Hockey Violence: The Canadian Criminal Code and Professional Hockey

ANGELA BAXTER*

I. INTRODUCTION

On March 8th, 2004, a National Hockey League game between the Colorado Avalanche and the Vancouver Canucks propelled the issue of violence in professional sports into the media spotlight once again. With just over 12 minutes remaining and the Avalanche winning 9–2, Canuck Todd Bertuzzi grabbed Avalanche defenceman Steve Moore from behind, punched him in the back of the head, and pushed his face into the ice. Moore suffered three fractured vertebrae in his neck and a concussion as a result of the incident. In addition to being suspended by the NHL for the remainder of the season and the playoffs, and forfeiting $500,000 of his salary, Bertuzzi was eventually criminally charged with assault causing bodily harm. He pleaded guilty to that same offence on December 22, 2004, in exchange for a conditional discharge and 80 hours of community service.[1]

Violence has always been a part of professional hockey, as have referee-imposed penalties and league-imposed fines and suspensions. What has not always been there, however, is the threat of criminal prosecution. For many years, violence in sports had been touted as being just "part of the game," with both parties content to leave it at that—the NHL happy enforcing their own rules, and prosecutors happy to stay out of the arena:

> There is no law that specifically exempts athletes from being prosecuted for assaults that occur during competition, so it is theoretically possible that a prosecutor could file

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* Author holds a B.Comm and LLB. from Queen's University, and is now an Articling Student at Bull, Housser & Tupper LLP in Vancouver, British Columbia.

1 David Allan Harris "Sucker Punch Not Part of the Game" *Burlington Post* (17 March 2004).

> charges every time a winger gets cross-checked or sucker punched. However, there is a gentlemen's agreement of sorts that exists between professional sports leagues and the authorities: As long as the NHL polices itself, and metes out fines and suspensions to offenders, prosecutors generally leave it alone.[2]

As such, even though common behaviour in professional hockey might technically satisfy the elements of various assault provisions under the *Criminal Code*, such conduct has generally been overlooked by prosecutors in Canada and other jurisdictions.

But even when certain laws have not been enforced in particular contexts in the past, there is always room for change as societal acceptance and norms evolve. There are many examples in Canadian legal history where certain actions that were once ignored by the criminal justice system have finally attracted criminal penalties. Only decades ago, domestic violence was often still considered to be a family matter that rarely attracted the attention of the justice system. Indeed, "it took us a very long time to open up the box to reveal domestic violence. But having done so, we've established that the family is not immune from scrutiny."[3] Similarly, as demonstrated by Bertuzzi's recent criminal prosecution, it appears that Canadians are gradually becoming less tolerant with particularly violent conduct in professional hockey that can lead to serious bodily injury.

Although still a fairly rare occurrence in Canada, this country has been more willing to bring charges against athletes for violence during games than authorities in the U.S.,[4] and back in May of 1969, the criminal law began to make its way into Canadian professional hockey arenas. On that day, Wayne Maki of the St. Louis Blues and Ted Green of the Boston Bruins became the first NHL players to be criminally charged in Canada after a stick-swinging fight at a pre-season game in Ottawa. Since then, a number of other professional hockey players have been charged under various assault provisions of the Canadian *Criminal Code*. And the outcomes have been mixed—ranging from jail time, to fines, to conditional discharges, and outright acquittals. Unfortunately, the written judgments have proved to be just as mixed. This leaves us with unacceptably vague rules of conduct, and professional hockey players not knowing which of their actions on the ice might attract the attention of Crown prosecutors. Judges have said that "because each case must be decided on its facts, it is difficult, if not impossible, to decide how the line is to be drawn in every cir-

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2 Brendan I. Koerner, "When Is Hockey Violence Illegal?" (11 March, 2004), online: Slate Magazine <http://slate.msn.com/toolbar.aspx?action=print&id=2096977> [*Koerner*].

3 Interview of Ronalda Murphy (29 January 2004) on *The Docket*, CBC Newsworld, Halifax.

4 Kris Axtman, "When Sports Violence Is a Criminal Act" (28 Feb, 2000), online: Christian Science Monitor <http://search.csmonitor.com/durable/2000/02/28/p1s5.htm>.

cumstance."[5] Indeed, the line may be difficult to draw with precision, but that cannot deter the courts from devising and articulating some sort of framework for criminal liability in the professional sports context. Many other *Criminal Code* provisions are extremely vague, and judges have seen fit to develop common law enhancements to aid in the ease of its application.

It is clearly acceptable to have laws constraining people's conduct, and corresponding punishments for those who choose to disobey the laws, but only when the application of those laws is predictable and understandable. Section 1 of the *Charter* requires that limits to rights and freedoms be "prescribed by law."[6] Similarly, as a principle of fundamental justice, s. 7 of the *Charter* requires that laws be intelligible.[7] The *Charter* demands that Citizens have access to, and understand the laws they are required to follow, and that is unfortunately not the case with Canadian assault laws as they apply to professional sports today.

This paper is not going to address whether or not the criminal law has a place in the professional hockey arena. Instead, it will proceed on the basis that now that the criminal law has already begun to encroach on the activities of these professional athletes, it is vital that we attempt to synthesize the principles articulated in our limited jurisprudence to create a framework within which players can now monitor or guide their own conduct. There is constant discussion of an 'imaginary line' drawn between acceptable and unacceptable conduct in hockey, with conduct going beyond that line considered to be criminal in nature. This paper will attempt to illuminate where that line has been drawn so far by the Canadian courts, and therefore when and what types of criminal charges will likely be laid for violence in professional hockey.

The way that Bertuzzi's prosecution was handled by the Crown is ample evidence that a workable framework for professional hockey conduct has yet to be effectively articulated in Canada. "Crown counsel, in their discretion to prosecute, decide which complaints will result in criminal charges,"[8] and it took prosecutors in this case more than six months from the date of the violent on-ice incident to lay charges against Todd Bertuzzi. This demonstrates the difficulty with which even police officers and Crown counsel have in applying the criminal law to the world of professional sports. If they are still unsure which actions on the ice will attract which legal sanctions, how can players be expected to know any better?

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5 *Agar v. Canning*, [1965] CarswellMan 59, affd 55 W.W.R. 384 (C.A.) at 3.

6 *Canadian Charter of Rights and Freedoms*, s.1, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11, [*Charter*].

7 *Ibid.*, s.7.

8 *R v. McSorley*, [2000] B.C.J. No. 1993, 2000 B.C.P.C. 116 [*McSorley*].

First, I will discuss the *Criminal Code* offences with which most professional athletes in Canada are charged, and how judges have applied and interpreted them, with specific emphasis on the elements of intent and consent. Second, I will outline how a variety of defences have been accepted or rejected by the courts. Finally, based on an outline of the charge elements and potential defences, I will attempt to develop a model code of conduct by which players can assess what they can and cannot do on the ice.

II. CRIMINAL CODE CHARGES IN PROFESSIONAL HOCKEY

In the context of sporting violence, the most common criminal charges laid in Canada are for "assault causing bodily harm" and "assault with a weapon," both found in s. 267 of the *Criminal Code*.[9] The section provides:

> 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
>
> is guilty of an indictable offence and is liable to imprisonment for ten years.

In order to charge an accused under either of these sections, however, the Crown must first show that the accused has met the criteria of "common assault" under s. 265(1).

A. Common Assault

There are three potential actions described in s. 265(1) of the *Criminal Code* that amount to "common assault," but for our purposes, subsection (a) is the most important. It provides that "a person commits an 'assault' when...without the consent of another person, he applies force intentionally to that other person, directly or indirectly."[10] As such, the Crown must show that the accused applied force intentionally to the victim, and that the victim did not consent to the application of force. This also means that no actual harm needs to exist or be proven by the Crown. The elements of intention and consent will be discussed in more detail in a later section.

Charges of common assault alone have been few and far between in the professional sports context, most likely because it is generally accepted that players consent to some minimal form of bodily contact when they enter the sports arena. Indeed, many judges have said that a charge of common assault would be unlikely to ever succeed in either an amateur or professional sporting context where some form of bodily contact is usually accepted as part of the game. In *R*

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9 *Criminal Code*, R.S.C. 1997, c. C-46, s.267 [*Criminal Code*].

10 *Ibid.*, s.265(1).

v. Gray, the accused was charged with common assault, but the court found him guilty of assault causing bodily harm instead, with Justice Allan making the following comment: "[The Accused] is not guilty of common assault...Indeed, it might well be that it would be extremely difficult to convict any player of common assault for his play during a game."[11] Similarly in *R v. Green*, a case of professional hockey violence, the trial judge stated:

> Given the permissiveness of the game and the risks that the players willingly undertake, I find it difficult to envision circumstances 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.[12]

These judicial statements seem to indicate that unless aggression on the ice results in physical injury to a player, it is highly unlikely that any criminal charges would be laid. However, there have been judgments since *Gray* and *Green* where the court has expressed concern with this attitude towards violence. In *R. v. Mayer*, for example, Justice Stefanson found the accused guilty of common assault and stated the following:

> It is not injury that determines the existence of the crime of assault in hockey games but rather it is the act itself and the circumstances under which the act is performed...Lack of serious injury is often more luck and good fortune than intent and in the case before me, it is not thanks to the accused that extremely serious injury did not result from his attack on the plaintiff.[13]

This opinion reflects the general criminal law dictum that we punish those with a guilty mind, often regardless of resulting actions, and explains why people may be criminally charged with offences like attempted murder, even where no harm is actually caused. Whether or not a professional hockey player should or even could be charged for common assault will likely depend on the particular scenario in question. Where a technical "common assault" occurs on the ice during the regular course of play, for example, the idea of "consenting" to some form of physical contact on the ice makes it reasonable that criminal charges would not be laid, even where physical harm results. However, it is perhaps equally reasonable that "if a player acts with blatant disregard for the safety of others, the conduct should not go unpunished merely because the aggressor was lucky in not actually causing serious injury to another."[14] Overall, it appears to be possible, but unlikely, that professional hockey players will be charged with simple

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11 [1981] CarswellSask 32, 24 C.R. (3d) 109, [1981] 6 W.W.R. 654 (Prov. Ct.).

12 [1971] 1 O.R. 591 at p.597, 16 D.L.R. (3d) 137, 2 C.C.C. (2d) 442 (Prov. Ct.) [*Green*].

13 [1985] CarswellMan 427, 41 Man. R. (2d) 73 (Prov. Ct.).

14 Anna Husa and Stephen Thiele, "In the Name of the Game: Hockey Violence and the Criminal Justice System" (2002) 45 Crim. L. Q. 509 at 517 [*Husa & Thiele*].

"common assault" in Canada—instead it will usually end up being a charge of "assault causing bodily harm" or "assault with a weapon."

B. Assault with a Weapon

In order to charge a hockey player with "assault with a weapon," the Crown must show that the accused used or threatened to use a real or imitation weapon in committing the assault upon the accused. "'Weapon' has been interpreted broadly to include a hockey stick, notwithstanding that a hockey stick is normally used for purposes other than to inflict injury on another."[15] Indeed, Justice Kitchen in *R. v. McSorley* stated that "every 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."[16]

This charge has not been applied frequently in Canada, and the authors of "In the Name of the Game: Hockey Violence and the Criminal Justice System" suggest that the criminal justice system favours laying charges under s. 67(1)(b) because of a negative stigma that attaches to a charge of assault with a weapon—and the desire to not tarnish the name of hockey as a long-standing institution in North America. They also believe that the fact that Marty McSorley was charged under this provision in 2000 is a sign that prosecutors may take a more interventionist role in hockey violence. However, it seems possible that there have been few prosecutions under this section not because prosecutors want to avoid tarnishing the good name of hockey, but instead because they think they would more likely get a conviction under a charge of "assault causing bodily harm." It might be that "bodily harm" would be easier to identify and prove in court than would the utilization of a hockey stick as a weapon.

C. Assault Causing Bodily Harm

The most common criminal offence with which professional athletes in Canada are charged is "assault causing bodily harm" under s. 267(1)(a) of the *Criminal Code*. Specifically, it provides that "everyone who, in committing an assault...causes bodily harm to the complainant is guilty of an indictable offence and is liable to imprisonment for ten years."[17] The Crown must therefore show that the assault committed resulted in bodily injury to the victim. Section 2 of the *Code* defines bodily harm as "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."[18] Although this definition attempts to shed light on the

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15 *Ibid.*

16 *McSorley, Supra* note 8.

17 *Criminal Code, Supra* note 9, s.267(1)(a).

18 *Husa & Thiele, Supra* note 14 at 513.

type of injury for which criminal sanctions will be applied, it is extremely vague and provides particularly weak guidance for professional hockey players. For the day-to-day activities of the general public, where physical contact akin to an assault is far from the norm, it is reasonable to have a vague definition of "assault" using terms such as "transient" and "trifling" to delineate where the bounds of acceptable conduct lie. However, in the context of professional hockey, where repeated bodily contact of some form has long been an accepted part of the game, more guidance is needed as to where those criminal bounds lie. It is relatively simple to recognize the criminal implications of a person punching another on a street corner and breaking his nose—to the general public this harm would no doubt be considered to be more than "transient or trifling in nature." On the other hand, whether or not a nose being broken in the course of a professional hockey game is more than "transient or trifling" in that context is less clear. When you have a situation where some form of bodily contact is the norm, the need for more clearly delineated lines and rules of conduct is heightened. Perhaps the *Criminal Code* should provide a more specific definition of "bodily harm" that would apply in the professional sports context, or judges should develop a more specific common law definition of "bodily harm" as it should apply to professional sports. Although it would be difficult to generalize across sports and leagues, it might be possible to list a few examples of what might constitute "bodily harm" in various levels of hockey. In the NHL, for example, "bodily harm" could be defined as injury that takes a player out of a game, or even injury that sends a player to the hospital. And in less competitive leagues, the standard for "bodily harm" might be lower, and perhaps defined as injury that forces the player to be temporarily taken out of the game. Although a more specific definition of "bodily harm" might prove to be useful in delineating unacceptable conduct, and a list of examples might be helpful at doing so, it would obviously be impossible to enumerate every type of specific injury that would qualify as bodily harm. As such, if examples are indeed listed, it should be made clear that the list is not exclusive or exhaustive.

III. The Operation of "Intent" in Professional Hockey

As mentioned earlier, "intent" is an element of "common assault" under s. 265(1) of the *Criminal Code*. Accordingly, the onus is on the Crown to show that the accused intentionally applied force to the victim—and this culpable state of mind must be proved beyond a reasonable doubt.[19] This intent is of a general nature, as opposed to a specific one, which was explained by Justice Minuk in *R. v. Paul*:

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19 *McSorley, Supra* note 8.

> The lack of a specific intent to harm the complainant is irrelevant. Once it is established that the accused had the general intent to strike out at the complainant, he had the necessary intent within the meaning of s.245 (now s.265(1)) of the *Criminal Code* on the principle that the law presumes a man to intend the natural consequences of his act. Even if he did not intend to cause the specific bodily harm to the complainant, his act is still unlawful because when he swung his stick...he knew or ought to have known that [the victim] was in the immediate vicinity.[20]

This seems to indicate that for an action to be "intentional" within the meaning of s. 265(1), the accused must either have struck the victim deliberately or have been aware, on an objective standard, that his actions would result in contact with the victim.

In addition to the "deliberate" or "objectively liable" standards, courts have assessed conduct on the ice on a standard of "recklessness." These were discussed in Justice Kitchen's lengthy decision in *R. v. McSorley*. The Crown's position in that case was that McSorley either deliberately struck Brashear in the head, or that he recklessly struck him in the head, not necessarily aiming for the head directly, but choosing to ignore the danger of hitting the head. Justice Kitchen explained that "recklessness...may be linked to wilful blindness—ignoring a known risk."[21] Beyond acknowledging that an assessment of recklessness would be a difficult task to undertake, he found it unnecessary to explain how such a task might be accomplished. This is because he found that McSorley deliberately intended to strike Brashear in the head, and not in the shoulder. He came to this conclusion by making the following analogy: "A child, swinging as at a Tee ball, would not miss. An NHL player would never, ever miss. Brashear was struck as intended."[22] It has been said that "the absence or presence of intent is a question of fact that must be determined on a case-by-case basis,"[23] but it appears as though Justice Kitchen has made a judgment call that every action of a professional hockey player is entirely intentional, and seems to leave no room for a finding of lack of intent in such a context. Such a hard-lined approach seems to be highly prejudicial to the fact-finding process—and completely unfair to the players. In a fast-paced game like hockey, surely there must be room for situations where a player inadvertently or accidentally strikes another player with his stick—where it should not always be considered intentional contact.

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20 [1989] M.J. No. 243 (QL) at 25-26, 7 W.C.B. (2d) 207 (Prov. Ct.). [*Paul*]

21 *McSorley*, *Supra* note 8.

22 *Ibid.*

23 *Husa & Thiele*, *Supra* note 14 at 518.

IV. The Operation of "Consent" in Professional Hockey

A. Introduction

The issue of consent is undoubtedly the most controversial aspect of any discussion regarding violence in professional sports. In many jurisdictions outside Canada, consent is raised as a "defence" in criminal prosecutions of professional athletes, but in Canada, "lack of consent" is technically one of the elements of the crime of assault that the prosecution must prove beyond a reasonable doubt. The burden, therefore, does not lie on the defendant to prove there was consent. However, some judges and journalists continue to say that "implied consent is an accepted defence against assault charges."[24] Regardless of whether the issue of consent is considered to be an element of the offence or a potential defence, the main question to be addressed is generally the following: What do professional hockey players consent to when they step on the ice? This question will be addressed in the following sections.

B. Levels of Intentional Bodily Contact in Professional Hockey

There appears to be two distinct levels of intentional bodily contact that exist in professional hockey. First, it is clear that in agreeing to play the game, hockey players consent to some mild forms of bodily contact and to the risk of injury therefrom—those forms explicitly written in the NHL Official Rules being the clearest form. Second, there are other forms of intentional bodily contact which are specifically denounced by the rules, and have corresponding penalties that are enforced by referees. Despite this explicit denouncement, some of these forms of contact still seem to fall within the accepted standards by which the game is played, and may therefore come within the scope of implied consent. However, it is equally clear that "there are some actions which can take place in the course of a sporting conflict that are so violent it would be perverse to find that anyone taking part in a sporting activity had impliedly consented to subject himself to them."[25] It is the dividing line between this bodily contact impliedly consented to and that contact which is unacceptably violent, which has been difficult for courts to delineate.

C. Bodily Contact Explicitly Consented to in the NHL Rules

The ultimate objective in the game of hockey is to put the puck in the opposing team's net. Many of the written rules of the game deal with legitimate means by which that may be done, including limited bodily contact that will not be rep-

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[24] *Koerner*, *Supra* note 2.

[25] *McSorley*, *Supra* note 8 at para. 70.

rimanded with a penalty. For example, Rule 85 provides that slashing, defined as "the act of swinging a player's stick at an opponent, whether contact is made or not" [26], is not allowed. However, "non-aggressive stick contact to the pant or front of the shin pads, should not be penalized as slashing."[27] This acknowledges the fact that some form of bodily contact is expected in the sport of professional hockey, and shows the explicit consent of the players to such contact when they sign their NHL contracts.

D. Bodily Contact Explicitly Denounced in the NHL Rules

In addition to providing explicit rules about what conduct is allowed on the ice, the codified "NHL Official Rules" provides a long list of prohibited acts, and corresponding penalties that will be imposed by referees when those rules are breached. Prohibited actions include biting, cross-checking, hair pulling, high sticking, and slashing, among many others.[28] Correspondingly, a series of penalties are listed as consequences of breaking the rules. These are divided into the following classes: Minor penalties, bench minor penalties, major penalties, misconduct penalties, match penalties, and penalty shots.[29]

When professional hockey players sign their annual contracts, they must undoubtedly be familiar with the NHL Official Rules and the penalties that will be imposed upon their team and opposing teams during play. However, just because certain actions are prohibited in the rules, and game penalties may be imposed, that does not necessarily mean that players impliedly consent to all forms of bodily contact that are contemplated in the official rules, or that they expect them to happen on a regular basis. It is often said that professional hockey players do impliedly consent to some of the prohibited forms of bodily contact, but this is limited to actions agreed to by players and referees in a secondary, unwritten code of conduct.

E. Bodily Contact Implicitly Consented to in Unwritten Code of Conduct

In addition to the official rules and penalties in the NHL official rules, there is an unwritten code of conduct impliedly agreed to by players and referees as to what conduct they consent to. In *R. v. McSorley*, Justice Kitchen summarized the lengthy testimony he heard from players and referees regarding acceptable conduct on the ice. For example, head butting is prohibited by the rulebook,

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[26] *NHL Rulebook*, Rule 85, online: NHL.com <http://nhl.com/hockeyu/rulebook/index.html>.

[27] *Ibid.*

[28] *Ibid.*, Rule 43.

[29] *Ibid*,. Rule 25.

and a match penalty may be called against an aggressor for that action but that does not necessarily mean that players consent to being the victim of an action as violent as head-butting. However, there are other actions, such as slashing, that are implicitly considered by players and referees to be legitimate and acceptable game strategy in certain circumstances. For example, the written rules prohibit slashing with the stick, but the unwritten code—impliedly agreed to be all players—says that slashing is permissible as long as it is during play, and not to the head.[30] A game penalty will be called nonetheless, but it can be said that the players impliedly accept that this type of conduct is a normal part of game strategy, and therefore consent to its occurrence. Although the testimony of players and referees is helpful in beginning to delineate the scope of the implied consent contained in this unwritten code of conduct, more is needed. We must therefore look to court decisions to develop a more comprehensive framework with which to work.

F. How the Courts Have Dealt With Finding the Dividing Line

In most cases involving the criminal prosecution of professional athletes, the contentious issue ends up being whether or not particular conduct exceeded the implied consent of the victim. For example, in *R. v. McSorley*, Justice Kitchen had to decide the following issue: "[W]hether the slash by McSorley, although in contravention of the written rules, was nevertheless within the customary norms and rules of the game," and therefore impliedly consented to by the participants.[31] Determining the scope of this "implied" consent is inherently more difficult than the explicit consent because nothing is written down, and there is no way of knowing for sure what each player is specifically (uniquely) consenting to happening on the ice. It may very well be that some players do not fully appreciate the serious physical risks to which they are exposing themselves on the ice.

Up until recently, courts have generally held that players implicitly consent to "normal," "accepted" or "inherent" parts of the game of hockey. In *R. v. Leyte*, for example, the judge held that "players are deemed to consent to acts resulting from instinctive reactions closely related to the play."[32] And in *R. v. Watson*, consent was found to be limited to "routine body contact" in the game.[33] In *R. v. Maloney*, the judge also held that "participants consent to assaults which are inherent in and reasonably related to the normal playing of the

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30 *McSorley, Supra* note 8.

31 *Ibid.* at para 25.

32 (1973), 13 C.C.C. (2d) 458.

33 (1975), 26 C.C.C. (2d) 150.

game."[34] It is important to note that determinations of normalcy or common acceptance are highly subjective, and may evolve over time as tolerance levels fluctuate. The consistent vagueness of the above rulings "illustrates the difficulty in devising a workable formula which reconciles the legitimacy of socially acceptable (and beneficial) violence with the equal need to protect participants from wanton violence."[35]

Fortunately, the Saskatchewan Court of Appeal in *R. v. Cey*[36] has more recently provided some clearer guidance using situational factors to assess whether implied consent exists such as: conditions under which the game in question is played, the nature of the act which forms the subject-matter of the charge, the extent of the force employed, the degree and risk of injury, and the probability of serious harm occurring were considered to be relevant criteria when determining the extent of the consent implied by participation. These factors were later cited with approval in Ontario in *R. v. Ciccarelli*[37] and *R. v. Leclerc*[38], and more recently in the B.C. Provincial Court in R. *v. McSorley*.

Overall, *Cey* is helpful because it spells out particular factors to be taken into account, as opposed to the extremely vague tests employed in earlier judgments. J. Paul McCutcheon explains *Cey*'s approach to determining what conduct is impliedly consented to on the ice:

> Violent and dangerous conduct which can be expected in the course of the game exceeds the implied consent. In this respect, the identification of the concern which underlies the issue, namely *the risk of serious injury*, is instructive. Thus, where the conduct is such as to carry a high risk of injury it will be unlawful regardless of the consent or of the frequency with which it generally occurs in the sport.[39]

This follows the rationale offered by the Supreme Court of Canada (SCC) in *R. v. Jobidon*[40] for there being public policy limits on the amount of force that can be legally consented to, even in the sports arena. The *Jobidon* scenario involved a fist-fight outside a bar, as opposed to a professional hockey game, but it is instructive here nonetheless.

The SCC found that the limits of implied consent are reached when adults intentionally apply force that causes serious hurt or non-trivial harm to each

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34 (1976), 28 C.C.C. (2d) 323.

35 J. Paul McCutcheon, "Sports Violence, Consent and the Criminal Law" (1994) 45 NILQ 267 [*McCutcheon*].

36 (1989), 48 CC.C. (3d) 480.

37 (1989), 54 CCC (3d) 121.

38 (1991), 67 CCC (3d) 563.

39 *McCutcheon*, *Supra* note 35.

40 *R. v. Jobidon*, (1991) 66 C.C.C. (3d) 454.

other. The focus in *Jobidon*, as in *Cey*, seems to be less on what the individual players might have implicitly consented to, and more on the inherent danger of a particular act of violence. Overall, the SCC has said that, for public policy reasons, we should not allow people to consent to serious bodily injury, notwithstanding the circumstances. As such, where conduct is extremely violent, and would objectively seem to lead to serious bodily harm, it will have exceeded any implied consent that a victim would have been permitted to give in the first place.

A combination of the *Jobidon* and *Cey* may lead to the following proposition: the implied consent of hockey players must be limited by public policy concerns, and that limit lies where conduct is objectively likely to lead to serious bodily injury or harm. And whether or not particular conduct is objectively violent may be determined using the series of factors laid out in *Cey*.[41] This way, the focus is less on what risks individual players may or may not have contemplated when they stepped out on the ice, and instead on what degree of physical harm is acceptable on a public policy basis.

In the end perhaps, the deciding factor in prosecuting professional hockey players should perhaps be whether or not serious harm was intended or caused, regardless of whether it is within the rules of the game or the aggressor believed it was consented to. Generally, professional hockey should be an intensely competitive game, without players being subject to routine serious bodily injury. Instead of skating on the ice, asking themselves questions like "is this against the rules of the game?" or "is this something the opposing player consented to?" players should be asking themselves "is this likely to seriously injure the other player?" If the answer is objectively yes, then the aggressor should be held accountable for his actions. The court in R. *v. Green*[42] acknowledged this problem and concluded that it would be very difficult for a player, embroiled in the intensity of an athletic context, to stop and determine whether an act he is about to commit constitutes an assault. Indeed, it makes much more sense for a player to consider whether they are going to cause another player serious harm, because it may be an easier and more instinctive decision to make. For example, most people are aware that being hit in the neck or head could be much more life-threatening that being hit in the leg.

V. POTENTIAL DEFENCES AVAILABLE TO PROFESSIONAL ATHLETES

Once the Crown has proved the substantive elements of an offence, there are still a number of defences that professional hockey players have tried to advance

[41] Note: These factors were listed earlier on page 12 of this paper.

[42] *Green*, *Supra* note 12.

to avoid being convicted of assault under the *Criminal Code*. Such defences include self-defence, provocation and reflex action, and each has been accepted by the courts with varying success rates—depending on the particular circumstances surrounding the alleged offence. Although they have all been generally described as "defences" in the case law, reflex action has often simply had the effect of negating the "intent" element of the offence, thereby limiting the Crown's ability to prove its case beyond a reasonable doubt. Whichever way these arguments are viewed, it is clear that they have been effectively advanced by accused persons to limit their criminal liability in the professional sports context.

A. Self-Defence

As with any accused person, the defendant in a sports violence action may assert that he acted in self-defence when he technically "assaulted" someone. Whether he will be successful, however, depends upon surrounding circumstances. The "force the defendant used must not only have been reasonable, but the defendant must also have reasonably believed that it was necessary to use such force and that the threatened harm was imminent."[43] And when a defendant asserts such a defence, the trier of fact must analyze the circumstances surrounding the act as well as the state of mind of the accused at the time in question.[44] In particular, it has been said that "[i]n order to successfully assert the defence of self-defence, the defendant must show that he or she was not the aggressor. This creates problems for many defendants in sports violence cases since they often fail to qualify as a non-aggressor in such situations."[45]

One of the only Canadian hockey violence scenarios where self-defence has been successfully argued was the 1969 fight between Wayne Maki and Ted Green:

> Green punched Maki during a scuffle around the puck. Green [then] swung his stick, striking Maki on the neck or shoulders, and Maki retaliated, which caused head injuries to Green. Maki was charged with assault causing bodily harm, and Green was charged with common assault.[46]

In *R. v. Maki*, Justice Carter acquitted Maki of charges for assault causing bodily harm because the Crown was unable to prove that he was not under a reason-

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43 Don Eugene-Nolan Gibson, "Violence in Professional Sports: A Proposal for Self-Regulation" (1981) 3 COMM/ENT L.J. 425 at 439 [*Gibson*].

44 R *v*. *Maki* (1971), 14 D.L.R. (3d) 164 at 166.

45 Mary Carroll, "It's Not How You Play The Game, It's Whether You Win Or Lose: The Need For Criminal Sanctions To Curb Violence In Professional Sports," (1989) 12 Hamline L. Rev. at 85 [*Carroll*].

46 Bradley C. Nielsen, "Sports and the Law: Controlling Sports Violence" (1990) 26 Trial 16 at 29 [*Nielsen*].

able apprehension of harm or that excessive force had been used under the circumstances. Similarly, in *R. v. Green*, Justice Fitzpatrick found as a fact that Maki "speared" Green in the lower abdomen and that Green's almost immediate response amounted to nothing more than "instinctive self-protection." It is unclear whether or not self-defence has been successfully or unsuccessfully raised since then in the professional sports context.

B. Provocation

Although professional athletes have attempted to argue "provocation" as a defence to assault on the ice, we do not let the general public use this excuse for fighting and the courts also seem to have difficulty validating it in the professional sports context. For example, in a civil case from 1965, *Agar v. Canning*, Justice Bastin stated that:

> 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 implied consent."[47] [Emphasis added.]

Although this decision was in civil court, it has been applied by later courts for the purpose of imposing criminal liability. At common law and under the *Criminal Code*, provocation is generally only a defence to murder. Despite this, however, the language used by some judges and authors in more recent writings indicates that only "unprovoked" attacks are worthy of criminal punishment. For example, the court in Maki said that "no athlete should be presumed to accept a malicious, *unprovoked* or overly violent attack," [48] and another author recently wrote that "*unprovoked* savage acts resulting in serious injury are the only acts of violence that should subject a player to criminal prosecution."[49] [Emphasis added]. The use of this language may, by default, lead one to think the judges are now implying that a "provoked" attack might *not* be worthy of such punishment. As such, it is possible that judges may use the common law to fashion a defence of provocation for charges other than murder.

Even if provocation were accepted as a defence in some cases, one does have to wonder what timeframe has to exist for a reaction to be considered a defence in response to being provoked, as opposed to a planned-out long-standing vendetta against another player—Bertuzzi's case for example. Surely if courts are going to accept provocation as a defence, it would not include three-week-long periods of premeditation.

In the end, it is unclear whether provocation would be accepted as an adequate defence to allow players to escape criminal liability for their actions, espe-

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[47] *Agar v. Canning* [1965] 54 W.W.R. 302 at 304.

[48] *Gibson, Supra* note 43 at 438.

[49] *Carroll, Supra* note 45.

cially when a considerable period of time has passed between the apparent provocation and violent reaction. It seems more likely that "provocation" might be taken into account as one of a series of factors that might mitigate against the imposition of criminal charges, as opposed to being a complete defence on its own to vicious attacks on the ice that cause serious harm.

C. Involuntary Reflex Action

The defence of involuntary reflex action is predicated on the theory that a particularly violent act committed by a player may be instinctive rather than premeditated or intentional. In this context, it has been argued that "a player's actions result from attitudes instilled in him at an early age, combined with the high level of pressure and emotion associated with sports.[50] The latter point was asserted by the court in *R. v. Green* case and was one of the bases of his acquittal. The defence of "involuntary reflex action" was also successfully raised in *R. v. Forbes*.[51] Similarly, in *R. v. Leyte*, the judge found that "players are deemed to consent to acts resulting from *instinctive* reactions closely related to the play since such reactions usually negative intent." [Emphasis added.] [52] As such, where an accused can demonstrate that his actions on the ice were based on reflex rather than actual premeditation, it is likely that a court would find the Crown unable to prove beyond a reasonable doubt that the accused had committed a voluntary act or had the requisite intent to satisfy the elements of any of the *Criminal Code* assault provisions.

VI. PLAYER'S GUIDE TO CONDUCT IN PROFESSIONAL HOCKEY

The following section will attempt to synthesize the principles and propositions discussed above with respect to violence in professional hockey. It should leave players with a practical framework that can be used to assess which conduct will be acceptable on the ice, and which conduct will likely lead to criminal prosecution. In addition, for those players who have already been charged with criminal offences, it provides a summary of which defences Canadian courts have tended to accept or reject in the professional sports context, and on what bases.

A. Which Bodily Contact Will Not Likely Lead to Criminal Prosecution?

As mentioned earlier, the NHL Official Rules explicitly lay out specific conduct that is acceptable during the game. Some of these rules are designed to enhance

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50 *Gibson*, *Supra* note 43.

51 *Ibid.* at 438.

52 *McCutcheon*, *Supra* note 35.

the game as a test of skill (game rules), while others are designed to protect players (safety rules). Based on a survey of relevant Canadian case law, it seems apparent that professional hockey players who sign NHL contracts are explicitly consenting to the affirmative actions written in the NHL rulebook. As such, players should not be concerned that the criminal law will become involved when such conduct occurs.

In addition to specifically allowing for certain conduct on the ice, the NHL Official Rules explicitly prohibit a variety of violent actions during hockey games. Players are obviously aware of the referee-imposed penalties that will be imposed when they engage in any of the explicitly prohibited conduct, but are generally unaware of which of these actions will be construed as criminal in nature. There appears to be a secondary code of conduct implicitly agreed to by all players and referees in the NHL, which means that players can assume that some of the actions denounced by the NHL are consented to by other players. Based on relevant case law, it appears that conduct should be considered as consented to or capable of being consented to as long as it does not pose the risk of serious bodily harm to the victim of the contact. Rather than thinking about whether an opposing player would likely have consented to the physical contact about to occur, players should simply consider the likelihood of causing serious physical harm to the opposing player—as this seems to be the deciding factor in much of the case law.

B. Which Bodily Contact Will Likely Lead to Criminal Prosecution?

It may be trite at this point to say that the main issue that players should be cognizant of at all times on the ice is the ultimate safety of other players. Where the risk of serious bodily harm to another player exists as a result of certain conduct, there is an increased likelihood that criminal charges will be pressed in Canada today. The rationale for this is simple: societal standards of decency demand that citizens cannot consent to being seriously injured, either inside or outside the professional sports context. One cannot turn an act from something illegal into something legal simply because another person consents to that act occurring. If that could happen, our criminal laws would have no weight in this country.

It is also important for professional hockey players to be aware of the attitude that Canadian courts have been developing toward the use of hockey sticks in the arena. While slashing is prohibited by the rules of professional hockey in Canada, it may be still impliedly consented to. However, it is now clear that a hockey stick will sometimes be considered to be a weapon for purposes of fulfilling the elements of certain assault provisions in the *Criminal Code*. As such, it is vital that professional hockey players be extra cautious in how they use their sticks on the ice.

C. How Are Defences Assessed by the Courts?

"Self-defence" will generally be accepted as a defence to assault charges, but only in limited circumstances where the accused was not the aggressor, the force used was reasonable in the circumstances, and there was a threat of imminent bodily harm. Given the unlikelihood of a player being prosecuted in the first place when such circumstances surround an assault, this defence will not likely be employed very often in Canadian courtrooms. Demonstrating that a particular motion was simply an "involuntary reflex action," rather than a premeditated, intentional attack, is also an effective way for a player to limit his liability in Canadian courtrooms. "Provocation" as a defence will usually prove to be problematic for players as a defence, as Canadian courts have been generally unwilling to accept it as an excuse for violent conduct on the ice that causes serious bodily harm.

VII. CONCLUSION

Criminal laws prohibit the actions of Canadian citizens in a variety of contexts, and not surprisingly provide for a range of penalties when those laws are broken. Assault provisions fom the *Criminal Code* are particular examples that have always had wide-reaching effects, but have only recently begun to be applied in the professional sports context. Because these provisions are purposefully vague, and have generally only been applied to conduct occurring in the public sphere, their application to professional athletes has been a long and arduous task for the courts to grapple with.

But the difficulty of this task should not deter judges from continuing to develop and articulate clearer guidelines for the conduct of professional hockey players. It is unacceptable to subject people to laws without providing them with specific guidance as to what conduct will be tolerated by society and what will be penalized with criminal prosecution. This paper has attempted to provide a synthesis of the relevant Canadian case law to date in order to shed light on the boundaries of acceptable conduct for these athletes, and potential defences that may be asserted in court once a player has been indicted for an offence.

Increasing the enforcement of criminal assault provisions in the professional hockey context should not result in more people being put in jail or otherwise punished—as long as specific guidance is provided to players. If players are made particularly aware of the dividing line between criminally acceptable and unacceptable conduct on the ice, and that charges will be filed against all offending players, this should encourage players to act less violently and be more cautious to avoid seriously injuring their opponents. Indeed, "once the professional sports leagues, owners, and athletes are put on notice through prosecu-

tion that egregious violence will not be tolerated regardless of where it occurs, they will begin to conform to legal norms of behaving rather than pay the price of violation the law."[53] If this is the case, there should eventually be little need for prosecutions of players or the imposition of criminal penalties.

The guidelines for conduct outlined in this paper should provide a starting point for further discussion on the issue of acceptable violence in professional sports. In assessing the doctrines developed by Canadian courts, it is important to remember that it is usually trial and first-level appellate courts that have rendered reported decisions. In fact, "[m]any of the decisions were delivered orally and do not reflect the precision of organization and terminology one might expect in written appellate decisions."[54] Although the SCC addressed the issue of consent to violent conduct in *R. v. Jobidon*, they have yet to deal with it specifically in the professional sports context. Judicial scrutiny of this area of law from the SCC could provide professional hockey players with the much needed guidance that is still lacking in existing case law in this area.

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53 *Nielsen*, *Supra* note 46 at 31.

54 Diane V. White, "Sports Violence as Criminal Assault: Development of the Doctrine by the Canadian Courts" (1986) Duke L. J. 1030 at 1037.