “[e]very time a player uses a stick to apply force to another player, the stick is being used as a weapon and not to direct the puck as it was designed to do. Whether or not McSorley assaulted Brashear, he was using the

²⁶⁹ Schiller, *supra* note 143 at 261.

²⁷⁰ Zajda, *supra* note 92 at 12.

²⁷¹ Schiller, *supra* note 143 at 261.

²⁷² Zajda, *supra* note 92 at 12; Schiller, *supra* note 143 at 262.

²⁷³ *McSorley*, *supra* note 111 at paras 24-25; Baxter, *supra* note 173 at 291.

²⁷⁴ Jones and Stewart, *supra* note 23 at 180.

²⁷⁵ *McSorley*, *supra* note 111 at para 75.

²⁷⁶ *Ibid* at para 73.

²⁷⁷ *Ibid* at para 104.

stick as a weapon when he struck the blow”.²⁷⁸ Not only did Brashear not consent to the slash, McSorley seemingly intended to commit the act. According to the judge, if McSorley intended to strike Brashear in the head, he is guilty of assault.²⁷⁹ The judge’s conclusion was that “[a] child, swinging at a Tee ball, would not miss. A housekeeper swinging a carpetbeater would not miss. An NHL player would never, ever miss. Brashear was struck as intended”.²⁸⁰ The court thus found McSorley guilty for assault with a weapon.²⁸¹ He was sentenced with a conditional discharge for eighteen months, which was criticized as being a very lenient sentence. According to Schiller, this sentence was a setback in the fight to end excessive violence in professional sports.²⁸² It sends the message that a discharge is a sufficient deterrent if the court is the answer to preventing future acts of violence. However, it can be said that the discharge was not enough. The judge was criticized for attempting to satisfy both parties. The prosecution received a guilty verdict, and McSorley remained out of jail. Schiller argues that less violent acts have gotten more severe consequences. In fact, the NHL commissioner even stated that the NHL’s suspension was harsher than the court’s discharge.²⁸³ The problem with such a lenient sentence is the message it sends young hockey players that so long as they don’t do anything worse than McSorley, they will not go to jail.²⁸⁴ As such, public interest requires harsher punishment when a hockey player brutally attacks an opponent with a hockey stick and causes serious injury.²⁸⁵

Four years later, the same court was presented with a case that has since become the most prominent incident of hockey violence. On March 8th, 2004, Bertuzzi sucker punched Moore

²⁷⁸ *Ibid* at para 105.

²⁷⁹ *Ibid* at para 78.

²⁸⁰ *Ibid* at para 108.

²⁸¹ *Ibid* at para 109.

²⁸² Schiller, *supra* note 143 at 269.

²⁸³ *Ibid* at 268-271.

²⁸⁴ *Ibid* at 273.

²⁸⁵ Stephen A. Thiele, “Sports and Torts: Injuring a Fellow Participant can be Costly” (2000) 23 *Advoc Q* 348 at 349.

during an NHL game in Vancouver, BC. After several attempts to start a fight with Moore, Bertuzzi reached out to grab him and struck him very hard from behind. The punch struck Moore in the right temple.²⁸⁶ After the punch, Moore fell with Bertuzzi falling on top of him. Members of Moore's team, the Colorado Avalanche, and Bertuzzi's team, the Vancouver Canucks, then joined the fisticuff, which ultimately created a pile of players lying on top of Moore. When the crowd cleared up, Moore was lying on the ice in severe pain. There was blood on the ice.²⁸⁷ The bodily harm suffered by Moore was quite severe. Moore suffered soft tissue injuries, as well as two hairline fractures of bones associated with the vertebrae. He also sustained facial lacerations and a concussion that rendered him unconscious on the ice.²⁸⁸ As a result, Moore spent several weeks in the hospital and never returned to the NHL.²⁸⁹ Bertuzzi was punished with a ten-minute penalty for intent to injure pursuant to the Rule Book, and was suspended from the NHL for the rest of the season, including playoffs.²⁹⁰ Bertuzzi was charged with assault causing bodily harm in which he pleaded guilty.

The court considered several mitigating and aggravating factors in the sentencing proceedings.²⁹¹ Among the aggravating factors included the effort Bertuzzi put in trying to provoke Moore to fight. The judge acknowledged that fighting does occur in hockey, but Moore clearly refused to fight Bertuzzi earlier in the game and again just before the punch.²⁹² Therefore, Moore did not consent to the punch. It went beyond the scope of the rules of the game, as well as Moore's implied consent.²⁹³ Additionally, the injuries sustained by Moore were also viewed as

²⁸⁶ *Bertuzzi*, *supra* note 126 at para 13.

²⁸⁷ *Ibid* at para 15.

²⁸⁸ *Ibid* at para 21.

²⁸⁹ *Ibid* at para 24.

²⁹⁰ *Ibid* at para 22.

²⁹¹ *Ibid* para 34.

²⁹² *Ibid* at para 35 and 38.

²⁹³ *Ibid* at para 38.

aggravating factors.²⁹⁴ There were also a number of mitigating factors. The court took into account the guilty plea, his age and lack of criminal record, and the fact that he paid a significant financial amount, exceeding \$500,000, by being suspended for the season.²⁹⁵ Bertuzzi also lost about \$350,000 in endorsements following his suspension from the NHL.²⁹⁶ The judge ultimately determined that a conditional discharge was appropriate in this case.²⁹⁷ The conditions included probation for one year,²⁹⁸ an order to not play in any sporting activity in which Moore is a participant,²⁹⁹ and eighty hours of community service.³⁰⁰ The court was looking at deterring Bertuzzi from committing similar acts in the future while also deterring other young players who might model their style of play to Bertuzzi.³⁰¹ The court believed the conditional discharge met the goal of deterrence. However, this sentence was criticized as being too lenient, similarly to the punishment in the *McSorley* case. It has been said that the punishment of probation and community service does not fit the crime and certainly does not deter other hockey players from violent conduct.³⁰² It is highly likely that if an exact incident occurred at a bar, the punishment would have been much more severe. Bertuzzi's actions had nothing to do with the game of hockey and was evidently a violation of the written rules and customary norms. The fact that he received minimal punishment for ending a player's career and was allowed to continue to play in the NHL sends the message that excessive violence is tolerable and will not result in harsh punishment.

²⁹⁴ *Ibid* at para 39.

²⁹⁵ *Ibid* at paras 40-43.

²⁹⁶ Zajda, *supra* note 92 at 13.

²⁹⁷ *Bertuzzi*, *supra* note 126 at para 46.

²⁹⁸ *Ibid* at para 55.

²⁹⁹ *Ibid* at para 59.

³⁰⁰ *Ibid* at para 61.

³⁰¹ *Ibid* at para 49.

³⁰² Clete Samson, "No Time Like the Present: Why Recent Events Should Spur Congress to Enact a Sports Violence Act" (2005) 37 *Ariz St LJ* 949 at 966-967.

Another leading case in sports violence is *Agar v Canning*³⁰³. It is a civil case between a member of a hockey team against a member of an opposing team, but the court made relevant pronouncements on issues relating to hockey violence. The facts of the case were simple. The defendant body checked the plaintiff during the course of a hockey game. The defendant had possession of the puck when the plaintiff hooked him with his hockey stick and hit the defendant with a blow in the back of the neck. The defendant then stopped, turned, and hit the plaintiff between the nose and the right eye. The plaintiff fell to the ice and was left unconscious.³⁰⁴ The plaintiff was seeking damages for the injuries caused by the defendant. The court then analyzed current law on the topic of sports violence to determine whether or not the defendant was liable. The judge stated that an existing legal principle states that an unlawful blow, struck out of anger, or which is likely done with intent to injure, is actionable. However, a blow that is struck simply in the course of a lawful sport is not actionable.³⁰⁵ The judge moved on to state that:

[h]ockey necessarily involves violent bodily contact and blows from the puck and hockey sticks. A person who engages in this sport must be assumed to accept the risk of accidental harm and to waive any claim he would have apart from the game for trespass to his person in return for enjoying a corresponding immunity with respect to other players. It 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.³⁰⁶

It seems as though the court was leaning towards exempting the defendant from liability for the injuries suffered by the plaintiff. Yet, the court clearly states that a limit must be placed on a player's immunity from liability.³⁰⁷ The problem arises when the court does not state in which case a player will not be immune from liability. Instead, the court indicated that "[e]ach case must be decided on its own facts so it is difficult, if not impossible, to decide how the line is

³⁰³ [1965] MJ No 24, 54 WWR 302 [*Canning*].

³⁰⁴ *Ibid* at para 2.

³⁰⁵ *Ibid* at para 4.

³⁰⁶ *Ibid* at para 6.

³⁰⁷ *Ibid* at para 8.

to be drawn in every circumstance”,³⁰⁸ which is consistent with the principles developed in the criminal cases. The *Canning* decision ultimately demonstrates a certain tolerance from the court. The judge accepted the legal principle that only excessive acts of violence are actionable, but later states how difficult it is to pinpoint which circumstances are deserving of legal intervention. In addition, the court in *McSorley* stated that it is at the prosecutors’ discretion to file an action against an offending hockey player for acts committed on the ice. So if courts are unable to determine which behaviours are actionable, “how can players be expected to know better?”³⁰⁹ While it is true that a line is difficult to pinpoint in every circumstance, it should not deter courts from interpreting the case law. However, it would be helpful to have a legislative framework in place to guide the courts in their decision-making. There are other sections of the *Criminal Code* that are difficult to interpret, but that has not prevented courts from getting involved. Judges normally interpret areas of the law that are vague and unclear in order to develop common law enhancements to make its application easier and more consistent.³¹⁰ Despite the court’s ability to clear up areas of law with their interpretations, the courts are hesitant to do so with regard to hockey violence. This is presumably due to the strong social forces behind these cases and the fanfare surrounding the prosecution of a professional athlete.

The case law on hockey violence has provided some guidelines in determining criminal liability despite the lack of a suitable judicial framework. As discussed above, there are several Canadian cases that have left us with some indication as to what kind of behaviour will likely lead to the involvement of the law. To summarize, the court in *Maki* determined that it is difficult to prove intent beyond a reasonable doubt, but criminal prosecution is possible despite the

³⁰⁸ *Ibid.*

³⁰⁹ Baxter, *supra* note 173 at 283.

³¹⁰ *Ibid* at 282-283.

league's ability to self-regulate. The court also noted that consent to bodily harm is limited and does not apply to all contact in hockey. This notion was furthered by the court in the *Green* case, wherein it was established that professional hockey players consent to a number of assaults anytime they are on the ice playing hockey otherwise the game would not be played with its customary speed, force, and competitiveness. In this case, since there was no intent to injure and the players acted instinctively, there was no conviction. The court ultimately determined that each case must be judged on its own facts, and that a charge of assault causing bodily harm would likely be more successful than a charge of common assault. The court in *Cicarelli* offered more guidelines since notions from *Jobidon* and *Cey* were adopted. This case was primarily concerned with questions of consent. The court applied the principle in *Jobidon* stating that consent is limited to force where bodily harm was not caused nor intended. Consent can be express or implied in the context of hockey, but it is limited to the contact that falls within customary norms and the rules of the game. The principle in *Cey* indicated that players are not expected to stop themselves in the heat of the game therefore some assaults are expected. As such, players agree to body contact that is unintentional, instinctive, or reasonably expected in the game of hockey. The court in *Cicarelli* relied on these principles to determine that a premeditated and intentional assault has no place in hockey. Therefore, acts that have a high risk of injury will be unlawful regardless of how often it happens in hockey. Similarly, the court in *Canning* determined that a blow struck out of anger or which is likely done with intent to injure, is unlawful. In other words, excessive acts of violence are actionable. Finally, the court in *McSorley* added that a hockey stick could be used as a weapon. When a hockey stick is being used in a manner that is not consistent with the rules of hockey, it can be used as a weapon. This case law ultimately determined that intent to injure and subsequent injury are important factors

that will decide if criminal assault took place. These cases provided some important insights that could eventually lead to a framework for criminal liability, however the lenient punishments in each case suggest that the courts were unwilling to make an impressionable statement on hockey violence. In summarizing the case law on hockey violence, it becomes clear that there are several issues with regards to the criminal prosecution of hockey players for on-ice conduct.

2.2.3 « Consent as a Limitation to Criminal Prosecution »

As shown in the case law, intent to cause injury is an essential element in the criminal prosecution of a hockey player. The prosecutor must show that the offending player had the *mens rea* to commit an assault pursuant to the *Criminal Code*, which is generally intent to hit the opponent. The intent to inflict a physical injury stems from the theory of implied consent. Implied consent will not be applicable if the prosecutor can prove that intent to cause injury was present. The physical contact, which caused the injury, must be clearly outside of the rules of the game.³¹¹ More specifically, Standen states that “criminal liability [...] requires that the injuries must be so severe as to be unacceptable in normal competition, requiring a change in the nature of the game”.³¹² Therefore, the prosecutor must show that the body contact was not related to the competition of the game, which can be quite difficult.³¹³ It can sometimes be impossible to distinguish what the player’s intent was in the heat of the game inasmuch as it is difficult to determine the scope of implied consent.

The defense of consent is a primary issue in both criminal and civil sports injury cases. It is the heart of most cases since the courts will deem that there was no liability if the athlete

³¹¹ Standen, *supra* note 134 at 634.

³¹² *Ibid.*

³¹³ Oh, *supra* note 19 at 319.

consented to the bodily injuries. It is thus one of the major limits to criminal prosecution. It has long been debated what type of conduct athletes typically consent to by participating in a hockey game. Generally, a hockey player consents to the body contact that falls within the official rules of the game. It could also include contact that violates the game rules if it deemed to be customary or anticipated by the nature of the game.³¹⁴ When the game involves minors, the parents or legal guardians typically give consent.³¹⁵ But courts have recognized that amateur hockey players consent to less assaultive acts of violence than professional hockey players. For example, players in the NHL wear the most advanced protective gear as opposed to children playing a game between friends who might not wear all the necessary equipment. Other Canadian case law has attempted to determine what falls under the scope of implied consent. In *R v Leyte*, it was deemed that players consent to acts that occur as a result of instinctive reactions related to the play.³¹⁶ The court in *R v Maloney* determined that hockey players impliedly consent to violence that is inherent and reasonably related to the normal playing of the game. If the intent of the accused was, however, to cause injury, then consent no longer applies.³¹⁷ It should be noted that injuries in hockey are generally more severe than injuries sustained outside of the context of hockey. As such, intent to cause injury refers to severe injuries seeing as minor injuries are generally regular occurrences in the game. Other cases have confirmed the principle that consent only applies to conduct that is foreseeable,³¹⁸ routine,³¹⁹ or incidental³²⁰ in the

³¹⁴ Gibson, *supra* note 158 at 437; John Barnes, *Sports and The Law in Canada* 2d ed (Toronto: Butterworths, 1988) at 257; Culhane, *supra* note 51 at 17.

³¹⁵ Culhane, *supra* note 51 at 17-18.

³¹⁶ McCutcheon, *supra* note 4 at 275-277; Farrugia, *supra* note 132 at 479.

³¹⁷ *Ibid.*

³¹⁸ *R v St. Croix*, [1979] OJ No 4556; 47 CCC (2d) 122.

³¹⁹ *R v Watson*, [1975] OJ No 2681; 26 CCC (2d) 150.

³²⁰ *R v Henderson*, [1976] BCJ No 1211; [1976] 5 WWR 119.

course of a hockey game. The rules of the game could also allow room for some contact to occur, making it an expected part of the game.³²¹

The court is thus mindful of these circumstances when determining whether implied consent should be applied to a player.³²² Nevertheless, implied consent can be a difficult thing to pinpoint. It differs from explicit consent seeing as it is not written down nor is it discussed between players and management before each game. As such, there is no way of really knowing what each player subjectively consents to in the course of any given hockey game. It is possible that one player views the extremely violent acts as regular occurrences in hockey, whereas another player might see it as criminal in nature. It is thus important to be mindful of the subjectivities of what is commonly accepted and consented to in the game of hockey.³²³ The court in *Cey* adopted an objective test in order to alleviate these difficulties with implied consent. The objective test in *Cey* takes a look at several factors including age, level of experience, conditions of play, and so on. This means that the threshold can differ between the levels of hockey. However, this test can easily result in a finding of certain conduct as unlawful that is commonly accepted in hockey. Many hockey plays are intended to be forceful, but is simply a part of the game. As such, the *Cey* test sets the threshold too low. Alternatively, McCutcheon suggests using a threshold that considers the tolerance of society. Since consent is actually attributed to the hockey player by operation of the law, he suggests explaining the lawfulness of violence on the ground that it is tolerated by society in the sports context.³²⁴ As such, if the conduct in question falls beyond the societal threshold, and is deemed to be intolerable by society, then the circumstances likely allow for legal intervention. Whereas the *Cey* test asks the

³²¹ *R v Leclerc*, [1991] OJ No 1533; 67 CCC (2d) 150.

³²² Barnes, *supra* note 314 at 94-95.

³²³ Baxter, *supra* note 173 at 291.

³²⁴ McCutcheon, *supra* note 4 at 281.

objective question of how a reasonable person in the same circumstances would have behaved in order to determine if consent was present at the time of the incident, the societal threshold measures the benefits of the sport versus the harmful effects of the conduct in question. In other words, “the question is whether the particular conduct so infringes societal interests that the perpetrator should be punished notwithstanding the victim’s consent”.³²⁵ If the conduct in question is in fact deemed to be intolerable by society, one can then ask the question of whether or not the conduct is also viewed as deviant from a subcultural point of view as a violation of the customary norms of the game. For example, fighting is prohibited by the rules of the NHL, yet it still occurs on a regular basis. It is foreseeable that an injury can occur during a fight.³²⁶ The court will however examine every detail of the fight to ensure that the players each consented to the fight. An accidental hit or drop of the hockey stick will not necessarily lead to the conclusion that implied consent was present.³²⁷ But when two players drop their gloves and hold their fists up in preparation for a fight, the players seemingly consent to fight each other. Although, a fighter may not consent to all types of hits he may receive during a consented fight. In *Maki*, the court stated that there could be no consent for the blow that injured the opposing player.³²⁸ In other words, while the fight itself may have been consensual, the blow that ultimately injured a player went beyond the scope of implied consent. So what happens when conduct goes beyond the scope of game rules and customs and the defense of consent is no longer applicable in the circumstances?

It has been suggested that these excessive acts of violence that go beyond the scope of implied consent are subject to criminal prosecution. Due to the defense of consent, Standen

³²⁵ Farrugia, *supra* note 132 at 473.

³²⁶ Standen, *supra* note 134 at 641.

³²⁷ Barnes, *supra* note 314 at 95.

³²⁸ *Ibid*; Barnes, *supra* note 6 at 216.

concludes that only a certain level of violence should be subjected to criminal prosecution. He suggests that only the acts that are far outside the rules of the game and the participant's expectations should be considered for criminal sanction.³²⁹ In other words, illegitimate violence that is deliberate and unnecessarily violent with foreseeable injuries should be subject to criminal prosecution.³³⁰ Examples of this include one player hitting another long after the victim falls onto the ice and is rendered helpless,³³¹ and instances where there are time lapses between a whistle and a hit that takes place after stoppage of play.³³² When an act is criminal in nature, some believe that consent should not be an allowable defense. As Oh suggests, "a person cannot license another to commit a crime".³³³ For example, Bertuzzi's attack against Moore was criminal in nature; therefore consent should not be a factor since there are limits to an athlete's consent. One of the primary reasons why we cannot prosecute all levels of violence is based on the notion that if hockey players run the risk of being prosecuted for all of their actions on the ice, it can harm the friendly competition of a physical sport many individuals thoroughly enjoy.³³⁴ And by limiting criminal prosecution to those actions that are not protected by consent, we can protect the integrity of the sport and maintain the high level of participation and enjoyment by the fans.

It is worth noting that similar issues regarding consent are not only problematic in criminal prosecutions but also in cases of civil sports injury litigation. The maxim *volenti non fit injuria* is applicable in these cases, meaning that there is no injury done to the willing person. However, an action in torts for an injury sustained during a hockey game can still end in an

³²⁹ Standen, *supra* note 134 at 640.

³³⁰ Barnes, *supra* note 314 at 92-93.

³³¹ *Ibid* at 94.

³³² *Ibid*.

³³³ Oh, *supra* note 19 at 320.

³³⁴ Standen, *supra* note 134 at 640.

award for damages if the act causing the injury was excessive even in the context of professional hockey.³³⁵ In the civil context, the notion of consent often relates to the assumption of risk doctrine. Violent behaviour will be deemed excessive if it is determined that the athletes did not assume the risks from such conduct. A plaintiff is not deemed to have assumed the risks of the defendant's unreasonable risk of harm. As such, Canadian courts have shown that an athlete does not assume the risks of players' negligent infliction of injury if the circumstances demonstrate that there was intent to cause injury.³³⁶ In summary, *volenti non fit injuria* is applicable, but only in situations where injury was not the intent of the offending athlete. Voluntary participation in hockey does warrant a certain level of implied consent, but only in circumstances where the rules and customs of the game are respected. Deliberate injury and egregious conduct are beyond the scope of consent and assumption of risk.³³⁷ A well-known example of this reasoning is found in *Hackbart*.³³⁸ While this is a football case, the court examined the applicability of the assumption of risk doctrine and ultimately determined that the defendant had acted in anger, and not according to the rules of the game. The inherently violent nature of football did not allow the athletes to conduct themselves in excessively and unnecessarily violent manners. The defendant disrespected the game rules, and intentionally injured an opponent. As such, the appellate court allowed the claim to move forward.³³⁹ Similar variations of this *ratio decidendi* exist in both civil tort actions as well as criminal prosecutions.

³³⁵ Citron and Ableman, *supra* note 151 at 195.

³³⁶ *Ibid* at 210.

³³⁷ *Ibid* at 211.

³³⁸ *Ibid*.

³³⁹ Culhane, *supra* note 51 at 17.

2.2.4 « Fighting in Hockey »

Hockey is the only professional sport that actively allows players to engage each other in fistfights, apart from combat sports. Other sports are able to maintain their popularity without allowing or regulating fighting, such as the equally violent sport of football that is immensely popular in the United States. However, as noted by hockey legend Wayne Gretzky, “hockey is not only surviving in the States with fighting... it’s becoming more and more popular”.³⁴⁰ As such, hockey is actually gaining American fanfare based on the fact that it permits fighting. For example, in the earlier years of hockey, teams such as the Philadelphia Flyers, who were known as the “Broad Street Bullies”, often received more attention and louder cheers “for a punch on the chin than a puck in the net”.³⁴¹ Fist fighting thus made its place in hockey over the years. Since no other team sport operates in this manner, it is a legal issue not known to other sports, such as football. The courts have expressed a somewhat ambiguous guideline that violent conduct in the course of a hockey game will be susceptible to criminal prosecution if intent to injure is present. Intent to injure during a fistfight can be very difficult to prove, yet an injury can happen very easily when two players are violently throwing punches each other while standing on skates on an ice rink being cheered on by fans and teammates alike. It can also be difficult to prove that the players have consented to any bodily harm they might suffer in the course of a fistfight. The definition of bodily harm in the *Criminal Code* is quite vague and can encompass any minor injury that might occur in hockey. While a minor injury such as a black eye occurs regularly in hockey, it is highly unlikely that it would ever be the subject of a criminal

³⁴⁰ Oh, *supra* note 19 at 316.

³⁴¹ Schiller, *supra* note 143 at 244.

prosecution. As such, this further supports a modification to the definition of “bodily harm” in the *Criminal Code*, as previously discussed.

In addition, while players might consent to the ordinary happenings of conduct occurring under the rules and customs of the game, fighting still occurs. Fighting is against the rules, but it is accepted as part of the customs of the game. Players will often accept a five-minute major penalty imposed by the referee in order to participate in a fight with an opponent. So at what point does consent exit, and intent to injure enter the arena? The court in *Cey* expressly refused to discuss the scope of consent during a hockey fight. And the Supreme Court in *Jobidon* stated that fighting is a socially useless activity in the ordinary walks of life, but sports have a social value, which adds some merit to the arguments that fighting in hockey is not unlawful.³⁴² However, when young athletes are severely injured, the social utility of fighting in hockey becomes more difficult to defend. For example, in 2009, a Senior AAA hockey player died from injuries sustained in a hockey fight.³⁴³ Don Sanderson died after being in a coma for twenty days following a hockey fight. Witnesses described the fight as a normal hockey fight where nothing unusual took place. Towards the end of the fight, Sanderson’s helmet fell off and he hit his head on the ice after stumbling from his opponent’s grip.³⁴⁴ He immediately fell unconscious and eventually into a coma, needing life support, before succumbing to his injuries.³⁴⁵ Incidents such as these, while extremely rare in hockey, could arguably be prevented if violent behaviour was consistently punished and the leagues adopted practices that did not encourage and promote violence.

³⁴² Barnes, *supra* note 6 at 216.

³⁴³ CBC Sports, “Senior Hockey League Player Dies From Fight-Related Injury”, (January 2, 2009) online: <<http://www.cbc.ca/sports/hockey/senior-hockey-league-player-dies-from-fight-related-injury-1.793185>>.

³⁴⁴ Atkinson, *supra* note 69 at 133.

³⁴⁵ CBC Sports, *supra* note 339.

The issue of fighting in hockey is mostly problematic when teams hire a hockey player for the sole purpose of intimidating opponents and being the team fighter, also known as a “goon” or an “enforcer”.³⁴⁶ These players are not always the most skilled athletes, but are the big and strong individuals that can fight on skates. They often feel pressure to compensate for their lack of talent by being excessively violent.³⁴⁷ Jones and Stewart have conducted some research on the topic of enforcers and have found a link between violence and player salaries. They indicate that the NHL salary structure for skilled players is different than that of enforcers. The players who are signed for their talent and skills often make a lot more money than those who are hired for their ability to use force on the ice.³⁴⁸ This suggests that the hiring of enforcers is done knowingly in order to use these players to retaliate against others in what Oh calls a “self-police system”.³⁴⁹ He is sent out onto the ice to intimidate a star player in attempt to get him to take a penalty so he sits out a couple minutes in the penalty box³⁵⁰ or to retaliate against an opponent who has roughed up a teammate.³⁵¹ It is also common for enforcers to engage in fights if their team appears to need a boost of momentum. At the beginning of the 2013/2014 season, an incident occurred in the NHL that sparked anew the debate on whether or not fighting should be allowed in hockey. On October 1st, 2013, the Toronto Maple Leafs faced off against their rivals, the Montreal Canadiens, and a fight eventually broke out between the teams’ two enforcers. The end result was that one of them was knocked unconscious after a heavy fall onto the ice. He had to be helped off the ice by medical personnel, and it was later reported that he suffered a

³⁴⁶ Gibson, *supra* note 158 at 430; Harary, *supra* note 25 at 202; Oh, *supra* note 19 at 314.

³⁴⁷ Gibson, *supra* note 158 at 429-430

³⁴⁸ Jones and Stewart, *supra* note 23 at 172-173.

³⁴⁹ Oh, *supra* note 19 at 314.

³⁵⁰ Harary, *supra* note 25 at 202.

³⁵¹ Oh, *supra* note 19 at 314.

concussion and would be out of the game indefinitely.³⁵² The debate on fighting is always ongoing and has sparked comments from everyone within the league and fans alike.

Some suggestions have been made in order to help minimize the violence, like the incident described above between two enforcers. Coakley suggests that teams should not hire players explicitly to fight and commit violent acts. Instead, enforcers should be suspended without pay and teams should be prohibited from replacing them during the suspension period. In addition, he suggests that team owners and coaches should be fined for the violent actions of their players.³⁵³ In contrast, Barnes suggests that teams who hire goons should be forced to play them.³⁵⁴ It is common knowledge in the hockey world that goons do not get a lot of ice time during a hockey game. They typically play under ten minutes per game, and most of their time is spent attacking opponents in various ways. They often end the season with a large number of penalty minutes. Barnes' arguments that teams should play their enforcers relates to the fact that teams will quickly lose interest in employing a goon if these players, who often lack real talent and skill, are playing twenty five minutes per game.³⁵⁵ As a result, teams will likely stop employing enforcers altogether in order to give the talented players more ice time for a greater chance to win the game.

When teams employ enforcers, it ultimately forces other teams to do the same. More specifically, when one team uses an enforcer to apply force against the opponents, other teams feel pressured to hire a similar player in order to protect the more talented players on the team from intimidation and violence. As more teams hire enforcers, the problem escalates and the violence increases. As a result, the Stanley Cup winning team is often the one with the fewest

³⁵² CTVNews.ca Staff. (October 2, 2013). Fighting in the NHL: Is it time to end the violence? *CTV News*. Retrieved from <http://www.ctvnews.ca/sports/fighting-in-the-nhl-is-it-time-to-end-the-violence-1.1480167>.

³⁵³ Coakley, *supra* note 10 at 210.

³⁵⁴ Barnes, *supra* note 6 at 228-229.

³⁵⁵ *Ibid.*

injured players at the end of the season.³⁵⁶ To illustrate the impact of enforcers in the NHL, McSorley was once asked whether or not he believed he would have become an NHL player if he was unable to fight, and replied as follows: “I would not have made Junior A”.³⁵⁷ To emphasize McSorley’s statement, a well-known sports attorney and agent once described the pressure for players to fight:

[t]he premium the NHL puts on fighting was reestablished every time I talked to a team on behalf of a draft choice. Invariably, the interview would get around to how well my client could fight... To my endless amazement, the clubs – if they got the impression that the boy wasn’t tough enough – frequently offered to enroll him in boxing classes”.³⁵⁸

A more recent example of this can be seen at a Montreal Canadiens practice when known enforcer Brandon Prust “fought” teammate Alex Galchenyuk.³⁵⁹ The fact that players are practicing fights clearly demonstrates the place fighting has in hockey. Whether it is through teams sending their young players to boxing lessons or enforcers teaching skilled players how to fight in practice, fighting remains a strategy for teams and players in the NHL to win games. Those who justify the use of violence often blame the speed of the game, the body contact, the aggressiveness of the game, and the individual frustrations of the players. It is often argued that an occasional fight or late hit is actually a good thing as it allows players to release frustration.³⁶⁰ In other words, fighting can be seen as therapeutic for the players. Without fighting, there could be harsher consequences and more severe injuries occurring as a result.³⁶¹ According to Horrow, the problem with this justification is that most players seemingly believe it.³⁶² Yet, other hockey associations seem to do just fine without fighting and excessive violence. For example, the

³⁵⁶ Harary, *supra* note 25 at 202.

³⁵⁷ *Ibid* at 203.

³⁵⁸ Yates and Gillespie, *supra* note 5 at 150.

³⁵⁹ BarDown Staff, “Prust and Galchenyuk drop the gloves at Canadiens practice”, (November 26, 2014) online: <<http://www2.tsn.ca/bardown/Story.aspx?Prust+and+Galchenyuk+drop+the+gloves+at+Canadiens+practice&id=473002>>.

³⁶⁰ Horrow, *supra* note 27 at 3.

³⁶¹ Jones and Stewart, *supra* note 23 at 176.

³⁶² *Ibid*.

International Ice Hockey Federation does not allow fighting in their tournaments. If a player fights during an international hockey game, he or she will be ejected from the tournament.³⁶³ If some leagues can survive without all the violence that can be seen in the NHL, it makes one wonder why it is tolerated at all in any league. A proper legislative framework for criminal liability could eventually make the game of hockey less likely to injure players all while maintaining the same entertainment factor it currently offers.

³⁶³ Oh, *supra* note 19 at 317.

Chapter 3

3 « Theoretical Perspectives »

The actions of the players within the world of hockey are seen as acceptable, despite the fact that some conduct can be viewed as aggressive and violent to outsiders. In fact, the hockey arena is often viewed as a rule-controlled environment in which violence is not considered to be criminal in nature. Donald Black's theories of law will be used to predict the behaviour of the law in this environment. The above-mentioned social issues in the sport of hockey can be explained with these theories, and it can predict the future role of the law within this social world.

Canadian precedent suggests that Canadians are becoming less tolerant of violent behaviour that leads to serious injury in professional hockey. It remains a rare occurrence, but the courts are less reluctant to bring charges in Canada against a professional athlete. There are examples in Canadian history that suggests it is possible to regulate an area of society that has previously been disregarded by the law. For instance, domestic violence was once ignored by the law and deemed to be a private family matter. However, the authorities eventually noticed a need for intervention by the justice system, and it is no longer immune from the law.³⁶⁴ This suggests that law could one day formally regulate other forms of violence. In fact, cases of domestic violence are being more heavily scrutinized by the justice system in the sporting world. For example, the NHL suspended a Los Angeles Kings hockey player indefinitely following a criminal charge for allegedly assaulting his wife.³⁶⁵ Similar charges have recently been laid

³⁶⁴ Baxter, *supra* note 173 at 282.

³⁶⁵ NHL.com Staff, "Kings defenseman Voynov suspended indefinitely", NHL (October 20, 2014) online: <<http://www.nhl.com/ice/news.htm?id=735321>>.

against professional athletes in other sports.³⁶⁶ The professional sports leagues have indeed noticed the importance of intervention in such affairs since they are imposing greater supplemental discipline than they have in the past. It stands to reason that on-ice violence could one day be the subject of similar intrusion by the league and the law, since it has slowly begun to do so. Since the law has intervened in the past, it is essential that a suitable legislative framework be put in place in order to properly regulate violence with the help of the law. This would also ensure that hockey players are able to monitor their own conduct to avoid being subjected to criminal prosecution. The development of a legislative framework on hockey violence should begin by adopting the notion that the law does in fact have a role to play in regulating on-ice conduct. For instance, it can be said that “the seriousness and quantum of injuries caused through violence, coupled, no doubt, with an awareness of their economic consequences, probably made a change in prosecutorial policy inevitable”.³⁶⁷ Since the law has already intervened in several cases in the past, it is reasonable to assume that it will get involved again in the future. Consequently, it would be ideal to put a framework in place to properly deal with such cases.

The legal analysis behind hockey violence as a criminal matter can be done with the help of social characteristics. The law normally functions in a way where the doctrines of law are applied to the facts of the case. Black argues that every case also has social characteristics.³⁶⁸ Black suggests that the following characteristics have an impact on the case: the social standing of each individual; the social distance separating the parties; the financial status of the parties; whether the parties are individuals or organizations; race, religion, and lifestyle; and the social

³⁶⁶ Jill Martin & Steve Almasy, “Ray Rice terminated by team, suspended by NFL after new violent video”, CNN (September 16, 2014) online: <<http://www.cnn.com/2014/09/08/us/ray-rice-new-video/>>.

³⁶⁷ McCutcheon, *supra* note 4 at 270.

³⁶⁸ Donald Black, *Sociological Justice* (New York, NY: Oxford University Press, 1989) at 8.

characteristics of the lawyers and the third parties.³⁶⁹ For instance, the fact that the NHL is an organization with billions of dollars and the players are individuals with millions of dollars has an impact on any legal decision relating to these parties. The social structure, which is determined with examination of all relating factors, is crucial to understanding why two cases that are almost identical can result in different outcomes. A good example is the difference in the *Maki* and *Green* decisions. As discussed above, the two cases dealt with the same incident but was tried seven months apart before different judges. Therefore, Black theorizes that the social characteristics of a case can predict and explain how a case is handled.³⁷⁰ The judges are seemingly condoning violence in sport but not in other contexts likely due to the high status of the athletes. Accordingly, this theory can be used to predict and explain why the law is seemingly invisible in the context of a hockey game. The social structure of the sport creates an environment that is tolerable of violence, which might explain the legal variation between the prosecution of an assault on the streets and a practically identical assault on the ice during a hockey game going unnoticed by the police and courts.

Black thus attempted to create a sociological theory that can predict and explain the variation of law in all instances.³⁷¹ It is then possible to distinguish between a jurisprudential model of law and a sociological model of law. The jurisprudential model is the most common and the actual way a court proceeds in deciding a case. The legal decision is made by relying on the rules and applying them to the facts of the case. In contrast, the sociological model prefers to take a look at the social characteristics. As expressed by Black, “the rules provide the language of law, but the social structure of the case provides the grammar by which this language is

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ *Ibid* at 19.

expressed".³⁷² In other words, to make a decision based solely on the law without consideration of the social characteristics surrounding the case would be to ignore the fact that the social structure changes from case to case. The sociological model assumes that law is variable. The social characteristics of the parties change and influences the way a case is handled. This ultimately impacts the end results and creates a variation in the way the law is used. For example, the judge presiding over the *McSorley* case apparently enjoyed the popularity and fanfare of it, which may have had an impact on the decision. The defence team called up Wayne Gretzky as a witness in support of McSorley and it was suggested that this may have distracted the judge.³⁷³ When the decision was made, the judge had printed out copies for the reporters who filled the court room, and invited them to cross the bar to get their copies, which goes against legal custom. It was said that the judge was joking and shaking hands with the reporters, seemingly enjoying being the final decision maker on this case.³⁷⁴ This demonstrates the effect of social characteristics of a case. It is reasonable to assume that the judge would not have conducted himself in this manner if the accused was an individual unknown to the media and accused of committing a crime on the streets. The judge in the *McSorley* case made a spectacle of the proceedings, as noted above with the reporters and fanfare, because the accused was a well known professional hockey player. In that sense, the accused had a higher social position than the judge, which may have resulted in the judge behaving differently than what is customary in criminal proceedings. In most criminal cases, the judge is able to maintain impartiality, but it appears that McSorley's fame and income placed him on a higher social status. It was suggested by Schiller that the judge may have been distracted by big name athletes such as Wayne Gretzky

³⁷² *Ibid.*

³⁷³ Schiller, *supra* note 143 at 265.

³⁷⁴ *Ibid* at 266.

being in the room.³⁷⁵ This ultimately led to the lenient punishment imposed on the accused. While McSorley was found guilty of assault with a weapon, he was simply given a conditional discharge. In ordinary circumstances where the accused is not a famous athlete, the punishment would likely include some prison time. However, McSorley was discharged despite the finding that he had the necessary intent to be found guilty of assault with a weapon. As described by Donald Black, the social forces behind a particular case can often be used to explain the behaviour and ultimate decision of a judge in a particular case.

It is essential to examine the social structure in each case since there are so many differentials in legal life that the written law cannot explain. A perfect example of this is in fact the application of law in professional hockey. The written law cannot explain why criminal law has been primarily left out of the hockey arena. For some, an assault on the ice might be equivalent to an assault on the streets, but by examining the social characteristics, it is possible to explain the lack of formal law in the world of hockey. The internal measures of discipline for on-ice conduct, including the NHL Rule Book, and the CBA, are just some methods for the league to regulate the amount of violence. This social structure provides a pattern from which we can predict and explain why the social world of hockey is less formally regulated and more immune to the law than other areas of social life. As suggested by Black, law varies with its environment.³⁷⁶ Each case is handled in a way that is dependent on its social context. In this sense, the NHL is separate from the rest of society in that it maintains its own rules and regulations to control the members of the league, which frees the athletes from external punishment, at least to a certain extent since no citizen is truly above the law.

³⁷⁵ *Ibid* at 266.

³⁷⁶ Black, *supra* note 368 at 19.

Black mentions other important variables, including the cultural distance between the adversaries; their degree of interdependence; and the extent to which there are alternatives to law. According to Black, culture is the symbolic aspect of social life. This includes concepts and ideas, languages, folklore and science, religion, values and customs, clothing and other decoration. Culture can increase and decrease with time.³⁷⁷ Cultural theories can be applied to law and can be explained with cultural values or custom.³⁷⁸ This theory presented by Black, which is exceedingly relevant to the world of hockey due to the culture discussed above, includes the existence of subcultures and deviant behaviour. According to Black, one theory of deviant behaviour can be explained by an individual's participation in a subculture. When deviant behaviour is common within a subculture, that group does not react negatively to such conduct. Therefore, not all behaviour is seen as deviant from the standpoint of the subculture. Only the conduct that is viewed as deviant by the group is actually deviant, whether or not societal opinions differ. In other words, many forms of conduct that are defined as deviant according to society, are accepted by the members of the group and minimal stigmas are attached to this conduct.³⁷⁹ More specifically, "deviant behavior is seen as conformity to the values of a subculture, so that what is wrong from the standpoint of the larger society is acceptable or even virtuous from the standpoint of the deviant's associates".³⁸⁰ As such, the behaviour of athletes is not controlled by society's norms, but rather the accepted norms of the subculture. In other words, society might not agree with fist fights in hockey seeing as folks are very divided in this debate, but fighting is generally reasonable in the minds of hockey players. Therefore, hockey players behave the way they do because it is accepted by the participants of the group. In fact,

³⁷⁷ *Ibid* at 63.

³⁷⁸ *Ibid* at 62.

³⁷⁹ Clarke, *supra* note 16 at 1172.

³⁸⁰ Black, *supra* note 368 at 79.

the customs of the sport plays an important role in determining what is considered part of the game and what actions are so egregious that most actors within the world of hockey would agree that it should be taken out of the game. Deviance thus refers to these actions that are so excessively violent that even the subculture views it as wrong. Athletes behave according to coaching, teammates, and emotions exacted by the heat of the game. Therefore, their conduct normally follows the rules and customs of the game as opposed to socially accepted behaviour. In other words, “athletes are responding to certain stimuli, stimuli that does not exist outside the arena [...] he or she is socialized by the sport to develop this attitude and utilize it during game play. The athlete rarely, if ever, receives subgroup condemnation for these acts, and thus has no immediate incentive to refrain from behavior that larger society finds distasteful”.³⁸¹ While some behaviours might be frowned upon or even illegal in everyday life, the subculture views it as perfectly acceptable. For example, fighting in hockey can be seen as deviant in the real world, but the customs of the hockey world indicate that it is perfectly acceptable to drop the gloves and fight an opponent. Not only is it acceptable, but hockey players are also often encouraged to use aggressiveness and violence as a skill because that type of conduct is customary in hockey. As articulated by Clark, “[i]f an athlete has been conditioned to perform in an antisocial fashion, why should that athlete be held accountable for responding predictably to the stimuli that evoke such behavior?”³⁸² In other words, if a player delivers a dirty blow to an opponent, it is likely that this will evoke a desire to retaliate and a subsequent fight would be expected. Why punish a player for a fight that he was trained to initiate in such circumstances other than by a five minute major penalty imposed by the referee? There is little stigma attached to this type of behaviour within the subculture and it can be argued that it adds to the functioning of the group. As will be

³⁸¹ Clarke, *supra* note 16 at 1173.

³⁸² *Ibid* at 1154.

discussed in the analysis of interview data, it is clear that some players use fighting as a therapeutic act to release frustration and as a means to prevent further dirty play. In this manner, some violence and deviance is actually normal for the group, despite formal social control norms stating the contrary.³⁸³ It is thus suggested that criminal liability should be limited to those instances where the subgroup itself sees the conduct as deviant and criminal in nature. This relates to conduct that not only falls well outside the rules and customs of the sport, but acts that violate the fabric of the game in a way that makes the game look savage. As will be argued below, actions that are intentional and result in serious injuries are often condemned by the individuals within the hockey world. Therefore, acts that are intended to cause harm such as hits to the head do not belong in the game, and should be punished by law. The sport of hockey does not condone intentional harm that causes serious injury and neither should the courts. While some judges are extremely lenient when faced with an accused who is a professional athlete, it should not be the case. Hockey players are citizens of the state and should be treated in the same manner as all other individuals, regardless of class or status.

Similarly, Kidder's theory on custom and the origins of law can be applied in this instance. Kidder describes law as a restatement of customs.³⁸⁴ This means that customs are taught through socialization and informal enforcement, therefore individuals feel obligated to conform.³⁸⁵ With regard to the example of fighting in hockey, it is possible that players learn how to fight as it is customary in hockey, and thus view this behaviour as acceptable and undeserving of external enforcement. This can be problematic if legislation was ever brought forward to regulate violent conduct on hockey. As suggested by Kidder, law works best when it

³⁸³ *Ibid* at 1172.

³⁸⁴ Robert L. Kidder, *Connecting Law and Society* (Englewood Cliffs, NJ: Prentice-Hall, Inc. 1983) at 37.

³⁸⁵ *Ibid*.

reinforces custom. In other words, “lawways cannot change folkways”.³⁸⁶ If change is needed, it is best to alter custom by adopting laws that are consistent with the folkways of the group.³⁸⁷ It is less challenging to implement laws that compliment people’s ideas, beliefs, and values as opposed to attempting to change these by force.³⁸⁸ That being said, it may be possible to change the custom surrounding violence in hockey using law. If hockey players were given criminal sanctions for actions on the ice, especially those that are clearly outside of the norms of customary play, their behaviour would likely change. However, it would change the fabric of the game. As seen in the discussion above on culture, there is a culture that exist in the hockey world that frames in-game violence as unthreatening and perfectly reasonable within the limits of the game. The law should therefore leave room for some foul play that is expected in the heat of the game.³⁸⁹ As noted below by several hockey players, hockey is known for its speed and need for quick decision-making during play. As such, dangerous plays involving body contact and stick work will occur regardless of harsh punishment. Even the most serious threat of punishment will not eliminate all violence. Kidder used the example of the prohibition. The prohibition of alcohol did not work because people found ways to continue producing and consuming it. Therefore, the lawway did not alter the folkway. People were accustomed to alcohol consumption, and a law was not going to prohibit them from doing so.³⁹⁰ It is possible that violent conduct in hockey would follow the same path if laws were drafted to alter the way the game was played. It is likely that athletes will simply continue to play according to the customs of the game. Therefore, laws to regulate the game will be more likely to succeed if they follow existing customs. In fact, norms that govern individual behaviour, such as the effect of the rules and customs of hockey on

³⁸⁶ *Ibid* at 38.

³⁸⁷ *Ibid*.

³⁸⁸ *Ibid* at 118.

³⁸⁹ McCutcheon, *supra* note 4 at 274.

³⁹⁰ Kidder, *supra* note 384 at 38.

the players, are often more important than the formal state rules.³⁹¹ As Kidder states, “laws could follow all the correct procedures and still fail, because laws that violate custom are resisted with as much ingenuity and zeal as is necessary to preserve those customs”.³⁹² Kidder suggests that legislators should be concerned with the opinions and practices of the people involved before drafting new laws that might go against their custom. The people’s explanations and justifications for their actions is essential in avoiding conflict between new laws and customs.³⁹³ More specifically, in order to adopt proper laws in a given area of society, it is essential that the informal rules that are also in play are adequately understood so that both informal and formal rules can work together. Laws and norms work best when they reinforce each other. Otherwise, it is possible that the informal norm will take precedence over the formal rule, making the latter essentially useless.³⁹⁴ Hockey players conform to the accepted norms of the group, which ultimately means they do not see their actions as criminal despite a formal rule in place making it unlawful. Consequently, laws must work with the informal rules of the game in order to avoid a conflict between the two. As will be further discussed in the analysis of data collected through interviews with hockey players, many of them declared they would not change the way they play the game if the law intervened to regulate their sport. Therefore, Kidder’s theory that laws must be compatible with the customs of the group allows one to predict that hockey players will not conform to the laws if they ignore the underlying norms of the sport.

It should be noted that judges are adhering to customs, which leads to distinctive decisions since the customs of the sport allow for some violent play to occur. When compared to similar violent cases outside of the sports context, the judges dealing with hockey violence are

³⁹¹ Clarke, *supra* note 16 at 1161.

³⁹² Kidder, *supra* note 384 at 44.

³⁹³ *Ibid* at 54-55.

³⁹⁴ Clarke, *supra* note 16 at 1161-1162.

very lenient. The case law on this subject suggests that judges tolerate excessive levels of violence likely due to the social characteristics of the case, such as the popularity of the sport and the consequent high status of the professional athlete. This should not be the case. By gaining an understanding on what the players think is tolerable, it gives the legal system a starting point as to when it is appropriate to intervene. If a violent act was serious enough to lead players to think it warrants criminal prosecution, then the legal system should intervene. Someone who is truly impartial would not be affected by the fanfare surrounding a case involving a professional athlete. For example, in the *Maki* decision, the accused swung his stick at Green in a vertical chopping motion, which resulted in serious injuries. This incident had the necessary elements for a guilty verdict, yet Maki was acquitted. The judge ultimately determined that Maki did not intend to injure Green beyond a reasonable doubt and did not see the incident as excessively violent given the context of a hockey game. This type of analysis by a judge can be explained by the theory presented above, which touches on the social characteristics of a case impacting the end result. If this exact incident occurred outside of the sports context, the judge would likely arrive at a guilty verdict rather quickly, and possibly for a more serious offence. While there have been some movement towards harsher punishment in hockey violence cases, from the *Maki* acquittal to the *Bertuzzi* guilty plea, there is some serious leniency coming from the judges in these types of cases. While customs within a subgroup can predict and explain the behaviour of the group, it should not be used to justify and condone criminal behaviour by wider society when it is the subject of a criminal prosecution. The customs will often result in some tolerance of deviant behaviour, even in other subgroups. For example, the police may decline to investigate motorcycle gangs for fighting among themselves because it is within their rules and customs that violence is acceptable. They are willing combatants and it would require many resources to

arrest these gang members each and every time they harm each other. Moreover prosecutions would have difficulty finding cooperative witnesses. However, when an arrest is indeed made, it is essential for the authorities to not condone this behaviour and impose relevant punishment. The customs simply explain the behaviour of the group and allow for some tolerance towards their way of doing things.

Kidder also uses custom to explain the behaviour of group life. This cultural approach, according to Kidder, makes the basic assumption that people make choices based on learned and subconscious preferences.³⁹⁵ These can be irrational preferences “because the people holding them cannot convincingly explain how their welfare is improved by making such choices”.³⁹⁶ In other words, people cannot explain why they act the way they do, but simply because they have always acted this way.³⁹⁷ This is applicable to hockey based on the idea that hockey players often have difficulty explaining why they play so aggressively or violently. They might say it helps the team win or gain momentum, but how do they justify the toll it takes on their bodies? As discussed in the player safety section above, the cumulative nature of hockey injuries can damage a hockey player’s health quite gravely. But since hockey players subculturally accept most forms of violence, not much concern is attributed to the consequences of violence.³⁹⁸ The use of violence is a learned behaviour for most hockey players, and aggression within the rules of the game is thus considered legitimate violence. The challenge is to strike a balance between legitimate and illegitimate violence. It is evident that the world of hockey cannot have complete immunity from the law. However, recognition of the norms that exist in the culture of hockey,

³⁹⁵ Kidder, *supra* note 384 at 52.

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid* at 53.

³⁹⁸ See pages 8-11 of this text.

and the adoption of mixed formal and informal methods of social control can influence proper regulation of violence in hockey.

As a society, we have accepted that sports are a necessary and socially benefitting thing, and consequently determined that it needed to be tolerable of some foul play. It is thus unreasonable to say that all levels of violence are unlawful. We must remain open to certain levels of violence that are expected and enjoyable in hockey. By limiting criminal prosecution to illegitimate and egregious levels violence, it respects the norms of the game that imply that the use of force is a part of the game. The customs and norms of the game are evident in the data collected through interviews with hockey players. Discussion with members of the subculture or subgroup allows for one to understand the customs of the game. The responses offered by the hockey players suggest that only high levels of violence, which are associated with intent to injure and severe injuries, are considered deviant by the subgroup. While outside society might view other actions as equally unlawful, most hockey players see it as a part of the game. Conduct that is part of the game should include any conduct that occurs regularly within the basic fabric of the game. The players accept the risk of injury so that the game can be played according to the way it was meant to be played: with force and aggression.³⁹⁹ The attitudes of the players indicate that if formal law intervened to take out regular physical aspects of the game, including fighting, the laws would not necessarily be successful. Because the players interpret these actions as part of the game, Black's sociological theory and Kidder's theory on custom suggests that formal social control would be largely ineffective. There is room to implement some changes, but any intervention by the law could have a side effect of reducing certain conduct that is necessary and desirable in the game. By accepting that physicality is a part of hockey, we can limit legal

³⁹⁹ Clarke, *supra* note 16 at 1177.

intervention to those actions that everyone within the subculture agrees is simply not part of the game and ultimately allow the players to play the game with friendly competition.

Chapter 4

4 « Data and Methods »

The use of vignettes can be helpful to study beliefs, values, and norms in attempt to explore the subjective belief system of the participants. Vignettes are written or pictured hypothetical scenarios about individuals and situations, a kind of thought experiment.⁴⁰⁰ Vignettes are most effective when they represent real stories. The researcher is tapping into the attitudes of participants regardless of their direct experience with similar situations, however it is ideal that the participant can imagine themselves in the same scenario. In addition, vignettes allow the researcher to compare and contrast different interpretations, while isolating certain cultural factors such as age and gender.⁴⁰¹ This approach is also useful to gain insight on the ethical framework and moral code of the participants.⁴⁰² In allowing the participants to share their point of view about a hypothetical scenario, vignettes engage the participant in a discussion that explores meanings and interpretations that are not as easily accessible through other methods. In other words, vignettes allow the time and space for participants to freely explore their answers, which gives them more control over the interview. They can decide if and when to introduce their own experiences in the discussion.⁴⁰³

The vignette approach can be used alongside interviews, which was the case in this study. Some researchers use vignettes to begin an interview and others save the vignettes for the end in

⁴⁰⁰ Rhidian Hughes, "Considering the Vignette Technique and its Application to a Study of Drug Injecting and HIV Risk and Safe Behaviour" (1998) 20 *Sociology of Health and Illness* 381 at 381.

⁴⁰¹ Emma Renold, "Using Vignettes in Qualitative Research" (2002) 3 *Journal of the ESRC Teaching and Learning* 3 at 3.

⁴⁰² Janet Finch, "The Vignette Technique in Survey Research" (1987) 21 *Sociology* 105 at 105.

⁴⁰³ Renold, *supra* note 401 at 3-4.

order to broaden the focus from personal experience to more theoretical issues.⁴⁰⁴ Fixed-choice responses or open-ended questions, or both can follow the vignettes.⁴⁰⁵ According to Hughes, “vignette data can complement other forms of data collection to provide a more balanced picture of the social world which researchers seek to understand”.⁴⁰⁶ Vignettes are especially useful to discuss sensitive topics. It can be easier for participants to discuss the issue by responding to other people’s situations. It is a less personal approach, while still allowing room for the participant to include personal experience if he or she desires.⁴⁰⁷ The vignettes seem to offer a way of asking concrete questions all while distancing the participant from personal experience. The participant takes the time to read the vignette and can reflect on how to respond appropriately, which creates a less threatening environment.⁴⁰⁸

In their research on violence in dating relationships, Hughes used vignettes to present hypothetical stories that appear both real and relevant to the participants.⁴⁰⁹ The participants were asked to rate how violent and abusive the stories were, what they believed would happen, and what they thought should happen after the event.⁴¹⁰ Most vignettes in this study on hockey violence describe a scenario that has taken place in ice hockey takes place regularly, or can occur in extreme circumstances. A few vignettes describe situations that are less likely to occur but remain possible if the level of violence is excessive. The participant was then asked if the scenario can be considered violent, and what the consequences should be in this scenario. The vignettes were a way to question the participants on the topic, without asking direct questions

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Finch, *supra* note 402 at 106.

⁴⁰⁶ Hughes, *supra* note 400 at 384.

⁴⁰⁷ *Ibid* at 388.

⁴⁰⁸ Finch, *supra* note 402 at 106; Renold, *supra* note 401 at 4.

⁴⁰⁹ Hughes, *supra* note 400 at 387-388.

⁴¹⁰ *Ibid.*

about their own experience while still allowing them space for sharing personal stories if they chose to do so.

4.1 « Vignette Research »

The vignettes were designed in order to investigate how players perceive social control and how it affects the way they react to violent situations. As such, the dependent variable is social control. When the law is studied as a dependent variable, it is examined as a reaction to deviant behaviour. In other words, we examine when the law is invoked and how it punishes violators.⁴¹¹

The hockey leagues have internal control in place to regulate violence, i.e. informal social control. For example, the NHL may impose penalties on players who violate the rules of the game. The league can also impose supplemental discipline on individuals, such as fines and suspensions, in reaction to acts committed on the ice. In addition, formal social control, the legal system, can intervene in order to address excessively violent situations that are deemed to be criminal in nature, although the law is rarely used for such criminal behaviour. The vignettes asked the participant to explain how a scenario might be handled and what the consequences should be in that particular situation. The participant is given a list of possible consequences, including no consequence; retaliation (i.e. response by the team); a penalty imposed by the referee; a penalty imposed by the league; and a penalty imposed by the court. The respondents were also given the choice to add other options, although none of them did this.

The independent variables used in these vignettes are as follows:

⁴¹¹ Black, *supra* note 368 at 2-3.

(a) Intent: Intent is measured with yes/no values. In each vignette, the hockey players in the scenarios either intended to commit the violent act or not.

(b) The rules of the game: The rules are measured with yes/no values. In each scenario, the hockey players are either respecting the rules of the game or disregarding the rules. For example, the NHL Rule Book recognizes that full body checks are legal actions in the course of a hockey game, while actions that are subject to penalties imposed by the referees in the game are outside the rules.

(c) Injury is measured according to an ordinal list:

- i. No injury or minor cut;
- ii. Minor injury, which results in the player leaving the game;
- iii. Severe injury resulting in the player missing several months;
- iv. Disability;
- v. Death.

The interviews were conducted in the course of four months during which a total of seventeen respondents (N=17) with a total of fifteen vignettes, which make up the unit of analysis. There was one female and sixteen male respondents all between the ages of 18 and 25. Of the seventeen respondents, seven were university hockey players, four played in Junior A leagues, and five were members of the OHL. The education levels of each respondent also varied with some having a high school diploma and others being in college or university. Very few had graduated with university degrees and were working on a second degree. The following table is a vignette matrix, which was used to identify the variable measures for each vignette:

Vignette	Independent Variables								
	Intent		Rules of the Game		Injuries				
	Yes	No	Yes	No	1	2	3	4	5
1	x			x	x				
2	x		x			x			
3	x			x		x			
4		x	x				x		
5	x			x			x		
6		x		x			x		
7	x		x				x		
8		x	x					x	
9		x		x				x	
10	x		x					x	
11	x			x				x	
12		x	x						x
13		x		x					x
14	x		x						x
15	x			x					x

Table 1: Vignette matrix illustrating the variable values. The number of the vignette (1 to 15) is marked by independent variable and corresponding variables.

As illustrated in Table 1, the fifteen vignettes measured each independent variable differently in order to test for the significance of each. The vignettes covered all possible combinations of each value of each variable, except unintentional acts within the rules and/or causing no injuries or minor injuries. These are presumed to be a part of the game and not liable for criminal prosecution. The expectations were that each variable would influence the responses of the hockey players. In general, all three independent variables are expected to affect the participants' responses to the vignettes. Intent is expected to be an important factor. Hockey is a fast sport where quick decisions must be made. Therefore, it is expected that players will not perceive unintentional acts to be excessively violent and cause for criminal prosecution. The next variable, rule violation, is expected to factor into the respondents' views that actions are criminal in nature. An act that is committed within the rules of the game is assumed to be legal. The third

variable, injury, is also expected to have an essential impact on the responses of the hockey players. It is reasonable to believe that more serious injuries will likely result in a vote for harsher punishment. Since the respondents play in different leagues, consideration will also be given to this factor. It is predicted that the players in different leagues will have different views, primarily with regard to the kind of punishment imposed. For instance, it is expected that players in the OHL will be more likely to prefer league self-regulation to court intervention. The OHL is the highest level of junior hockey and the players in this league are the most likely to be drafted into the NHL. Therefore, they play a similar style to the professional leagues and are likely less inclined to allow the law to intervene in their game.

Following the vignette presentations, the respondents were asked a series of open-ended questions in a semi-structured interview process. The questions were grouped into three sections: (1) the physical nature of hockey; (2) excessive violence in hockey; and (3) consequences to excessive violence. Each section had a number of questions aimed at engaging the respondent in conversation about each topic. It allowed the players to comment on how they felt about the physical nature of hockey, what they think is excessively violent, and what they think the consequences should be for acts of excessive violence.

4.2 « Results »

Despite the small sample, the results of the vignette research indicate that intent, rule violation, and injury are related to the respondents' willingness to include the law as a response to violent conduct. Each variable will be described in detail below. However, the characteristics of the respondents did not seem to affect the responses. For instance, age and gender was tested for variation. The results were too similar to claim any real differences. That being said, the sample

of female respondents was too small to compare with the male sample. The level of hockey resulted in some slight differences. The bar graph below illustrates that university players are more likely to favour league-imposed penalties (over 20%) and court intervention (over 10%) than Junior A and OHL players. The Junior A players are the least likely to support harsher penalties, with less than 10% indicating a need for league-imposed penalties or court intervention.

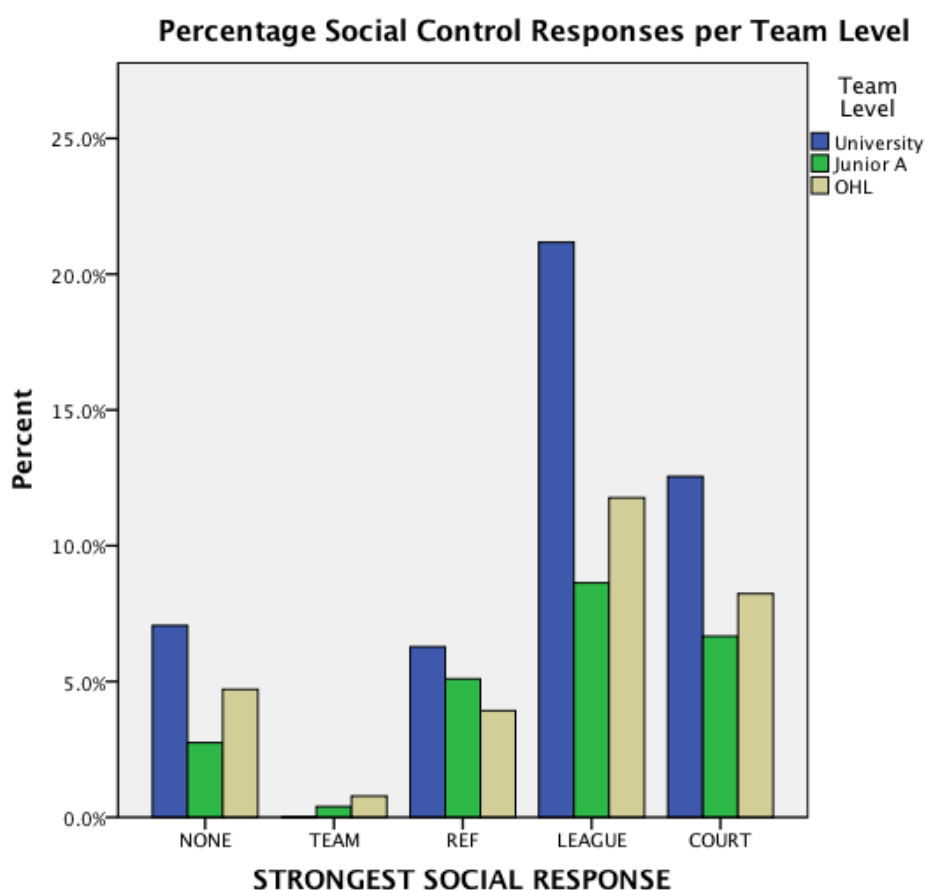


Figure 1: Percentage of strongest social response by league.

4.2.1 « Intent »

As predicted, intent was an influential factor for the respondents who indicated that the offending player in the given scenario should be punished by the league with fines or suspensions, or through judicial means. The opposite can also be said. The scenarios that represented unintentional acts often resulted in the respondents saying it was simply part of the game. It is a risk that hockey players take simply by participating in the game. The vignettes that referred to unintentional acts, but resulted in responses indicated a penalty by the referee, league, or court likely had other factors in play such as rule violation or injury. As show in Figure 1, fewer scenarios with intent to harm resulted in responses for no consequence.

	Intent		Total
	No	Yes	
Court	22 (12%)	46 (18%)	68 (14%)
League	74 (39%)	97 (33%)	171 (36%)
Referee	67 (35%)	104 (36%)	171 (36%)
Team	10 (5%)	18 (6%)	28 (6%)
None	16 (9%)	21 (7%)	37 (8%)
Total	189 (100%)	286 (100%)	475 (100%)

Table 2: Number and percentage of responses for vignettes with or without intent to injure.

The following graph illustrates the relationship between intent and social control. It clearly indicates that intentional acts most often result in harsher punishment with a greater likelihood of involving the league for supplemental discipline or court intervention.

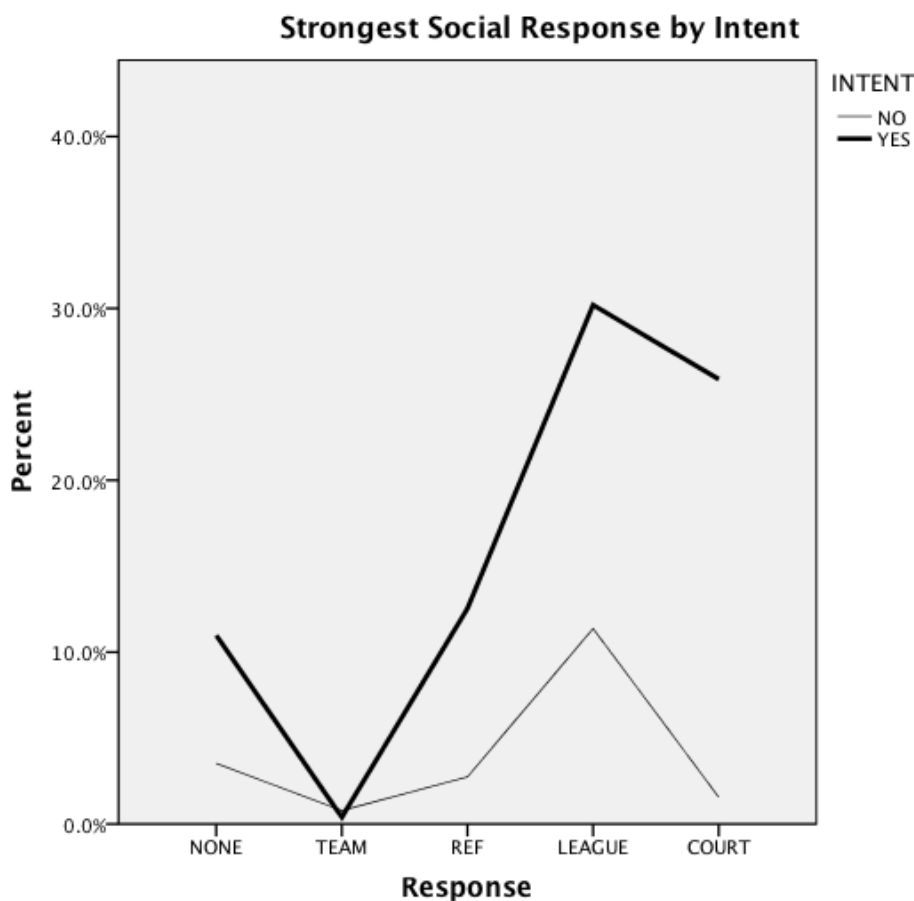


Figure 2: Percentage of strongest social response by intent.

The majority of the respondents articulated the importance of intent. Some players suggested that the use of video replay is essential in determining intent. It is possible to see on video if the player purposely tried to hurt his opponent or not. But overall, the respondents agreed that players are responsible for what they do on the ice, “accident or not”. However, it must be noted that things do happen in hockey, regardless of intent. One respondent clearly articulated that ‘freak accidents’ will occur:

[...] one of your questions where the guy crosschecks him and he breaks his neck or whatever it was, I think something like that where maybe he didn't mean, like yeah he went for the crosscheck, but it wasn't intentional or maybe it was intentional but it wasn't “I was trying to kill you” or something like, I think something like that, it's not a criminal act or anything [...] Like freak accidents do happen so that's what I'm trying to say.

What this player appears to be saying is that despite the player's intent to commit an act that is a clear violation of the rules of the game, the player did not intend to break his opponent's neck. Therefore, there are varying levels of intent at play. Intent to commit an act against the rules of the game does not equate intent to commit a criminal act in violation of state laws. Some illegal play such as crosschecking occurs with some regularity in hockey and it is rare that it will result in severe injury. As such, the player's intent to commit this act does not likely mean that he or she was able to foresee the potential of serious injury. The foreseeability of the risk is an important factor according to the law, particularly in the civil context. While the possibility of serious injury exists, it is not foreseeable in some circumstances, particularly those that normally occur in hockey. For example, one does not foresee suffering a serious concussion when receiving a full body check against the boards, despite the fact that it can happen. The results of the interviews clearly demonstrate that the players perceive that certain risks are assumed when they step out onto the ice. They equally intend to commit certain acts that may seem assaultive to the outside world, but this intent does not mean intent to cause serious injury to others in every scenario.

There does exist the possibility, however, in some situations that players intend to cause harm. As articulated by one player, players sometimes target players who are known for having a history of injuries:

[W]hen I was growing up I was fortunate enough to play with a lot of good people and they do know who's injured on the other team and they 100% take advantage of guys, maybe not concussions so much, cause that's probably crossing the line, but I know if a guy has a bad wrist or bad shoulder or bad knee, they'll probably go after it, as a form of savageness I guess.

This is not to say that all conduct resulting in injury was intended to cause injury, but rather to support the notion that there are different levels of intent. Sometimes the player just wants to take over possession of the puck by using their body, but there are rare occasions where

injury is the sole intent. It was clear when discussing the impact of intent with the players that obvious intent to injure and a subsequent injury is crossing the line of acceptable conduct. The majority of respondents acknowledged that there is no room for players who intentionally injure other players. Therefore, intent to injure should not be tolerated, but intent to violate the rules of the game can be acceptable. For instance, many players accept to fight each other and many others intend to commit acts like crosschecking or charging, but this does not mean they intend to hurt their opponent.

4.2.2 « Rule Violation »

Another important variable in the determination of consequences for violent conduct is rule violation. The impact of rule violation is clearly demonstrated by the numbers:

Within Rules?			
	No	Yes	Total
Court	35 (15%)	22 (11%)	46 (10%)
League	106 (44%)	67 (32%)	27 (6%)
Referee	76 (32%)	67 (32%)	143 (32%)
Team	21 (9%)	6 (3%)	173 (39%)
None	1 (0%)	45 (22%)	57 (13%)
Total	239 (100%)	207 (100%)	446 (100%)

Table 3: Number and percentage of responses for vignettes with or without rule violation.

Close to forty percent of the responses indicate that the conduct in the vignettes that presented a scenario within the rules of the game were simply an inherent part of hockey. Some also responded that a penalty by the referee or league would be necessary as well, but the conduct was nevertheless a part of the game. Only a small percentage believed that conduct within the rules of the game would result in a penalty assigned by the court, likely due to other factors like intent and/or injury. In contrast, only one respondent indicated that conduct against

the rules would result in no consequence. This was in response to the first vignette, which was a simple fighting scenario with no injuries. As such, this respondent clearly thinks fighting is a part of the game not warranting a penalty, despite a fight being a violation of the rules. Besides this outlier, every other vignette with conduct against the rules resulted in some sort of penalty. The overall preference seems to be in favour of league self-regulation as opposed to court involvement, which again is consistent with the data that was received in the open-ended questions.

The relationship between rule violation and social control was tested similarly to the graph produced to test the relationship between intent and social control. It yielded almost identical results in the sense that rule violation will influence the responses and support a great likelihood for league-imposed fines and suspensions and court intervention.

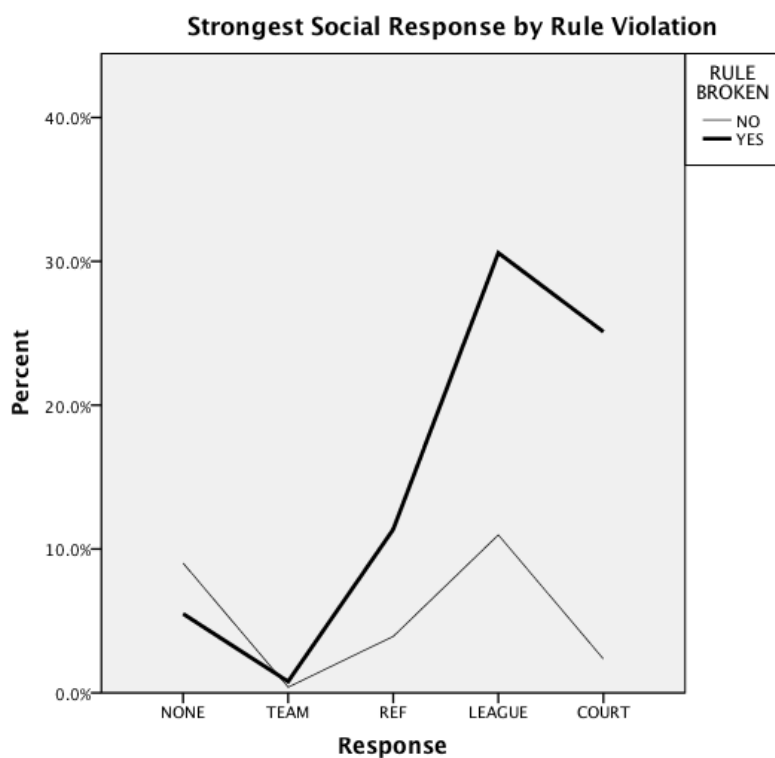


Figure 3: Percentage of strongest social response by rule violation

4.2.3 « Injury »

The more severe the injury, the stronger the social response, as can be seen in the table below:

	Injury					Total
	No Injury	Minor Injury	Severe Injury	Disability	Death	
Court	0 (0%)	1 (2%)	7 (6%)	23 (16%)	37 (25%)	68 (14%)
League	2 (10%)	13 (28%)	43 (38%)	58 (40%)	55 (36%)	171 (36%)
Referee	15 (75%)	19 (42%)	45 (39%)	48 (33%)	44 (29%)	171 (36%)
Team	2 (10%)	0 (0%)	9 (8%)	9 (7%)	8 (5%)	28 (6%)
None	1 (5%)	13 (28%)	10 (9%)	6 (4%)	7 (5%)	37 (8%)
Total	20 (100%)	46 (100%)	114 (100%)	144 (100%)	151 (100%)	475 (100%)

Table 4: Number and percentage of responses for vignettes based on severity of injuries.

The vignette responses indicate that injury is a significant factor in explaining the social response. With regard to court involvement, it is possible to see a trend with increasing court intervention, as the injuries get more and more severe. This suggests that the severity of the injury has an impact on the perspective of the players with consideration to penalties assigned by the court. This is also evident in the comments made by certain respondents. As one player said, “if he was injured and stuff, probably just say a penalty assigned by the league and the ref. It’s weird cause if there was no injury, you would say no consequence kinda thing but it’s tough, like as soon as somebody gets injured then it’s completely different”. This response was given in regards to vignette 3, which presented the respondent with the following scenario:

Two divisional rival teams are meeting in a regular season game. The team’s fourth lines are on the ice. The puck is dropped. A line brawl ensues. All players on the ice are fighting, except for the goalies. The players on the bench are yelling. The head coach of one team is yelling at the opponent’s head coach. The referees are attempting to separate the fighters. Jones and Smith are throwing punches at each other, when Jones catches Smith right in the head. Smith is knocked down and the fight ends. Smith leaves the ice to get medical attention and does not return to the game. Smith will miss a couple games as a precautionary measure.

The player’s comment on the injury being the reason for the referee and league-imposed penalties is likely because line brawls do happen in hockey. Such conduct will often result in an in-game penalty imposed by the referee for fighting, but any supplemental discipline is not

always the case. This player suggests that the injury is the main reason for supplementary action to be taken against the player who caused the injury. Similar comments were made by other respondents, for instance, one player who said that “nowadays, [...] it doesn’t matter the hit as long as the injury is severe, action still needs to be taken otherwise it just looks bad”. Likewise, another respondent remarked on the difficulty to decide what kind of consequence to impose in vignettes with injuries because the “severity of injury decides everything, even if it’s a clean hit”. Another respondent concurred that it is difficult because every hit is different and every scenario varies with multiple factors. This player illustrated this in the following manner:

It’s so loosely based like it all depends, say someone gives a dirty hit and they hit him in the head but he’s not injured then you make a clean hit and you hit him to the boards but he is injured, like it’s, I feel nowadays it’s all about the severity of the injury and what happens. It’s tough for the pro leagues to get a grasp cause it’s gonna keep happening, no matter what. Unless they take out hitting completely, it’s gonna happen. But taking hitting out ruins the game.

These comments are consistent with the general law on the matter. As discussed in the section on case law, the courts work on a case-by-case basis because every hockey incident is different. Even in the case of a fight, like the incident in *Jobidon*, the court indicated that every hit in the one fight must be analyzed. The simple idea that both players consented to fight does mean they consented to each and every blow that occurs during the fight. Therefore, it is not surprising that the players had difficulty in responding to the vignettes because it required them to consider every aspect of the incident. They often asked for more details on the incident because they realize that every little detail matters. This suggests that any future case of hockey violence should indeed be tried on its own facts before the court, as has been done in the past. Despite the court’s difficulties in defining a sports violence crime, they have operated correctly in analyzing every aspect of the incident when looking for intent and consent.

When looking at the numbers more closely, the impact of this variable on the responses becomes more evident. There was only one vignette with no injury, which presented a scenario of two players engaging in a consensual fight. A vast majority indicated that the referee should impose a penalty. Fifteen of seventeen respondents were in agreement that fighting is a part of hockey, but it is a violation of the rules warranting a five-minute major penalty. As one respondent commented, “it happens so regular that, if there are no serious injuries, it’s not that big of a deal”. When scenarios with minor injuries were presented to the respondents, the majority seems to think that penalties imposed by the referee and the league are sufficient. Similarly, scenarios with severe injuries, such as concussions, also produced a greater number of responses in favour of in-game penalties and supplemental discipline by the league. The majority of the responses in favour of court intervention for scenarios with severe injuries were made in reaction to the vignettes with intent to injure. Specifically, six of seven responses for court involvement were in response to vignettes with intent. One of these was fight between two players. The severe injury occurred when one player fell to the ice, and the other kept throwing punches despite his opponent being in a defenseless position. As will be discussed further, hitting an opponent after being knocked down is frowned upon. Once a player is down, it is said that the player must stop hitting. This explains the higher number of responses in favour of court intervention. The player acted in contravention of an unwritten rule in hockey, and therefore had intent to harm his opponent, necessitating harsher punishment.

The need for more severe penalties is greater when disability or death occurs as a result of violent conduct. While penalties by the referee and league are also selected by most respondents, the leniency towards the law increases with injury. More than half of the responses to scenarios with the death of a player indicated that the courts should intervene. As one player

put it, “just because he dies, they’d have to do a lot of investigation to see if he was trying to hurt him”. This comment indicates that intent to injure is also an important factor when the law gets involved, thereby suggesting that it is not solely the severity of the injury that influences the player perspective towards court intervention.

4.3 « Social Control »

In summary, the majority of the responses indicating no consequence were in regards to vignettes representing regular hockey plays. In other words, no consequences should be imposed on players who are acting according the rules or customs of the game. When intent and injury becomes an issue, there is a greater likelihood of retaliation. As one respondent suggested, “if the player’s instantly injured, players should step in to defend his teammate”. Retaliation is generally used as a defense mechanism for the players. It is used primarily in situations where something happened to instigate it. For example, a response by the team is more likely to occur if a dirty hit was delivered against a player, thereby necessitating the teammates to step in to his or her defense. Therefore, retaliation increases with rule violation and injury. It should be noted that retaliation can attract the attention of the courts. The incident that got Cicarelli in trouble with the law was in fact retaliatory. Cicarelli attempted to defend himself in court by implying that he was simply reacting to a hit delivered against him by the victim earlier in the same game. The court did not accept this argument, thereby confirming that retaliation can fall outside the scope of implied consent. In Cicarelli’s case, the court deemed that his actions were not regular hockey plays and had the capacity to injure. Despite the lack of actual injury, any excessively violent act

that has the capacity to injure was sufficient to warrant judicial intervention.⁴¹² Therefore, when players are acting in retaliation, they must remain conscious that not everything that is done in response to earlier attacks can be done within legal play. It might be seen as provocation, but the players who are retaliating against an opponent must still act within the rules and norms of the game. It does not provide immunity from the law.

The need for harsher punishment increases when all variables – intent, rule violation, and injury – are present. That being said, there is a preference for penalties imposed by the referee and the league as opposed to court intervention. Some players suggested that the leagues are capable of handling their own affairs in the sense that “the leagues are their own courts [...] they pay people to be head of discipline of the NHL and they have a lot of power too in their own way”. It should be noted that despite the player preference for league self-regulation, there is a significant conflict of interest in this scenario. The NHL has often noted its partiality towards a violent game, which suggests that the Commissioner and player safety personnel might not be inclined to make decisions that might alter the physical aspect of the game. However, when it comes to the most excessive acts of violence coupled with disability or death, there is less reluctance to introduce the law. The following graph illustrates this trend. When disability or death occurred as a result of violent conduct, the respondents showed a preference for court intervention. As seen in Figure 4, over 20% of the respondents indicated that court intervention may be justified when disability or death occurred in a given scenario whereas less than 5% indicated that involvement of the courts was necessary in scenarios without disability or death. When compared to league-imposed penalties, the results are fairly equal with just over 20% of the respondents indicating the need for the league to impose supplemental discipline when

⁴¹² See page 53 of this text for discussion on the *Cicarelli* case.

disability or death is the result of a violent act and slightly less than 20% choosing league intervention when disability or death does not occur. This suggests that most respondents are in agreement that league-imposed punishment is needed whether or not serious injury occurs, as opposed to court intervention, which is chosen more often when there is serious injury. Court intervention was the most contested method of regulation by the respondents. Most of the respondents showed some hesitance to choose court intervention unless there was a very serious harm such as disability or death coupled with intent.

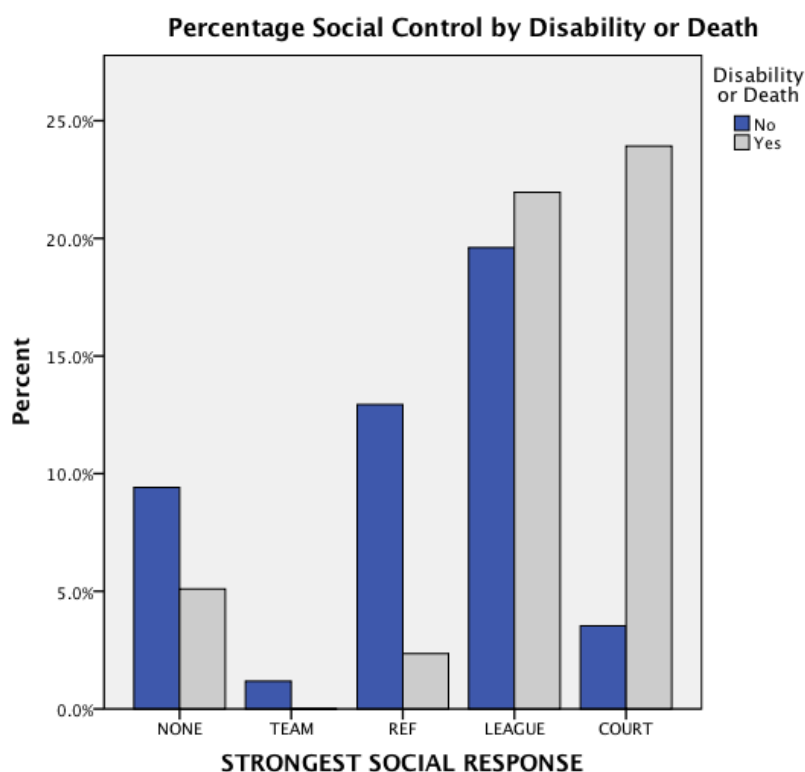


Figure 4: Percentage social control when disability or death results.

The final vignette was often cited as a prime example of excessive violence necessitating intervention from the courts. This vignette reads as follows:

Jones skates towards Smith and challenges him to a fight. Smith refuses. Jones used his stick to trip Smith who falls hard to the ice. Unable to get away, Jones starts kicking Smith who is still

lying on the ice. Smith loses consciousness and must be taken off the ice by the medics on a stretcher. Smith goes into a coma and later dies from his injuries.

This vignette shows intent to injure in the way that the player was kicking him even after he was lying on the ice defenselessly. There was a violation of the written rules when the players began to fight, and there was a violation of the customary norm that a player should never hit a defenseless player. In addition to the player succumbing to his injuries, this scenario presents all variables in the most severe manner. This vignette received fifteen responses in favour of court intervention. As will be discussed further, any scenario involving these variables is clearly not part of the game and the players condemn it. It is thus viewed as deviant from the point of view of the subculture itself. This explains the support for court intervention in this scenario. Two respondents did not think this scenario should result in the prosecution of the offending player. The lack of support for court intervention by these respondents can likely be explained in the following explanation by one of those two players:

Intent is a big factor – if there was intent to injure and he did end up dying, I just think just because you're playing an organized sport and it's fast I just don't see how you can go to jail for it but I do think that the player who caused it should be responsible and never play again. Just because we're playing hockey, I'm sure if you did this to a random person, it would be a totally different answer, but to us, it's you kind of sign up for it. Fast game, people do things on the ice so quickly, so stupid, you don't realize what you're doing until something serious happened. I don't know if it makes us sound like savages if we say that he shouldn't go to jail if he dies but I think there's a little different mindset when you're a hockey player then just a normal person in that incident cause they'll look at it and say – oh for sure this guy's going to jail, he killed the guy – but I've seen guys to do a lot of greasy things that probably could have killed guys and they haven't – you just, I dunno, you just move on, I guess it's just the name of the game.

This quote was given in response to vignette 13, a scenario with rule violation but without intent resulting in death, but this respondent clearly articulated throughout the interview that he did not believe that the law should intervene in any circumstance. Perhaps this can be explained by Kidder's theory on custom in the sense that this player does not view anything that happens on the ice as real deviance. There are simply acts that occur in the heat of the game in a sport that is known for its speed and physicality. To this small minority of respondents, the

leagues should be able to deal with violence effectively because scenarios like vignette 15 rarely occur, if ever. However, it was often suggested that harsher penalties can be imposed by the leagues in response to excessive acts of violence. Generally speaking, there is strong support for legal intervention, despite two outliers, in excessive cases involving clear intent to injure, rule violation, and severe injury or death.

4.4 « Liability »

The respondents were asked to provide a percentage for liability in the cases where injuries were suffered. The results ultimately show that the league should be primarily liable for any injuries sustained by the players. The team is also often noted to be responsible for their own players. The numbers remained constant throughout the vignettes, with one notable exception. Liability seems to shift from the teams to the player who caused the injury as the injuries increased. The following table shows the number of responses supporting each option for liability.

	Injury					Total
	No Injury	Minor Injury	Severe Injury	Disability	Death	
No One	--	9 (19%)	18 (20%)	8 (7%)	2 (2%)	37 (10%)
Player*	--	5 (11%)	11 (12%)	25 (23%)	39 (33%)	80 (22%)
Team*	--	5 (11%)	7 (8%)	12 (11%)	14 (12%)	38 (11%)
League	--	17 (36%)	34 (38%)	50 (45%)	49 (42%)	150 (41%)
Team**	--	11 (23%)	20 (22%)	16 (14%)	13 (11%)	60 (16%)
Total	--	47(100%)	90(100%)	111 (100%)	117 (100%)	365 (100%)

*Who caused the injury

**Of injured player

Table 5: Number and percentages of responses on who should be liable for player injuries.

These numbers suggests that the severity of the injury influences the responsibility of the player. It was often noted by some respondents that players are responsible for how they behave on the ice. The numbers support this view in the sense that the vignettes presenting intentional acts causing death received a great number of responses indicating that the aggressor should be

liable for the death of the victim. The liability imposed on the player who caused the injury is greater when the seriousness of the injury is greater. There was 11% of the respondents indicating that the player should be liable when the act caused a minor injury, 12% when there is a severe injury, 23% when there is disability, and 33% believe the player should be liable when death occurs. Therefore, as the severity of the injury increases, so does the liability imposed on the player who caused it. That being said, the league is also held accountable in every instance with 35% to 45% of the respondents indicating that the league should be liable within each level of injury. Perhaps this demonstrates the threshold for criminal prosecution as well. The acts that are perceived as the player's responsibility seem to be acts that are condemned by the player perspective. If severity of the injury and intent to cause such injury are the essential variables for condemnation within the subculture, these are likely the same variables that would be examined in court. In comparison to the number of respondents who indicated that offending players should be subjected to criminal prosecution in the case of death (see Figure 3.3), 54.4% of respondents indicated that a penalty can be assigned by the court in the case of death, and 57.4% indicated that the player should be held liable for the conduct in the same vignettes. This shows a consistent willingness to involve the law by a majority of responses, whether it is through criminal prosecution or civil liability.

4.5 « Open-Ended Questions – Qualitative Data »

4.5.1 « The Physical Nature of Hockey »

The interviews concluded with several open-ended questions with the goal of allowing the players to discuss the topic further in their own words. The first questions focused on the physical nature of hockey. Hockey is a sport with body contact and a certain level of inherent

aggressiveness. The players were asked what they thought and how they felt about the physical aspect of the game. There is a consensus among respondents that physicality is a part of the game. As one player articulated, it is “woven into the fabric of the game”. Several respondents reiterated this point. Most of the players like the physicality and see it as a necessary part of the game, as long as it is kept clean. This was an important detail made by a number of respondents. The physical aspect of the game is necessary and used strategically to win games, but there are limits. Dirty hits and distinct attempts to cause injury are not hockey plays and should not be considered as accepted conduct in the game of hockey. However, the physical aspect that is intrinsically part of hockey, including hitting and fighting, should not be taken out of the game. Some respondents noted that fighting is important in order to keep players in check, in the sense that without fighting, “people will run guys out and it’ll be out of control. There won’t be any consequences to what people do, so you’ll see more injuries and more out of control”. In other words, fighting is used as a consequence against players who deliver dirty hits and cheap shots. Players know that opponents have tough players willing to drop the gloves if they do something to harm their teammates. Therefore, some players argue that fighting is a positive outcome of the physicality of the game. As illustrated by a university hockey player, in a league that does not allow fighting,

players are a lot more dirty and they’re allowed to get away with a lot more things and I find it’s kind of more dangerous cause guys who would never normally fight or never do anything dirty, they’re doing more dirty things cause they know they’re not gonna get into a fight or anything like that.

This suggests that some players view fighting as an essential tool to keep violence under control. To take fighting out of hockey could have a negative effect and in fact cause violence and risks of injury to increase. Since players know that they will have to face consequences for

delivering bad hits, it is likely that they play a cleaner game in order to avoid the repercussions of fighting.

In short, the players agree that the physical essence of the game relates to the skill and ability to make plays and score goals. Clean hits and body checks are skills that are taught from an early age. Hockey players learn these in order to keep possession of the puck and score goals. All the players conveyed that they like the physical nature of hockey. Many respondents brought up the fact that there are penalties for conduct that go beyond what is part of the game. There is also disciplinary action that can be taken by the league to deal with the more excessive violations of the game rules. Similar to the provision in the CBA stating that the NHL does not intend to alter the basic fabric of the game when imposing supplementary discipline,⁴¹³ the respondents clearly indicated that the law should not get involved to transform the physical aspect of the game. In other words, the physical nature is in fact a part of the basic fabric of the game according to the player perspective. If the law is to get involved, it should remain conscious of the fact that there is a certain level of physicality and body contact that is considered part of the game. It should therefore take note of the willingness of players to use their bodies to play the game and knowingly accept the risk of injury when they play hockey. In fact, several respondents noted that hockey players know what to expect in terms of body contact and risk of injury when they play the game. As one respondent with junior hockey experience indicated,

I think once you're part of a league or part of a team, you take that responsibility and you kind of know what can happen. Unless something very severe happens, I think you kind of sign up for that yourself. You know what you're getting into. Unless something over the top happens, which doesn't usually happen.

Consequently, there is no purpose in imposing new rules that eliminate the inherent physicality of the game. This is simply in relation to the regular body contact that occurs in hockey, and not

⁴¹³ CBA, *supra* note 33 at Article 18.2.

excessive acts of aggressions or violence. The players are aware of the rules, which leave room for some physicality, and they generally play accordingly. The courts should intervene only when an act of excessive violence occurs and causes serious injury that was unexpected or unforeseeable. The players willingly accept the risk of harm in order to play the game with its inherent physicality; therefore any rule changes should bear in mind that it is a physical sport. There is a certain level of consent given by the players when it comes to body contact.

The respondents were then asked how their coaches and fans feel about the physical nature of the game. It was suggested by most hockey players that their coaches generally encourage physicality, primarily as a skill or advantage against the other team. Respondents spoke about using their bodies to get what they want and how it minimizes the other team's possession of the puck. There was one notable difference between university coaches and junior coaches. University coaches seemingly prefer a cleaner game due to the difference in rules that disallows fighting in university hockey. Several university hockey players noted that their coaches in junior encouraged physicality and fighting, whereas their university coach simply encourages it to gain possession of the puck and deliver clean hits. This indicates the importance of the rules of the game. Coaches will likely alter their coaching tactics according to the rules. This contradicts some of the literary contentions that coaches will encourage some players to use excessive force against their opponents, such as the allegation that Bertuzzi's coach ordered him to go after Moore. Therefore, it is likely that any argument suggesting that coaches urge their players to use excessive on-ice violence that falls outside the scope of normal in-game physicality is simply the exception to the rule. Just like there are dirty players in the league who are known as repeat offenders, there can also be coaches who occasionally violate the rules. But overall, it seems as though the players and coaches respect the rules to protect the integrity of the

game. Most coaches like the physical nature of the game, but the respondents clearly stated that their coaches preferred a cleaner game. In other words, coaches will often encourage physicality but not violent behaviour that is criminal in nature and outside the rules and customs of the game.

With regard to the fans, the respondents generally agreed that fans love the physical nature of the game, at times more than the players do. According to several respondents, it is an entertainment factor and it puts fans in the seats, which supports the literary notion that violence sells. Some players indicated that fans are somewhat torn on it in the sense that they don't like dirty hits and dirty players, but they react accordingly. A good hit will often result in cheering, whereas dirty hits will receive disapproval from the fans. As described by one respondent,

I've hit somebody like just a regular hit, something that happens every single game and like the crowd just goes crazy and it's just an easy little hit. And when a bad hit happens, they judge it so they like to be their own [referees] so I think the fans love it.

Although another respondent discussed the idea that fans that have never played or do not watch it a lot do not fully understand why the physicality is needed. It was also noted that when fans cheer after a good hit, it energizes the players. It gives the players momentum throughout the game, which is perhaps why it an advantage to play in front of a home crowd that is often said to be the sixth man on the ice. The home crowd can use its passion and enthusiasm to directly influence the play of the athletes on the ice.⁴¹⁴

It was also suggested that some fans go to the games specifically to see fights. As one respondent said,

I think they love it. I think some people go out to the games specifically to see fights. Another league I used to play in [...], there used to be unlimited fights but now you're only allowed to fight five times and then you start to get suspended. I know for a fact that some people lost interest cause there weren't so many fights. Cause it's not the highest level of league and you could of drive a half hour and find a better level so that league kind of lost fans.

⁴¹⁴ Brett Slawson, "Get Loud! The Top 10 NHL Arena Atmospheres", The Hockey Writers (February 3, 2015) online: <<http://thehockeywriters.com/get-loud-the-top-10-nhl-arena-atmospheres/>>.

This type of argument relates to the idea that leagues might not be inclined to eliminate or limit the amount of violence in the game because it would mean lost interest and less revenue. If minor leagues are losing fans after the decision to implement a new rule that limits fighting, it stands to reason that the professional leagues will surely not follow their example. As a billion dollar industry,⁴¹⁵ it is reasonable to presume that income would diminish to a certain extent if fighting and other violent conduct is reduced. The enthusiasm by the fans surrounding fighting can be seen anytime two players drop the gloves. The fans stand to their feet and cheer until someone wins the fight. This is evident to anyone who regularly watches NHL games on television or has ever attended a live event. The fans thrive on the physicality, which supports the figurational approach that suggests that sports offer a rule-controlled environment in which athletes and fans can enjoy violence without the constraints of everyday life.

Not only is violent behaviour viewed as a positive, revenue-enhancing aspect of the game for the leagues, players also seemingly view it as an attractive feature of the game. As mentioned earlier, some respondents discussed the notion that fighting can prevent more recklessness and severe injuries since it imposes consequences on the players who behave unnecessarily violently. This view supports the literary idea that fighting is therapeutic. It is said that fighting can be a good way for the players to release frustration and gain momentum. By essentially allowing the players to drop the gloves and fight, it ensures that the players will not continue to throw cheap shots and dirty hits at each other. In a sense, the occasional fistfight cleans up the game. Some players have specifically stated their support to keep fighting in the game for this reason. They see it as part of the game. According to one respondent,

⁴¹⁵ Mike Ozanian, Kurt Badenhausen & Christina Settini, "The Most Valuable NHL Teams", Forbes.com (November 25, 2014) online: <<http://www.forbes.com/nhl-valuations/>>.

I think a lot of the hitting and the dirty hits and the unsportsmanlike aspect of the game would be greater without the fighting because people are less worried about other people on other teams. There are people out there to protect other people and if there aren't guys like that in the game then people can just run around and take advantage of not having to suffer the consequences of payback.

A lot of discussion took place on the importance of fighting to protect teammates. Fighting as measure of retaliation is a necessary part of the game for many of the respondents. It is a way to ensure the opponents will not attack your teammates and if they do, it sends the message that it will not be tolerated. However, it is unclear if staged fighting is a part of the game. For instance, a fight between the teams' two enforcers right off the faceoff for no reason other than hatred fueled by rivalry does little to protect teammates and prevent injuries. Perhaps this is where the line should be drawn separating lawful and unlawful fistfights. Fights that are entered into by willing combatants in retaliation or in defense of a teammate are legitimate whereas a fight for no other reason but to attack a rival is illegitimate violence. Further discussion on illegitimate violence took place with the players, which led to the conclusion that there is in fact a consensus among players that there is a line dividing legitimate and illegitimate violence.

4.5.2 « Excessive Violence »

Following a conversation on the physical nature of the game, the interviews then moved into a discussion on excessive violence and whether or not the players believe there is such a thing as too much violence. All players who were interviewed agreed that there is in fact such a thing as too much violence. Several comments were made about hockey being a quick game where emotions can easily take over and cause players to do things they would not normally do. As such, some players, most notably the enforcers can sometimes blur the lines of acceptable

conduct. This suggests that the players are aware that there is a line between acceptable and unacceptable levels of violence. Some respondents suggested that players are responsible for taking a step back when they think they might cross that line of acceptable conduct. Some respondents talked about how a young hockey player is taught how to hit and be hit as they grow up playing hockey suggesting that it is possible that an injured player simply put him or her self in a bad position and was not ready to take a hit. Consequently, it is not just the responsibility of the player giving the body check to do it safely, but it is also up to the player taking the hit to protect his or her body from the hit. For example, one respondent indicated that

there are points where guys are in vulnerable positions and there are times when you have to respect the fact that say his back is turned to you, there's obviously penalties for things like that but people just have to have that brain too to make sure they're not putting people's lives or careers in jeopardy.

To further illustrate where the line should be drawn, one respondent indicated that anything done with a malicious intent and a distinct attempt to hurt someone is crossing the line. It is thus crossing the line when it is not about the sport anymore, and the act causing an injury is not a hockey play. Essentially, if the act does not resemble a play that regularly occurs in hockey and appears more like an assault, it likely crosses the line of acceptable conduct.

The respondents were then asked to provide an example of what they thought was excessively violent. Examples include the *Bertuzzi* and *McSorley* cases; using sticks or skates as weapons; the goalie fight involving Patrick Roy's son; dirty plays, such as throwing elbows, hitting from behind, and hits to the head; the kicking example from the vignettes; the act of running someone from behind with intent to injure; slashing and two handed spearing; line and bench clearing brawls; and knowing someone has a concussion problem and delivering a hit to the head. It seems as though the responses from the hockey players fall in line with the definitions of violence offered by Smith. The examples of excessive violence given by the

respondents essentially fall within the third and fourth categories of violence: quasi-criminal and criminal violence.⁴¹⁶ Both categories of violence relate to acts that violate the rules of the game, the customs of the game, and formal law. The primary difference between the two relates to the attitudes of the players on what kind of punishment should be imposed as a consequence. When it comes to quasi-criminal violence, such as cheap shots and late hits, it is commonly frowned upon by the players, but often agreed that league-imposed punishment is effective. On the other hand, criminal violence relates to assaultive acts, which often results in more severe injuries, as such, players generally conveyed an inclination towards legal intervention. It is therefore this type of violence that will likely attract the attention of the courts because criminal violence is not a part of the game. For those egregious on-ice incidents of criminal violence, the players condemn it and agree that it is too much violence, whereas quasi-criminal violence is accepted despite societal condemnation.

4.5.3 « Consequences to Excessive Violence »

In order to establish the proper consequences in a given scenario from the player's perspective, the respondents were asked what they would like to see as a consequence to excessive acts of violence. They were then questioned about the league's ability to self-regulate and apply punishment that would deter future acts of violence. This led to discussion on whether or not the law should intervene. Most respondents were satisfied with league-imposed fines and suspensions, despite an affirmative response to the question on criminal court intervention. A fair number of the respondents indicated that a penalty by the criminal courts might be necessary in some circumstances, such as when intent to injure is present or when someone's career is taken

⁴¹⁶ See pages 7-8 of this text for definitions.

away. Instead of involving the courts, some respondents conveyed the viewpoint that league-imposed penalties could be more severe. Several suggestions were made that repeat offenders should have higher consequences or even be thrown out of the league entirely: “There’s no room for players who just want to go out there and cause injuries. Still have to respect the rules and play the right way”, and that “taking away a guy’s ability to do something that he loves is probably just as bad as sending them to jail”. While it is very reasonable to say that sending an offending player to prison would definitely be worse than banning a player from the hockey league, it simply shows the mentality that exists among hockey players that being suspended for a long period of time or being banned entirely would have a strong deterrent. It suggests that imposing harsher punishments such as long suspensions or banishments may indeed prevent certain acts of violence. It was also suggested that the league needs to recognize the potential for excessive violence a bit more in the sense that referees should be more aware of who they’re refereeing that night in order to keep the violence under control. For instance, if two rival teams are facing off against each other, it could be helpful for the referees to be aware of the high risk of dirty play or retaliation. The referees have the ability to keep the violence under control if they are able to recognize when a game is getting out of control.

With regards to the league’s ability to effectively control violence with league-imposed fines and suspensions, the general consensus appears to be that they do have the ability to deter future acts of violence. However, it was also generally accepted by most respondents that league-imposed fines and suspensions could be more severe. Many respondents indicated that fines do not carry the same deterrence as suspensions. In the professional level, the players have large salaries and the minimal fines don’t always set the tone. Suspensions effectively impose fines that are proportionate to income. In junior and university leagues, the players do not make much

in terms of a salary, if they even draw income at all, so it was put forward that fines are not an effective way to control rule violations. On the other hand, suspensions allow the offending player to think about what happened and realize that it should not happen again. That being said, several respondents indicated that some players, mainly repeat offenders and some unusual incidents such as the *Bertuzzi* case, could suffer harsher suspensions. Some suggestions were full year suspensions, or banishment from the league entirely. Suspensions can be effective deterrents:

[s]uspensions, I think they need to be bigger, more and more games or something like that because then you start thinking about your job more like if I miss 18 games for a suspension, someone else might get called up and he plays better than me but if you get suspended two games and you bring up a call up and he plays two-three minutes per game, then no big deal and he comes back. So I just think suspensions should be a little bigger and longer and the fines I don't think they intimidate players too much.

This quote is in line with the literary notion that some players might be hesitant to introduce the law into the world of hockey or even to self-report their injuries to their teams for fear of being taken out of the game. It indicates that suspensions can also threaten career prospects. As discussed above, some athletes might be reluctant to tell team doctors about any potential injury knowing someone else would replace them during their time away to recover. Similarly, others are seemingly unwilling to launch lawsuits against fellow players for any harm that was caused to them, especially in a contract year, for apprehension that teams will choose other options over them. The same reasoning can be applied to suspended players. Any significant amount of time away from the ice, whether it is due to injury or suspension, can result in a young player being called up from a minor league affiliate and performing well. The above-mentioned quote illustrates that the players are conscious of this possibility, which adds to the deterrent effect of suspensions.

When asked if the criminal court should intervene, 14 of 17 respondents indicated that the law should intervene at some point. Two respondents indicated that the law should not intervene and two others were unsure about this type of intervention. The recurring point made by the respondents was that the league can handle most incidents of on-ice violence, but the law should get involved for the extreme and excessive cases. These cases, as described by the respondents, are those associated with intent and injury. Examples of such extreme cases were given, such as the *Bertuzzi* incident, the *McSorley* case, using a stick as a weapon, and when a player's career is ended as a result of an intentional act. The two respondents who were on the fence about this question indicated that the league is likely capable of handling the issue, but there might be room for the law to intervene in rare exceptions. One respondent who was in favour of legal intervention indicated that it is reasonable for the law to get involved if it is initiated by the player, which indicates support for civil law intervention and not criminal prosecution.

Several respondents brought up the *Bertuzzi* incident as the ultimate example of excessive violence. Most players agreed that this case did in fact belong in the courts and what Bertuzzi did does not belong in the game of hockey. It was generally agreed that Moore was entitled to some compensation but there was a lot of discussion on whether or not the figure of \$38 million was reasonable. Some respondents suggested that Moore would not have made that much money had he been able to continue to play in the NHL. But overall, the lawsuit was reasonable. Another recurring comment was the unreasonableness of the decision that allowed Bertuzzi to come back to the NHL after his suspension. As one respondent indicated, "if he causes injury and ends a career, then he shouldn't play either". Several respondents reiterated this point. Another respondent said that this incident "was completely inappropriate. It makes the game look savage

and portrays the wrong message about hockey”, which perhaps sets the threshold for the dividing line between acceptable conduct and intolerable levels of violence. Anything that is not a hockey play and makes the game look “savage” could potentially become a legal matter. Perhaps a respondent who separated hockey plays unlikely to take place in everyday life from assault that can take place outside of hockey offered the most fitting illustration:

if you take the fans, the equipment away and it looks like something that can happen on the street, cause if I cross-check somebody, that’s a hockey play, like that doesn’t happen anywhere else. But if you grab somebody from the back of the jersey or shirt, if it’s on the street, the hoodie, and you sucker punched him in the back, like I said, you take everything away that happened, so I think something that relates to the outside world that happens in the hockey arena that causes serious injury, then for sure the lawsuit against him is totally fine.

Finally, the respondents were questioned about a potential framework for criminal liability. They were asked about whether they would change the way they play if the criminal courts ever intervened in order to provide such a framework. Of the 18 respondents, 11 indicated that they would change the way they play if the courts provided a framework for criminal liability. Five respondents said that it would not affect their game, but it would definitely change certain players’ behaviour. It would help prevent the very extreme cases from happening, such as *Bertuzzi* and *McSorley*. Only two respondents indicated that a framework would not change the way they play, one of which indicating that you do not expect those extreme cases to happen so you do not have to change the way you play. The second respondent who responded negatively to this question indicated that the court’s threshold would probably be too high to affect the everyday game of hockey players.

The rest of the players who responded affirmatively to this question said that a framework could prevent players from going the extra mile and reduce the number of injuries. Players would be more aware of how they conduct themselves on the ice. But a number of them indicated that they are not physical or dirty players in general, therefore would not change the

way they play. One respondent noted that hockey is a quick game and emotions can take over. As such, a framework will not prevent all incidents of excessive violence. Some things will still happen in the heat of the game. Other respondents shared the same concern:

I don't think it should be set in stone, sorta thing. I think there are a lot of things that are accidental, that could go either way. Not saying that they don't know the game but if you're involved where things are accidental, and it's taken to court, then the people involved, those with the final verdict, don't understand the situation or the game and don't understand what happened. I think it's all part of the moment and that's hard to read from just watching it on video. So I think there's scenarios that need and scenarios that don't, and even if the scenarios are similar, if it's set in stone then it can cause some problems.

Therefore, if a framework was provided by the courts, the respondents seem to prefer one with a high threshold that would not interfere with the physicality of the game, regular hockey plays, and accidental acts that take place in the heat of the game. As illustrated by one respondent, legal intervention will not prevent all types of violence and injuries:

People who don't play the sport don't realize that it's so fast, anything can happen so quickly. Especially guys who are first time offenders, they might not mean to hit them in the head. But it's gonna happen. You can't stop it, the game is too quick. I feel repeat offenders should be penalized more, or even kicked out for doing so. You see that nowadays in the NHL, people will get bigger suspensions for repeat offenders. It's a tough area though to draw the line, there's no standard, every hit is different.

Seeing as the use of force is part of athletes' skills as hockey players, and they are taught at a young age how to use it to their advantage, this respondent makes a good point. It would be incredibly difficult for a player to stop him or her self from delivering a potentially dangerous hit in the heat of the game. The use of force is learned behaviour for most hockey players who have been playing the sport for years. This means that many athletes play the game instinctively. They react to things that happen on the ice according to the way they were taught and trained to behave. Consequently, not only will intervention by the law be ineffective in altering the instinctive nature of athletes who behave in the heat of the game, it will also be ineffective in controlling the levels of violence if it is within the customary norms of the game. As per Kidder's theory on custom, players are unlikely to change the way they play the sport if the law

does not follow the customs of the sport. It was clearly articulated by each respondent that it is customary in hockey to play with some level of violence. Therefore, legal intervention should be limited to the acts that clearly fall outside the rules and the customs of the game. This refers to acts that are subculturally deviant to the point that each participant in the subgroup condemns that kind of behaviour. Using this point of view, there are very few occasions that are clearly deviant and deserving of criminal prosecution. The player perspective demonstrates that only excessive and rare scenarios will or should lead to intervention by the criminal courts. As will be discussed in the next section, the respondents have generated a consensus that they consent to almost all types of violence that can be expected in the game of hockey. As such, any intervention by the law should be limited to cases that clearly fall outside of implied consent.

4.5.4 « Implied Consent »

By determining what is excessive and criminal in nature, players will know how to conduct themselves. Current law is flexible, but not foreseeable. It is not clear what kind of conduct will attract the attention of the authorities. Players are not fully aware in what circumstances he or she may face criminal prosecution. More guidance is needed in order to determine the boundaries of criminal law in professional hockey. The courts have offered some guidance, but it remains uncertain what is criminal in the context of professional hockey. The idea behind defining the crime of hockey violence is that if players know what will likely result in criminal prosecution, it is possible that players will behave less violently. Only the conduct that is clearly outside the rules and customs of the game and formal legislation should be susceptible to criminal prosecution. This can, however, be problematic. As discussed above, a common defense to assault in the sports context is implied consent. The fact is that consent can be different for each

player seeing as it is very subjective in nature. What one player consents to in the course of a hockey game is not necessarily the same for another player in the same game. This is the primary reason for an objective test. It allows the courts to apply objective consent to all players and maintain uniformity.

It is possible to see the highly subjective nature of implied consent from the interview data. Some players interpreted the extremely violent scenarios as simply part of the game whereas others saw some less violent cases as unlawful. Consequently, a uniform application of implied consent to all players would require all players to know and agree upon all the customary norms of the game. Just as the judges took different routes in the *Maki* and *Green* cases dealing with the same incident, each hockey player can have different viewpoints on the customs of the game. For example, several respondents indicated that there is an unwritten rule in hockey, which basically states that when a player is defenseless, you stop hitting. Since it is an unwritten rule, it would fall under the customary norms of the game. The existence of an unwritten rule or customary norm of the game would be an important factor in the determination of whether or not there is implied consent. A player might consent to a fight, but if he falls to the ice and remains defenseless, the unwritten rule would indicate that he did not consent to any further contact. If there is further contact and the player violates the unwritten rule, several respondents indicated that the teammates are allowed to step in and retaliate in defense of their teammate. This represents another custom or unwritten rule in the game. You will not find a section allowing retaliation in the Rule Book. But the players are all seemingly aware that it is expected in most circumstances that you will defend your teammate when necessary. This suggests that an amendment to the Rule Book might be needed. A specific rule touching on retaliation and other unwritten customs should be added in order to make it clear to the players what is allowed and

what is to be removed entirely from the game. The formal rules of the game present the scope for explicit consent, but the unwritten rules are quite difficult to interpret and apply uniformly across the league. Since consent is a major legal concern in sports, it would be reasonable to suggest more concise rule amendments in order to make it clear what is consented to and what constitutes excessive violence. It would also help determine what is objectively consented to by all participants.

The data collected through the interviews evidently demonstrates that each case and even each individual hit is different. There are many factors at play when determining what a player consents to when he or she steps out onto the ice. There are also plenty of social characteristics that can alter the way a sports violence case is handled. The social structure is crucial to explaining why two cases that are almost identical can result in different outcomes; why each individual hit can be handled differently. The law varies with its environment, whereby the social structure of hockey creates an environment that is tolerable of violence. This explains the legal variation between the prosecution of an assault on the streets and a practically identical assault on the ice during a hockey game. The factors that are embedded in the determination of implied consent, primarily the customs of the game, all play into the way the case would be handled. This supports the sociological model presented by Black, which indicates that the social characteristics of the case are essential in understanding why the judges treat professional athletes accused of a criminal act differently than someone else who might commit the same act off the ice. To make a decision based solely on the notion that fighting is unlawful, for example, would ignore the social structure of hockey, which maintains that fighting is a part of the game. As conveyed by Kidder, legislators should be concerned with the opinions and practices of the people involved before drafting new laws. The law works best when it reinforces custom. The

interviews with hockey players clearly indicate that there is a certain level of violence that should not be taken out of hockey because it is customary to play aggressively and physically. Since customs are taught through socialization and learned behaviour, athletes are simply responding to instinctive ways of playing the game. Therefore, the legislative framework should remain consistent with the customs of the game and consider the player perspective that only egregious and deviant acts should be subjected to criminal prosecution.

It should be noted that there are limits regarding the ability to generalize these findings due to the very small sample size ($n=17$). There were seven university players, four Junior A players, and six OHL players. Of these seventeen players, there was only one female player. Interviews are a great tool for data collection, but they also have limitations. The small sample should not be taken as the truth or the opinion of all players. Additionally, the levels of play can be confounded in the sense that each player could have played at different levels of hockey in the past. Many of the university players, who were older in age than the Junior A and OHL players, have played junior hockey before their university careers began. Therefore, their perspectives may be applicable to different leagues and should not be interpreted as a clear representation of each league. The age of the players could also be a factor in the limitations to make generalizations. There could be several factors in play and no single characteristic should be used to make generalizations.

Chapter 5

5 « Proposal for Regulating Player Injuries »

The interview data clearly demonstrates that the player perspective sees the league as entirely capable of regulating player conduct. However, it was also evident that players would like to see harsher punishment for the more excessive acts of violence, such as full year suspensions or complete banishment from the league. In other cases, some respondents supported the intervention of criminal law. That support, however, was often in conjunction with league-imposed penalties. Considering the reluctance of the players to introduce the law into the world of hockey, it is worthy to consider other options to regulate hockey violence than the criminal prosecution of offending athletes. As articulated by Clarke, “[n]either the application of the criminal law nor any other proposed method for dealing with sports violence will alone, adequately address all aspects of the problem”.⁴¹⁷ As such, a number of propositions can be made to regulate hockey violence and prevent serious injuries from occurring.

To begin, it is essential to properly define the conduct that would most likely attract the attention of the authorities. As evidenced by the data described above, the player perspective views conduct that is associated with intent to injure, rule violation, and a severe injury to be condemnable. Excessive violence that is criminal in nature should always have a combination of these variables in play. As defined by the players who were interviewed, excessive violence relates to conduct with a malicious intent and distinct attempt to injure. It is conduct that does not resemble a hockey play. In other words, it is conduct that looks just like an assault if the fans, equipment, and arena are taken away. Certain acts might appear to be assaultive in nature if it

⁴¹⁷ Clarke, *supra* note 16 at 1192.

occurred on the street, such as a fistfight, but the player perspective clearly shows that some conduct is a part of the game. Consequently, assaultive conduct that does not resemble a hockey play and that was intended to cause injury does not belong in the game. It is this type of conduct that is problematic and should be taken out of hockey. While incidents of excessive violence are still likely to occur from time to time, the goal is to significantly reduce the number of injuries sustained in violent acts that could be prevented.

There are a number of ways that could potentially address the problem of excessive violence. With respect to the player perspective, which shows reluctance to use the law and a preference for league self-regulation, any attempt to keep the criminal law from the world of hockey should be made. Nevertheless, the law is an effective tool that can be used to regulate the most egregious incidents of violence with clear *mens rea* to commit a crime, which is also likely to cause serious injury. When it comes to less assaultive incidents, there are perhaps other ways to deal with the consequences. The first recommendation is to improve player safety by requiring the league to refine their methods of self-regulation. The league should realize that suspensions would have a greater deterrent effect if they were longer and correspond to the offending act. For example, several respondents indicated that Bertuzzi should not have been able to return to the league after he took Moore's career away with a sucker punch. Had he been banned from the league entirely, it would send the message to the rest of the players that this type of conduct would not be tolerated. The players would know that similar conduct would certainly equate to banishment. Based on some of the responses from the interviews with hockey players, the threat of having one's hockey career taken away should serve the goal of deterrence and prevent Bertuzzi-like scenarios from happening again. Harsher suspensions can equally be applied to repeat offenders. The league can also change the way fines are applied after on-ice excessive

violence. For example, one of the respondents indicated that, in the OHL, it is often the teams that get fined for player conduct because the player's do not make much in terms of a salary. As suggested by this respondent, it increases the player's accountability: "in our league, fines, we don't really have as much money to pay so it's usually team oriented so a team will get fined for a player's actions and I think that helps because there's a lot of consequences towards a player from the team. It doesn't go under the radar sorta thing". Despite the fact that professional hockey players do have the money to pay for fines, it could be a benefit to also fine the team. If the team suffers financial loss due to a player's conduct, perhaps the team will encourage less violent play and ensure that the offending player does not repeat the offense. Barnes has made a similar proposition to make organizations accountable for employing players who are known to be violent. This author put forward the idea of implementing a compensation board to arbitrate claims when a professional team has lost a player due to excessive violence.⁴¹⁸ The board would have the authority to impose a fine on the offending player and the team he plays for. The funds would then be allocated to the team who lost a player due to the violent incident since they suffered a disadvantage by losing a roster player to injury.⁴¹⁹ Similarly, Gibson suggests putting in place a joint committee on player discipline in order to properly evaluate excessively violent incidents and to impose proper consequences. The goal would be to create a committee made of various members, including league administrators, team management representatives, as well as players. As such, the commissioner would no longer have the sole responsibility of determining punishment.⁴²⁰

⁴¹⁸ Barnes, *supra* note 6 at 227.

⁴¹⁹ *Ibid.*

⁴²⁰ Gibson, *supra* note 158 at 449.

There are also other measures that can be taken by the league to improve the regulations and consequences to excessive violence that occurs on the ice. Drastic changes to the rules or the customs of the game are not needed in order to ensure safer playing conditions. The player's association can negotiate for safer working conditions and improved insurance benefits;⁴²¹ a compensation fund can be set up for long term physical harm;⁴²² and everyone within the league can be compelled to undergo educational training to ensure safe playing conditions.⁴²³ For example, emphasis can be placed on skill development and sportsmanship. The league can equally impose stricter officiating to ensure violence remains under control. Such initiatives would work together to coordinate a system of rules and internal disciplinary measures that discourages excessive violence and ultimately improve league self-regulation. The law can hold residual power and intervene when it deems necessary to address incidents of excessive violence. For instance, legislators can make an amendment to the *Criminal Code* to include a provision on hockey violence and a modified definition of "bodily harm" specific to hockey incidents:

A person commits an assault in the course of a hockey game in all circumstances that go beyond the rules and customs of the game. Among these circumstances include:

- (a) hitting a player long after he or she falls onto the ice;
- (b) time lapses between a whistle and a hit, resulting in the hit taking place after stoppage of play;
- (c) using sticks or skates as a weapon;
- (d) hits from behind and other hits whereby the victim is defenseless;
- (e) hits to the head;
- (f) two-handed spearing and slashing;
- (g) hitting a player with a suspected concussion or other injury with intent to aggravate the injury; and
- (h) other actions not protected by the doctrine of implied consent.

⁴²¹ Barnes, *supra* note 6 at 228.

⁴²² Culhane, *supra* note 51 at 19.

⁴²³ Barnes, *supra* note 6 at 229-230; Barnes, *supra* note 314 at 100-101; Kong, *supra* note 36 at 139.

This type of disposition would allow the courts some discretion in hockey violence cases but it would equally offer some guidance. It generally sums up the definitions of quasi-criminal and criminal violence as defined by Smith and discussed above. Such a disposition also allows the opportunity to list possible punishment in light of a guilty verdict, which would address the problem of lenient sentences previously imposed in cases of hockey violence. In addition, players would be aware of the type of conduct that is likely to attract the attention of the authorities and would be required to alter their behaviour on the ice.

Conclusion

The sport of hockey is a physical, aggressive, and entertaining game for players and fans alike. The physicality is an aspect that most enjoy, but it can lead to levels of violence that go beyond what is reasonably expected by the participants. It supports a culture of violence that frames in-game violence as non-criminal and less ominous. The hockey players often adopt masculine traits, which means violence is frequently used by the players to manifest their strength and dominance. The social and legal perspectives of hockey violence have similar variables. They both relate to the question of how much violence is too much violence, and player injuries. There is a fine line between acceptable levels of violence and intolerable violence. The four different types of violence, as developed by Smith,⁴²⁴ offer an indication of this line, but it remains unclear what, if any, should be dealt with through the criminal courts. Despite the fact that some on-ice conduct is assaultive in nature, several issues prevent the successful prosecution of a professional hockey player. An athlete is generally found to have consented to the body contact reasonably expected in a sport. Therefore, by simply participating in hockey, the player implicitly accepts the risk and consents to the regular body contact of hockey, including hits and body checks. However, the case law on the subject reveals that any intent to injure will dismiss the defense of consent. Injuries are costly for both players and teams. If the injuries are severe, it can take a player out of the game for a long period of time. It can even take a player out for the rest of his career, or take his life. Despite this, hockey leagues continue to promote and encourage violent behaviour because it attracts fans and it yields profit. As long as the leagues do not have an incentive to curb violence, the levels will persist and

⁴²⁴ See pages 7-8 of this text for the description of the four types of violence.

perhaps even rise. Intervention by criminal courts could implement widespread awareness that high levels of criminal violence will not be tolerated, and ultimately prevent career ending and life changing injuries.

Professional hockey leagues have the ability to use internal mechanisms of social control to regulate the behaviour of their players. They have the power to do this through contractual commitments when an athlete signs with a professional team. The player agrees to be bound by the player's contract, the Rule Book, and the CBA. These stipulate the rules of the game and any disciplinary measures that can be imposed on players who violate the rules. However, it is clear that there exists unwritten rules among the players that are often interpreted as simply being a part of the game. Consequently, disciplinary measures can be taken against violations of the rules, but also breaches of the customary norms of the game.

This study found that hockey players generally prefer league self-regulation over the intervention of the law. However, the majority of respondents did indicate that the law should intervene in matters of excessive conduct. This conduct is defined by the respondents as those associated with intent to injure and a severe injury. Cases like the *Bertuzzi* incident was often cited as the prime example of violence necessitating legal intervention. The circumstances of this incident led to a charge of criminal assault and a civil lawsuit for compensation by the victim. This incident was gravely condemned by the hockey world. The threshold for criminal prosecution, however, is quite high for most respondents who indicated that the law should intervene at some point. Therefore, the consensus is that the league is capable of handling most incidents of on-ice violence. However, the punishments imposed by the league should be harsher. Players who commit acts of excessive violence similar to the Bertuzzi and McSorley incidents should not be able to return to the NHL. They severely injured other players with

intentional acts of violence, and these incidents have grave potential to ruin the careers of the injured players. Consequently, the offending players should be punished with complete banishment from the league. With regard to less assaultive acts, the league should consider full year suspensions for these players, seeing as longer suspensions would have a greater deterrent effect. The law then has the ability to intervene in these cases as well. Any conduct that warrants full year suspensions or complete banishment would like be condemned by the entire hockey community and therefore susceptible to criminal prosecution. The law should also recognize its residual power in any scenario it deems necessary, regardless of supplementary action taken by the league.

The threshold for criminal prosecution should be kept at this high level for several reasons. First, the law and social norms work best when they reinforce each other. The data indicate quite clearly that a legally imposed framework for criminal liability will not necessarily affect hockey players if it attempts to impose unreasonable changes. Players will continue to play with the game's usual physicality, including hitting and fighting. Of course, if fighting was legislated out of hockey and suddenly players were receiving season-long suspensions, or complete bans from the league, we would likely see a reduction or even a stop to the fighting. However, most players and fans seemingly enjoy the fighting in hockey, giving the owners a financial incentive to continue the practice. Perhaps the ideal approach to reduce the overall number of fights would be to impose harsher punishment than a simple five-minute major penalty. By taking small steps towards minimizing the fighting, the customs of the game have time to change instead of imposing drastic changes that would likely result in condemnation from everyone within the hockey world. Secondly, it has been recognized that sports have a social utility. If society determines that the benefits outweigh the potential for injury-causing

conduct, then sports must be offered some leniency when it comes to legal standards touching on violence. As illustrated by Clarke, “if requiring the players to consider the consequences of their acts will prevent the sport from being played in the way society desires it to be played, then such a requirement is incompatible with sports as they exist, and should not be applied until the sport norms are changed”.⁴²⁵ Therefore, any attempt by the law to make the game safer would have to be consistent with the customary norms of the game in order to be effective. The criminal prosecution of an offending athlete would likely lead to unwanted results. Unless the offending action was so severe as to justify legal intervention with condemnation from the hockey world, the prosecution would alter the norms of the game in a drastic way. This alteration would interfere far too greatly in the sense that it would change the game. In order to impose changes, it is best to begin by addressing the culture surrounding the violent nature of the game. This can begin by addressing the problem internally with harsher fines and suspensions. If any acts of excessive violence occur beyond the imposition of full year suspensions or complete banishment, the need for criminal prosecution would become more evident. It is not justifiable for the law to intervene in all matters of violence right away. It should focus on conduct that is in violation of the rules and customary norms of the game that is also condemned by the members of the hockey world. The threshold should be kept at a high level in order to preserve the integrity of the game and allow athletes to play the game the way society has grown accustomed to and chosen to tolerate.

⁴²⁵ Clarke, *supra* note 16 at 1178.

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