CALLING PENALTIES FROM THE BENCH: JUDGES WEARING STRIPES

CLAYTON BANGSUND*

"The timorous may stay at home."
~ Judge Benjamin N. Cardozo[1]

I. INTRODUCTION

Numerous sports authorize and even encourage behavior that, outside of the sporting arena, would be characterized as tortious and perhaps even criminal. These include, without limitation, boxing, wrestling, hockey, football, rugby, baseball and lacrosse. The general theory underlying these "sporting exceptions" is that a participant consents to the otherwise illegal[2] conduct, or at the very least, voluntarily assumes the risk that such conduct will occur.[3] Aggressive behavior is inevitable, and perhaps even necessary, in fostering vigorous competition in a sporting contest.

Boxing, hockey and football all contain apposite examples of aggressive physical conduct that is consented to by participants. Indeed, in boxing the very essence of the contest is to punch one's opponent with enough ferocity to "knock

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[1] *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173 (N.Y. 1929) [hereinafter *Murphy*].

[2] The term "illegal", as used herein, generally refers to conduct that is either tortious or criminal, or both.

[3] As noted, this is a generalized statement. The applicable legal analysis, described in more detail herein, is obviously more complicated and nuanced.

him out" – an act that would surely attract legal scrutiny if undertaken on the sidewalk. In both hockey and football, players use aggressive tactics including bodychecking (using hockey parlance) and blocking or tackling (using football parlance) to advance their team's cause. These aggressive tactics are within the rules, and participants clearly consent to being bodychecked, blocked or tackled, as the case may be, provided such act falls within the prescribed rules of the game.

Within each of the aforementioned sports, there are also examples of conduct that participants do not consent to in the literal sense. For example, during a hockey game,[4] the victim of a cross-check[5] hardly consents to being assaulted with his opponent's stick.[6] It is more accurate to say that the player voluntarily assumes the risk that he may be the victim of such an attack during (or even after) the course of play.[7] He appreciates that if the referee observes him cross-checking an opponent (or receiving a cross-check from his opponent), a minor penalty will be assessed.[8]

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[4] Other sports contain similar examples. For example, consider boxing (hitting below the belt), football (face-masking) and baseball (high and inside pitch intended to scare a dangerous batter off the plate).

[5] National Hockey League Official Rules 2011-2012 [hereinafter NHL Rules], Rule 59.1 ("Cross-checking – The action of using the shaft of the stick between the two hands to forcefully check an opponent.").

[6] See Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition*, 7 U. Miami Ent. & Sports L. Rev. 191 (1990) at 215.

[7] See *McKichan v. St. Louis Hockey Club, L.P.*, 967 S.W.2d 209 (Mo. App. E.D. 1998) [hereinafter *McKichan*].

[8] NHL Rules, *supra* note 5, Rule 59.2. Depending on the severity of the cross-check, a five minute major penalty and a game misconduct may be assessed by the referee (Rules 59.3 and 59.5). In addition, a match penalty may be assessed if, in the referee's judgment, the offender attempted to or deliberately injured his opponent (Rule 59.4). Rule 59.4 (and many similar rules) expose a fundamental inconsistency with the NHL Rules and the manner in which they are applied in practice. Imagine that a hockey play is blown dead and in an ensuing scrum, Player A cross-checks Player B across the back. This is a common occurrence in an NHL hockey game. Interpreted strictly, Rule 59.4 would mandate the assessment of a match penalty, the most serious on-ice penalty in hockey. After

Indeed, his opponent may physically attack him in a variety of fashions, either pursuant to or in contravention of the rules, and such attack may or may not attract the imposition of a penalty.[9] In either event, both he and his opponents are fully aware of the risks of participating in the sport, and either consent to, or voluntarily assume the risk of, the physically aggressive conduct.

The example set forth in the preceding paragraph establishes that there exists conduct that technically violates the rules of hockey, yet falls within a range of tolerable behavior under the customs, conventions and norms of the sport that merely attracts trifling sanction if detected by the referee. Players understand the element of danger that lurks each time they step onto the ice surface. They do not expect that such conduct will draw scrutiny from courts of law.

With a focus on professional hockey, this paper explores the limits of the general theory of "consent and voluntary assumption of risk."[10] Indeed, there are certain acts that clearly fall outside the scope of those which a hockey player could reasonably be considered to have "consented to" or "voluntarily assumed the risk

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all, in cross-checking Player B, what other intent (other than to inflict pain) could Player A have? Because the play had already ended, he certainly couldn't suggest that he was cross-checking Player B to assist his team in scoring a goal. Thankfully, referees have applied this rule (and the many others like it) in a more sensible fashion. Of course, intent to injure becomes a much more important issue when the legal system gets involved.

[9] There are instances where clear violations of the NHL Rules do not attract a penalty, even when observed by the referee. One need only watch an overtime period of a playoff game to observe this phenomenon. The underlying notion is that referees do not want to "decide" the outcomes of games, and will therefore be more lax in their application of the NHL Rules at critical moments of the game in order to allow the players decide the outcome themselves. There are proponents and opponents of this officiating style. Of course, the common tendency is for fans to prefer the officiating style that most benefits their favorite team.

[10] For simplicity and ease of reference, the "theory of consent and voluntary assumption of risk" is commonly referred to herein as the "consent theory".

of." For example, imagine if a hockey player removed his skate and attempted to stab or slice his opponent with the steel blade.[11] His opponent could not, under any reasonable line of argument, be said to have "consented to" or "voluntarily assumed the risk of" such conduct. Similarly, it could not be seriously asserted that a player consents to, or voluntarily assumes the risk of, his opponent bringing a firearm onto the ice to assist in winning puck battles.[12] As noted by Justice Adesko, "some of the restraints of civilization must accompany every athlete onto the playing field."[13] In both of the above scenarios, the offending player would not be surprised to receive a visit from law enforcement officers. Admittedly, these examples are at the extreme end of the spectrum. Nonetheless, they illustrate that there exists conduct that clearly falls outside the customs, conventions and norms of the game and, consequently, beyond the limits of the consent theory. Of course, between these particularly egregious examples and the fairly innocuous example of a minor tripping penalty,[14] there lie countless murkier acts that are not so easily parsed and categorized.

The challenge, then, is to articulate, with a measure of clarity, the distinction between conduct that attracts legal scrutiny and conduct that does not. After all, both cross-checking one's opponent with a stick and stabbing one's opponent with a

[11] In the cult comedy classic, *Happy Gilmore*, (University Pictures 1996), the lead character, and namesake of the film, brags about his hockey achievements: ("During high school, I played junior hockey and still hold two league records: most time spent in the penalty box; and I was the only guy to ever take off his skate and try to stab somebody.") It is unclear whether Gilmore was sued, or faced criminal charges, in connection with the stabbing incident.

[12] Lazaroff, *supra* note 6 at 194.

[13] *Nabozny v. Barnhill*, 334 N.E.2d 258 (Ill. Ct. App. 1975) [hereinafter *Nabozny*] at 260; Also see *Turcotte v. Fell*, 502 N.E.2d 964 (N.Y. Ct. App. 1986) [hereinafter *Turcotte*].

[14] NHL Rules, *supra* note 5, Rule 57.

skate are technical violations of the rules of hockey. What makes one a minor penalty and the other a criminal offense? Is it: (1) the severity of the underlying act? (2) the gravity of the consequences of such act? or (3) the offender's subjective intent in committing the act? How can a hockey player predict, with any amount of certainty, which of his acts will be insulated from legal scrutiny and which will not? For those who "play on the edge", this is a pertinent question. Indeed, there are many players who have graduated to the National Hockey League (the "NHL"), not due to their impressive offensive skills and/or stellar defensive skills, but primarily because of their willingness to play on the periphery. Their sheer tenacity and intimidating bearing give them a competitive edge, and are considered admirable traits by coaches and general managers alike. Paradoxically, the same behavior that enables them to earn handsome salaries as professional hockey players also subjects them to increased risk of civil liability and criminal sanction.

In both the criminal and tort arenas, courts have had considerable difficulty articulating a clear and consistent standard for adjudging athletes for their conduct during competition.[15] In view of the unique nature of each sport, it may be inappropriate to apply a uniform standard across all sports.[16] Indeed, given the

[15] For more detailed commentaries on sports participant conduct liability, see Lazaroff, *supra* note 6; Barbara Svoranos, *Fighting? It's All in a Day's Work on the Ice: Determining the Appropriate Standard of a Hockey Player's Liability to Another Player*, 7 Seton Hall J. Sport L. 487 (1997); Heidi C. Doerhoff, *Penalty Box or Jury Box? Deciding Where Professional Sports Tough Guys Should Go*, 64 Mo. L. Rev. 739 (1999).

[16] Lazaroff, *id.* at 194. Also see Michael K. Zitelli, *Unnecessary Roughness: When On-Field Conduct Leads to Civil Liability in Professional Sports*, 8 Willamette Sports L.J. 1 (2010) at 3 (discussing the courts' consideration of league rules and supplementary discipline as a means of determining whether specific conduct falls within the scope of the game).

inimitable nature of hockey, it may well be in a "league of its own" insofar as legal analysis is concerned.

II. THE BACKDROP: HOCKEY AS A UNIQUELY VIOLENT SPORT

A. INTRODUCTION TO HOCKEY CULTURE

Of all the major North American team sports, hockey is clearly among the most violent and is arguably the most interesting to consider for the purposes of identifying and articulating the limits of "consent" and "voluntary assumption of risk." There are numerous reasons for hockey's uniquely violent nature.

Hockey, unlike any of the other major sports, requires players to adorn razor sharp blades on their footwear. Skate blades enable players to travel at velocities of nearly 30 miles per hour on an unforgiving ice surface surrounded by rigid boards and unyielding tempered glass. Indeed, the playing surface in hockey is likely the most inherently dangerous of all the major North American sports. This inherent danger is compounded by virtue of the athletes' swiftness.[17] These various factors make violent collisions a common occurrence during a hockey game.

Another unique aspect of hockey is that each player navigates the ice equipped with a stick. The hockey stick, when utilized for its principal purpose, enables a player to dazzle spectators, teammates and opponents alike with his skills

[17] Hockey players are capable of reaching speeds unequaled by their counterparts in football, baseball and basketball. Indeed, among the contact sports, hockey is the fastest. For another account of the unique nature of hockey, see Patrick K. Thornton, *Rewriting Hockey's Unwritten Rules: Moore v. Bertuzzi*, 61 Me. L. Rev. 205 (2009) at 206.

in handling the puck, passing it to teammates and shooting it into the opposing team's net. However, this tool of the trade can, and often is, conveniently converted into a weapon for use in obstructing opponents, and in more egregious cases, inflicting pain on those opponents.[18]

As noted in Part I, another distinctive feature of hockey is that the official rules prescribe a wide array of prohibited physical attacks that, if observed by the referee, merely result in the imposition of a relatively insignificant penalty. A number of these penalties specifically address improper usage of the hockey stick,[19] while others address improper use of body parts,[20] or the manner or circumstances in which an attack is perpetrated.[21] During a typical hockey game, the vast majority of penalties imposed are "minor" penalties that require offenders to sit in the penalty box for a maximum of two minutes.[22] Because players are not ejected from the game for most rule violations, it is arguable that these prohibited acts are anticipated, condoned and perhaps even invited under the customs, conventions and norms of the game (also commonly referred to herein as "falling within the scope of the game").[23] Thus, one might assert that a hockey player is generally within his "rights"[24] to slash his opponent on the shin provided he is willing to serve a minor penalty for the infraction. In contrast, a baseball player is not entitled to use

[18] Svoranos, *supra* note 15 at 490.
[19] See NHL Rules, *supra* note 5, Rule 55 (Hooking), Rule 58 (Butt-ending), Rule 59 (Cross-checking), Rule 60 (High-sticking), Rule 61 (Slashing), Rule 62 (Spearing).
[20] *Id.,* Rule 45 (Elbowing).
[21] *Id.*, Rule 42 (Charging), Rule 43 (Checking from behind).
[22] *Id.*, Rule 16.2. If the opposing team scores during a power-play, the penalty terminates and the offending player is released from the penalty box.
[23] Zitelli, *supra* note 16 at 2.
[24] Using the term loosely.

his bat to whack the opposing backcatcher on the shin if he hopes to remain in the game as a participant.

The distinctive features described above have arguably contributed to the establishment and evolution of hockey's correspondingly distinct "violent culture". Indeed, many people introduced to hockey for the first time are disconcerted, and even appalled, by the violent nature of the sport.[25] For example, they question why fighting is included in the range of behavior that merely attracts a relatively insignificant penalty, as opposed to ejection from the contest and suspension or expulsion from the league. After all, fighting does not appear directly related to the chief objective of hockey, namely, outscoring the opposing team. In other words, they question tolerance of fighting in a sport that purports to have the scoring of goals, not the landing of punches, as its primary focus. In this sense, punching an opponent in the face during a hockey game is readily distinguishable from punching an opponent in the face during a boxing match.

B. FIGHTING IN HOCKEY

1. An Introduction to the Hockey Fight

During the course of an NHL hockey game,[26] it is not uncommon to see players engage in bare-knuckled fist-fights. A "major" fighting penalty requires a

[25] Doerhoff, *supra* note 15 at 739.

[26] Fighting is also permitted, in varying degrees, in other professional and amateur hockey leagues.

player to serve five minutes in the penalty box.[27] After serving his time, the player is released from the penalty box and may continue to play in the game. Indeed, on occasion, that same player may get into another scrap!

Hockey players regularly choreograph fights by removing their gloves, helmets and elbow pads, circling a few times (like professional boxers), and then engaging in an open area of the ice so that all in attendance can view the spectacle. Indeed, many hockey fights are planned well in advance (sometimes during a previous game, and occasionally during the pre-game warm-up). Combatants will, on occasion, confirm prior to a pending face-off that they will fight when the puck is dropped, and then proceed to exchange fisticuffs immediately thereafter, congratulating each other on the effort after the dust has settled. Other times, a fight spontaneously occurs, emanating from a particular on-ice incident or a general melee. In other instances, when a team is putting in a rather listless effort, a player will fight simply to boost the team's morale. Indeed, such a fight may not be motivated by any ill will towards his opponent whatsoever.

[27] NHL Rules, *supra* note 5, Rule 46.14.

2. Abolitionists: The General Case for Eradication

The role of fighting in hockey has always been, and remains, a hotly contested issue.[28] Indeed, the NHL regularly considers implementing a ban on fighting, but to date has not followed through with this course of action.[29] Abolitionists argue that fighting is not, in any meaningful way, related to the general objective of the sport, and therefore should be given "zero tolerance" as in other major professional team sports. They assert that if a player engages in a fight, he should immediately be ejected from the game and should thereafter be subjected to harsh supplementary discipline from league administrators. The eradication of fighting, opponents argue, would completely eliminate the role of "enforcers"[30] and thereby increase the quality of play by encouraging teams to select players who exhibit better offensive and defensive hockey skills. In addition, they argue that the eradication of fighting would enhance the credibility of hockey and make the sport more appealing to the masses[31] thereby increasing revenues for the business of hockey. Finally, abolitionists argue that no person, either within or without the

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[28] See TSN, Study Suggests Canadians Would Support Fighting Ban in NHL, http://www.tsn.ca/nhl/story/?id=382923 (last visited Dec. 18, 2011).

[29] Svoranos, *supra* note 15 at 494.

[30] An "enforcer" is a player whose primary role is to intimidate opposing players and occasionally engage in fights in an effort to protect teammates and the team's "honor". These players tend not to score many points. Rather, their statistical prestige is measured in penalty minutes. Although the term "enforcer" does not appear in the NHL Rules, most teams have one or more enforcers on their roster.

[31] Particularly the large U.S. market. But see J.C.H. Jones & Kenneth G. Stewart, *Hit Somebody: Hockey Violence, Economics, The Law, And the Twist and McSorley Decisions*, 12 Seton Hall J. Sport L. 165 (2002) at 172 (the authors cite studies that suggest that U.S. hockey game attendance is positively correlated to more extreme forms of violence).

sports arena, should be "licensed to commit crime with impunity."[32] In other words, matters of general public policy should trump sporting tradition.

3. Proponents: In Defense of Fighting

Proponents of fighting disagree with abolitionists on the economic impact fighting has on the business of hockey.[33] They argue that spectators are actually drawn to the arena (or the television set) by the prospect of seeing a hockey fight. Thus, they believe that fighting ultimately contributes to hockey's economic "bottom line". Of course, it is difficult, if not impossible, to draw any firm conclusions about the economic impact of fighting on the business of hockey. And perhaps economic considerations ought not to be determinative of the issue in any event.

Economics aside, proponents further argue that fighting actually serves an internal policing function that referees and league disciplinarians cannot otherwise achieve. Ironically, they suggest that fighting actually promotes player safety.[34] The argument is that allowing fighting in hockey provides a compelling disincentive to those players who would otherwise commit flagrant and dishonorable attacks on their opponents. Given the inherently dangerous nature of the sport (i.e. the unforgiving playing surface, the exceptional speed of the game and the use and potential for abuse of hockey sticks, etc.), there exist certain "cardinal sins" in

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[32] Jeff Yates & William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 Cornell J.L. & Pub. Pol'y 145 (2002) at 152.

[33] Jones & Stewart, *supra* note 31 at 170, where the authors quote Bobby Clark, former Philadelphia Flyers' player and general manager. ("If they cut down on the violence too much, people won't come out to watch...Violence sells!")

[34] Svoranos, *supra* note 15 at 490.

hockey's "unwritten code".[35] These sins include, among others, (i) aggressive use of the hockey stick as a weapon,[36] and (ii) targeting of an opponent's goaltender and other star players. The theory is that fighting, also an integral part of the unwritten code,[37] acts as a stronger deterrent to the commission of the cardinal sins than do penalties imposed by referees and supplementary discipline imposed by league administrators.[38] A predatory player will think twice before committing a particularly egregious act (which might cause injury to his opponent) if he is aware that he will be engaged in a fight as a result of such act. In other words, fear for his personal safety and reputation, and perhaps the safety and reputation of his teammates, will prevent him from committing dangerous offenses on the ice, and therefore hockey's most skilled players will be better protected. This "mafia mentality" is widely held within the hockey world.

It is useful to consider a specific example of the "policing theory" in practice. Wayne Gretzky, widely considered the greatest player in hockey history, was not large in stature. The Edmonton Oilers (and indeed, each NHL team Gretzky played for during his illustrious career) utilized enforcers[39] to patrol the ice surface in order to (i) discourage violations of the unwritten code, and (ii) exact "justice" in the event of a code violation. These enforcers were not expected to produce goals and assists for the Oilers. Rather, their primary function was to police the game and

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[35] All self-respecting hockey players hold the unwritten code in reverence and aspire to live by it. See Jones & Stewart, *supra* note 31 at 182.

[36] As noted above in note 19, *supra*, using a stick in this manner also constitutes a violation of the NHL Rules, but is viewed among players as particularly cowardly and dishonorable.

[37] Sovranos, *supra* note 15 at 490.

[38] *Id.* at 490.

[39] Dave Semenko, Lee Fogolin, Marty McSorley and Tony Twist, among others.

protect Gretzky. Opposing players clearly understood that there were grave consequences if Gretzky was touched. Even a clean bodycheck on Gretzky, delivered within the rules of the game, drew the ire of the enforcers. If an opposing player was foolish enough to transgress this unwritten rule, he would immediately be challenged[40] to a fight by the enforcer. Occasionally, when an offender was not considered worthy of fighting the Oilers' enforcer, his team's enforcer was expected to defend team honor. In this sense, the code violator would be held accountable, not only to the Edmonton Oilers, but also to his teammates. Conventional wisdom was that this internal policing, enforced by NHL tough-guys, sufficiently discouraged opponents from targeting the sport's biggest stars.

Under this paradigm, the hockey fight might be analogized to a duel. Indeed, one hearkens back images of duelers defending honor and integrity with swords or pistols. The modern day hockey version simply substitutes bare knuckles for deadly weapons. And quite fittingly, it also includes the "dropping of gloves" as a symbolic gesture that the duel is about to begin. The fight, once concluded, theoretically has a cleansing effect that eliminates the "bad blood" between the teams.[41]

The ancient duel's efficacy in resolving disputes came under harsh scrutiny, and so too has the hockey fight's efficacy in deterring other undesirable on-ice conduct. Nonetheless, many current players endorse the continued role of fighting

[40] In many instances, the code violator was not merely challenged. Rather, he was forced into fighting the Oilers' enforcer.

[41] Jones & Stewart, *supra* note 31 at 168.

in hockey. For example, many believe that the controversial instigator rule,[42] which imposes on the "instigator" of a fight an additional minor penalty, a ten-minute misconduct and a mandatory game misconduct, performs a disservice to the game by emboldening predatory players to target opponents with less fear of reprisal (compared to when the instigator rule was not in force).[43] If such a player does not voluntarily engage in a fight when challenged by the other team's enforcer, his team will be rewarded with a power-play and the ejection of the intimidating enforcer from the contest (pursuant to the instigator game misconduct rule). In this sense, opponents of the instigator rule argue that its application creates a perverse incentive for predatory players to engage in malicious behavior. In other words, the rule prevents enforcers from performing their function effectively.

4. The Policing Theory In Practice

As noted above, it is debatable whether the policing theory is supported in truth. Indeed, two of the most unpleasant incidents to have occurred in the NHL during the last decade would suggest that the fighting paradigm is more theory than reality. On February 21, 2000, during an NHL hockey game between the Vancouver Canucks and the Boston Bruins, Donald Brashear (of the Canucks) and Marty McSorley (of the Bruins) engaged in a fight during the first period.[44] Brashear decidedly "won" the fight. Later in the game, with his team holding a comfortable

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[42] NHL Rules, *supra* note 5, Rule 46.11.
[43] Habsterix, NHL Instigator Rule: Changes Need to be Made!, http://habsterix.wordpress.com/2011/03/12/nhl-instigator-rule-changes-need-to-be-made/ (last visited Nov. 26, 2011).
[44] Jones & Stewart, *supra* note 31 at 180.

lead, Brashear taunted McSorley.[45] In response, McSorley attempted to engage Brashear in another fight during the final seconds of the contest. Brashear declined, and skated away from McSorley.[46] In an ill-conceived attempt to persuade Brashear to change his mind, McSorley pursued Brashear during the course of play and slashed him on the head, knocking him unconscious.[47] McSorley's slash clearly violated the rules of the game, and perhaps more importantly, was decidedly beyond the scope of the game.[48] As a result of the incident, the NHL suspended McSorley for one year and fined him $72,000.[49] He never played another NHL hockey game, though Brashear eventually resumed his career as a feared NHL enforcer. As discussed in more detail in Part III of this paper, McSorley was charged with and convicted of criminal assault with a weapon.[50]

The McSorley example, when considered in isolation, tends to refute the policing theory. Fighting, rather than dissuading players from using hockey sticks as weapons (as posited by policing theory proponents), was actually a motivating factor for McSorley's use of his stick as a weapon. Furthermore, the earlier fight between Brashear and McSorley did not fulfill its purportedly therapeutic role of eliminating bad blood between the players. Contrarily, it actually created heightened animosity that eventually led to the unfortunate stick-swinging incident. Of course, strict code adherents might argue that Brashear violated the unwritten

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[45] *Id.* at 180.
[46] *Id.* at 180.
[47] For video footage of the incident, see Youtube, https://www.youtube.com/watch?v=zHwUNftlO1A.
[48] Even the most hardened hockey enthusiast would not view McSorley's conduct as falling within the scope of the game.
[49] Thornton, *supra* 17 note at 213.
[50] *R. v. McSorley*, [2000] B.C.J. 116.

code by taunting McSorley and then declining the second fight, thereby exacerbating the problem. They might further argue that slashing an opponent on the head does not accord with the unwritten code, and as such, the policing theory is not technically to blame. But the point remains that the policing theory did not work as intended in this instance.

Nor did the policing theory work as intended during a game between the Vancouver Canucks and the Colorado Avalanche on March 8, 2004. During a previous game between the teams on February 16, 2004, Steve Moore of the Avalanche delivered an aggressive check on Canucks' star forward, Markus Naslund.[51] The check left Naslund bleeding and concussed, and caused him to miss three subsequent games.[52] Leading up to the March 8th contest between the Canucks and Avalanche, several Canucks' players suggested that there would be retaliation against Moore for the incident.[53] Indeed, Moore was engaged in a fight with Canucks' forward Matt Cooke during the early stages of the game.[54] Late in the game, with the Avalanche holding a comfortable lead, Todd Bertuzzi attempted to provoke Moore into another fight.[55] Moore declined and skated away from Bertuzzi. During the course of play, Bertuzzi followed Moore the length of the ice, punched Moore in the back of the head, and drove him into the ice face-first as other players piled in to the melee.[56] Moore was knocked unconscious and sustained multiple injuries including

[51] *R. v. Bertuzzi*, [2004] B.C.J. No 2692 at para. 7.
[52] *Id.* at para. 7.
[53] *Id.* at para. 8.
[54] *Id.* at para. 11.
[55] *Id.* at para. 13.
[56] For video footage of the incident, see Youtube https://www.youtube.com/watch?v=EpKa2ARS8tU

spinal fractures.[57] Bertuzzi's attack clearly fell outside the scope of the game. The NHL suspended Bertuzzi for the remainder of the regular season and playoffs, and fined the Vancouver Canucks organization $250,000.[58] Moore never played another game in the NHL.[59] As discussed in more detail in Part III, British Columbia prosecutors charged Bertuzzi with assault causing bodily harm.[60] In addition, Moore sued Bertuzzi and several other defendants including the Vancouver Canucks organization and Marc Crawford, the team's head coach, in the Ontario Superior Court of Justice, seeking $19.5 Million in damages.[61] The trial is tentatively scheduled to begin in 2012.

Again, the Bertuzzi example tends to refute the theory that fighting discourages the commission of predatory acts. After all, the threat of a fight did not prevent Moore from delivering the aggressive check on Naslund during the February 16th contest. Furthermore, the initial fight between Cooke and Moore, during the March 8th game, did not quell the animosity between the teams. Instead, Bertuzzi's desire to further avenge Moore's hit on Naslund led Bertuzzi to commit another predatory act which itself was a violation of the unwritten code.

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[57] *R. v. Bertuzzi*, *supra* note 51 at para. 21.
[58] *Id.* at para. 22; Thornton, *supra* note 17 at 208.
[59] Thornton, *id.* at 208.
[60] *R. v. Bertuzzi*, *supra* note 51.
[61] See *Moore v. Bertuzzi*, [2008] O.J. No. 347.

5. Final Remarks on the Role of Fighting in Hockey

In fairness, few theories work as hypothesized one hundred percent of the time, so it is arguable that the McSorley and Bertuzzi incidents do not conclusively "debunk" the policing theory. Indeed, one can point to the seemingly successful application of the policing theory in the Gretzky example. After all, Gretzky enjoyed a long and healthy career during which he set, and in many instances obliterated, over 60 offensive records.[62] In any event, fighting is part of the game of hockey in its current state and, for better or worse, many players and spectators enjoy this aspect of the sport. And the reality is that the act itself, in which two willing participants engage in fisticuffs, has not typically drawn scrutiny from courts of law.

C. HOCKEY VIOLENCE AS A GENERAL BACKDROP FOR LEGAL ANALYSIS

This paper does not argue for or against the continued role of fighting in hockey. The discussion in Part II.B is intended to provide the reader with an explanation for fighting's presence in hockey, and consequently, its recognition as a generally accepted custom or norm of the game. Any legal analysis concerning conduct of a player during a hockey game must be undertaken in light of hockey's culture which, as demonstrated above, includes overtly violent acts unrelated to the principal purpose of the game (i.e. scoring goals).[63]

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[62] Wayne Gretzky, Gretzky NHL Records, www.gretzky.com (last visited Nov. 18, 2011).
[63] See *McKichan*, *supra* note 7.

Against this backdrop, let us now turn to the key issue, which is to identify and articulate the standard for imposition of liability, criminal or civil, on an athlete for his or her conduct during competition. Whether the conduct takes place during a hockey fight or in some other context, the question should remain the same: At what point are the limits of the "consent theory" surpassed?

III. THE LAW

Not surprisingly, courts have had difficulty determining the appropriate standard of liability for incidents that occur in the hockey arena specifically, and in sports generally. This is because sports represent a "separate reality"[64] in which participants commonly achieve success through aggressive and, in some instances, downright vicious conduct. Indeed, in contact sports, intentionally inflicting pain on the opponent is often an integral part of a winning strategy. In the infamous words of the late Jack Tatum, a former Oakland Raiders safety, "I never make a tackle just to bring someone down. I want to punish the man I'm going after. I like to believe my best hits border on felonious assault."[65] With this "separate reality" in mind, courts have struggled to articulate consistent and predictable legal rules in cases concerning the conduct of athletes engaged in competition. Indeed, legal analyses vary from jurisdiction to jurisdiction. Part III of this paper reviews the courts'

[64] Svoranos, *supra* note 15 at 489.

[65] J. Tatum & W. Kushner, *They Call Me Assassin* (1979) at 18. Jack Tatum was a free safety with the Oakland Raiders of the National Football League. During a pre-season football game in 1978, Tatum delivered a tackle against New England Patriots' receiver Darryl Stingley, which paralyzed Stingley from the chest down. Tatum gained notoriety for his refusal to express remorse for the incident.

historical treatment of cases concerning the violent conduct of athletes generally, and professional hockey players specifically.

A. CRIMINAL LAW

1. Criminal Law and Professional Hockey

Over the last five decades, numerous incidents occurring during professional hockey games have resulted in criminal prosecutions.

During a 1969 exhibition game in Ottawa, Ontario, between the St. Louis Blues and the Boston Bruins, Ted Green and Wayne Maki got into an altercation.[66] In order of occurrence, Green (of the Bruins) punched Maki (of the Blues) in the face, Maki speared Green in the abdomen, Green slashed Maki in the arm, and Maki finished the duel by slashing Green over the head and causing him serious injury.[67] Ontario prosecutors pressed charges against both players – Green was charged with criminal assault,[68] and Maki with assault causing bodily harm.[69]

In acquitting Green of the assault charge, Fitzpatrick J. acknowledged the inherently violent nature of hockey, and concluded that Green's slashing of Maki was an instinctive act, performed without intent to commit assault.[70] In acquitting Maki of assault causing bodily harm, Carter J. accepted Maki's claim that he was

[66] *R. v. Maki*, [1970] 3 O.R. 780 (Prov. Ct. J.) at 780-781.
[67] *Id.* at 780-781; Also see Svoranos, *supra* note 15 at 504-505; Also see Linda S. Calvert Hanson & Craig Dernis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 Seton Hall J. Sport. L. 127 (1996) at 140-141.
[68] *R. v. Green*, [1971] 1 O.R. 591 (Prov. Ct. J.).
[69] *R. v. Maki*, *supra* note 66.
[70] *R. v. Green*, *supra* note 68 at 596-597.

acting in self-defense against Green (who was found to be the aggressor).[71] Carter J. went on to state that he would have found Maki guilty of assault causing bodily harm had Maki not been defending himself.[72] In this respect, Carter J. rejected Maki's alternative defense of "consent", stating:

> Thus all players, when they step onto a playing field or ice surface, assume certain risks and hazards of the sport, and in most cases the defence of consent as set out in s. 230 of the Criminal Code would be applicable. But as stated above there is a question of degree involved, and no athlete should be presumed to accept malicious, unprovoked or overly violent attack.[73]

In 1975, six years after the Green-Maki episode, an ugly incident between Dave Forbes (of the Boston Bruins) and Henry Boucha (of the Minnesota North Stars) resulted in Forbes being charged with aggravated assault with a dangerous weapon.[74] Boucha and Forbes had been in a skirmish, and continued to exchange verbal barbs while serving their penalties.[75] Upon leaving the penalty box, Forbes struck Boucha in the eye with the butt-end of his stick and caused serious injury to the extent that Boucha almost lost his eye.[76] Forbes then continued to pummel Boucha after the initial butt-end attack.[77] Forbes was the first professional athlete to be criminally charged in the United States as the result of conduct arising during the course of competition.[78] The jury was unable to reach a unanimous verdict, thereby

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[71] *R. v. Maki*, *supra* note 66 at 783.
[72] *Id.* at 782-783.
[73] *Id.* at 783.
[74] *State v. Forbes*, No. 63280 (Dist. Ct. Minn.).
[75] Svoranos, *supra* note 15 at 510.
[76] *Id.* at 510.
[77] *Id.* at 510.
[78] *Id.*

causing the judge to declare a mistrial. The prosecutor elected not to retry the case against Forbes.[79]

During a 1988 game between the Minnesota North Stars and the Toronto Maple Leafs, Dino Ciccarelli (of the North Stars) got into an altercation with Luke Richardson (of the Maple Leafs). Using his stick, Ciccarelli slashed Richardson twice on the head, and then punched Richardson in the mouth.[80] Richardson was not hurt on the play. Nonetheless, Ciccarelli received a 10 game suspension from the NHL, and Ontario prosecutors had him arrested and charged with assault. He was convicted and sentenced to one day in jail and a fine of $1,000.[81] In rendering its decision, the court held that Ciccarelli's attack on Richardson went beyond the implied consent of the players of the game.

In *R. v. McSorley*, described above in Part II, Marty McSorley was charged with and convicted of "criminal assault with a weapon" for his attack on Donald Brashear.[82] However, the Court granted him a conditional discharge, so he served no time in prison.[83] In Justice Kitchen's disposition of the matter, it was noted that McSorley's slash on Brashear fell outside the customary norms of the game.[84] In finding him guilty of assault, Kitchen J. concluded that the prosecution had met its

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[79] *Id.*; Also see Hanson & Dernis, *supra* note 67 at 139.
[80] For video footgage of the incident, see Youtube http://www.youtube.com/watch?v=Hodb0LUALjI.
[81] *R. v. Ciccarelli* (1989), 54 C.C.C. (3d) 121 (Ont.).
[82] *R. v. McSorley*, *supra* note 50.
[83] McSorley was also able to avoid a permanent criminal record by virtue of the conditional discharge.
[84] *R. v. McSorley*, *supra* note 50 at para. 44.

evidentiary burden of proving that McSorley intended to strike Brashear on the head.

In *R. v. Bertuzzi*, also described above in Part II, Bertuzzi struck a plea bargain with British Columbia prosecutors pursuant to which he pled guilty to "criminal assault causing bodily harm" in exchange for a conditional discharge.[85] During sentencing, Weitzel J. acknowledged the violent nature of hockey, but noted that Bertuzzi's actions "clearly went beyond the reasonable limits of the game."[86]

Interestingly, not all criminal investigations, in respect of hockey incidents, arise out of conduct clearly outside the scope of the game. On March 8, 2011, the Boston Bruins played the Montreal Canadiens at the Bell Centre in Montreal. During a race for the puck, Zdeno Chara (of the Bruins) shoved Canadiens' forward Max Pacioretty head-first into a stanchion and knocked him unconscious.[87] Pacioretty sustained a concussion and a broken vertebra that prevented him from playing the remainder of the season. Chara was assessed a five minute major penalty and a game misconduct, but received no supplementary discipline from the NHL. Fueled by fan outrage, Montreal police launched a criminal investigation against Chara, but recently decided against laying criminal charges in connection with the incident.[88]

2. Synthesizing the Case Law

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[85] *R. v. Bertuzzi*, *supra* note 51.
[86] *Id.* at para. 38.
[87] For video footgage of the incident, see Youtube http://www.youtube.com/watch?v=jimZ1tSdPY0.
[88] TSN, No Charges Against Bruins D Chara for Pacioretty Hit, http://www.tsn.ca/nhl/story/?id=380675 (last visited Nov. 18, 2011).

A common thread runs through each of the successful convictions described above. In each case, the court concluded that the player's conduct went beyond, not merely the rules of the game, but the scope of the game. Once the "beyond the scope of the game" threshold was exceeded, the court applied the same legal principles that would apply in a non-hockey setting. This is a sensible approach. Indeed, this approach is reflected in the definition of "consent to bodily injury" in the *Model Penal Code* (italics mine):[89]

> When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:
>
> > (a) the bodily injury consented to or threatened by the conduct consented to is not serious; or
> >
> > (b) *the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law*; or
> >
> > (c) the consent establishes a justification for the conduct under Article 3 of the Code.

Thus the *Model Penal Code* includes a "consent theory" doctrine, specifically for athletics, within its framework.

Some argue that there ought to be a more robust use of the criminal law in policing athletic violence and redefining public norms.[90] Proponents of this approach would prefer to see more active use of prosecutorial discretion to pursue

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[89] *Model Penal Code*, §2.11(2). The *Model Penal Code* itself is not the law in any United States jurisdiction, but the Code has been adopted, in whole or in part, in numerous states.

[90] Yates & Gillespie, *supra* note 32 at 168.

charges, even if for "symbolic" purposes.[91] This assertion is susceptible to two main criticisms. First, from a pure cost-benefit analysis perspective, the wisdom of expending significant government resources to pursue criminal prosecutions for merely symbolic purposes, is questionable. Secondly, one must evaluate what "symbolic message" is actually being sent to the public at large when an athlete is charged and convicted, but then subjected to no meaningful punishment.

The case law supports the notion that criminal prosecutions, for on-ice conduct, will only be pursued in the most egregious of cases in which a player's conduct goes beyond the scope of his competitors' reasonable anticipation. Even where charges have resulted in convictions, the relatively insignificant sentences handed down by judges suggest that courts are uncomfortable meting out prison sentences as punishment for on-ice conduct. Courts are clearly very mindful of, and deferential to, the inherently violent nature of hockey, and give great weight to the voluntary assumption of risk one undertakes when he steps onto the ice surface. While some may find these outcomes unsatisfying, I prefer the deferential approach taken by both prosecutors and judges. In reality, the on-ice actions of professional hockey players do not pose a direct threat to general public safety. As such, incarcerating hockey players seems unnecessarily harsh save and except in the most extreme instances. In my view, prosecutors should continue to exercise their prosecutorial discretion sparingly, reserving criminal prosecutions for attacks that clearly go beyond the scope of the game (i.e. outside the reasonable anticipation of the participants).

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[91] *Id.*

B. TORT LAW

1. General Analytical Framework

Three general theories of liability have been asserted in cases scrutinizing injurious sports' participant conduct: (1) negligence; (2) recklessness; and (3) assault and battery.[92]

Negligence is defined as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation."[93] In order to ground a claim in negligence, a plaintiff must establish four basic elements: (1) that the defendant owed a duty of care to the plaintiff; (2) that the defendant breached that duty; (3) that the plaintiff sustained an actual injury; and (4) that the defendant's breach of duty caused the plaintiff's injury.[94] Of the three theories of civil liability, the negligence standard imposes the least onerous requirements on the plaintiff because he or she is not required to establish the defendant's intent. Instead, "negligence consists of mere inadvertence, lack of skillfulness or failure to take precautions."[95] Of course, one major challenge in applying the negligence theory in the context of sports is defining the duty of care a player owes to his opponents. If a player is permitted to tackle his opponent in a football game, on what basis can it be asserted that he owes his opponent a duty of care?

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[92] Lazaroff, *supra* note 6 at 195.
[93] Black's Law Dictionary at 1056 (7th ed. 1999).
[94] *Id.*
[95] *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (1979) [hereinafter *Hackbart*] at 524.

In *Niemczyk v. Burleson*,[96] the Missouri Court of Appeals was faced with the question of whether a softball shortstop, who collided with an opposing team's base runner, could be held liable in negligence. The court endorsed the negligence standard but noted that sports participants generally assume the risks ordinarily incident to the game.[97] The court identified several criteria to be considered in determining whether an action for negligence could be sustained in a particular case:

> (1) the game involved; (2) the ages and physical attributes of the participants; (3) their respective skills at the game and their knowledge of its rules and customs; (4) their status as amateurs or professionals; (5) the risks inherent in the game as opposed to those not within the realm of reasonable anticipation; (6) the presence or absence of protective equipment; (7) the "degree of zest" with which the game was being played; and (8) doubtless others.[98]

The Court thus embraced the notion that the inherently dangerous nature of a sport may insulate an otherwise tortious act from liability.

Most courts have rejected the negligence standard in sports conduct liability cases, opting instead to apply a recklessness standard.[99] Recklessness "involves a choice or adoption of a course of action either with knowledge of the danger or with

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[96] 538 S.W.2d 737 (Mo. Ct. App. 1976) [hereinafter *Niemczyk*].

[97] *Id.* at 740.

[98] *Id.* at 741-742. The trial court dismissed the action on the basis that a sports injury claim could not be predicated solely on a theory of negligence. The Missouri Court of Appeals reversed the decision and remanded the case for trial, concluding that a claim framed in negligence could apply in exceptional circumstances.

[99] Lazaroff*, supra* note 6 at 195; Doerhoff, *supra* note 15 at 745; See *Nabozny*, *supra* note 13; *Hackbart*, *supra* note 95; *Ross v. Clouser*, 637 S.W.2d 11 (Mo. Banc. 1982) [hereinafter *Ross*]; *Turcotte*, *supra* note 13; *McKichan*, *supra* note 7.

knowledge of facts which would disclose this danger to a reasonable man."[100] Thus, in order to ground a claim in recklessness, a plaintiff must demonstrate that the defendant intended to commit the impugned act. The factors enunciated in *Niemczyk* appear to remain pertinent in determining whether an act is reckless in a particular circumstance.[101]

The third theory of liability is assault and battery. Assault is defined as "[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact."[102] Battery is defined as "[a]n intentional and offensive touching of another without lawful justification."[103] Of the three theories of liability, assault and battery impose the highest burden on the plaintiff because he or she must establish the defendant's intent, not only to commit the act, but also to cause the particular harm.[104] Given the courts' willingness to impose liability on the less onerous recklessness standard, plaintiffs do not typically rely on the theory of assault and battery as their only theory of liability in sports injury cases.

In *Hackbart*,[105] a leading decision on professional sports conduct liability, the Tenth Circuit of the United States Court of Appeals considered whether Charles "Booby" Clark and his employer, the Cincinnati Bengals, could be liable to Dale Hackbart for a neck fracture sustained by Hackbart during a National Football

[100] *Hackbart*, *id.* at 524.
[101] *Ross*, *supra* note 99 at 14; *McKichan*, *supra* note 7.
[102] Black's Law Dictionary, *supra* note 93 at 109.
[103] *Id.* at 146.
[104] *Hackbart*, *supra* note 95 at 525; Also see Zitelli, *supra* note 16 at 3.
[105] *Hackbart*, *id*.

League (the "NFL") game. Specifically, the appellate court overruled the trial court's determination that the inherently violent nature of football "renders injuries not actionable in court."[106] The appellate court concluded that the conduct in question (i.e. Clark striking Hackbart on the back of the head and neck after the play had ended) was actionable under the recklessness standard.[107] In rendering its decision, the court contrasted the "intent" requirement for recklessness with that for assault and battery,[108] noting the following:

> Assault and battery then call for an intent, as does recklessness. But in recklessness the intent is to do the act, but without an intent to cause the particular harm.[109]

It is also noteworthy that the Tenth Circuit concluded that Clark's conduct did not fall within the rules or the general customs of football.[110] The case was remanded for trial, and the parties subsequently settled the claim for $200,000.[111]

In *Avila v. Citrus Community College Dist.*,[112] the Supreme Court of California concluded that intentional conduct in a sporting contest that violates a rule of the game, but still falls within the "bounds of the sport", does not attract civil liability.[113] In rendering its decision, the court concluded that the "assumption of risk" doctrine

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[106] *Id.* at 518-519.
[107] *Id.* at 524.
[108] *Id.* at 520, 524-525. The court noted that Hackbart's potential claim for assault and battery was statute barred under the circumstances.
[109] *Id.* at 525.
[110] *Id.* at 521.
[111] Paul C. Weiler, Gary R. Roberts, Roger I. Abrams & Stephen F. Ross, *Sports and the Law: Text, Cases and Problems* (West Publishing Co., 4th ed. 2011) at 1092.
[112] 131 P.3d 383 (Cal. 2006) [hereinafter *Avila*].
[113] *Id.* at 394.

gave the defendant a complete defense against the plaintiff's claim.[114] However, the court acknowledged that an athlete does not assume the risk of a co-participant's intentional or reckless conduct "totally outside the range of the ordinary activity involved in the sport."[115]

2. Tort Law and Professional Hockey

It is instructive to review the professional hockey liability cases in light of the general analytical framework described above in Part III.B.1. Of particular interest is the impact of hockey's uniquely violent nature on the legal analysis.

In 1976, as a result of the incident between Dave Forbes and Henry Boucha, as described above in Part III.A., Boucha sued Forbes and several other parties for the injuries he sustained.[116] The case was settled before trial for $3.5 Million thereby alleviating the court of the need to resolve the matter.[117]

In 1982, a Michigan jury awarded $850,000 to Dennis Polonich (of the Detroit Red Wings) for injuries he sustained when Wilf Paiement (of the Colorado Rockies) struck Polonich in the mouth with an excessively forceful "baseball-like swing" of his hockey stick.[118]

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[114] *Id*. at 394.
[115] *Id*. at 394.
[116] Thornton, *supra* note 17 at 212; Also see Svoranos, *supra* note 15 at 509.
[117] Svoranos, *id.* at 509; Thornton, *id.* at 212.
[118] *Polonich v. A.P.A. Sports, Inc.* No. 74635 (E.D. Mich. Nov. 12, 1982) [hereinafter *Polonich*]; Also see Hanson & Dernis, *supra* note 67.

In the 1998 *McKichan*[119] decision, the Missouri Court of Appeals had occasion to consider the scope of tort liability in a professional hockey setting. As a preliminary note, the court endorsed the "recklessness" standard and thus seemingly overruled its prior decision in *Niemczyk* respecting the application of the negligence standard. The incident involved Tony Twist of the Peoria Rivermen, the International Hockey League (the "IHL") affiliate of the NHL's St. Louis Blues, and Stephen McKichan, a goaltender for the Milwaukee Admirals. Several seconds after the referee blew his whistle to end play, Twist continued into the offensive zone and, ignoring a subsequent whistle specifically directed at him, cross-checked McKichan into the boards, knocking the goaltender unconscious.[120] The referee assessed Twist a match penalty, and the IHL suspended him from playing for the duration of McKichan's injury and in all subsequent games between the two clubs.[121] McKichan sued Twist and the St. Louis Blues hockey club. In discussing the doctrines of "assumption of risk" and "consent," the Court endorsed the *Niemczyk* criteria, noting the following:

> In practice, the concepts of duty, assumption of risk, and consent must be analyzed on a case-by-case basis. Whether one player's conduct causing injury to another is actionable hinges upon the facts of an individual case. *Ross*, 637 S.W.2d at 14. Relevant factors include the specific game involved, the ages and physical attributes of the participants, their respective skills at the game and their knowledge of its rules and customs, their status as amateurs or professionals, the type of risks which inhere to the game and those which are outside the realm of reasonable anticipation, the presence or

[119] *Supra* note 7.

[120] *Id.* at 211. Also see Jones & Stewart, *supra* note 31 at 188. (The authors explain that Twist's attack on McKichan was in retaliation for an incident earlier in the game during which McKichan punched Twist in the face with his blocker.)

[121] *Id.*

> absence of protective uniforms or equipment, the degree of zest with which the game is being played, and other factors. *Id*.[122]

Applying the *Niemczyk* criteria to the case at hand, the court concluded that Twist's attack did not give rise to liability. On behalf of the court, Judge Grimm stated:

> This body check, even several seconds after the whistle and in violation of several rules of the game, was not outside the realm of reasonable anticipation. For better or for worse, it is "part of the game" of professional hockey. As such, we hold as a matter of law that the specific conduct which occurred here is not actionable.[123]

In concluding that Twist's conduct was within the scope of the game, the court recognized, and indeed deferred to, the uniquely violent nature of hockey. In fact, the court arguably disregarded the IHL's assessment of the incident as deserving of a major suspension. Upon deeper reflection, one wonders whether the court erred in concluding that Twist's attack on McKichan did not go beyond the scope of the game. I suspect that a majority of professional players and coaches, if asked, would not consider the Twist-McKichan incident a common occurrence (i.e. within the ambit of the unwritten code).

In any event, *McKichan* confirms that very few acts committed during the course of a hockey game (even after the whistle is blown) are actionable in tort. Indeed, the decision suggests that "there does not seem much that is actionable in professional hockey."[124] Only the most egregious acts will result in liability. Incidentally, following the McKichan incident, Tony Twist graduated to Peoria's

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[122] *Id.* at 212.

[123] *Id.* at 213.

[124] Jones & Stewart, *supra* note 31 at 190.

parent club, the St. Louis Blues, to become one of the NHL's most notorious enforcers. Indeed, one of the players he protected during his tenure with the Blues was the "Great One", Wayne Gretzky.

Contrast *McKichan* with the earlier Superior Court of Connecticut decision in *Babych v. McRae*.[125] During a September 24, 1986 hockey game between the Quebec Nordiques and Hartford Whalers, Ken "Basil" McRae (of the Nordiques) slashed Wayne Babych (of the Whalers) across the knee thereby causing serious injury. Babych sued McRae and the Nordiques for, among other things, assault and battery, wanton and reckless conduct and negligence. The defendants brought a motion to strike Babych's claim for negligence on the ground that "a negligent violation of a safety rule by a professional athlete fails to state a legally sufficient cause of action."[126] The Court dismissed the motion to strike, thereby suggesting that an action for negligence for on-ice conduct may be successful in the State of Connecticut (or at least should not be struck at the pleadings stage).[127]

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[125] 567 A.2d 1269 (Conn. Super. 1989) [hereinafter *Babych*].

[126] *Id.* at 1269. The defendants relied on *Turcotte*, *supra* note 13, as authority for the proposition that negligence is not a legally sufficient cause of action when one professional athlete is injured by another. The Court dismissed the defendants' argument concluding that Connecticut was not bound by the *Turcotte* decision.

[127] Other examples of courts endorsing a negligence standard for hockey related incidents include the British Columbia decisions of *Unruh v. Webber*, [1992] 98 D.L.R. 4th 294 (B.C. Sup. Ct.), and *Zapf v. Muckalt*, [1995] 11 B.C.L.R. 3d 296 (Sup. Ct.), [1996] 20 B.C.L.R. 3d 124, [1996] 26 B.C.L.R. 3d 201. In both cases, amateur junior hockey players were rendered quadriplegics as a result of being checked from behind into the boards. In both cases, the court applied a simple negligence standard in holding the defendants liable. Meanwhile, in other Canadian jurisdictions, courts have applied a peculiar "negligence plus" standard (a term coined by Jones & Stewart, *supra* note 31) in which the plaintiff must establish both simple negligence and intent or recklessness. See *Champagne v. Cummings*, [1999] O.J. No. 3081, Court File No. 870/97 [hereinafter *Champagne*].

As noted above in Part II, Steve Moore has sued Todd Bertuzzi and several other defendants (including the Canucks' then coach, Marc Crawford, and the Canucks organization) in the Ontario Superior Court of Justice in connection with the March 8, 2004 incident. Presumably, his $19.5 Million claim includes allegations of assault and battery, recklessness and negligence. If the matter is not settled before trial, the court's decision will undoubtedly be of major import in this developing area of law. Will the Ontario Court adopt a broad meaning of "customs, conventions and norms of the game," similar to the court in *McKichan*, and thereby deprive Moore of a civil remedy? Or will it "cut a new path"[128] and hold Bertuzzi and/or his co-defendants liable for Bertuzzi's blindside attack? The customs, conventions and norms of the NHL game, and the limits of "consent" and "assumption of risk," will certainly have an impact on the legal analysis.

In Moore's civil suit, it will also be interesting to observe whether Marc Crawford, the Canucks' head coach, will incur any liability in connection with the incident, and to what extent, if any, Crawford's actions may mitigate Bertuzzi's liability. Crawford was allegedly seen laughing while Moore lay injured on the ice following Bertuzzi's attack.[129] In his complaint, Moore alleges that Crawford instructed Canucks' players to seek retribution against Moore during the March 8, 2004 contest. What, if any, impact will Crawford's alleged directions have on Bertuzzi's liability? If the case does not settle before trial, it will certainly be a landmark decision in North American professional sports conduct liability

[128] Thornton, *supra* note 17 at 217.

[129] CBC, Police Investigate Canucks' Bertuzzi for Hit on Moore, http://www.cbc.ca/sports/story/2004/03/09/avs-canucks0308.html (last visited on Dec. 16, 2011).

jurisprudence. The case will have major precedential implications for future cases involving sports violence.

3. Synthesizing the Case Law

As demonstrated above, the analytical approach employed by the courts has not been entirely consistent, and varies from jurisdiction to jurisdiction. However, the majority view approach can generally be distilled into a two-part test, to wit:[130]

> 1. Did the conduct, which caused actual injury to the plaintiff, fall within the rules of the game, or alternatively, within the scope of the customs, conventions and norms of the game such that the plaintiff could have reasonably anticipated such conduct? In answering this question, the criteria set out in *Niemczyk*, as adopted in *McKichan*, continue to be pertinent in defining the "scope of the customs, conventions and norms of the game" in each particular situation.
>
> If yes, then the conduct is not actionable.
>
> If no, then proceed to Question 2.
>
> 2. Did the conduct constitute a reckless act? (i.e. Did the defendant adopt a course of action either with knowledge of the danger or with knowledge of facts that would disclose the danger to a reasonable person?)
>
> If yes, then the defendant is liable.
>
> If no, then the defendant is not liable.

The majority approach is fairly sensible. The primary strength of the approach is that the first branch of the test is flexible enough to adapt to the specific circumstances of each particular case. For example, a professional hockey incident

[130] The test can be fairly discerned from the modern case law. See Zitelli, *supra* note 16 at 3; Also see Lazaroff, *supra* note 6 at 223-224. The Lazaroff article, written in 1990, proposes a substantially similar version of the test. The test has been employed by courts before and since, either implicitly or explicitly.

would require a particularly egregious act in order to transgress the "scope of the game" threshold, while tennis would require less startling conduct given the sport's congenial norms.[131] Of course, sports like football and basketball[132] fall somewhere in between hockey and tennis on the "scope of the game" spectrum. As a practical matter, the question of whether a particular act goes beyond the scope of the game should be determined having regard to the testimony of the affected parties and perhaps others who are familiar with the sport in question (i.e. former players, on-ice officials, coaches, etc.). Because the "scope of the game" question varies based on the nature of the sport, the ages and physical attributes of the participants, and the status of athletes as amateurs or professionals, among other factors, a decision about whether a particular act goes beyond the scope of the game needs to be decided by the trier of fact on a case-by-case basis. In *McKichan*, one wonders whether Judge Grimm considered evidence from players in concluding that Twist's conduct fell within the scope of the game, or alternatively, whether he took judicial notice of this fact based on his knowledge of the sport. As noted above, many professional hockey players would likely consider such an attack outside the scope

[131] This notion is particularly well articulated in Zitelli, *supra* note 16 at 2. ("...throughout the course of these contests [i.e. hockey and football], players' conduct, though perhaps extremely violent at times, is given greater leeway when analyzing whether such conduct is outside or within the scope of the game. Other sports, such as baseball and basketball, are not as inherently violent or contact-based, and thus, certain harmful conduct is more likely to be considered outside the scope of the game.") (square bracketed portions mine)

[132] Basketball provides a good illustration of the flexibility of the test. While in hockey, punching an opponent in the face is commonplace (and would not likely attract civil liability), punching an opponent in the face clearly falls outside the scope of the game of basketball. And it is this distinction that likely explains the result in *Tomjanovich v. California Sports, Inc.*, 1979 U.S. Dist. LEXIS 9282 (S.D. Tex 1979) (Rudy Tomjanovich was successful in obtaining damages for extensive facial injuries sustained by virtue of being punched in the face by Los Angeles Lakers' forward Kermit Washington).

of the game. A contrary finding on the "scope of the game" issue would have drastically altered the outcome of *McKichan*.

In a recent article, Michael K. Zitelli proposed that the second branch of the test should require the defendant to intend injury to the plaintiff in order to attract liability.[133] While I understand the thrust of his argument,[134] I respectfully disagree with his conclusion. Recall that one reaches the second branch of the test *only if* he concludes that the impugned conduct goes beyond the scope of the particular game. Assuming the impugned conduct goes beyond the scope of the game, there is no compelling reason to insulate the athlete from liability absent only subjective intent to injure.

In fact, a more sensible version of the test might require a *lower* standard of liability at the second branch of the test, again depending on the nature of the sport in question.[135] For example, imagine if, during a professional basketball game a bench player mindlessly wandered onto the court, in a manner that clearly fell outside the customs, conventions and norms of the game, and collided with an unsuspecting opponent who was backpedalling to gain defensive position, thereby

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[133] Zitelli, *supra* note 16 at 10.

[134] Zitelli views it as untenable to expect athletic participants to act in a non-reckless manner. Indeed, for many athletes, the only way to achieve maximum competitive performance is by acting recklessly. But again, under the articulation of the test contained herein (and Zitelli's own articulation), the requirement to act in a non-reckless manner only arises when it is determined that such act goes beyond the scope of the game. Thus, one can act in an exceedingly reckless manner and yet remain insulated from liability provided that he has not surpassed the "scope of the game" threshold. Indeed, one can even have subjective intent to injure his opponent (as demonstrated by Jack Tatum) provided such intent is consonant with the scope of the game. For more on this point, see Lazaroff, *supra* note 6 at 214; Doerhoff, *supra* note 15 at 756.

[135] See Lazaroff, *supra* note 6 at 214.

causing the backpedalling player serious injury. Should the wanderer be able to avoid liability simply because he was merely negligent (and not acting recklessly or with intent to injure)? Perhaps a negligence standard would be more appropriate in this situation.

For hockey, the main focus of this paper, the recklessness standard for the second branch of the test is appropriate. In a practical sense, the second branch of the test is somewhat superfluous because once it is determined that a player is acting outside the scope of the game of hockey (a rather high onus as exemplified in *McKichan*), it almost necessarily follows that such injurious conduct will be reckless. In other words, it is difficult to imagine how such injurious conduct could be considered non-reckless if it goes beyond the scope of hockey.

IV. CONCLUSION

Based on my review of and reflection on the jurisprudence, I am of the view that the courts have generally done an admirable job of reconciling two "institutions" that seem inherently incongruous: (1) the rule of law,[136] and (2) competitive sports. Although the courts have not always been consistent in their articulation and application of the various legal principles, case outcomes have typically honored the spirit of the underlying notion that an athlete should be free to vigorously compete in his or her chosen sport provided such athlete's conduct does

[136] Both criminal law and tort law.

not transgress the customs, conventions and norms of the sport.[137] In this sense, judges have proven quite adept as off-ice officials.[138] They have worn their stripes well.

With respect to NHL hockey, it seems clear that any major shift in the customs, conventions and norms of the game (i.e. to make it kinder and gentler) must emanate from either or both of two sources: (1) the NHL itself; or (2) legislators. If the NHL wishes to fundamentally alter the culture of its game, it can do so through the imposition of stiffer suspensions and fines for overtly violent conduct. [139] In the past few years, for example, the NHL has made a concerted effort to reduce the incidence of concussions by imposing severe suspensions on those players who target the heads of their opponents with bodychecks.[140] To some observers, the NHL has not gone far enough by, for example, not implementing an outright ban on fighting. Of course, the power to fundamentally change the culture of hockey ultimately resides in the hands of elected politicians. If they so choose, they can impose their will on the NHL through enactment of stringent rules and regulations. Indeed, they "could legislate the sport out of existence."[141]

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[137] See Zitelli, *supra* note 16 at 1. ("It has been traditional for courts to exercise great restraint in sports-related cases, relying on the belief that 'the law should not place unreasonable burdens on the free and vigorous participation in sports.'")

[138] One exception to this general observation is the *McKichan* decision. It is arguable that Twist should have been liable for his attack on McKichan.

[139] See Lazaroff, *supra* note 6 at 226; Also see Jones & Stewart, *supra* note 31 at 192-193 (where the authors argue for more league self-regulation coupled with a more robust application of the vicarious liability doctrine that would hold teams financially responsible for the violent acts committed by their players during the course of the game).

[140] NHL Rules, *supra* note 5, Rule 48 (Illegal Check to the Head).

[141] Lazaroff, *supra* note 6 at 226.

In the meantime, due to hockey's uniquely violent nature, it has presented a "special case" for the courts' application of legal rules. How does the court determine that a particular act has transgressed the customs, conventions and norms of hockey, or gone beyond the scope of the game? The answer is exceedingly difficult to describe with any measure of specificity or clarity. Yet, in reviewing video replays of the various incidents, the answers seem obvious. In this sense, an attempt to define the "scope of the game" for hockey is reminiscent of an attempt to capture the definition of the term "pornography" using words alone. As Justice Potter Stewart famously quipped, "I just know it when I see it."[142]

Understandably, a serious hockey player may be dissatisfied with these vague conclusions given all that is at stake. For the time being, if he is worried about being injured in a violent hockey incident and not having any grand prospect of successful legal recourse, perhaps he should pay heed to those words of advice offered by Judge Cardozo so many years ago: "The timorous may stay at home."[143]

[142] *Jacobellis v. Ohio*, 378 U.S. 184 (1964).
[143] *Murphy, supra* note 1.