Fighting in Hockey: Prosecutable or Permissible?

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ABSTRACT

Fighting is against the rules in hockey, but it is firmly part of the culture of the sport. However, *R v Cey* and *R v Jobidon* placed the legality of hockey fights in a precarious position. The caselaw applying these appellate-level decisions to hockey-related violence nationwide has been incredibly inconsistent, resulting in a lack of clarity for police, Crown attorneys, and hockey players concerning the potential criminal jeopardy of hockey fight participants. This article canvasses the different approaches taken regarding hockey fights by courts across Canada and ultimately argues that a modified version of what is referred to herein as the "serious injury approach," which draws the line at actions taken with the intention to cause, or recklessness or wilful blindness to the likelihood of causing, serious injury to the other participant in the fight, should be endorsed as the universal approach to cases involving hockey fights.

***Keywords*:** *Criminal law, Hockey, Consent fights, Sports, Jobidon, Cey, Assault*

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INTRODUCTION

In any sport, there must be a line which, when crossed by a participant, leads to criminal consequences. However, it can be difficult to determine exactly where this line should be drawn. A legal framework through which that line can be determined on a case-by-case basis was established by the Saskatchewan Court of Appeal ("SKCA") in *R v Cey*.[1] This legal framework was approved and elaborated upon by the Supreme Court of Canada ("SCC") in *R v Jobidon*.[2] However, significant difficulty has arisen in the application of these cases to hockey fights. Depending on the interpretation of *Cey* and *Jobidon*, many or all hockey fights may involve illegal conduct. Due to varying interpretations of these cases, the law as stated in *Cey* and *Jobidon* has been subject to inconsistent application, resulting in a lack of clarity for police, Crown attorneys, and hockey players regarding which acts are illegal in the context of hockey fights. As such, a universal approach to the criminalisation of conduct in hockey fights must be established.

The discussion surrounding this issue by other academics has primarily focused on the criminalization of violent conduct in *professional* hockey games.[3] Consequently, there has been little consideration of how this legal framework and its various interpretations impact amateur or semi-professional hockey players. This oversight is noteworthy, given that amateur and semi-professional players far outnumber professional players and may be subject to a comparatively lower threshold of permissible violent conduct. As such, a broader and more inclusive analysis of the threshold for criminalization of hockey-related violence in a post-*Cey* and *Jobidon* legal landscape is necessary.

This essay will provide an overview and evaluation of the different approaches adopted by courts nationwide. It ultimately argues in favour for a modified version of what will be referred to in this paper as the "serious injury" approach. This approach defines the threshold for liability as actions

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1 *R v Cey*, 1989 CanLII 283 (SKCA) [*Cey*].

2 *R v Jobidon*, [1991] 2 SCR 714, 1991 CanLII 77 [*Jobidon*].

3 See e.g. Anna Husa & Stephen Thiele, "In the Name of the Game: Hockey Violence and the Criminal Justice System" (2002) 45(4) Crim LQ 509; Angela Baxter, "Hockey Violence: The Canadian Criminal Code and Professional Hockey" (2005) 31(2) Man LJ 281.

taken with the intent to cause, or with recklessness or willful blindness to the likelihood of causing, serious injury to another participant in the fight.

THE STATE OF THE LAW ACCORDING TO *JOBIDON* AND *CEY*

In *Cey*, the SKCA was tasked with determining whether the trial judge erred in his decision that a vicious cross-check into the boards during an amateur hockey game, which resulted in facial injuries, whiplash, and a concussion, did not constitute assault causing bodily harm.[4] In allowing the Crown's appeal, the SKCA made two important rulings. Firstly, they held that, although there was implicit consent on the part of the complainant to a certain degree of intentional body contact by virtue of their participation in the sport, they did not directly or implicitly consent to acts which constitute "a marked departure from acceptable conduct" under the rules of the sport.[5] Secondly, they held that "the mere fact that a type of assault occurs with some frequency does not necessarily mean that it is not of such a severe nature that consent thereto is precluded."[6] Specifically, they held that consent cannot be given for "violence that is employed with the intent to do injury."[7]

In *Jobidon*, the SCC held that consent is generally vitiated where there is an intention by the perpetrating party to cause bodily harm.[8] Although the case was not specifically about consent and criminality in the sporting context, the SCC did express general approval of the approach articulated in *Cey*,[9] and offered some comments of its own on how their ruling should be applied in the context of sports. They held that "the policy of the common law will not affect the validity or effectiveness of freely given consent to participate in rough sporting activities, so long as the intentional applications of force to which one consents are within the customary norms and rules of the game."[10] This has consistently been interpreted to mean

4 *Cey, supra* note 1.

5 *Ibid.*

6 *Ibid.*

7 *Ibid.*

8 *Jobidon, supra* note 2 at para 107.

9 *Ibid* at para 126.

10 *Ibid.*

that only violent acts that exceed the ordinary norms of conduct within the sport fall under the *Jobidon* rule, not every violent act in breach of the codified rules.[11] Further, the SCC held that "very violent forms of force which clearly extend beyond the ordinary norms of conduct will not be recognized as legitimate conduct to which one can validly consent."[12] However, the SCC refused to specify exactly where that line laid, holding instead that the distinction of what constitutes a criminal act in the context of a physical sport should be "developed gradually over time, in cases where the facts more naturally allow for it."[13]

In combination, these two cases suggest that violent acts will not be subject to criminal prosecution if they: (1) are not a marked departure from the rules of the sport, and (2) do not clearly extend beyond the ordinary norms of the sport, unless those acts are either committed with the intent to cause injury or are so violent in nature as to preclude the ability to consent to them.

ISSUES OF APPLICATION TO HOCKEY FIGHTS

This legal framework poses significant challenges when applied to fights in hockey games. In *Jobidon*, the SCC stated that "[u]nlike fist fights, sporting activities and games usually have a significant social value; they are worthwhile."[14] A question therefore arises as to how a fist fight should be treated when it occurs within the context of a hockey game. Are such fights also socially valuable due to their connection to a sporting activity, and thus excluded from the general rule articulated in *Jobidon*, or should consent be vitiated in the context of hockey fights as well?

Consensual fighting is against the rules in hockey but is generally considered to be a part of the game and is well within the ordinary norms of the sport. However, hockey fights almost always involve some degree of violence. At a minimum, the initiator intends to strike, grab, wrestle, or otherwise be physically aggressive toward the other participant. It can

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11 See e,g, *R v AE*, 2000 CanLII 16823 at para 39 (ONCA); *R v Krzysztofik*, 1992 CanLII 13029 (MBKB).

12 *Jobidon, supra* note 2 at para 127.

13 *Ibid* at para 135.

14 *Ibid* at para 126.

therefore be argued that all hockey fights, regardless of the level of play, are illegal under the rules established in *Cey* and *Jobidon*.

Treatment of Hockey Fights by the Courts

Prior to *Cey* and *Jobidon*, the limited jurisprudence concerning the ability of a hockey player to consent to participation in a hockey fight was relatively unanimous. No appellate-level courts had dealt with the issue, but the trial courts were consistently of the opinion that fighting was a part of the game, and that fights consensually entered into between two players did not generally constitute criminal assault.

In *R v Watson*, the earliest of these cases, the accused was charged after lunging at an opposing player and briefly choking him unconscious in retaliation for a slash that the player had committed against him.[15] The level of play was classified as "juvenile non-professional."[16] Although the court held that the complainant did not consent to the fight in this instance, it acknowledged that "[t]here are undoubtedly situations in hockey games in which players impliedly consent to fight."[17]

Similarly, in *R v Henderson,* a case dealing with allegations arising from a major junior-level hockey game,[18] the accused struck an opposing player in the head with his fist after a routine post-whistle altercation had concluded and while they were both approaching the penalty box, causing him to fall to the ice unconscious.[19] Although the accused was found guilty,[20] it was held that "when two players, either directly or by implication, consent to involve one another in combat, provided the combat occurs within the bounds of fair play, each player ought to be given the immunity that is accorded those who participate in the sport generally."[21]

In *R v Mayer,* the accused was charged in relation to a "sucker punch" in a junior-level game that resulted in the complainant being taken off the

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15 *R v Watson*, [1975] OJ No 2681 at para 8, 26 CCC (2d) 150 [*Watson*].

16 *Ibid* at para 3.

17 *Ibid* at para 26.

18 *R v Henderson*, [1976] BCJ No 1211 at para 3, 5 WWR 119 [*Henderson*].

19 *Ibid* at paras 5-7.

20 *Ibid* at para 29.

21 *Ibid* at para 20.

ice on a stretcher.[22] Although the accused was also convicted in this case, the analysis notably turned on whether the combat exceeded the bounds of fair play, which was to be determined on a case-by-case basis by assessing the particular nature and circumstances of the conduct in question.[23]

Following *Cey* and *Jobidon*, the jurisprudence has become far less consistent. While the number of cases applying this legal framework to hockey fights is relatively limited, there are still enough decisions involving either direct altercations or related instances of injurious on-ice violence to identify several emerging trends in its application.

The first of these approaches, referred to in this paper as the "traditional" approach, interprets *Cey* and *Jobidon* in a manner that remains consistent with the earlier jurisprudence discussed above. This approach is best articulated in *R v SRH*, where the accused was charged with aggravated assault after he struck the complainant in the stomach with the butt of his stick, seemingly without provocation, causing a ruptured bowel and a bruised pancreas. The accused was found guilty, but the Court also held that:

> If organized sporting events had not been carved out by *Jobidon* from its ambit, the decision would have had the effect of criminalizing many body checks and consensual fights that would have been legal under *Cey*. The Supreme Court recognized that the issue of consent in relation to sporting events is properly dealt with in accordance with the principles set out in the *Cey* decision and are not governed by *Jobidon*.[24]

In the case of R v McSorley, a professional hockey player swung his stick in a manner similar to a baseball swing, striking another player in the head. This action knocked the victim to the ice and caused a seizure and concussion. As a result, the accused was convicted of assault with a weapon.[25] However, the Court also recognized the following:

> [T]here is an unwritten code of conduct agreed to by the players and the officials. This amalgam of written rules and the unwritten code leads to composite rules, such as the following. It is a legitimate game strategy to slash another player, but if done with sufficient force, and if the referee sees it, then the offender's team plays one player short for two minutes. It is a legitimate game strategy to fight another

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22 *R v Mayer*, 1985 CanLII 3816 at para 6 (MBPC) [*Mayer*].

23 *Ibid* at para 13.

24 *R v SRH*, 2011 ABPC 2 at para 46 [*SRH*].

25 *R v McSorley*, 2000 BCPC 116 at paras 50 and 109 [*McSorley*].

> consenting player, but the offenders are kept off the ice for a period of time determined by the referee.[26]

Similarly, in *R v King-Norris,* the accused, a junior hockey player, pled guilty to assault causing bodily harm after he initiated a fight and punched the complainant, resulting in a broken jaw.[27] Since the rule against fighting is breached so frequently, the court held that fighting is properly considered to be within the norms of the sport.[28]

In summary, under the traditional approach, the fact that fighting is against the rules in hockey is not determinative. Like the fair play rule articulated in *Henderson* but worded in a manner more consistent with the language of *Cey* and *Jobidon*, these cases draw the line at blatantly excessive violence committed during a hockey game,[29] a determination to be made on the "peculiar facts" of each case.[30]

An alternative line of cases, referred to herein as the "serious injury" approach, has made attempts to grapple with the preclusion of consent to "violence that is employed with the intent to do injury"[31] articulated in *Cey,* by imposing criminal sanctions for acts committed during a hockey fight with the *intent* to cause *serious* injury. The vitiation of a hockey player's consent to participate in a hockey fight does not flow automatically from this approach. The emphasis under the serious injury approach is placed on the *intention* of the accused to cause *serious* injury, not on whether serious injury actually occurred. [32]

For example, in *R v Faith*, the accused had mistakenly believed that the complainant had expressed a desire to fight during a junior-level game. In response, he punched the complainant once in the face, causing a broken jaw.[33] However, it was held that "the conduct of the accused did not evince

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26 *Ibid* at para 21.

27 *R v King-Norris*, 2021 ONCJ 682 at para 1 [*King-Norris*].

28 *Ibid* at para 5, citing *R v Leclerc*, [1991] OJ No 1533, 4 OR (3d) 788 (ONCA).

29 *R v S (SR)*, [1991] MJ No 279 at para 21.

30 *R v Thériault*, 2013 QCCQ 9971 at para 50; citing *Watson, supra* note 15; wherein the accused was found not of assault causing bodily harm after checking an opposing player from behind in a semi-professional game and being suspended.

31 *Cey, supra* note 1.

32 *R v GT*, [1996] OJ No 4424 at para 22, 18 OTC 73 [*GT*].

33 *R v Faith*, [2006] AJ No 846 at paras 11, 13 and 26.

a deliberate purpose to inflict injury upon the complainant, notwithstanding that injury did occur in this case."[34] As a result, the accused was found not guilty.[35]

Another line of cases has focused on applying the holding in *Jobidon* that "very violent forms of force which clearly extend beyond the ordinary norms of conduct will not be recognized as legitimate conduct to which one can validly consent."[36] The approach taken in these cases will be referred to herein as the "infliction" approach. The infliction approach is distinguishable from the serious injury approach in that it draws the line more restrictively at the *infliction* of bodily harm in cases involving hockey-related violence. It focuses on the *result* of the act in question rather than the *intention* of the accused and imposes a lower bar concerning the severity of a complainant's injury from which criminal sanctions will result. Thus, these cases take a strict approach to the interpretation of *Jobidon* in the context of hockey fights, indirectly holding that any act which results in bodily harm is so violent as to preclude the ability to consent to it. As a result, these cases refuse to allow hockey fights to fall under the exception to the general bodily harm rule carved out in *Jobidon* for "rough but properly conducted sporting events."[37] All the decisions that have taken this approach were in Quebec.

In *LSJPA – 0945*, the accused was charged with assault with a weapon after slashing another player in the face during a major junior-level hockey game.[38] In determining that the accused was guilty, it was held that "no court may conclude that a hockey player may have consented that an assault causing bodily harm be committed on him, since no one has the legal capacity to grant such a consent."[39]

Similarly, in *R c Mula*, a case dealing with a fight during a soccer game, reference was made to a holding in *R c Laliberté*, a case in which the accused struck another player with his stick during a semi-professional game. The judge in *Mula* translated the holding of *Laliberté* into English as follows:

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34 *Ibid* at para 38.

35 *Ibid* at para 48.

36 *Jobidon*, *supra* note 2 at para 127.

37 *Ibid* at para 76.

38 *LSJPA – 0945*, 2009 QCCQ 8477 at para 19 [*LSJPA*].

39 *Ibid* at para 90; citing *R v PM* (22 May 1996), 520-03-000141-953.

> [B]lows that follow involuntarily from fights could constitute theoretically attacks or aggression assault, but they would be within the consent. It is altogether different when we are faced with bodily injury. When it's a question of bodily injury, the jurisprudence and all the decisions are to the effect that no one can consent to bodily injury.[40]

As such, although the infliction approach does not preclude the ability of a hockey player to consent to participate in a hockey fight altogether, they provide very little room for them to do so without risking criminal prosecution. Any fight which results in bodily harm or injury may result in criminal charges, regardless of circumstances or intent of the accused.

Meanwhile, in *R v Roy*, the Court took a rather unique and extreme stance in comparison to the rest of the jurisprudence. In this case, it was held that hockey fights are always illegal. In the words of the court, "[a] criminal offence is very simple to demonstrate. When, at a hockey game… a player looks at another player, throws down his gloves and begins punching the other player - that is a criminal offence, period."[41] The basis for this decision is the position that a player conceding to the instigation of a fight by another player is never able to truly consent, since they are doing so out of self-preservation rather than actual desire to fight: "if the other person removes his gloves, it is because he has at that moment assumed a defensive posture."[42]

Accordingly, under this approach, neither the intentions of the players nor the resulting injuries are relevant;[43] hockey fights amount to assault by the initiator in all circumstances. This reflects an even stricter interpretation of *Jobidon* than that of the infliction approach. Although *Jobidon* did not deal specifically with consensual fights in a sporting context, this approach emphasizes the position in *Jobidon* that "fist fighting is without social value"[44] and refuses to allow fist fights between hockey players to fall under the exception for "rough but properly conducted sporting events"[45]

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40 *R c Mula*, JCPQ 2001-36 at para 31, [2000] QJ No 4516 [*Mula*]; citing *R c Laliberté*, [1999] JQ no 6347, JE 99-840 [*Laliberté*].

41 *R v Roy*, 2009 QBBQ 13939 at para 39 [*Roy*].

42 *Ibid* at para 40.

43 *Ibid* at para 91.

44 *Jobidon*, *supra* note 2 at para 23.

45 *Ibid* at para 76.

whatsoever. This is illustrated by the court's holding that "not wanting to fight is not the exception, it is the rule you must follow whether you're playing hockey or any other activity."[46]

1. The Issue of Inconsistency

These cases illustrate substantial inconsistency in the application of *Cey* and *Jobidon* to hockey fights, both nationwide and within the provinces themselves. Although courts in Quebec have generally taken a stricter approach where hockey fights are concerned, *R v Thériault*, the most recent case in Quebec to grapple with the issue, instead followed the traditional approach.

This inconsistency is incredibly problematic, as it provides little guidance for hockey players to determine the scope of actions they are permitted to take on the ice. If the goal of criminalizing certain violent conduct in hockey is to deter players from crossing a threshold beyond which their behaviour becomes socially unacceptable, that goal cannot be achieved where there is no clear articulation of where that threshold lies.

Compounding this issue is the inconsistency in arrests and prosecutions related to hockey fights. Hockey fights happen very frequently in hockey games in Canada, yet the cases dealing with assault charges stemming from them are relatively sparse, reflecting the rarity with which the police and Crown pursue such charges. In *R v Blaquière*, the court noted that the accused was the only person charged after a hockey game "where there were so many fights both on the ice and in the stands that several police officers had to intervene."[47] This could give the appearance of unfair, inconsistent, or selective prosecution of hockey fight-related assaults.

If there is inconsistent prosecution, those charged with hockey-related offences may come to believe they are being targeted due to some inalienable characteristic, political affiliation, or, in the case of travelling players, their membership with the visiting team. This perception not only risks undermining public confidence in the administration of justice, but also frustrates key objectives of criminal punishment. A player who believes they were prosecuted selectively may feel less morally blameworthy, thereby weakening the goals of specific deterrence or rehabilitation. Similarly, if the public at large feels that a player was selectively prosecuted, this may reduce

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46 *Roy, supra* note 41 at para 90.

47 *R v Blaquière*, 2012 QCCQ 362 at para 23.

the effectiveness of general deterrence, as people may conclude that criminal liability depends on factors unrelated to the player's actual on-ice conduct. As a result, they may believe that there is no risk of prosecution in performing the same on-ice conduct so long as the perceived extraneous factor does not apply to them.

The inconsistency with which the police and Crown pursue charges related to hockey fights is also likely a result of the lack of consensus in the jurisprudence concerning when such conduct crosses the line into criminal behaviour. Without clear guidance on which forms of violent on-ice conduct are likely to result a criminal conviction, it becomes difficult for prosecutors and law enforcement to determine when charges should be laid and pursued.

The current situation thus cries out for a universal approach to the law surrounding the ability of hockey players to consent to hockey fights, which can be consistently applied to all players who violate the law. Despite the position of the SCC in *Jobidon* that the line of criminality in sports should be "developed gradually over time,"[48] clarification from the appellate-level courts, and perhaps even the SCC, has become necessary.

Selecting the Universal Approach

Arising from the need for a universal approach to the law surrounding the ability of hockey players to consent to hockey fights is the question of which approach should be universally taken. Therefore, an assessment of each existing approach is necessary.

The most obviously flawed approach is that taken in *Roy*. Although not inconsistent with *Jobidon* or *Cey* per se, banning hockey fights outright is an extreme approach in comparison to the rest of the relevant jurisprudence. Even the infliction approach cases, which apply *Jobidon* more strictly than the other approaches, have not gone so far as to entirely criminalize fighting in hockey.

In addition, the rationale in *Roy* to support the position that a hockey player is unable to truly consent to participate in a fight initiated by another player is deeply flawed. It imagines all hockey fights as occurring in a scenario in which the initiating player drops his gloves and rushes at the

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48 *Jobidon*, *supra* note 2 at para 135.

accepting player, which is objectively incorrect. For example, in hockey, there are players known as enforcers, whose role amounts to "essentially a boxer on ice."[49] As part of their role, they are expected to engage in physical confrontations, often referred to as "hockey fights," with enforcers on opposing teams. These fights are often mutually agreed to in advance, before any violence or aggression has commenced. In such circumstances, the players are not entering into a fight out of self-preservation, as they consented to participate in the fight before they were faced with a threat to their safety.

Further, the approach taken in *Roy* is flawed in that it fails to recognise the social value of hockey fights. The social value of hockey in general is well recognised in the jurisprudence. For example, in *R v Ashton*, the court stated that hockey "is Canada's game. There are few things that will energize our country like a hockey game… In many ways, the sport represents who we are as a people. Like the game, as Canadians we are proud that in order to succeed we require tenacity, strength, intelligence and team work."[50] As discussed above, it is also widely recognised that fighting is a part of the game of hockey, and even the stricter cases recognise that it can be "a legitimate game strategy to fight another consenting player."[51] Since hockey has social value recognised by the courts, fights with legitimate strategic value should arguably also be considered socially valuable in the eyes of the courts by extension. It can therefore be argued that they should fall under the exception to the general rule carved out in *Jobidon* for "rough but properly conducted sporting events."[52] It should also be noted that other sports permitted in Canada, such as boxing, are entirely based on fist fights. If these sports are legal, presumably due to their social value, the same rationale suggests that hockey fights should also not be entirely criminalized.

Finally, even the court in *Roy* was cognizant that its decision was likely contrary to public opinion. As stated in *Roy*, "we have seen crowds cheering in such situations and shouting their approval… and nobody has ever raised a banner reading: 'Please stop fighting.'"[53] While the court of public

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49 *McEwan v Canadian Hockey League*, 2022 BCSC 1104 at para 73.

50 *R v Ashton*, 2017 ONCJ 585 at para 1.

51 *LSJPA*, *supra* note 38 at para 85; citing *McSorley*, *supra* note 25 at para 21.

52 *Ibid* at para 76.

53 *Roy*, *supra* note 41 at para 41.

opinion should not necessarily dictate the bounds of criminal law, it is certainly a relevant consideration.

After dealing with the extreme approach in *Roy*, we are left with the three more moderate approaches to choose from. Beginning with the traditional approach, it can be argued that this line of cases stretches the interpretation of *Jobidon* to its breaking point. The perspective that sporting events were "carved out by *Jobidon* from its ambit"[54] is not entirely accurate. *Jobidon* clearly mandates the vitiation of consent to "very violent forms of force which clearly extend beyond the ordinary norms of conduct" of a sport.[55] As such, the *Jobidon* rule limiting the ability to consent to some forms of violence clearly applies to some extent in the sporting context. Furthermore, although partially consistent with *Cey*, the blatantly excessive test does nothing to consider a player's intent to cause injury. Therefore, the traditional approach is also undesirable in that it is inconsistent with the leading authorities on the issue of consent to violence in sports.

Meanwhile, the infliction approach strictly interprets *Jobidon*, holding that any act that causes bodily harm is violent enough to vitiate consent to it, and refusing to allow any fights which cause bodily harm to fall under the exception to the general rule carved out in *Jobidon* for "rough but properly conducted sporting events."[56] As such, it can be argued that the infliction approach goes too far in indirectly restricting the ability of hockey players to participate in hockey fights. Under this approach, any players who choose to participate in hockey fights open themselves up to significant risk of criminal repercussions should the force they apply during a fight cause bodily harm to their opponent. The reality is that hockey fights by their very nature frequently result in bodily harm, and bodily harm could occur regardless of the player's intentions or the likelihood of such results. Further, it can be argued that the infliction approach fails to give appropriate weight to the intention of the accused, as contemplated in *Cey*, by placing undue emphasis on the result of their actions. The infliction approach is therefore undesirable for the same reason as the traditional approach, in that it is inconsistent with the leading authorities.

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54 *SRH*, *supra* note 24.

55 *Jobidon*, *supra* note 2 at para 127.

56 *Ibid* at para 76.

This leaves the serious injury approach, which is arguably the approach most consistent with both *Jobidon* and *Cey*. It gives appropriate weight to the intention of the accused as contemplated in *Cey* by placing actions taken with the intention to cause serious injury within the realm of criminality. Meanwhile, it also considers the clear preclusion to consent to "very violent forms of force"[57] mandated by the SCC in *Jobidon*. Any act which is intended to cause serious harm is by nature very violent,[58] and thus cannot be consented to. Furthermore, it avoids the pitfalls of the infliction approach by permitting force that is neither intended nor likely to cause bodily harm, however serious, and recognises that some form of bodily harm will frequently occur in hockey fights by their very nature. Given that the courts have acknowledged the social value of hockey fights and the likely public opinion that they should be permitted, non-serious and expected injuries resulting from hockey fights should be left outside the boundaries of criminal law. Similarly, even serious injuries which are neither intended nor foreseeable yet occur due to freak accidents should not result in criminal punishment. Whether an injury is non-serious, expected, or the result of a freak accident can be determined by the courts on a case-by-case basis, thereby preserving to some extent the SCC's position in *Jobidon* that the boundaries of criminality in a sporting context should be "developed gradually over time, in cases where the facts more naturally allow for it."[59]

These considerations lead to the conclusion that the serious injury approach is the best approach found in existing case law. However, some slight modifications to this approach are desirable before it is crowned as the universal approach at the appellate level. Specifically, conduct that is very likely to result in serious injury, and is undertaken either recklessly or with wilful blindness to that likelihood, should be explicitly captured within the approach. These acts would fall within the ambit of "very violent forms of force"[60] contemplated by *Jobidon*, and it is important to remember that the intention of the accused is not the only relevant consideration recognised by the leading authorities.

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57 *Jobidon*, *supra* note 2 at para 127.

58 *Ibid* at para 74.

59 *Ibid* at para 135.

60 *Jobidon*, *supra* note 2 at para 127.

Conclusion

In summary, *Cey* and *Jobidon* have established a framework through which the legal limits of violence in sport may be assessed on a case-by-case basis.[61] However, significant inconsistency has emerged in the application of these cases to hockey fights. This has resulted in a lack of clarity for police, Crown attorneys, and hockey players regarding which acts are illegal in the context of hockey fights. The current situation thus necessitates a universal approach to the criminality in hockey fights. The best candidate for a universal approach is a modified version of the serious injury approach, which draws the line at actions taken with the intention to cause, or with recklessness or wilful blindness to likelihood of causing, serious injury to the other participant in the fight.

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61 *Ibid.*