

The Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law

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I: INTRODUCTION

It is generally accepted that society tolerates rough and potentially injurious contact sports because of the benefits it derives from sporting endeavour. In doing so, conduct that constitutes criminal assault is condoned, and the participants' consent is deemed to be effective. There are limits to this consent, however, and participation in sporting contests should not be viewed as a licence to abandon the restraints of civilisation. Thus, there is a point beyond which the consent of the individual is considered immaterial and the conduct involved is treated as unlawful. The case law involved reveals the difficulty in identifying this point, and in devising a workable formula that both accommodates society's desire for competitive contact sport, and serves to protect participants from wanton violence.

In recognising that there are limits to what can and cannot be consented to, it is interesting to look at the approach the courts have taken in relation to violence in other spheres, in particular, sadomasochism. It is clear that public policy and public interest act to determine what is socially valuable, and can therefore be consented to; this article looks at the public policy issues involved in relation to the consent defence.

II: GENERAL THEORIES OF CONSENT

In the nineteenth century case of *R v Coney*,¹ Hawkins J stated the principle:²

[T]hough a man may by his consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public.

Members of society must tolerate certain inconveniences to sustain a modicum of social order.³ Thus, if society views the harmful effects of certain conduct as outweighing the associated benefits, it will deem any consent ineffective in the interest of society. Therefore, the question is whether the particular conduct so infringes societal interests that the perpetrator should be punished notwithstanding the victim's consent.

The state has an interest not only in protecting citizens from any unwanted intrusions but also in the preservation of their health. This is achieved by protecting individuals against harm-causing acts, and antisocial behaviour. Thus, in *Wright's* case of 1604⁴ a "lustie rogue" was imprisoned for engaging another person to cut off his hand so that he would be a more proficient beggar.

Any individual who has knowingly and voluntarily consented to the infliction of bodily harm has presumably decided that some other value is more important than physical health.⁵ Thus, whenever the state chooses not to acknowledge a victim's consent, the law is effectively restricting personal freedom. While such freedom is of considerable importance, it is accepted that public policy and public interest will on some occasions require the state to take on a paternalistic role. Nonrecognition of the consent defence will force individuals who are contemplating certain acts to consider whether society will approve of them, and thereby serves as a deterrent.⁶

Balancing the state's paternalistic attitude with a desire to protect individual freedom requires an assessment of when an injury is to be deemed so severe that state interests outweigh individual interests, thereby rendering consent ineffective.⁷ Examples of conduct which have sufficient social utility to justify tolerance by the state of the injuries or invasions that accompany it include: surgery, scientific research, war, sports, police use of force to keep the peace, and chastisement by private citizens (for example, parental discipline of children).⁸

1 (1882) 8 QBD 534.

2 Ibid, 553.

3 See Note, "Consent in Criminal Law" (1976) 75 Mich L Rev 148.

4 11 Jac 1, Co Litt 127 (1604), as cited in Note, supra at note 3.

5 Supra at note 3, at 165.

6 Ibid, 166. See also *R v Donovan* [1934] 2 KB 498; *R v Brown* [1993] 2 All ER 75.

7 Supra at note 3, at 166.

8 Infra at note 30.

Most conduct which causes bodily harm is not considered beneficial, however, and thus the issue is at what point, in the absence of any benefits, the state's interest in preventing bodily injury is sufficiently infringed to render consent ineffective.⁹

In *R v Donovan*¹⁰ the Court noted that "in early times when the law of this country showed remarkable leniency toward crimes of personal violence"¹¹ consent was a defence to anything short of maiming.¹² Evolution of societal standards was recognised, and thus consent could not be a defence if the conduct accompanied an intent to cause bodily harm or knowledge that bodily harm would probably result. Bodily harm was interpreted as including "any hurt or injury calculated to interfere with the health or comfort of the [victim]. Such hurt or injury need not be permanent, but must, no doubt, be more than transient or trifling."¹³

In *R v Brown*¹⁴ the majority held that a victim could not at law consent to the infliction of actual bodily harm, while Lord Slynn of the minority thought the dividing line should be drawn at the level of the infliction of serious bodily harm. The majority's decision focused upon public policy considerations as to whether consent should be permitted as a defence to otherwise criminal assault,¹⁵ and indicated that while such a defence should be operative in properly conducted contact sports, it was not available for the satisfaction of a sadomasochistic libido.¹⁶

III: APPLICATION OF THE CRIMINAL LAW TO SPORTS: EARLY COMMON LAW CASES

Historically, courts and commentators have frequently differed in their view of whether consent should be effective in sporting contests. One of the earliest known commentaries on this dispute is that of Michael Dalton writing in 1655.¹⁷

⁹ Supra at note 3, at 167.

¹⁰ Supra at note 6.

¹¹ Supra at note 3, at 168, citing *R v Donovan*. The case involved a male defendant who had "caned" a 17-year-old girl for sexual gratification.

¹² "Everyone has a right to consent to the infliction upon himself of bodily harm not amounting to a maim." Stephen, *Digest of the Criminal Law* (1887) 129.

¹³ Supra at note 6, at 509.

¹⁴ [1993] 2 All ER 75.

¹⁵ Freckelton, "Masochism, Self-Mutilation and the Limits of Consent" (1994) 2 J Law & Med 48, 60.

¹⁶ See text, *infra* at Part V.

¹⁷ Dalton, (1635) *The Country Justice* Cap 96, 246, cited in Note, *supra* at note 3, 169.

Playing at Hand-Sword, Bucklers, Foot-Ball, Wrestling and the like, whereby one of them receiveth a hurt, and dieth thereof within a year and a day; in these cases, some are of the opinion, that this is no Felony of Death: some others are of opinion, that this is no Felony of Death, but that they shall have their pardon, of course, as for misadventure, for that such their play was by consent, and again, there was no former intent to do hurt, or any former malice, but done only for disport, and trial of manhood.

In the mid-1700s, Lord Hale took the view that death resulting from joint participation in a contact activity such as cudgels or wrestling was not “excusable homicide.”¹⁸ Participants in such sports intended to harm each other and therefore the death of one participant would render the other guilty of manslaughter.¹⁹ However, in his famous eighteenth century discourse on the English Law, Sir Michael Foster took a contrary view stating that although the appearance of combat existed, in reality cudgelling and wrestling were “no more than a friendly exertion of strength” with neither participant intending bodily harm.²⁰ Such competitions were “manly diversions” that gave strength, skill, and activity and made the participants ready for defence. Further, he refused to call them unlawful, concluding that the death of one participant would not subject the other to a manslaughter charge.²¹

In the nineteenth century, the courts retreated from the absolutist, irreconcilable positions adopted by Hale and Foster,²² and began to treat malicious intent as a question of fact rather than of law. This was apparent in *R v Bradshaw*,²³ where a manslaughter charge arose out of a friendly game of soccer when the defendant, on approaching the deceased, jumped in the air and kneed him in the stomach. Lord Bramwell, in directing the jury, stated that:²⁴

[N]o rules or practice of any game whatever can make that lawful which is unlawful by the law of the land, and the law of the land says you shall not do that which is likely to cause the death of another.... [And] independent of the rules, if the prisoner intended to cause serious hurt to the deceased, or if he knew that in charging as he did he might produce serious injury and was indifferent or reckless ... then the act would be unlawful.

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Although the case resulted in an acquittal, Bramwell I.J.’s direction to the jury confirmed the applicability of the criminal law to sport. His approach allowed the jury to make a case-by-case determination of the mental state of the perpetrator. Thus, when making their decision the jury necessarily decided whether the conduct in question was acceptable to society.²⁵

18 Supra at note 3, at 170.

19 Ibid, 79.

20 *Crown Cases and Crown Law* (1762) 260; cited in Note, supra at note 3, 170.

21 Ibid.

22 Supra at note 3, at 170.

23 (1878) 14 Cox CC 83.

24 Ibid, 84-85.

25 Supra at note 3, at 170-171.

Twenty years later in *R v Moore*²⁶ the deceased was killed in a soccer match after being struck from behind during a game. In dealing with the defendant's liability the Court stated that "football was a lawful game, but it was a rough one, and persons who played it must be careful to restrain themselves so as not to do bodily harm to any other person. No one had the right to use force which was likely to injure another, and if he did use such force and death resulted the crime of manslaughter had been committed."²⁷ Thus, the approaches in *Bradshaw* and *Moore* establish that although there is a place for the criminal law in sports, there is a level of violence to which the players can consent.

In *R v Coney*²⁸ the "sport" of bare-knuckle prizefighting was held to be unlawful, and thus joined duelling and fencing with naked swords as an "exception" to the general sports exception to the principles of assault.²⁹ Included amongst the reasons for holding such prize-fighting unlawful was the potential threat to the public peace which the activity posed, the fact that the blows were struck in anger, and that they were calculated to do harm.³⁰ The distinction between that which is lawful and that which is not was summarised by Stephen J:³¹

The consent of the person who sustains the injury is no defence ... if the injury is of such a nature, or is inflicted under such circumstances, that it is injurious to the public as well as the person injured In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football and the like; but *in all cases the question of whether consent does or does not take from the application of force its illegal character, is a question of degree depending upon the circumstances.*

These remarks indicate an acceptance by the law of some degree of force.³² Yet, the use of excessive force is unlawful irrespective of the rules of the game or the consent of the participants.³³ The consent of the prizefighters had no bearing on the question of its lawfulness, as the degree of force clearly exceeded that envisaged by the Court as being permissible.³⁴

Thus, although the parties may be fully consenting to the blows and injuries which may result, if the sport or conduct in question is unlawful in itself then consent will not bar a criminal prosecution.³⁵ Although an individual may

26 (1898) 14 TLR 229.

27 Ibid, 230.

28 Supra at note 1.

29 That is, although lawful sports were exempted from general criminal assault application, such unlawful sports were not.

30 McCutcheon, "Sports Violence and the Criminal Law" (1994) 45 Northern Ireland Legal Quarterly 267.

31 Supra at note 1, at 549 (emphasis added).

32 Supra at note 30, at 269.

33 See supra at notes 23 and 26.

34 Supra at note 30, at 269.

35 See supra at note 2 and accompanying text.

compromise his or her own civil rights, he or she cannot destroy the right of the Crown to protect the public and keep the peace.³⁶

Despite this foundation for applying the criminal law to sports violence, prosecutions and convictions for such violence were very rare. Plausible explanations for the lack of proceedings include the possibility that the courts viewed participants in such sports as competing for the love and enjoyment of the game, thus lacking the requisite *mens rea*.³⁷ A second explanation is that although purporting to apply the same principles that they would in non-sports cases,³⁸ the courts required a greater showing of injury. For example, in *Bradshaw* “serious injury” was required, in *Moore*³⁹ “bodily harm”, and in *Coney* Stephen J articulated a standard that would consider consent effective even when considerable force was used so long as there was no “serious danger” to “life and limb”.⁴⁰ Thus, it appears as though the sports cases are in fact exceptions to the general laws of assault.

This trilogy of cases sets the framework for the application of the criminal law to violence in the sports arena. Further, they indicated that the accused would be liable whether or not the violence was permitted in the rules. And while *Bradshaw* and *Moore* both dealt with fatal violence, the decision in *Coney* confirmed that the law does not confine itself to this, and set limits to the capacity of participants to consent to the imposition of violence. The cases establish that consent is implied by participation, but it is not exhaustive. The extent and reach of this consent is therefore open for clarification.

1. Case Law

The escalation of sports violence has resulted in increased public concern not only because of the injuries sustained by the athletes involved, but also due to the detrimental impact the violence has on both spectators and aspiring young players.⁴¹ Despite the traditional reluctance to invoke the law in sports, and the view that sports violence is better dealt with by disciplinary action on the part of the relevant governing bodies,⁴² there has been a notable increase in proceedings in the last twenty-five years. Canada was among the first to respond to their concerns and followed the line taken by British courts, making more than one hundred

³⁶ Supra at note 1, at 567 per Lord Coleridge CJ.

³⁷ The rationale for this position is that either they are not aware that their conduct is likely to cause injury or they do not intend to cause injury; supra at note 3, at 172.

³⁸ Supra at note 33.

³⁹ It may have been this particular difference in standard that caused *Bradshaw* to be acquitted and *Moore* to be convicted.

⁴⁰ Supra at note 1, at 549.

⁴¹ White, “Sport violence as criminal assault; the development of doctrine by Canadian Courts” (1986) *Duke L J* 1030, 1031.

⁴² See text, *infra* at Part III para 2.

criminal convictions for offences involving player violence in the 1970-1985 period.⁴³

(a) Canada

In 1969 an altercation arose during the course of a professional ice hockey game, which resulted in the prosecution of the two participants, Edward Green of the Boston Bruins and Wayne Maki of the St Louis Blues. The incident began during the game when Green struck Maki in the face with a gloved hand, and although the judges came to different conclusions as to exactly what followed it appears that Maki retaliated by “spearing” Green in the lower abdomen with his hockey stick. A stick fight ensued in which Green first struck Maki near the shoulder and Maki countered with a blow which fractured Green’s skull.

In *R v Maki*⁴⁴ the scope of actual consent that can be inferred by an individual’s participation in a professional ice hockey game was discussed. In finding the consent defence inapplicable on the facts of the case the judge cited with approval language in *R v Coney*, to the effect that the availability of the defence was dependent on the circumstances leading to the injury. The judge also cited the civil case of *Agar v Canning* where it was stated that:⁴⁵

[I]njuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of implied consent.

Relying on this, the judge concluded that the defence would not apply because “no athlete is presumed to accept malicious, unprovoked or overly violent attack.”⁴⁶ And thus despite Maki’s acquittal on grounds of self-defence, the case serves as useful precedent. Likewise, in the companion case of *R v Green*⁴⁷ the Court also acquitted the accused. In *Green*, however, the Court relied in part upon implied consent stating that “no player enters on to the ice of the National Hockey League without consenting to and without knowledge of the possibility that he is going to be hit in one of many ways once he is on the ice.”⁴⁸ The judge found that the victim consented to being struck by a glove because he knew that that practice was common in ice hockey games and was not likely to result in serious injury.⁴⁹

The judgments in both *Green* and *Maki* reiterated the established principle that there is a limit to the magnitude and severity of a blow to which another is

43 Supra at note 41, at 1034.

44 (1971) 14 DLR (3d) 164.

45 (1966) 54 WWR 302.

46 Supra at note 44, at 167.

47 (1971) 16 DLR (3d) 137.

48 Ibid, 140.

49 Compare with *R v Billingham*, infra at note 81.

permitted to consent. And despite acquittals in both cases, they indicate that a player could be convicted for assaults in the course of a game given the proper circumstances.

These cases comprise the cornerstone of modern jurisprudence on this topic yet fail to establish a clear dividing line between what can and what cannot be consented to in the sports arena, other than the implicit suggestion in *R v Green* that the nature of the sport would be a criterion.⁵⁰ Subsequent Canadian decisions have failed to clarify the situation, and have done little other than illustrate the difficulty in formulating a workable test for sports violence.

The decision in *R v Leyte* held that athletes who participate in competitive contact sports “must be deemed to consent ... [to being hit] so long as the reactions of the players are instinctive and closely related to the play.”⁵¹ Similar tests were articulated in *R v Maloney*⁵² and *R v Henderson*.⁵³ The former stated that players are presumed to consent to conduct inherent in and reasonably incidental to the normal playing of the game, while the latter said that players consent to conduct that is incidental to the sport. The three different tests essentially create a standard that both recognises the primacy of actions that are an intrinsic part of the sport and adds a margin of grace around them so as to include actions closely connected to playing the game.⁵⁴

*R v St Croix*⁵⁵ added the concept of foreseeability to the notion of implied consent. Here, the accused hit the victim across the mouth with his stick. This conduct went “beyond foreseeable consented to behaviour”, was not done instinctively or in self-defence and thus the accused was convicted. In *R v Watson*,⁵⁶ however, the Court limited consent to routine body contact of the game stressing the importance of not allowing sport to become a forum to which the criminal law does not extend.

These cases reiterated the applicability of the criminal law to violence in sports, while attempting to recognise as lawful that which is within the nature and spirit of the game. Such a test is open to criticism, however, for being unworkably vague and thus allowing too much latitude to overtly violent players.⁵⁷

The appellate decision in *R v Cey*⁵⁸ attempted to provide clearer guidance as to the level of permissible violence in sports. Here, the accused cross-checked an opponent from behind pushing his face into the boards surrounding the rink. The

50 Supra at note 30, at 275.

51 (1974) 13 CCC (2d) 458, 459 (emphasis added).

52 (1976) 28 CCC (2d) 323.

53 [1976] 5 WWR 119.

54 Supra at note 41, at 1039.

55 (1979) 47 CCC (2d) 122.

56 (1975) 26 CCC (2d) 150 (Ont Prov Ct); *R v Cote* (1981) 22 CR (3d) 97.

57 In practice, prosecutions were more likely to be successful where force was applied after play had stopped or where the victim was uninvolved in a melee or was withdrawing from it: Supra at note 53; *R v Duchesneau* (1978) 7 CR (3d) 70; *R v Gray* [1981] 6 WWR 654; *R v Cote*, ibid.

58 (1989) 48 CCC (3d) 480.

victim suffered facial injuries, whiplash, and concussion, yet still testified that despite the hit he would continue to play even if there was a fair chance he was going to suffer the same injuries.

In determining the scope of implied consent in the context of a professional ice hockey game, the question before the Court was whether the conduct carried with it “such a high risk of injury and such a distinct probability of serious harm as to be beyond what, in fact, the players commonly consent to, or what, in law, they are capable of consenting to.”⁵⁹ Justice of Appeal Gerwing stated that:⁶⁰

[T]here are some actions which can take place in the course of a sporting conflict that are so violent that it would be perverse to find that anyone taking part in a sporting activity had impliedly consented to subject himself to them.

Further, Gerwing JA viewed the scope of implied consent in the context of a team sport, such as ice hockey, as being determined by reference to certain objective criteria. **Such criteria include:**

- (i) **The nature of the game played (whether amateur or professional, youth or adult etc);**
- (ii) **Nature of the particular act or acts and their surrounding circumstances;**
- (iii) **The degree of force employed;**
- (iv) **The degree of risk of injury; and**
- (v) **The state of mind of the accused.**

The judge viewed these criteria as matters of fact to be determined with reference to the whole of the circumstances,⁶¹ and stated that they formed the ingredients which ought to be looked to in determining whether in all of the circumstances the ambit of the consent at issue in any given case was exceeded.

The majority considered the Attorney-General's Reference (No 6 of 1980)⁶² to be applicable and saw no reason in principle that it should not apply to sports. In citing a passage from the judgment which stated “it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason”,⁶³ Gerwing JA saw contact sport as falling within the ambit of “good reason”.⁶⁴

By spelling out this set of objective criteria the Court has attempted to depart from the vagueness of the tests in earlier decisions.⁶⁵ In doing so the Court appears

⁵⁹ Ibid, 481.

⁶⁰ Ibid, 488.

⁶¹ Ibid, 491.

⁶² [1981] QB 715.

⁶³ Ibid, 719.

⁶⁴ Supra at note 58, at 492. See *ibid*; also *R v Brown*, supra at note 14.

⁶⁵ Supra at note 30, at 276.

to have moved toward a test which is considerably less tolerable of sports violence.⁶⁶ Where the conduct is such as to carry a high risk of injury it will be unlawful regardless of consent or of the frequency with which it occurs in sport.⁶⁷ This approach has been considered and approved in recent Canadian decisions such as *R v Ciccarelli*⁶⁸ and *R v Jobidon*⁶⁹ which confirm the application of the *Cey* test to sport, viewing it as preferable to one which permits that which can be expected during a game.

(b) *The United States of America*

Surprisingly, the United States' application of the criminal law to sports violence is relatively undeveloped in comparison to Canada. The unreported case of *State v Forbes*⁷⁰ was the first criminal proceeding against an athlete for conduct within the playing arena. The incident occurred in early 1975 when, on returning to the ice after serving a penalty for fighting, Forbes took a swing at the victim, Henry Boucha. Forbes missed with his gloved hand, but connected with the butt end of his stick. When Boucha fell to the ice Forbes jumped upon him punching him until they were separated. As a result, Boucha required three operations to repair a damaged eye socket and he suffered double vision for eight months. Whilst internal discipline by the National Hockey League resulted in a ten month suspension for Forbes, the criminal trial remarkably ended with a hung jury and no retrial was ordered.

The follow-up case of *State v Freer*⁷¹ resulted in an assault conviction when the accused threw a retaliatory punch after a player pile-up had been cleared. The Court saw the first punch as falling within the scope of consent,⁷² while viewing the latter as not being consented to. A more recent case, *State v Floyd*⁷³ involved a brawl in a game of basketball, involving players from both teams. Iowa law provides that an act is not an assault when the parties are "voluntary participants in a sport ... and such act is a reasonably foreseeable incident of such a sport ... and does not create an unreasonable risk of serious injury or a breach of the peace."⁷⁴

Although little can be taken from these cases in terms of formulating a framework for the scope of implied consent, the 1965 Restatement (Second) of Torts provides more guidance. Comment b of Section 50 states:

⁶⁶ Ibid. Arguably, if such a test had been applied in earlier cases fewer acquittals would have resulted.

⁶⁷ Ibid.

⁶⁸ (1989) 54 CCC (3d) 121.

⁶⁹ (1991) 66 CCC (3d) 454.

⁷⁰ Minnesota District Court, 1975, No 63280; cited in McCutcheon, *supra* at note 30, at 278.

⁷¹ 86 Misc 2d 280 (1976).

⁷² See *supra* at note 47, where the judge also viewed punching as falling within the scope of player consent.

⁷³ 466 NW 2d 919 (1991).

⁷⁴ Iowa Penal Code 708.1, cited in note, *supra* at note 3, at 278.

Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by the rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as test of skill.

In making such a distinction the Restatement provides a more workable standard by recognising that a player consents to, and assumes the risks inherent in, violations of the rules of the game; but does not consent to conduct which violates safety rules. The delineation between safety rules and rules designed to make the game a more skilful one is logical and justifiable. Liability for breaches of safety rules neither inhibit the vigorous participation of athletes nor diminish the attraction of the game to spectators. Liability for breaches of non-safety rules, for example those concerning off-side positioning would, however, be nothing more than an impediment to the peaceful enjoyment of the game.

The civil cases of *Nabozny v Barnhill*⁷⁵ and *Hackbart v Cincinnati Bengals, Inc.*⁷⁶ have approved the approach enunciated in the Restatement. This position is supported by McCutcheon who states that “the advantage of this approach is that it draws a readily identifiable line between permitted force and that which attracts liability Moreover, it shares with the criminal law a concern to protect participants from excessively dangerous play.”⁷⁷

Thus, although the criminal cases have done little in terms of formulating a test for determining the scope of consent, a look to the civil realm provides a highly valid and workable formula that can be applied to the criminal sphere to punish and deter excessively dangerous play.

(c) *Great Britain*

The lack of action on the part of British prosecuting authorities since their early attempts to deal with sports violence⁷⁸ has been attributed to player reluctance in reporting offences to the police.⁷⁹ This, however, does not explain the lack of prosecutions at a professional and international level in light of large-scale media coverage. As Duff states, it would certainly appear that players at the highest level of sports are somewhat above the law.⁸⁰

The first rugby case to appear before the courts in Britain was *R v Billingham*⁸¹ where, in an incident away from the main area of play, the accused punched the

75 31 Ill App 3d 212 (1975).

76 601 f 2d 516 (10th Cir), *cert denied*, 444 US 931 (1979).

77 *Supra* at note 30, at 279.

78 See text, *supra* at Part III paras 1-5.

79 Duff, “A Hooligans Game - Played by Gentlemen” [1994] SLT (News) 277, 277.

80 *Ibid*.

81 [1978] Crim LR 553.

opposing halfback in the face, fracturing his jaw in two places. He was convicted, despite testimony by Mervyn Davies, a former Welsh Rugby International, who stated that in the modern game of rugby “punching is the rule, rather than the exception.”⁸² Davies’ testimony indicates that punching is a part of the game consented to by players when they take the field, but the judge obviously saw the danger in adopting such a position.

In directing the jury the judge stated that rugby was a physical game necessarily involving the use of force “of a kind which could reasonably be expected during a game.” He further stated that there is no unlimited licence to use force, and that “there must obviously be cases which cross the line of that which a player is deemed to consent.”⁸³ The decisive distinction in relation to the scope of player consent was between force used in the course of play and force used outside the course of play. The jury convicted Billinghamurst of inflicting grievous bodily harm, and he was sentenced to nine months imprisonment.⁸⁴

The only action against a Home Unions Rugby International was that taken against David Bishop where the Welsh player punched an opponent in facts similar to those in *Billinghamurst*.⁸⁵ When no move was made by his club to discipline him, prosecuting authorities brought an action. His guilty plea led to a suspended sentence, but the case at least serves to illustrate the ability to prosecute prominent players.

In *R v Johnson*⁸⁶ the accused was charged with wounding with intent after he bit and tore the lower earlobe of an opponent during an inter-police rugby match. He was convicted and sentenced to six months imprisonment, the Court viewing such behaviour as clearly beyond the scope of players’ consent.⁸⁷

Despite the ample opportunity for clarification by British courts, the law relating to consent in the sports arena remains vague. The British cases seem to base conviction on whether the act was committed during play or in an incident away from the main area of play, the latter being judged to be the more serious of the two infringements.⁸⁸ This can be traced to *R v Billinghamurst* where the Court held that consent was effective only where the harm was received in the course of

82 See supra at note 79, at 278.

83 Supra at note 81, at 553.

84 His sentence was suspended for two years.

85 See Duff, supra at note 79.

86 (1986) 8 Cr App R (Sentencing) 343.

87 Compare with the 1995 incident at Athletic Park in Wellington where South African Springbok prop Johan Le Roux blatantly bit the New Zealand All Black captain, Sean Fitzpatrick’s ear. The attack was in full view of television cameras, and photos of the incident were published in the newspapers. Despite this coverage the matter was left to the New Zealand Rugby Football Union to deal with and no criminal proceedings were brought. See also *McMillan v HM Advocate*, High Court of Justiciary appeal court, Scotland, 14 June 1994, GWD 26-1560, Temporary Sheriff Hamilton; cited in Duff, supra at note 79, at 279, where a player was imprisoned for nine months for head-butting an opponent.

88 See *R v Shervill* (1989) 11 Cr App R (S) 284; *R v Davies* [1991] Crim LR 70.

89 Supra at note 81.

playing the game.⁸⁹

In any event the case law provides little by way of formulating a test that is capable of determining the scope of an athlete's consent. In *R v Brown*, where the law of consent was fully reviewed, the approach by the appellate court in *R v Cey* was supported. The English Law Commission also supports the transfer of the *Cey* criteria into English law. It thus appears that the British courts will follow the majority in *Cey* in using objective criteria to determine whether the actions of the accused were so "violent and inherently dangerous as to be excluded from the scope of implied consent."⁹⁰

(d) Australasia

The Australasian approach to controlling violence on the sports field has been less litigious than overseas. It appears as though the traditional reluctance to allow the criminal law into sport is firmly entrenched in Australia and New Zealand, where prosecuting authorities appear happy to leave disciplinary measures to the private sports tribunals.⁹¹

The *Johnson and McMillan* cases⁹² contrast with the different approach taken by the Australian and New Zealand justice systems. Whereas Johnson and McMillan were both imprisoned for their conduct on the sports field, similar incidents in rugby and rugby league in Australia and New Zealand have resulted in, at worst, suspensions for a number of games, and at the least, an on-field penalty.⁹³

Is it the case that internal disciplinary measures are effective in controlling on-field violence, or are our sporting heroes above the law? An incident that arose out of a recent trans-Tasman rugby encounter illustrates the question. Australian Rugby International Michael Brial lashed out at All Black Frank Bunce hitting him no less than eight times while Bunce clung to the ball and tried to evade the

⁹⁰ Supra at note 58, at 481.

⁹¹ Such an approach is desired by the major North American sports bodies who fear that increased criminal prosecution could have a large negative impact on their sports.

⁹² Supra at notes 88-92 and accompanying text.

⁹³ For example, Denis Betts of the Auckland Warriors rugby league team was ordered from the field in 1996 for a head butt and received a two match suspension. John Allen and Michael Foley, of the Springbok and Australian Wallaby Rugby teams respectively, received only an on-field penalty for the same offence, with no disciplinary action taken by the Rugby Union. Likewise, in recent incidents captain All Black Sean Fitzpatrick was head-butted on consecutive weekends (July 20 and 27 1996). Both incidents were caught on camera but on-field discipline was deemed sufficient and no further action was taken.

⁹⁴ If such an incident had taken place outside a bar would the penalty imposed have been the same? This disparity of treatment is brought into focus by the case of a young black amateur player, Paul Smithers, who after suffering racial slurs during the game, fought with one of his ice hockey opponents after the game, taking that persons life. Smithers was convicted of manslaughter. Walter Kuhlmann points out the irony that "if Smithers' attack ... had occurred during the game, Smithers could have been liable for a five minute major penalty. Off the ice, he was liable for a term in prison."

barrage. Brial was penalised and no further action was taken.⁹⁴

In *R v Tevaga*⁹⁵ the New Zealand Court of Appeal reduced a sentence of periodic detention to one of community service. Here, Tevaga ran twenty-five metres and punched an opponent claiming it was in defence of a team-mate who was apparently being attacked. The punch broke the victim's jaw, and the Court had this to say:⁹⁶

Assaults in the course of sporting contests ... cannot be tolerated by the community or the courts. Whatever tacit acquiescence may be said to have prevailed in the past in relation to the kind of almost barbaric behaviour exemplified by this case is no longer acceptable by current standards.

A more recent case shows that this sentiment may be taking hold. The 1996 case where All Black Ian Jones was prosecuted for allegedly kicking opponent Junior Paramore in the head was the first against an All Black for an on-the-field incident.⁹⁷ Although conflicting evidence led to Jones being acquitted, the case perhaps indicates that prosecuting authorities are becoming more vigilant in this area.

The unreported case of *Chrichton v Police*⁹⁸ serves as an illustration of a conviction for conduct described as "well outside the range of fair play. It was a deliberate piece of foul play of a particularly unpleasant kind",⁹⁹ and as such the accused was imprisoned. In the Australian case of *R v Heke*¹⁰⁰ the accused was found guilty of manslaughter after the deceased was injured in a head-high tackle. In this case and those mentioned, the courts in New Zealand and Australia have apparently not been concerned with applying, or formulating, any form of workable test for the scope of consent on the sports field. Indeed, while the Court in *Tevaga* acknowledged the less than rigorous approach that has prevailed in the past, it merely analysed the incident in terms of the vague notion of "fair play".

The civil case of *Pallante v Stadiums Pty Ltd (No 1)*¹⁰¹ dealt with a claim that all boxing was unlawful because the blows inflicted were either intended, or likely, to do bodily harm. Despite being a civil case the Court stated that applications of force which are within the rules of a sport might nevertheless constitute an assault where the blows are intended to cause injury. In addressing the role of consent in a boxing match, McInerney J referred to the *Bradshaw, Coney, and Moore* cases and concluded that the consent of the person injured is disregarded because "it injures society if a person is allowed to consent to the infliction on himself of such

95 [1991] 1 NZLR 296.

96 Ibid, 297.

97 Referred to in Law Talk (1997) 7 July, 15.

98 High Court, Christchurch, 17 December 1992, AP 32/92, Tipping J, noted [1993] BCL 323.

99 The accused grabbed his opponent's testicles and wrenched them causing him considerable pain for some time and an inability to walk properly for a week or so.

100 Supreme Court of Queensland, 6 February 1992, as cited in Fisher, *infra* at note 123, at 18.

101 [1976] VR 331.

102 Ibid, 340.

a degree of serious physical injury.”¹⁰² While the judge made a valiant attempt to account for the immunity of boxing from the criminal process, it appears impossible to do so.¹⁰³

Thus, it can be seen that while the prosecuting authorities in New Zealand and Australia have largely left the private disciplinary tribunals to deal with on-field violence, a small number of cases are beginning to be brought to the courts’ attention. It is doubtful whether this will increase by any large degree, and it is therefore likely that private bodies will be left to look after their own affairs. This raises the question of whether a more effective and desirable solution can be found that utilises internal disciplinary measures to the fullest, and leaves state sanctions for conduct of the worst kind.¹⁰⁴

2. Internal Discipline

A common opinion that arises in commentaries dealing with the problem of violence in sports is that the criminal law has a legitimate role in intervention, but ideally only after internal regulatory mechanisms have failed to effectively control and penalise the violence.¹⁰⁵ In such situations the state will be justified in intervening to protect its interests by deeming consent to certain acts ineffective.¹⁰⁶ In accepting such arguments one is left with the difficult task of determining what mixture of legal and internal control is desirable in dealing with the problem of violence in sport.¹⁰⁷

Rules of the various sports usually prohibit certain types of conduct that pose abnormal risks of injury (ie safety rules)¹⁰⁸ or that are likely to inflame volatile tempers.¹⁰⁹ It is the umpire or referee who usually polices such rules, and has the authority to discipline players for breaches. These officials have a broad discretion to impose penalties against a player or his or her team for any misconduct. On-field disciplinary measures range from a mere penalty to a citing or a sending off. Such actions by the controlling official may often lead to further disciplinary action by the sport’s controlling body. However, these penalties are minor when compared to those given to perpetrators for the same conduct committed outside the sporting context.¹¹⁰

Internal controls have the benefit of being quick and certain, and these factors

¹⁰³ See text, *infra* at Part VI.

¹⁰⁴ See *infra* at notes 112-130 and accompanying text.

¹⁰⁵ *Supra* at note 3. See also *supra* at note 30.

¹⁰⁶ *Supra* at note 3, at 175.

¹⁰⁷ Kuhlmann “Violence in Professional Sports” [1975] *Wis L Rev* 771.

¹⁰⁸ *Supra* at note 73.

¹⁰⁹ *Supra* at note 3, at 175.

¹¹⁰ For example, the case of Richard Loe who was suspended for eye gouging an opponent in an Otago v Waikato rugby clash in October 1992 (see *Sunday News*, 1 June 1997, 67). Although he was suspended from playing this punishment was itself suspended to allow Loe to travel to play and coach in France.

are thought to be more effective in deterring undesired behaviour than the imposition of severe penalties.¹¹¹ What is not certain is whether private organisations themselves are capable of adequately protecting societal interests without judicial or other government involvement.¹¹²

In *R v Maki* the Judge stated that participation in a sport, regardless of the extent of self-regulation, should not give players immunity from criminal sanctions.¹¹³ McCutcheon states that private agreement or regulation cannot be allowed to override or negate the demands of the criminal law.¹¹⁴ Flakne and Caplan argue:¹¹⁵

[T]o suggest that a governing body of a particular sport determine appropriate sanctions for a quasi-criminal or criminal act would be tantamount to granting the board of directors at General Motors jurisdiction over the determination of guilt or innocence and the appropriate punishment for one of their employees who, while on the job, killed his foreman.

While such a view may appear extreme, the lack of action in many cases,¹¹⁶ and inconsistencies in application in others,¹¹⁷ tends to add weight to concerns that to leave discipline to private sports bodies is to put the sportsfield outside the reach of the law. But, as not all sporting violence warrants criminal sanctions, the imposition of such sanctions would appropriately only deter those players who engage in particularly egregious conduct. Thus, the category of conduct that is violent, but not sufficiently extreme to be appropriately punished through the criminal law must be deterred by another form of sanction. This is where private regulation of sports violence should have a place. It would be more appropriate and effective to allow private bodies to control sports violence that does not warrant criminal liability, thereby leaving only particularly violent behaviour to be punished by the courts.

The arguments for and against internal control can be summarised as follows:

- (i) Internal control is a more effective means of disciplining and detering violence because sports administrators more accurately know what conduct is reasonable in the heat of a game.¹¹⁸ They also know what risks players face because of their close contact with the history of the game and the players themselves. For example, a late charge in a game of rugby will normally be within the scope of consent, whereas eye

¹¹¹ Supra at note 3, at 175.

¹¹² Ibid.

¹¹³ Supra at note 44, at 167.

¹¹⁴ Supra at note 30, at 282.

¹¹⁵ Note, "Sports Violence and the Prosecution" TRIAL, January 1977.

¹¹⁶ Supra at note 90.

¹¹⁷ Supra at note 109.

¹¹⁸ Ibid, 784.

gouging will not, and would therefore be punished. Yet, to allow a private group to make such decisions is tantamount to a grant of a part of the state's jurisdiction. Therefore, the role of the criminal law at a certain point seems logical.

- (ii) Only internal administration can perform an adequate job of policing the whole of the sport.¹¹⁹ Having the criminal law too heavily involved in controlling sports violence would diminish the benefits gained from sport, as it has the potential to be unnecessarily disruptive, and could lead to unnecessary prosecutions. Controls that affect team competitiveness and a player's income, for example, player suspensions, will operate as sufficient deterrents.
- (iii) The sporting bodies themselves argue that the special status of sport as a business integrally related to the social life of the nation entitles them to some right to discipline players for the good of the sport. Further it has been said that "... there are two great national institutions which simply cannot tolerate ... external interference: our Armed Forces and ... our sports programs."¹²⁰
- (iv) Present internal sanctions have been criticised as being ineffective deterrents. Should the sanctions become significantly more severe, as is beginning to happen, and more closely approximate the punishment of the criminal law the players are more likely to seek the advice of lawyers, and require the same kinds of procedural protections afforded by criminal statutes.

Fisher sees the role of a private sporting tribunal as being complementary to the criminal law.¹²¹ In his view, the tribunal should operate under rules that are sensitive enough to ensure that sporting practices and community standards are compatible.

The "Kangaroo Courts" of the past have been overhauled in response to the demands from the public arising from increased violence on the sports field.¹²² "The growth of sport as a business means that sports organisations need to set up appropriate bodies to determine disciplinary matters in an environment where justice can be done ... the ultimate role of the tribunal is to ensure that the practice of the particular game or pastime can continue in an appropriate and proper

¹¹⁹ Ibid, 786.

¹²⁰ Slusher, "Sport: A Philosophical Perspective" (1973) 38 Law & Contemp Prob 129 quoting Dr Max Rafferty, (former Superintendent of Public Instruction, State of California).

¹²¹ "The Role and Conduct of Private Sporting Tribunals - The Tribunal's Perspective", *The Law of Sport*, (1993) Legal Research Foundation, Seminar, 17.

¹²² Ibid, 18.

¹²³ Ibid, 23.

manner.”¹²³

Thus, it is submitted that there is a definite role for private sporting tribunals in controlling and deterring sports violence. The Australasian willingness to leave such violence almost completely in the hands of such bodies is, however, of concern. There is a definite limit to the scope of player consent, and allowing a private body to act in place of the state for more serious offences has the potential to be injurious to public welfare. In New Zealand and Australia we have perhaps overlooked the role of the criminal law in an attempt to preserve the nature of our favourite sports. As such we need to effectively address the issue of violence in sport. If a line can be drawn that indicates the limits of consent, then conduct beyond this should be subject to criminal sanctions while conduct below this threshold should be left to internal controls.

IV: DEVELOPING A FRAMEWORK FOR THE CONTROL OF SPORTS VIOLENCE

The more workable tests that exist for determining the permissible level of violence are the *Canadian Cey*¹²⁴ test, the violation of safety rule test¹²⁵, and the German notion of *Sozialadaquanz*.¹²⁶ Other tests that exist are the *Bradshaw/Moore* test, the various *Coney* tests, and the test found in the Model Penal Code (MPC) and the Proposed Federal Criminal Code (PFCC) of the United States.

The cases of *R v Bradshaw* and *R v Moore* state that consent to any conduct that is either intended or likely to cause serious bodily injury is ineffective. This is perhaps overly broad owing to the malicious intent requirement.¹²⁷ A player, not motivated by any malicious intent, is required to evaluate at his or her own peril the danger of any act before undertaking it.¹²⁸ Such accountability for player violence would no doubt reduce serious injury, but would also have a large detrimental impact on the way competitive sports are played.¹²⁹ Further, the failure to require a malicious intent would render a sport such as boxing illegal.¹³⁰

A second source for a test for the scope of consent in contact sport can be seen in *R v Coney*. In this case three distinct rationales underly the judgments indicating a form of pick-and-choose situation. In *Coney*, conduct may be illegal and the consent ineffectual either because the act is:

¹²⁴ See *supra* at notes 59-70 and accompanying text.

¹²⁵ *Supra* at note 73.

¹²⁶ *Supra* at note 30, at 270.

¹²⁷ *Supra* at note 3, at 176.

¹²⁸ *Ibid*.

¹²⁹ Such a standard would eliminate not only undesirable conduct, but also reduce some desirable conduct necessary to the continued vigour and popularity of the game.

¹³⁰ See text, *infra* at Part VI.

- (i) Against public policy;¹³¹
- (ii) Conducive of a breach of peace;¹³² or
- (iii) In itself inherently dangerous.¹³³

Although the judgements in *Coney* received favour in *R v Brown* based on the “possible injury to the participants” concern, the standards put forward are too vague and arbitrary. They offer little by way of a workable test for prosecuting sports violence, and give a minimal guidance to athletes. Thus, the *Coney* tests, although serving as useful guidelines for the analysis of sports violence, do not help in respect of formulating a specific test.

The American MPC and PECC have put forward a standard which holds consent is effective when given either:

- (i) To conduct that does not threaten or cause serious injury; or
- (ii) To foreseeable conduct that results in foreseeable harm.¹³⁴

This approach is weak, however, for it fails to distinguish malicious intent to injure, from conduct consistent with the spirit of the game.¹³⁵

The remaining tests can be seen as more valid and applicable to the scale and popularity of modern sport. A workable test needs to take into account the sporting environment in which the conduct in question occurs, and should not unduly punish acts without the moral backing of society. Such tests should, it is submitted, be ultimately concerned with player safety as the *Cey*, Restatement, and Sozialadaquanz tests are.

1. The Cey Test

As mentioned above, *R v Cey* dealt with an assault in an amateur ice hockey match. Justice of Appeal Gerwing, for the majority, chose to use objective criteria in determining whether the actions of the accused were so “violent and inherently dangerous as to be excluded from implied consent”.¹³⁶ In doing so Her Honour made a move away from the vague and uncertain tests formulated earlier. It was held that although any action by a player inevitably involves an assessment of the player’s subjective view as to the victim’s consent, the scope of that consent should be determined by the objective criteria.

¹³¹ Supra at note 1, at 551 per Stephen J.

¹³² Ibid; supported by Cave and Hawkins JJ, and Lord Coleridge CJ.

¹³³ Ibid; supported by Cave and Matthews JJ.

¹³⁴ Model Penal Code 2.11(2)(a) and (b) (Proposed Official Draft, 1962); PFCC 1619(1)(a) and (b) as cited by McCutcheon supra at note 30, at 270.

¹³⁵ Supra at note 3, at 175.

¹³⁶ See text, supra at Part III para 1(a).

The relevant factors in determining whether violence is inherently dangerous include age, level of experience, conditions of play, and the like.¹³⁷ The majority considered that the subjective state of mind of the accused was only one factor, and in fact was “not particularly significant”, in determining whether the accused’s action fell within the scope of activity to which the victim implicitly consented.

This approach has received wide approval in subsequent Canadian and English cases.¹³⁸ It has the notable feature that it is ultimately concerned with player safety, and it aims to apply a suitable threshold to the context involved.¹³⁹

2. The Restatement (Second) of Torts: the Violation of a Safety Rule Test

The advantage of the violation of safety rule test is that it draws a clear and distinct line between that which is lawful and that which is not. Although it defers in part to a private agency to determine the scope of liability, the function of the safety rules coincides with the primary concern of the criminal law in this sphere.¹⁴⁰

Inferring athletes’ consent to all contacts not proscribed by safety rules effectively exempts such contacts from criminal liability, regardless of how violent they might be. This distinction is rooted in common sense, and serves to allow common practices in sport such as heavy tackles which serve the dual purpose of preventing an opponent from gaining an advantage, and of “softening” them up.¹⁴¹

A further advantage of the violation of safety rule test is that by not focusing on the presence of intent to inflict bodily harm it is sufficiently flexible to preserve the fundamental characteristics of different sports within the legal framework.¹⁴²

Commentators have stated that such a test should be applied to amateur and professional sports alike as this is more practical, and better serves the overall purpose of deterring sports violence.¹⁴³ Whether athletes are professional is relevant only as indicative of their level of experience and expertise.¹⁴⁴ Thus, the Restatement test shares with the criminal law, and the *Cey* test, a concern to protect participants from excessively dangerous play.

¹³⁷ Supra at note 30, at 279.

¹³⁸ Supra at note 68; *R v Brown* supra at note 6.

¹³⁹ Thus, it appears that what is acceptable in, say, international rugby would be unacceptable at age group level.

¹⁴⁰ Supra at note 30, at 280.

¹⁴¹ Ibid, 279.

¹⁴² Ibid, 280.

¹⁴³ Rains “Sport Violence: A Matter for Societal Concern” (1980) 55 Notre Dame Lawyer 796, 800.

¹⁴⁴ Ibid, 801.

3. Sozialadaquanz

The last of the tests is that of the German notion of sozialadaquanz. This approach deems an athlete to have consented to only that conduct which is “part of the game”. It is notable for avoiding the disadvantages of the *Brown*, *Coney*, and *Moore* tests, and recognises that if society wants a sport to be played in a certain way it must tolerate certain harms. It requires society to tolerate those injuries that are an unavoidable part of playing the game in the way that society desires. As a result, if there is any part of a sport that is intolerable then it is up to society to make changes.

Sozialadaquanz states that if a player possesses an attitude consistent with the ideal of the game, he or she will be able to rely on the consent. Such an approach has support because it focuses on the underlying policy considerations involved such as the state’s interest in the health of its citizens, the benefits afforded society by sports, the individual liberty interest, and the state’s paternalistic function.

This approach has the advantage of focusing on the extent to which society will tolerate harms before sacrificing the beneficial aspects of sports. Yet, it appears too uncertain in the face of the *Cey* test. And, although a form of this test was implemented in *R v St Croix*,¹⁴⁵ and despite similarities with the Restatement test, it was largely rejected in *R v Ciccarelli*¹⁴⁶ and *R v Jobidon*¹⁴⁷ which ruled in favour of the *Cey* test.

The more workable tests then are the *Cey* and Restatement tests which share an ultimate concern for player safety, while at the same time allowing ease of application in the courts. The *Cey* test has an overall advantage to the Restatement test in that it allows the context of the game to have a prominent bearing on the scope of player consent. Yet, the Restatement test has workable potential in light of internal disciplinary action for minor infringements. In any event, the criminal law needs to be careful not to overly intrude, and thereby diminish, the social enjoyment of competitive contact sport.

V: SADOMASOCHISTIC ENCOUNTERS CONSENT DEFENCE OR CRIMINAL OFFENCE?

In his minority judgment in the historic decision in *R v Brown* Lord Slynn stated that “a line has to be drawn as to what can and as to what cannot be the subject of consent”¹⁴⁸ This concept is widely accepted, and is in accordance with

145 Supra at note 55.

146 Supra at note 68.

147 Supra at note 69.

148 Supra at note 14, at 121.

common sense and the rule of law.¹⁴⁹ Problems arise, however, when one attempts to actually devise a framework of permissible conduct that is in line with societal interests. Case law has “drawn a distinction between consent to acts which the law does not disapprove¹⁵⁰ and consent to acts which the law regarded as antisocial, immoral, or dangerous, such as the infliction of harm for sexual gratification.”¹⁵¹ Thus, it is necessary to differentiate the forms of conduct that fall beyond the socially-acceptable level, and attempt to identify the policy reasons for doing so.

In *R v Brown* a three to two majority held that where an injury occurs in the course of a sadoomasochistic encounter consent is no defence. The judgements of the House of Lords focused upon the public policy considerations relevant to whether consent should be permitted as a defence to conduct that constituted assault. Lord Templeman held that “society is entitled and bound to protect itself against a cult of violence”, and stated that “pleasure derived from the infliction of pain is an evil thing,” and that “cruelty is uncivilised.”¹⁵² Lord Lowry went further to say that “sadoomasochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society.”¹⁵³

It is clear that lawful sports, ear piercing, and tattooing are viewed to fall within the confines of allowable conduct. But the line becomes blurred when one considers multiple piercings of the nose, navel, lips, and eyebrows. Further along the spectrum still is nipple piercing, and still further lies genital piercing and group acts of sadoomasochistic wounding.

The range of conduct that is permissible at any given time is clearly evolving and changes in relation to what public policy and societal interest determine to be “good reason”¹⁵⁴ at that time. The 1992 decision in *R v Boyea*¹⁵⁵ held that the courts should take into account “that social attitudes have changed over the years ... and therefore the voluntarily accepted risk of incurring some injury [via sexual vigour] is probably higher now than it was in 1934”¹⁵⁶ indicating the need to look at activities in their social context.

In *Brown*, Lord Lowry acknowledged that the natural way to construe this was that “there is no assault if consent is provided by the victim unless there are public policy reasons for criminalising it.” However, he then held that the very fact of causing actual bodily harm was a public policy reason for criminalising the

149 For example, one cannot agree to be murdered; *R v Donovan* supra at note 6, at 210-211 per Swift J: “If an act is unlawful in the sense of being in itself a criminal act ... it cannot be rendered lawful because the person to whose detriment it is done consents to it.”

150 For example, ritual circumcision, tattooing, ear-piercing, and violent sports.

151 Supra at note 14, at 63. Lord Jauncy in *R v Brown*, supra at note 14 at 90, noted that in *R v Donovan* the Court of Appeal had drawn this distinction.

152 *R v Donovan*, supra at note 6, at 84.

153 Ibid, 100.

154 See supra at note 62; and supra at note 14.

155 (1992) 156 JP 505, 513 as cited in Freckelton, supra at note 15, 68.

156 Ibid, referring to *R v Donovan* supra at note 6.

conduct unless there was “good reason for not doing so.”¹⁵⁷

The majority in the House of Lords clearly viewed sadomasochistic activities as not constituting “good reason,” and therefore dismissed the appeals. But, what constitutes “good reason” is difficult to define:¹⁵⁸ “[A] proper balance between the special interests of the individual and the general interest of the individuals who together comprise the populace at large” needs to be struck.¹⁵⁹

1. Culturally-Based Injurious Behaviour

A cultural context is important in relation to what can be consented to, and as such the line between condoned infliction of injury upon the self and that which is not culturally sanctioned can become blurred. Debate about practices of female circumcision¹⁶⁰ in North African communities residing in Australia illustrates the conflict that can occur between different cultures’ views on when violence can be legitimately inflicted upon the body.¹⁶¹ The practice of infibulating both sides of the labia and the application of padlocks as a means by which a husband could guarantee his wife’s chastity is a practice well known in Africa, the Middle East, and India.¹⁶² However, sexual equality in Western society ensures that such practices are seen as repugnant and, in most cases, criminal.¹⁶³

Because of the emphasis Western society places on health and idealised appearance, and its abhorrence of suffering the voluntary assumption of pain has a deviant or subversive aspect for most.¹⁶⁴ Thus, it is not surprising that the House of Lords failed to see satisfaction of the sado-masochistic libido as “good reason” for the intentional infliction of bodily harm. But what is interesting to note is Western society’s embrace and approval of cosmetic surgery and sex-change operations as forms of body alteration which the law authorises.

2. Sadomasochism 施虐受虐狂

“The infliction of violence by persons upon one another in circumstances of sexual activity is highly problematic both from the point of view of determining legality and from the point of view of legal policy development.”¹⁶⁵ In *R v Brown*

¹⁵⁷ Supra at note 14, at 98.

¹⁵⁸ For example, tattooing and boxing would not appear to be promoting family life or society’s welfare.

¹⁵⁹ Supra at note 14, at 116 per Lord Mustill.

¹⁶⁰ There are three types of female circumcision in which children and young babies are circumcised. Some do not survive the operation which is often conducted by unqualified people using unclean or blunt instruments without anaesthetic. Bibbings and Allridge, (1993) 20 JLS 356, 359.

¹⁶¹ Supra at note 15, at 55.

¹⁶² Hindmarsh, “Body Piercing - Erotic, Exotic, Primitive and Popular” *Melbourne Star Observer* 8 January 1993, 1, as cited in Freckelton, supra at note 15, at 49.

¹⁶³ For example, the English Prohibition of Female Circumcision Act 1985.

¹⁶⁴ Supra at note 15, at 55.

¹⁶⁵ Ibid, 59.

the majority advocated a “social utility” approach¹⁶⁶ whereby once bodily harm is caused, for consent to be effective, the accused must demonstrate why the particular consensual conduct is needed in the public interest.¹⁶⁷

Legal chastisement, lawful sports, and surgery are viewed as needed in the public interest, but the apparent accepted legality of ear piercing, cosmetic surgery (undertaken for the purposes of vanity or fashion), and tattooing does not comfortably conform to the language of social utility.¹⁶⁸ It is difficult to come up with persuasive reasons as to why such activities are positively needed in the public interest, other than for upholding personal freedom and liberty.

In *Brown*, Lord Mustill, though at pains to avoid any moral endorsement of the appellants’ conduct, stressed that the law should interfere with individual liberty only as much as is necessary.¹⁶⁹ He stated the test in terms of “social disutility” “社會無用” (rather than the social utility test advocated by the majority) implying that it could not be said that the public interest demanded criminalisation of the appellants’ conduct.¹⁷⁰ Kell believes that the social disutility approach provides a more satisfying explanation for the existing exceptions to the bodily harm principle and would represent a better balance between individual autonomy and the larger interests of modern society.¹⁷¹

One commentator, however, summed up the moral thorns of the dilemma stating that:¹⁷²

[M]uch has been said about individual liberty and the rights people have to what they want with their own bodies but the courts must draw the line between what is acceptable in a civilised society and what is not

Unquestionably, this comes down to a matter of public policy, and in the House of Lords the majority obviously viewed the line as excluding consent by the victim to intentional infliction of bodily harm¹⁷³ in a sado-masochistic encounter. As such, this nonrecognition of the consent defence forces individuals who are contemplating certain acts to consider whether society will approve of them and serves as a deterrent, for punishment may ensue despite the victim’s consent.¹⁷⁴

Edwards sees the majority’s decision in *Brown* as required by the public interest. She states that “in our desire to preserve privacy, individual liberty and freedom from state intervention we are in danger of missing what lies at the heart

166 Kell, “Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a Reappraisal?” (1994) 68 ALJ 363, 365.

167 Supra at note 15, at 63.

168 Supra at note 166, at 376.

169 Supra at note 14, at 116.

170 Supra at note 166, at 377.

171 Ibid.

172 As quoted in Edwards, “No Defence For a Sado-masochistic Libido”, (1993) NLJ 406, 406.

173 As defined in *R v Donovan*, supra at note 6, at 509.

174 Supra at note 3, at 166.

of sado-masochism - its potential for violence.”¹⁷⁵ She agrees with Lord Templeman where he said that society is bound to protect itself from a cult of violence,¹⁷⁶ and views the appellants’ activities as contrary to the public interest. In *Brown*, Lord Templeman chose not to classify sadomasochism in the same way that sports and surgery have been, stating that he was “not prepared to invent a defence of consent for sadomasochistic encounters which breed and glorify cruelty and result in offences”.¹⁷⁷

~~However, not everyone agrees. Duff has suggested that respect for a person as an autonomous agent requires respect for their integrity as a sexual agent.~~¹⁷⁸ Bamforth says that this should, so long as all parties involved have consented, also protect their evaluation of what counts, for them, as meaningful sexual activity, whether sadomasochistic or otherwise.¹⁷⁹ ~~H.L.A Hart goes further saying that laws restricting consenting sexual behaviour may create misery of a quite special degree.~~¹⁸⁰ ~~He observed that sexual impulses form a strong part of each person’s day-to-day life, so that their suppression can affect “the development or balance of the individual’s emotional life, happiness and personality.”~~¹⁸¹

Sadomasochistic behaviour might, to the outsider, appear to be no different to casual or malevolent violence; but the crucial point is, that for sadomasochists, the violence is a meaningful part of sexual activity.¹⁸² “Seen in this light, the significance of the violence involved is analogous to that of (permitted) rough physical interaction in contact sports.”¹⁸³ But, it is the social perception of the two activities that leads to one being seen as socially valuable and in the public interest, while the other is shunned and unable to be consented to.

In *R v Coney* the Court held that a prizefight was unlawful. Justice Cave said:¹⁸⁴

The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial.

Leaving aside the anomaly of boxing in this context, the judge’s statement seems to strike at the heart of the distinction between sport and sadomasochism.

¹⁷⁵ Supra at note 172, at 406.

¹⁷⁶ *R v Brown*, supra at note 6, at 84.

¹⁷⁷ Ibid, 83.

¹⁷⁸ Duff, *Intention, Agency, and Criminal Liability: Philosophy of Action and the Criminal Law* (1990) 167, cited in Bamforth, *infra* at note 179, at 663.

¹⁷⁹ Bamforth, “Sado-masochism and Consent” [1994] Crim L R 661.

¹⁸⁰ *Law, Liberty and Morality*, (1963) 22 cited by Bamforth, *ibid*.

¹⁸¹ Referred to in Bamforth, supra at note 179, at 665.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Supra at note 1, at 539.

That is, the fact that the violence involved is an integral part of the sadoomasochistic experience is precisely that which renders it unlawful. Justice Stephen in *R v Coney* said that “in all cases the question whether consent does or does not take from the application of force its illegal character, is a question of degree depending on the circumstances.”¹⁸⁵ In *Brown*, the circumstances were viewed to be unlawful, and thus the appellants’ consent was ineffective. This is in accordance with Swift J in *R v Donovan* where he stated that “it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.”¹⁸⁶

However, Lord Jauncy¹⁸⁷ referred to Stephen J in *Coney*, stating that he appeared to consider that it required serious danger to life and limb to negative consent.¹⁸⁸ He declined to follow this view and preferred to follow the reasoning of Cave J in *R v Coney* and the Court of Appeal in *R v Donovan, Attorney-General’s Reference (No 6 of 1980)*, and *R v Boyea*; holding that the infliction of actual or more serious harm is an unlawful activity to which consent is no answer.

Such a result is interesting in light of *R v Donovan* and *R v Boyea* where the injuries that were sustained by the two women could not have been described as in any way serious. Thus, it is the infliction of actual bodily harm which appears to make such conduct fall beyond the scope of public interest, and render the victim’s consent to be ineffective.

The 1957 Wolfenden Report declared that the function of the criminal law is:¹⁸⁹

[T]o preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.

In *R v Brown*, Lord Lane CJ, in the Court of Appeal, found that two of the appellants had been responsible in part for the corruption of a youth. Evidence also disclosed that alcohol and drugs were employed to encourage the consent of certain of the group’s members and to increase enthusiasm. In the House of Lords, Lord Templeman stated that sadoomasochism was not only concerned with sex, but also with violence.¹⁹⁰ And further, that evidence disclosed that the “practices of the appellants were unpredictably dangerous and degrading to body and mind, and were developed with increasing barbarity and taught to persons whose consent were dubious or worthless.”¹⁹¹

¹⁸⁵ Ibid, 549.

¹⁸⁶ Supra at note 6, at 507.

¹⁸⁷ *R v Brown*, supra at note 14, at 90.

¹⁸⁸ A similar view was expressed by McInerney J in the Supreme Court of Victoria in *Pallante v Stadiums Pty Ltd*, supra at note 103.

¹⁸⁹ *Report of the Committee on Homosexual Offences and Prostitution* (Cmd 247, 1957).

¹⁹⁰ Ibid, 82.

¹⁹¹ Ibid.

It is submitted that, it is these facts and the clear distaste that the House of Lords had for the appellants' activities that led to their appeals being dismissed. Further, Lord Templeman stated that the question of whether the defence of consent should be extended to the consequences of sadomasochistic encounters could only be decided by consideration of public policy and public interest.¹⁹² And it is clear that while society not only condones, but wholeheartedly embraces, violent sports such as rugby league, ice hockey, and rugby it has a general distaste for the "perverted and depraved"¹⁹³ practices of sadomasochists. This means that the former will remain to be seen as "manly sports and exercises which tend to give strength, activity and skill",¹⁹⁴ while the latter will become recognised as falling into a special category of acts such as prize-fighting or duelling which the law has singled out as contrary to public policy and interest.

While it is open for the legislature to enact otherwise, the law and public opinion point to the unavailability of consent as a defence to criminal charges arising out of a sado-masochistic encounter. As such, sadomasochistic activities will remain outside the scope of consent that can be given.

But "the fact that surgeons are permitted the defence of consent if faced with the charge of committing grievous bodily harm upon their patients so long as the patients' consent is informed, suggests that the law as a matter of principle is nowhere near fully evolved on the circumstances in which consent should be permitted as a defence to even the infliction of serious harm."¹⁹⁵ "If both sado-masochistic activity and surgery are prima facie legal, and consent is provided to both, the distinguishing factor between them must be the public policy decision to deny the efficacy of consent to the latter and to permit it to the former."¹⁹⁶ Thus, it comes down to a public policy decision as to which conduct should have the consent defence available to it.

VI: PUBLIC POLICY

R v Brown focused upon the public policy considerations in relation to the lawfulness of sadomasochistic activity. The conduct of the appellants was viewed as being against the moral fabric of society and therefore not in the public interest.¹⁹⁷ Examples of activities that are considered to be in the public interest such as sport and surgery are condoned and encouraged because of the benefits derived by society. Such activities appear to be condoned when looked at in terms

¹⁹² Ibid.

¹⁹³ Supra at note 14, at 100 per Lord Lowry.

¹⁹⁴ East, "Pleas of the Crown" (1803) 1 Ch v para 41, 269 cited in note, supra at note 3, at 159.

¹⁹⁵ Supra at note 15, at 69.

¹⁹⁶ Ibid.

¹⁹⁷ That is, via the social utility approach.

of the social utility test, but this approach fails when confronted by other, apparently legal conduct.

For example, as noted above, it is difficult to see how activities such as body piercing and tattooing are in the public interest, other than by making a concession to personal freedom. And whilst the *Attorney-General's Reference (No 6 of 1980)* stated that “good reason” is required, when one looks at certain circus practices¹⁹⁸ and the sport of boxing it is difficult to justify these practices.

There is a need to protect individual freedom and personal liberty, but there are limits to what one will be allowed to consent to. Although “public policy views the social benefit of competing in, or watching sport as justifying the tolerance of a threshold of violence which would otherwise be unlawful conduct which exceeds the bounds of decency is a matter of public concern”¹⁹⁹ and as such should not be allowed.

The state plays a paternalistic role in protecting citizens from unwanted intrusions, and preserving their health and safety. Conduct which tends to diminish self-restraint and reduce inhibitions to the point where the actor might not care about the consequences of his or her conduct is of public concern. Yet, public policy is a double-edged sword. It may render legal a prima facie illegal assault; or vitiate consent where the act might otherwise have been deemed legal by virtue of that consent. Harm that would pass without comment at a boxing match could well lead to prosecution if inflicted in the course of sadomasochistic activities, even if in the privacy of one's home and thus, the social utility of boxing in this context needs to be questioned. *Pallante v Stadiums Pty Ltd (No 1)* attempted to do just this, but in *Brown* Lord Mustill viewed the task as impossible. He remarked on McInerney J's valiant efforts to arrive at an intellectually satisfying account of the apparent immunity of professional boxing from the criminal process, in the end stating that it is “best to regard boxing as another special situation which for the time being stands outside the ordinary law of violence because society chooses to tolerate it.”²⁰⁰

The intent of each participant in the sport of professional boxing is to hit the opponent as hard, and as often, as possible. The intent is to inflict harm on the opponent and in doing so be left standing in the hope of receiving a monetary reward. This can be contrasted with martial arts, for example, karate, judo, and kempo, which while also involving physical contact are focused on testing the relative skill of each participant. These have strict codes of conduct to prevent intentional infliction of harm upon an opponent. They are ancient martial arts that

198 For example, the “Torture King” in Jim Rose's circus/freak show. Here, the performer skewers his torso, arms, and face with over forty pins of various sizes. People pay to watch and be entertained by this. Also, the performer stands on stage while another throws darts at his back. Later in the show the audience are invited to walk on his back as he lies face down on first a bed of nails and second, freshly broken glass.

199 Supra at note 30, at 282.

200 Supra at note 14, at 109.

fall within the category of a lawful sport. Thus, professional boxing has the illegal intent to inflict harm on another, just as is the case in a sadomasochistic encounter. It is submitted that it is hard to distinguish the two, and thereby rationalise the current legality of boxing. Professional boxing, in the authors opinion, amounts to a publicly sponsored beating of an opponent. And while death does not always ensue, the potential exists in each bout.

Attempts for the total abolition of boxing based on an increasing mortality rate, and the injurious effects to boxers' health, have been defeated on the ground that the risks of boxing have been exaggerated, and that it is a relatively harmless outlet for aggression.²⁰¹ There is no doubt that it is sensible to assess degrees of harm as permissible or not depending upon the social interest or value involved. There must, however, be a stipulated ceiling; harm of a type or degree which cannot be inflicted unless the activity from which it derives is specially recognised as having a value which permits such infliction.²⁰² It is clear that sports have such a value, and it appears that sadomasochistic activity at present does not. What is not clear is why boxing continues to remain a lawful activity in the face of the high mortality rate that it now has, and with regard to the analysis in *R v Brown*.

VII: CONCLUSION

Society tolerates the violence that occurs in competitive contact sport because of the benefits derived from such endeavour. It chooses to recognise the consent of the athletes who participate in these sports, thereby rendering conduct that would otherwise constitute assault to be legal. The important point to note is that while society will allow this consent to operate, participation in contact sport is not a licence to abandon the restraints of civilisation.

While one is able to consent to the contacts that are received upon the sportsfield, some things cannot be so freely consented to. The paternalistic role of the state will see some activities as being contrary to public interest and against public policy. Such restrictions on individual liberty are necessary to maintain a modicum of social order. If the harmful effects of any activity are viewed to outweigh the associated benefits, the state will choose not to recognise any consent given. By taking such a stance the state forces individuals, whether on the sportsfield or not, to consider whether society will approve of their proposed course of action.

In analysing the scope of player consent to violence that occurs in the sports arena, and in recognising that there is a definite limit to what a player does and can consent to, the need to formulate a workable test for sports violence prosecutions is

201 Williams, "Consent and Public Policy" [1962] Crim LR 74, 80.

202 Leigh, "Sadomasochism, Consent: Law Reform" [1976] 39 Mod Law Rev 130, 138.

apparent. The *Bradshaw*, *Coney*, and *Moore* trilogy laid the foundation for such a test, and modern case law has been effective in furthering the task.

The *Cey* test, the safety rule test, and the notion of *sozialadaquanz* present the best alternatives for application of the criminal law to sports violence. But, it is the *Cey* test that best combines concern for player safety with ease of application in the courts. The limits of consent are established with reference to objective criteria and relevance to the circumstances in which the act occurred. By focusing on these factors the *Cey* test provides a workable formula on which to base criminal prosecution of serious sports violence.

In applying such a test there is a definite role for private sports tribunals. It is here that the author thinks the Restatement (Second) of Torts test should operate. It seems clear that although the safety rules of any sport are concerned with protecting participants from injury, not all violations of safety rules warrant the wrath of the criminal law. Therefore, for minor infractions of such rules, discipline should be left up to the sports governing body. Only upon a major breach of conduct should a player be accountable before a court of law.

The benefit of an internal influence upon discipline in sport is that the sports body has knowledge of what a player commonly consents to. In addition players receive quick and certain punishment, and unnecessary prosecutions are avoided. Therefore, in situations where the state views player consent to be exceeded the *Cey* test will be used to prosecute the offender. And with such a system in place the criminal law will intrude into the realm of sport only as much as is necessary to punish major infractions of the sport's rules and society's interest.

Having established limits to consent on the sportsfield, it is possible to compare them with limits to consent in sexual activity in the home. Sadomasochism is concerned not only with sex but with violence. The question is whether a concession to individual liberty should be made as in the case of body piercing.

Cultural practices such as female circumcision reflect differences in perception of what can and cannot be the subject of consent.²⁰³ Often the evolution of current thinking will lead to a practice, for example, acupuncture, receiving general acceptance by the populace.

It is clear that the House of Lords viewed sadomasochism as being contrary to public interest, and therefore declined to acknowledge consent to the intentional infliction of bodily injury. It is in light of this decision that an interesting parallel can be drawn with the sport of boxing. While most sports teach and foster discipline, teamwork, leadership, co-operation and sportsmanship, they do not exhibit the intent to inflict bodily harm, although some may result. Professional boxing does possess such an intent, and while it is a traditional test of a participant's skill and strength it essentially fosters an intent to injure for money.

Thus, in professional boxing the intent is to inflict and receive injury for money, and in sadomasochism the intent is to inflict and receive pain and suffering

203 It is, of course, questionable whether the young women can be said, on any definition, to consent.

for sexual pleasure. We choose to view participants in sadomasochistic activities as perverted and depraved, yet why are spectators at a boxing match not seen as so? In *R v Coney*, the spectators were said to be guilty of aiding and abetting the crime of prizefighting. Is the modern sport of professional boxing so different? The author thinks not.

Thus, although public policy and state paternalism justifies the nonrecognition of consent to sadomasochism, it is also justified in allowing society to enjoy the benefits of playing and watching competitive sport. A line needs to be drawn as to the level of violence allowed in these sports, and as such the legality of professional boxing in modern society is dubious.