"GOOD CLEAN SPORT:" CRIMINAL LIABILITY IN SPORTS

George Orwell in his 1945 essay, "The Sporting Spirit," observed that "sport has nothing to do with fair play. It is bound up with hatred, jealousy, boastfulness, disregard of all rules and sadistic pleasure in witnessing violence: in other words it is war minus the shooting."[1] While the average fan likely does not view their favorite sport as akin to war, there is no denying that violence and sport are inherently intertwined. However, both lawmakers and laymen alike have recognized some acts of violence in sport go too far.

On occasion, courts have been called upon to find the line where violence within the context of sport has crossed the line into criminality. Some level of violence is necessary – to apply the same rules of criminal liability both on and off the field would effectively be to end participation in sport. Largely, the doctrine of implied consent has emerged as the guiding principle in what is acceptable. Those acts which a player has implied to consent to will not attract criminal liability. However, a deeper look at the relevant jurisprudence suggests a legal fiction operates in this realm of law. Rather than consent, the notion of "good clean sport" is the primary factor guiding the courts. Good clean sport is that which promotes honor, dignity, and order in society. Though legal fictions have often been critiqued, this particular legal fiction operates to foster participation in sport and should be regarded as instrumental in the viability of both professional and amateur sport.

I. VIOLENCE IN SPORT

There is perhaps no better example of the inherent intertwining of violence in sport than the enforcer tradition in ice hockey. In 1922, the NHL altered the rules of the game to penalize fighting only with a five-minute penalty rather than removing the player for the remainder of the

[1] George Orwell, "The Sporting Spirit," *Tribune* 468:14 (1945) 10-11.

game.[2] This rule change gave rise to the need for "enforcers" - players who do not necessarily excel in scoring or playmaking, but who are nonetheless valuable to the team for the role they play in policing the ice against opposing players who might otherwise get overly aggressive against the team's more skilled players. Put differently, an enforcer "protects the game's best players from injury and acts of disrespect."[3]

NHL careers have been made on the back of the formal implementation of fighting into the game. Jody Shelley, who racked up 18 goals and 1538 penalty minutes in his 627-game NHL career acknowledged that without the enforcer tradition he "wouldn't have even made [a] major junior team," much less found a spot on an NHL roster.[4] Arguably the pinnacle of the enforcer role is Marty McSorley, who came to be known as "Wayne Gretzky's bodyguard" due to his significant physical presence and willingness to engage in violence to protect his teammates.[5] Despite his reputation, McSorley saw his role largely as *preventing* violence on the ice. In his experience, enforcers are responsible for quelling rising aggression between two teams: "fighting an opposing player has sobering effect on the guys back on the bench, who could get back to playing good, clean hockey."[6]

McSorley and the enforcer role generally has grown to be deeply respected by fans and players alike. Notwithstanding, in October 2000 a Canadian court found that McSorley's policing of the ice had crossed the line into criminal behavior, finding him guilty of assault after

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[2] Cole Morrissette et al, "The Impact of the Instigator Rule on Fighting in the National Hockey League" (2022) 2 *Transnational Sports Medicine* online: <doi.org/10.1155/2022/7024766> at 1.
[3] Marty McSorley, "Foreword" in Ross Bernstein, *The Code: The Unwritten Rules of Fighting and Retaliation in the NHL* (Chicago: Triumph Books, 2006).
[4] The Canadian Press "Jody Shelley could represent a dying breed of enforcers in the NHL" *National Post* (7 November 2013) online: <nationalpost.com/sports/hockey/nhl/jody-shelley-could-represent-a-dying-breed-of-enforcers-in-the-nhl>.
[5] Scott Ostler, "Marty McSorley is Prospering in the Security Business," *Los Angeles Times* (12 January 1989) online: <latimes.com/archives/la-xpm-1989-01-12-sp-374-story.html>.
[6] McSorley, *supra* n.3.

slashing opponent Donald Brashear in the head with his hockey stick.[7] McSorley received an 18-month conditional discharge along with an order not to engage in any sporting event with Brashear as the opposition.[8]

Indeed, despite respect for some level of violence, courts have been clear that hockey and other professional sports cannot become a "a sanctuary for unbridled violence to which the law" does not apply.[9] Jurisprudence in this area, though somewhat limited, allows for an understanding of what conduct the courts will consider part of the game, and what will attract criminal liability.

II. THE IMPLIED CONSENT DOCTRINE

In addressing violence in both professional and amateur sport, courts have largely relied on the doctrine of implied consent: "[b]ecause society has chosen to foster sports competitions, players necessarily must be able to rely on that consent when playing the game."[10]

The Canadian cases *R. v Maki*[11] and *R. v Green*[12] appear to be the beginning point for the evolution of this area of law.[13] Both cases arose from the same incident which took place during a 1969 NHL exhibition game. In the first period of the game, both Maki and Green were involved in a "skirmish" which eventually escalated to the two players swinging their sticks at one another.[14] Maki sustained injury to his mouth from a punch in the face, while Green sustained serious injuries resulting from a blow to his neck from Maki's hockey stick.

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[7] See *R. v. McSorley*, 2000 BCPC 116 (Can. B.C.).
[8] See *R. v. McSorley*, 2000 BCPC 117 (Can. B.C.).
[9] *McSorley*, *supra* n.7 at 13 (citing *R. v. Watson* [1975] O.J. No 2681 (Can. Ont.) (QL).
[10] 6A C.J.S Assault § 103 (2023).
[11] [1970] 3 O.R. 780 (Can. Ont.).
[12] [1971] 1 O.R. 591 (Can. Ont.).
[13] Though this is not a comparative piece, jurisprudence from both Canada and the United States is relied upon to provide a more nuanced and complete analysis of the issue.
[14] *Green*, *supra* n.12.

The pair of decisions, in *dicta*, established the doctrine of implied consent in this context, finding there is "no doubt that the players who enter the hockey arena consent to a great number of assaults on their person."[15] The decisions do not delineate a precise legal test as to where the "rough and tumble of the game" crosses the line into a criminal assault, rather this discretion is left to future courts.[16] However, adoption of the implied consent doctrine is strongly encouraged as a means to provide benefit "to the players … to the general public peace … and in particular to young aspiring athletes who look to the professionals for guidance and example."[17]

American courts answered this call, applying the implied consent doctrine and pursuing the difficult task of defining its boundaries. *People v. Freer*[18] is one such example. In that case, the defendant, a youth football player, punched an opposing player in retaliation after being tackled during a youth football game. The punch caused a laceration to the opposing player's eye which required plastic surgery. The court considered the implied consent doctrine, citing both *Maki* and *Green*, summarizing the pair of cases to conclude: "1) There is a limit to the magnitude and dangerousness of a blow to which another is deemed to consent. (2) In all sports players consent to many risks, hazards and blows."[19] The punch was found to be outside the scope of the blows a player consents to, and on this basis the defendant was convicted of assault.

The court in *State v. Shelley*[20] followed *Freer* to produce a similar result. In that case, the defendant struck an opposing player in the face during a recreational basketball game, breaking this opponent's jaw. The court was persuaded by the two-part test set out in *Freer*, finding the

[15] *Id*.
[16] *Id*.
[17] *Maki*, *supra* n.11 at 15.
[18] 86 Misc.2d 280, 381 N.Y.S.2d 976 (N.Y.Crim.Ct. 1976).
[19] *Id* at 978.
[20] 85 Wash. App. 24, 929 P.2d 489 (Div. 1 1997).

defendant's actions were above the limit of magnitude and dangerousness the opposing player had consented to. Accordingly, the defendant was convicted of assault.

Nearly two decades after the skirmish between Maki and Green, Canadian courts were once again called upon to decide whether an incident of violence in the NHL was contrary to criminal law. Dino Ciccarelli of the Minnesota North Stars was convicted at trial after striking an opponent in the head with his hockey stick three times in succession. His appeal was dismissed, the court applying the implied consent doctrine, finding the trial judge had considered the degree of force used, and properly concluded the acts in question were beyond the implied consent of the victim.[21] The *Ciccarelli* decision can be seen as coming full circle to firmly solidify the implied consent doctrine as the relevant legal test in this context. It is trite law that certain acts of violence are outside the scope of what a player consents to; the magnitude and dangerousness being the primary factors in making this determination. However, a deeper analysis of the relevant case law suggests that policy considerations play more of a role than is evident on the face of the implied consent doctrine.

III. "GOOD CLEAN SPORT"

Despite the consensus view that the degree and magnitude of the violence do most or all of the heavy lifting in the implied consent test, ultimately these factors are routinely subjugated to public policy considerations. More important is whether the act in question serves to promote honor, dignity, and respect for society – "good clean sport."

In *Ciccarelli*, the court notes that "[v]iolence in sports is father to violence in everyday life. … [r]espect for authority has declined in the world of professional sports and its decline is reflected in too many aspects of daily life in the world at large."[22] While the implied consent

[21] *R. v. Ciccarelli*, [1989] CarswellOnt 945 (Can. Ont.) at 127.
[22] *Id*. at 126-127.

doctrine purports to be an objective test, in reality a subjective analysis of whether the accused's conduct will encourage "citizens in general [to] accept the rule of law rather than the rule of force" forms the *de facto* legal test.

The ruling in *People v Schacker*[23] supports this view. The facts of that case are very similar to those in *Freer*: during a youth "no-contact" hockey game, the defendant used his hockey stick to strike an opposing player on the back of his neck. The whistle had blown and play was stopped at the time of the act, as was also the case in *Freer*. The victim sustained a concussion, blurred vision, headaches, and memory loss - similar in seriousness to the injuries in *Freer*. Despite the very similar facts, the violent act in *Schacker* was found to be within the scope of implied consent, and the assault charge was dismissed.

Looking to notions of good clean sport helps to explain this apparent discrepancy. In *Freer*, the defendant's violent act was retaliatory. It was an act of aggression resulting from a boiling over of rising anger. A violent outburst and inability to control one's emotions is the antithesis to social order. If allowed to go unpunished, such outbursts may be seen as denigrating respect for authority. In contrast, the violent act in *Schacker* was a calculated measure to police the game. While the opposing player certainly did not consent to a check from behind in a no-checking league, the violent act was rooted in the well-respected enforcer tradition, which promotes notions of honor and dignity.

The somewhat bizarre *US v Red Frame Parasail*[24] proceedings also help to illustrate the emphasis on good clean sport over consent or the degree of violence. The court in that case considered whether forfeiture proceedings were authorized by the Airborne Hunting Act

[23] 175 Misc. 2d 834, 670 N.Y.S.2d 308 (Dist. Ct. 1998).
[24] 160 F.Supp.2d 1048, 179 A.L.R. Fed. 769 (D. Ariz. 2001).

(AHA).[25] Though sport hunting is seen by many as cruel and grotesque, it has historically been seen as associated with aristocracy, and an important social pastime enjoyed by those with only the utmost honor and dignity. Though it is clearly violent (albeit not towards humans), sport hunting is generally permitted by law. However, the AHA prohibits the use of planes or other aircraft for hunting. The rationale for this prohibition, as explained in the decision is that making use of an aircraft for hunting is as "low as a human could possible [sic] get, when with all of the modern devices that it is possible to place at the command of an individual, they are unwilling to walk, … but they would like to hire somebody to fly them around in an airplane and harass game and birds so that they may walk home and hang some animal's head from their walls in their den."[26] Put in less harsh terms, sport hunting from an airplane is entirely devoid of the honor, dignity, and respect for social order typically associated with sport hunting. As such, it is prohibited despite being no more violent than traditional sport hunting.

IV. THE LEGAL FICTION AND ITS IMPLICATIONS

The implied consent doctrine in this context should be viewed as a legal fiction – consent is assumed by the court where necessary to promote respect for authority, and to uphold notions of honor and dignity in sport. The use of legal fictions has been criticized by some legal scholars; Jeremy Bentham saw their use as an "opiate," and "a syphilis."[27] Yet other scholars find encountering a legal fiction to be an "extreme delight," and see their use in simplifying the law as a "poet[ic] … benefit [to] mankind."[28] Somewhere in between these two extremes is the reality that the use of legal fictions is sometimes necessary to produce a just and equitable result,

[25] 16 U.S.C.A. § 742j-1
[26] *Red Frame Parasail*, supra n.24 at 1054.
[27] Louise Harmin, "Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment" (1990) 100:1 Yale Law J 1 at 4-5.
[28] Raphael Demos, "Legal Fictions" (1923) 24:1 International J of Ethics 37 at 55.

but must be approached with caution. Put differently, legal fictions are "handy," but "dangerous tools."[29]

The implied consent doctrine, though it is a legal fiction to be sure, should not be regarded as particularly dangerous. The first reason for this lies in the name: *implied* consent. Legal fictions which use labels to identify them as such, containing words such as "quasi," "constructive," or "implied," remind the user that they are relying on a fiction.[30] These "linguistic reminders" of falsity give rise to a level of cognitive dissonance, and force the user to be more deliberative in their use.[31] In *Maki,* the court noted that the victim's "indication that he wanted to prosecution" and "did not testify for either the [prosecution] or defence" was "somewhat unusual," but did not alter the analysis.[32] The linguistic reminder perhaps acted to guide the court in an analysis beyond whether the act was expressly consented to. In *Ciccarelli,* the linguistic reminder acted to guide the court in analysis of the "co-existing unwritten code of conduct impliedly agreed to" by NHL players, rather than just the written rules of the rulebook. The linguistic reminder present in the implied consent doctrine is beneficial and serves to guide courts in consideration whether an act of violence is consistent with good clean sport.

V. CONCLUSION

From renown enforcers such as Marty McSorley to routine pushing and shoving in amateur sporting events, there is no ignoring that violence and sport are inherently intertwined. The legal fiction of the implied consent doctrine has emerged to facilitate participation in sport, operating to allow acts of violence that promote dignity and honor in sport, while punishing those that cross the line and threaten respect for authority.

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[29] John C. Gray, *The Nature and the Sources of the Law* (New York: Columbia Univ. Press, 1921) at 37.
[30] Chunlin Leonhard, "Dangerous or Benign Legal Fictions, Cognitive Biases, and Consent in Contract Law" (2017) 91:2 John's L Rev 385 at 402.
[31] *Id*. at 403
[32] *Maki*, *supra* n.11 at 7.

George Orwell might critique the implied consent doctrine on the basis that it can, on occasion, serve to "encourag[e] young men to kick each other on the shins amid the roars of infuriated spectators."[33] Indeed, there is no doubt that the courts in their attempts to protect honor and dignity in sport have upheld violent acts that would cause the average spectator to shudder. On occasion, sports violence has been seen "to create fresh animosity" amongst spectators, leading to further violence – the antithesis to the notions of good clean sport the implied consent doctrine ostensibly upholds.[34]

Such critique, however, fails to recognize the important role that participation in sport, whether as a player or a spectator, plays in constructing civil society – even when the sport is inherently violent. Participation in sport allows diverse individuals to come together into a realm where they can thrive; connecting through mutual admiration for a team or game - and "some people thrive on swirls of pure, violent energy."[35] The implied consent doctrine, though an imperfect solution, provides some sense of certainty as to what acts of violence in sport will cross the line and attract criminal liability. Though rooted in a legal fiction, the implied consent doctrine ensures free and fierce participation in sport and allows us to continue playing and watching the games we all know and love.

[33] Orwell, supra n.1.
[34] *Id.*
[35] Eric Simons, "What science can tell sportswriters about why we love sports" Columbia Journalism Review (September/October 2014, online: <archives.cjr.org/full_court_press/science_sportswriting.php>.