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**THE INTERACTION BETWEEN THE CRIMINAL
LAW AND NON-CONTACT SPORTS. A LOOK AT
CONCURRENT JURISDICTIONAL ISSUES AND
THE DEFENCE OF IMPLIED CONSENT**

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Abstract

This paper explores when the criminal law should intervene in cases of non-contact sporting violence. The relationship between the criminal law and sporting bodies will be discussed. Sporting bodies can punish effectively. However, there are concerns surrounding the fairness of these punishments because of their commercial nature. The criminal law should intervene when it offers a more effective punishment. Once it has been established that the criminal law should intervene, this paper will explore the defence of implied consent. This paper recommends a test that looks at all of the circumstances of the action, taken from the Canadian case of Cey. This test balances the flexibility and uncertainty issues as well as complying with the New Zealand law relating to consent. This paper then explores when the defence should be removed when there is intentional infliction of harm. Due to the high public policy concerns, the defence should be removed in the majority of the instances of intentionally inflicted harm and always when grievously bodily harm is intentionally inflicted.

Key words

Consent; Concurrent jurisdiction; Intentional infliction of harm; Assault; Sport

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I Introduction

A favourite pastime of many New Zealanders is sport.¹ This includes sports that fall into the broad category of non-contact sport.² It may seem like the criminal law and sport never interact. However, the criminal law does not stop because someone has stepped onto the sports field.³ The criminal law and sport interact when there is sporting violence. The criminal law will intervene and punish participants when there is sporting violence in non-contact sports. Though, the criminal law will not intervene in every case of non-contact sporting violence. As sporting bodies are able to punish the acts of violence, it is important to discuss when the criminal law should intervene and attempt to punish offenders. Even though the criminal law has intervened, it cannot automatically punish participants. The participants may still have the defence of implied consent available. It is essential to clarify the law surrounding implied consent in New Zealand, for both mere bodily harm and the intentional infliction of harm, which is greater than mere bodily harm, in non-contact sports.

Historically, sport has been offered special treatment by the criminal law,⁴ with the criminal law not intervening in cases of sporting violence. There are growing calls, however, that the criminal law needs to intervene when violence occurs on the sports field.⁵ If the criminal law is to intervene in cases of non-contact sporting violence, it needs to ensure that there are no other mechanisms, such as sporting bodies, available to punish players effectively. If sporting bodies are allowed to maintain an ability to punish players, this may have undue effects on amateur players. It is important to ascertain whether these effects are fair and justifiable.

¹ According to Statistics New Zealand, 79 percent of adult New Zealander's participate in sport-related activity every month see Statistics New Zealand "Kiwis' participation in cultural and recreational activities" (21 February 2018) <www.stats.govt.nz>.

² Non-contact sports are sports where the players are physically separated in an effort to make it virtually impossible to make physical contact during the event see Segen's Medical Dictionary "Non Contact Sport" (2012) The Free Dictionary <www.thefreedictionary.com>.

³ *R v Maki* [1970] 3 OR 780 at [13].

⁴ Anneliese Nelson "When, where and why does the State intervene in Sport: a contemporary perspective" (1 July 2005) Sports Law eJournal <<https://epublications.bond.edu.au>> at 1.

⁵ Ben Livings "Sports violence, "concurrent jurisdiction" and the decision to bring a criminal prosecution" (2018) 6 Crim LR 430 at 433.

When the criminal law intervenes, it may only punish offenders if they have no defence to the charge of assault. A defence available, merely found by playing the sport, is the defence of implied consent. It is essential to find the limits of this defence in New Zealand, relating to non-contact sporting violence. Various tests will be discussed from overseas jurisdictions to find the test best suited in New Zealand. This test will then be evaluated, against the other tests, to see whether it can be improved to fit the New Zealand context better.

When the harm is more than mere bodily harm, the defence of consent may not apply to every act of violence on the sports field. Public policy concerns may cause the removal of the defence when there is intentional infliction of harm. The public policy concerns must override the social utility of the action and the personal autonomy of the participant to remove the defence.⁶ These factors will be discussed in the context of non-contact sporting violence to determine the level where the defence cannot survive because the public policy concerns are so significant they outweigh the other factors.

II Concurrent Jurisdiction of Sporting Bodies and the Criminal Law

Sporting bodies often have rules and regulations surrounding violence occurring during play. Similarly, the criminal law deals with violence that occurs through criminal sanctions. These bodies may try to work independently of the other to punish offenders individually, or not at all. However, to punish these acts effectively and efficiently the two bodies should work together. This section looks at the reasoning behind that conclusion and the impacts this will have on amateur and professional players.

A Can Sporting Bodies Punish Players Effectively?

Sporting bodies often have their own disciplinary procedures. Sporting bodies are better at deterring and punishing violent play because of the speed, consistency and fairness of the internal regime.⁷ Due to this, in the vast majority of situations, it is undesirable for the criminal law to interfere with the sporting body's procedures.⁸

Foreign jurisdictions limit criminal punishment when it deems that the sporting body's punishment was adequate. There was a reduction in the punishment in *Mayer*,⁹ and a refusal

⁶ *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445, (2015) 28 CRNZ 216 at [50(d)].

⁷ Livings "Sports violence", above n 5, at 442.

⁸ *R v Barnes* [2004] EWCA Crim 3246, [2005] 1 Cr App R 30 at 509.

⁹ *R v Mayer* [1985] 41 Man R (2d) 73 at [21].

to grant exemplary damages because of the sporting body's punishment in *Rogers v Bugden*.¹⁰ When the punishment is not adequate, such as an unsatisfactory suspension, then the criminal law will intervene as was the case in *Chapman*.¹¹ New Zealand already limits criminal punishment because the offender faced a punishment external to the criminal law system, such as losing employment.¹² Due to this, New Zealand courts also would likely limit sentences based on the external punishments given by a sporting body.

Sporting bodies are better placed to punish players because of their expertise and competence to police the limits of acceptable violence.¹³ They can induce evidence that would be inadmissible at trial while maintaining a lower standard of proof.¹⁴ Sporting bodies are often better placed to punish offenders. They can punish for a wider variety of actions than the criminal law because of the availability of a broader range of evidence. Furthermore, criminal prosecutions should generally be avoided as the criminal law is not always well-equipped to adjudicate on sporting violence.¹⁵

The criminal law does not stop because someone has stepped on the sports field, however.¹⁶ Sporting bodies cannot effectively punish every action on a sports field, as can be seen in *Chapman* where the suspension was deemed inadequate.¹⁷ The criminal law exists as a mechanism to protect society¹⁸ and should be treated as such. If sporting bodies were allowed to punish offenders exclusively, then issues arise of fairness and neutrality.¹⁹ Priority must be given to the criminal law when deciding to punish offenders. While in certain cases this may not be appropriate, as the sporting body can effectively punish the offender, they should not have full jurisdiction over sporting violence.

¹⁰ *Rogers v Bugden* (Unreported, 14 February 1990) NSW Supreme Court.

¹¹ *R v Chapman* [2010] (unreported) Crown Court (Warwick).

¹² *Inland Revenue Department v Song* HC Wellington CRI-2008-485-158, 10 February 2009 at [12].

¹³ Livings "Sports violence", above n 5, at 431.

¹⁴ Livings "Sports violence", above n 5, at 441.

¹⁵ Livings "Sports violence", above n 5, at 432.

¹⁶ *R v Maki*, above n 3, at [13].

¹⁷ *R v Chapman*, above n 11.

¹⁸ Albert Levitt "Some Societal Aspects of the Criminal Law" (1922) 13 JCLC 90 at 93.

¹⁹ *R v McSorley* 2000 BCPC 116, [2000] BCJ No 199 at [12].

B When Should the Bodies Remain Separate and When Should they Interact?

Allowing the sporting body's punishment to supersede the criminal law's punishment creates serious issues. The bodies are often commercial entities and have no obligation to work in the public interest.²⁰ These bodies can manipulate their proceedings to focus more on their commercial interests rather than fairness. The lack of fairness can negatively affect sportspeople when the commercial interests force the sporting body to excessively punish offenders.

For example, the Australian cricketers, who were found guilty of ball-tampering, were banned for one match by the international body. The ban pales in comparison to the national sporting body's 12-month suspension, which was brought about by the public and media outrage at the original ban.²¹ The potential financial ramifications if the national body did not act would have been huge, with existing sponsors threatening to stop sponsoring the sport if the incident was not dealt with appropriately.²² The inability to ignore commercial interests raises important issues of procedural fairness. This issue clearly shows that it may be in the public interest to allow courts to interfere in order to protect athletes from unfair sentences. They should not allow bodies that often have a greater desire to protect their image, rather than being fair,²³ to entirely dictate punishments.

There are concerns that the criminal system is effectively delegating responsibility for trying and punishing offenders to sporting bodies.²⁴ Sporting bodies are effectively becoming a "law unto themselves",²⁵ and the criminal law needs to intervene more to stop this. This argument is in contrast with the argument that the criminal law should only intervene in exceptional cases because of the conduct of the participants is best judged by tribunals with

²⁰ *McSorley*, above n 19, at [12].

²¹ Ed Kemp "Ball-tampering: Why the public outrage & punishment have gone too far" (27 March 2018) Wisden <www.wisden.com>.

²² Darren Gray "'A shameful moment for Australian sport': Cricket sponsors hit out" *The Sydney Morning Herald* (online ed, Sydney, 26 March 2018).

²³ Livings "Sports violence", above n 5, at 443.

²⁴ Ben Livings "'Legitimate sport' or criminal assault? What are the roles of the rules and the rulemakers in determining criminal liability for violence on the sports field?" (2006) 70(6) *Journal of Criminal Law* 495 at 502.

²⁵ Livings "Legitimate sport", above n 24, at 504.

specialist knowledge of the realities of the particular sport.²⁶ The best solution is reconciling these beliefs. The criminal law should not intervene when the sporting body can effectively punish the offender. Sporting bodies should be the dominant system unless the punishment they offer is ineffective.

These beliefs were successfully reconciled in England between the Crown Prosecution Service and the English Football Association.²⁷ The agreement states that the sporting body's disciplinary functions will be respected. The sporting body will maintain priority when it offers a more effective punishment than the criminal law.²⁸ However, when this is no longer the case, the criminal law will intervene and can suspend the sporting body's disciplinary functions to avoid any interference.²⁹ Whether the criminal law should intervene should be decided on the facts, though there is a non-exhaustive list of factors which guide these decisions.³⁰ This system is desirable, and New Zealand should adopt it. It provides for a "fair and efficient" system of justice³¹ which allows both bodies to work together to ensure that all actions are punished effectively, without overburdening either party.

This system also protects players from over-punishment. The criminal law can protect players from the overly harsh sentences by suspending the sporting body's functions. The criminal law would still punish the player, but it would be a more suitable punishment than that offered by the sporting body.

A primary concern of the system in England is how it unfairly deals with amateur players. It creates an implicit preference for sporting bodies to deal with professional players and criminal prosecution for amateur players.³² This implicit preference creates a divide between the two sets of players. This system should only be proposed to be adopted in New Zealand if the divide is fair and reasonable.

²⁶ Tom Brennan "The Law Regulating Violence In Sport Is Inconsistent, Ill-Equipped And In Need Of Reform" (April 2014) Student Journal of Law < <https://sites.google.com/site/349924e64e68f035>>.

Joanna K "Decriminalising Sporting Tackles" (2005) 42 New Law Journal 155.

²⁷ Livings "Sports violence", above n 5, at 430–431.

²⁸ Crown Prosecution Service "Agreement on the Handling of Incidents Falling under both Criminal and Football Regulatory Jurisdiction" (2 September 2015) <www.cps.gov.uk> at 2.

²⁹ At 3.

³⁰ At 3–4.

³¹ At 3.

³² Livings "Sports violence", above n 5, at 447.

C Amateur vs Professional Players

Professional players are much more likely to respond to a financial punishment issued than an amateur player.³³ Furthermore, there are resourcing issues in amateur sports³⁴ which creates an issue for sporting bodies to punish the behaviour effectively. In amateur games, there are often no trained referees and a weaker understanding of what is allowable. It becomes nearly impossible to accurately work out the seriousness of the breach in the amateur game. Sporting bodies would face a massive financial hurdle if they attempted to investigate every act of sporting violence that occurred while people played the specific sport. The criminal law, with much greater powers of investigation, is better placed to investigate in unsanctioned amateur games.

Amateur players do not have the same ability to access an appropriate disciplinary process.³⁵ Sporting bodies often have no effective control, nor any power, to impose disciplinary sanctions against amateur players.³⁶ Sporting bodies can not control amateur players in the same way they can control professionals, which rely on the sport for their livelihood. While amateur players may feel disproportionately targeted, often the actions that sporting bodies punish professional players for would not make it to the courtroom.³⁷ Thus, while the criminal courts disproportionately punish amateur players, amateur players are not being punished for as many actions as professionals.

There is a clear divide between amateur and professional players. However, this divide is fair and rational. Without the ability to effectively control amateur players, sporting bodies cannot effectively punish amateur players for every breach. Without increasing the resources offered to every amateur game, sporting bodies cannot investigate every violent action. The divide is fair and reasonable, and as such, New Zealand should adopt a system where the criminal courts will intervene when the punishment given by the sporting body is ineffective.

³³ Livings “Sports violence”, above n 5, at 447–448.

³⁴ Livings “Sports violence”, above n 5, at 448.

³⁵ Livings “Legitimate sport”, above n 24, at 505.

³⁶ Simon Gardiner, “Sports Participation and Criminal Liability” (2007) 15 *Sport and the Law Journal* 19 at 21.

³⁷ Livings “Legitimate sport”, above n 24, at 505.

D Conclusions

The criminal law cannot allow sporting fields to become a law unto themselves. While courts should be wary of interfering too often, when the punishment by the sporting body is ineffective the courts should intervene and hand out an effective punishment. While this system appears to affect amateur players adversely, the divide between amateur and professional players is grounded in the practical realities of each level of sport. The criminal law should intervene when the sporting body's punishment is not effective or appropriate.

In cases of sporting violence, when the criminal law has intervened, the defence of consent can apply. Participants impliedly consent to specific assaults when they occur in sport.³⁸ There is a lack of judicial authority on this defence in New Zealand. Thus, this paper will explore various tests used to determine the level of implied consent and work out what the best test is for non-contact sports in New Zealand. First, it is useful to discuss the general law of consent in New Zealand.

III New Zealand Law

A The Law on Consent

The New Zealand Supreme Court, in *Ah-Chong v R*,³⁹ identified and laid out the defence of consent. Justice Arnold set out the relevant points of the defence:⁴⁰

- (a) The common law position in relation to consent is preserved by s 20 of the Crimes Act, except to the extent that consent is dealt with specifically in particular statutory provisions.
- (b) Where consent is available as a defence, an honest but mistaken belief by the perpetrator in consent will also provide a defence. The mistaken belief need not be reasonable.
- (c) Consent can be a defence to an assault where no serious injury is intended and caused except in the case of fighting.

³⁸ *Attorney-General's Reference (No 6 of 1980)* [1981] 1 QB 715 at 719.

³⁹ *Ah-Chong*, above n 6.

⁴⁰ *Ah-Chong*, above n 6, at [50].

- (d) In relation to intentional infliction of harm that is greater than “mere bodily harm”, consent may be a defence unless:
- (i) there are good public policy reasons to forbid it; and
 - (ii) those policy reasons outweigh the social utility of the activity in question and the value that society places on personal autonomy.
- (e) Where grievous bodily harm is intended, it will be rare for a court to accept that consent is available as a defence. It will be different where an activity (a contact sport, for example) involves the *risk* of serious injury. In such cases, a court is more likely to accept that consent is available, ie, that participants consent to run the risk of serious injury.

Consent can be implied or express.⁴¹ Because the actions must fall within the scope of the consent, the defence is often limited to minor harms and reasonable risks.⁴²

The defence of consent encompasses express consent, implied consent⁴³ and the honest belief of consent.⁴⁴ In a sporting context, there will often be no express consent given, limiting the defence of consent to implied and honest belief of consent. As an honest belief of consent is an entirely subjective matter, the test proposed will mainly focus on implied consent.

Public policy concerns can cause the removal of the defence when more than mere bodily harm is intended and caused. The removal of the defence because of public policy concerns is subject to the social utility of the activity and the personal autonomy of choosing the risk.⁴⁵ The defence can also be removed when there is reckless disregard for the safety of others.⁴⁶

B General Law

The Crimes Act 1961 defines assault as intentionally applying, attempting to apply, or threatening to apply force to another directly, or indirectly.⁴⁷ Assaults range in seriousness;

⁴¹ *R v Lee* [2006] 3 NZLR 42, (2006) 22 CRNZ 568 at [262].

⁴² *R v Barker* [2009] NZCA 186, [2010] 1 NZLR 235, (2009) 24 CRNZ 308 at [61].

⁴³ *Ah-Chong*, above n 6, at [51].

⁴⁴ *Ah-Chong*, above n 6, at [52].

⁴⁵ *Lee*, above n 41, at [316].

⁴⁶ *Lee*, above n 41, at [314].

⁴⁷ Crimes Act 1961, s 2.

from common assault,⁴⁸ to wounding with intent,⁴⁹ to an element of a murder charge.⁵⁰ Depending on the level of intention and harm, sporting violence can fall under any of the charges relating to assaults.

It is well established that the defence of consent may apply when the action occurred in a properly conducted lawful game or sport.⁵¹ However, this is not an absolute defence as there are prosecutions relating to sporting violence on the sports field.⁵² Just because an action occurs on a sports field it does not mean that the defence will automatically apply.

While an honest belief of consent need not be a reasonable belief, the reasonableness of the belief will go towards establishing whether the belief was honest or not.⁵³ Any test relating to implied consent should also enable a fact-finder to determine whether the belief in consent was reasonable. This test should be practical and understandable to both a fact-finder and an ordinary sportsperson. With these criteria in mind, the tests used and discussed in other jurisdictions will be evaluated to see whether they can fit within New Zealand's wide-ranging defence of consent, with relation to violence occurring in non-contact sports.

IV Implied Consent Tests

A factual scenario will be used as a starting point to evaluate what the best test for New Zealand. If the test cannot adapt to the fact scenario, then the test is inappropriate in the New Zealand context. For example, consider a basketball game where one player elbowed another player in the face. The situations surrounding this elbow will change, such as the severity of the action and when it occurs, in order to expose flaws in the forthcoming tests. Basketball is an appropriate sport in this context as it is a popular sport in New Zealand⁵⁴ and has been

⁴⁸ See Crimes Act, s 196 and Summary Offences Act 1981, s 9.

⁴⁹ Crimes Act, s 188.

⁵⁰ Crimes Act, s 167.

⁵¹ *Attorney-General's Reference*, above n 38, at 719.

⁵² See *Crichton v Police* HC Christchurch AP382/92, 17 December 1992; *R v Tevaga* [1991] 1 NZLR 296 (CA); and *Vaeno v Police* HC Auckland A266/87, 18 February 1988.

⁵³ *R v Nazif* [1987] 2 NZLR 122 (CA) at 128.

⁵⁴ In 2017 over 25,000 secondary school students played basketball and was the sport with the highest growth rate over the previous five years see Basketball New Zealand "Census Shows Basketball to Become NZ's Most Popular Secondary Schools Sport by 2020" (8 February 2018) < <http://www.nz.basketball>>.

considered a non-contact sport,⁵⁵ despite the physical contact that often occurs in the sport. Furthermore, to be considered the best fit within the New Zealand context the test needs to comply with the law as stated in *Ah-Chong* and be compatible with non-contact sports. The test cannot be a results-based test.⁵⁶ Furthermore, the test must be flexible enough to adapt to all manners of sports and abilities but not be so flexible as to leave sportspeople uncertain of when their actions will cross the threshold leading to a conviction of assault. While this test applies to all levels of harm if the harm was more than mere bodily harm the defence may be removed.⁵⁷

This section will discuss the appropriateness of overseas tests. The tests fall under three broad categories: within the circumstances of the sport, on the ball contact and dangerous activities. Each test within these categories will be discussed to determine whether they are the most appropriate test for non-contact sporting violence in New Zealand.

A *Within the Circumstances of the Sports Tests*

This heading has been adapted and used to form many different tests in multiple jurisdictions. At the heart of the following tests is the English case of *Bradshaw*.⁵⁸ This case found that if someone was playing within the rules and practices of the game, it was reasonable to infer that it was not a criminal act.⁵⁹ However, it is clear that the mere fact that the action occurred within a sport is not enough to exempt the act from criminal prosecution.⁶⁰ The following tests pinpoint the position where the actions are no longer protected by merely playing a sport and will start to constitute a criminal act.

⁵⁵ Dolf Zillmann, Rolland C Johnson and Kenneth D Day “Provoked and unprovoked aggressiveness in athletes” (1974) 8(2) *Journal of Research in Personality* 139 at 142.

⁵⁶ *Lee*, above n 41, at [291].

⁵⁷ *Ah-Chong*, above n 6, at [50(d)].

⁵⁸ *R v Bradshaw* (1878) 14 Cox CC 83.

⁵⁹ At 83–84.

⁶⁰ *R v Maki*, above n 3, at [13].

1. *Objective criteria relating to the circumstances (the Cey test)*

The Saskatchewan Court of Appeal gave a leading judgment on implied consent in sport in the case of *R v Cey*.⁶¹ While this is a case relating to a full-contact sport, it provides the basis for the test in Canada when the harm occurred in a non-contact sport.⁶²

Before this case, there was a large grey area in the law of Canada. The grey area was any action between those actions which form part of the rules and accepted standards of the game, which the defence covered,⁶³ and actions which were so violent that someone could not impliedly consent to the action.⁶⁴ The defence in New Zealand can only be removed on public policy grounds,⁶⁵ unlike in Canada where the defence will be removed if the actions are so violent that it “would be perverse” to find implied consent.⁶⁶ The grey area in New Zealand is between the actions under the rules and accepted standards and the acts where public policy deems that the defence should be removed. *Cey* attempted to remove the grey area by introducing an objective criteria test which pays due regard to all the circumstances of the particular game. The *Cey* test looked at the following factors:⁶⁷

The conditions under which the game in question is played, the nature of the act which forms the subject matter of the charge, the extent of the force employed, the degree of risk of injury, and the probabilities of serious harm are, of course, all matters of fact to be determined with reference to the whole of the circumstances.

This test is an incredibly flexible test which can adapt to many different situations within a particular game. Regardless of the context surrounding the basketball scenario above this test can apply, as the circumstances element will adapt to whatever circumstances surround the elbow. As the whole of the circumstances element determines the level of implied consent, the test can adapt and apply to any fact scenario.

⁶¹ *R v Cey* (1989) 48 CCC (3d) 480, [1989] 5 WWR 169 (CAsask).

⁶² See *R v Leclerc* (1991) 67 CCC (3d) 563, (1991) 4 OR (3d) 788 (ONCA); *R v Krzysztofik* (1992) 16 WCB (2d) 7, 79 Man R (2d) 234.

⁶³ *Cey*, above n 61, at [24].

⁶⁴ *Cey*, above n 61, at [25].

⁶⁵ *Lee*, above n 41, at [316].

⁶⁶ *Cey*, above n 61, at [25].

⁶⁷ At [32].

However, this flexibility creates a level of uncertainty where sportspeople are unable to ascertain the levels in the particular game. There is increased uncertainty due to the uniform approach to the level of implied consent in a game,⁶⁸ especially when the uniform level of implied consent differs from what the player believes the limits are. The honest belief of consent defence can mitigate this issue. This defence enables a participant if they honestly believe that their act was consented to, to escape a charge of assault. However, if the participant is unsure about whether the other participant will consent to the action taking place, the defence of honest belief of consent cannot apply. If there is doubt in the mind of the participant, the belief was not honestly held, and the defence will not apply.

The uncertainty issue is inescapable if the test is to be flexible, as the test has to be broad in order to encompass a wide variety of sports. Flexibility must trump uncertainty as it is imperative that the test applies to every sport, as long as the level of uncertainty is not so great as to leave participants unsure about whether any action is consented to or not. As this is not the case in this test, the issue of uncertainty is minor compared to the benefits gained by the flexibility of the test.

There is criticism that the test neglects non-contact sports.⁶⁹ However, the addition of a criterion relating to whether the rules contemplated contact or not placates this issue.⁷⁰ This criterion is not determinative of whether there is implied consent but merely a relevant factor when determining all the circumstances of the game.⁷¹

There is likely a lower level of implied consent for amateur players compared to professional players. Amateur sports often lack trained referees and high-end protective equipment. Thus, professional players may consent to more assaultive behaviour.⁷² The differing level of implied consent can add uncertainty, as amateur players may act in the same manner as professional players despite having a lower level. However, this issue can be entirely mitigated by the honest belief defence as if participants honestly believe they can act the same way as professionals then they can still be covered by the defence.

⁶⁸ *Cey*, above n 61, at [28].

⁶⁹ James Mountier “What Happens on the Field Stays on the Field: When Should the Criminal Law be Employed for Assaults During Sport” (LLB (Hons) Dissertation, University of Otago, 2012) at 11.

⁷⁰ *Leclerc*, above n 62, at [22].

⁷¹ *Krzysztofik*, above n 62, at [10].

⁷² *R v St Croix* 1979 CarswellOnt 1483, 47 CCC (2d) 122 at [6].

Despite these potential limitations, this test has found favour in Canada in both contact and non-contact sporting violence cases.⁷³ The test is flexible and is not a results-based test. The benefits of the flexibility and the ability to mitigate the issue of uncertainty, through the honest belief defence, outweigh the concerns relating to uncertainty. This test is a test that fits well within the New Zealand context. This test should apply in New Zealand for non-contact sports. The other tests should still be examined to see whether they can add to this test, or be considered more appropriate.

2. *The action was incidental to the sport*

This test has its basis in public policy. There was a public interest in ensuring that sports were not be interfered with when the infliction of injury is merely incidental to the purpose of the primary activity.⁷⁴ This idea was later expanded to look at the type of sport and the particular classification of play within the various levels of sport.⁷⁵

This test is more specific than the *Cey* test. This test focuses on actions which are reasonably incidental to, and inherent in, the regular playing of the particular sport,⁷⁶ rather than looking at all of the circumstances of the particular game. This test merely states that if the actions are reasonably incidental to the sport, regardless of any other circumstances, the defence of implied consent applies.⁷⁷ The *Cey* test looks at all of the circumstances, including whether the action was reasonably incidental to the sport,⁷⁸ before determining the level of implied consent.

The specificity of this test creates issues when applied to actual scenarios. Using the basketball example, an elbow which was deliberately thrown to inflict mere bodily harm will be impliedly consented to if the action was part of competing for the ball. As competing for the ball is incidental to basketball, the defence of implied consent applies. This is wrong. Players should not be allowed to use the sports field to commit deliberate assaults contrary to the rules of the game. Allowing this would mean the sports field would become lawless

⁷³ For example, see *R v Ciccarelli* [1989] OJ No 2388, 54 CCC (3d) 121, 9 WCB (2d) 402 at [18]; *R v Leclerc*, above n 62, at [25].

⁷⁴ *R v Coney* (1882) 8 QBD 534 at 539.

⁷⁵ *Mayer*, above n 9, at [9].

⁷⁶ *R v Maloney* (1976) 28 CCC (2d) 323 at [10].

⁷⁷ *Mayer*, above n 9, at [9].

⁷⁸ *Cey*, above n 61, at [25].

which is unacceptable.⁷⁹ This test, in isolation, cannot be allowed because of this practical concern.

This test allows a fact-finder to decide whether the action was within the scope of consent. It would be rare to impliedly consent to an action that was not reasonably incidental to the sport. However, the defence of implied consent does not automatically apply merely because the actions are reasonably incidental to the sport. For example, despite being reasonably incidental to the sport, slide tackles in football have been criminally prosecuted.⁸⁰ There are serious concerns if this test was to be used in isolation.

Fortunately, this test does not have to be an isolated test. Adding this test as an element in the *Cey* test would alleviate the practical concerns that arise when it used in isolation. The broader *Cey* test includes elements such as the force used, which would apply to the deliberate assaults this test allows. The more extensive *Cey* test, including the element of whether the action was reasonably incidental to the sport, is a much better test to use in New Zealand.

3. *Whether the actions were part of a legitimate sport*

This test, from the judgment in *Barnes*,⁸¹ forms the basis of the English jurisdiction about implied consent in sport. Implied consent will likely be no defence when the action goes beyond “what a player can reasonably be regarded as having accepted by taking part in the sport”.⁸² When the risk-taking is unreasonable, with respect to the conduct needed to play the game, causes injury then the action should be actionable in court.⁸³ Overall, the test asks whether the actions were done as part of a legitimate sport.⁸⁴

This test is similar to the test advanced in *Cey*. Despite the lack of references in *Barnes*, there is an assumption that that Lord Wolf was guided by *Cey* when creating the test put

⁷⁹ *R v Watson* [1975] OJ No 2681, 26 CCC (2d) 150 at [22].

⁸⁰ *R v Chapman*, above n 11.

⁸¹ *R v Barnes*, above n 8.

⁸² At 509.

⁸³ At 512.

⁸⁴ At 515.

forth in *Barnes*.⁸⁵ Academics welcomed the supposed use of *Cey* to guide the judgment.⁸⁶ This implies that the principles guiding the two tests are the same. Due to this similarity, the two tests will face the same problems regarding the lack of certainty.

While the principles of this test are similar to those in *Cey*, this test faces additional problems. Due to the lack of definition of legitimate sport,⁸⁷ this judgment leaves the law surrounding violence in sports in an unclear state.⁸⁸ The lack of clarity combined with the uncertainty already existing in the similar *Cey* test creates an exceptionally high level of uncertainty. This element adds little flexibility to compensate for the increased uncertainty. The element of legitimate sport, being undefined, is not helpful in determining a test for New Zealand.

With the removal of the element of legitimate sport, the test proposed in *Barnes* is nearly identical to the test proposed in *Cey*, just with some different language. However, the updated language does little to quell the uncertainty issue surrounding the test, especially when compared to the relatively certain *Cey* test. Due to the increased uncertainty, coupled with the lack of increased flexibility, New Zealand should not adopt the legitimate sport test.

4. *The action occurred outside the unwritten code of conduct*

This test stems from the case of *McSorley*.⁸⁹ The scope of implied consent in sport includes an unwritten code, superimposed on the rules,⁹⁰ as well as guidelines that referees create unique to the game scenario.⁹¹ The unwritten code, guidelines and the written rules must be taken into account when deciding whether the actions were within the scope of the implied consent.⁹²

⁸⁵ Brennan, above n 26.

⁸⁶ A Pendlebury "Perceptions of Playing Culture in Sport: The Problem of Diverse Opinion in the Light of *Barnes*" (2006) 4(2) *ESL Journal* 5 at [7].

⁸⁷ Ben Proctor "When should criminal liability be attached to harmful challenges in football?" (January 2012) *The Student Journal of Law* <<https://sites.google.com/site/349924e64e68f035>>.

⁸⁸ Proctor, above n 87.

⁸⁹ *McSorley*, above n 19.

⁹⁰ At [18].

⁹¹ At [22].

⁹² At [24].

What this test seeks to do is expand and clarify the *Cey* test's element of the whole of the circumstance's element. *McSorley* expressly endorses the *Cey* test as correct in law⁹³ and applicable to the facts.⁹⁴ The unwritten code element has received legal backing as part of, and thus subject to, the more extensive *Cey* test.⁹⁵

This test cannot act independently of the more extensive *Cey* test. In the basketball example, suppose that elbowing was allowed under the unwritten code. Further, suppose the player that was elbowed was coming back from a head injury and had expressly asked the other team to stop elbowing when she was on the court in order to avoid further injury. It is clear that there is a high risk of serious harm. Despite this, anyone that elbowed her could claim the defence of implied consent as it was part of the unwritten code. Using a more extensive inquiry, such as the *Cey* test, these actions could not be held to be impliedly consented to, as the circumstances indicate the opposing team knew of the risk of injury and probability of serious harm, which forms part of the *Cey* test.⁹⁶ It would be contrary to the purpose of the criminal law system, which is to protect citizens,⁹⁷ to allow serious harm to occur, despite the opposing team knowing the seriousness of the risk and the player refusing to expressly consent to the harm, when the actions fall foul of the rules of the sport.

A breach of the guidelines is often, in itself, not enough to override the implied consent of a player.⁹⁸ There are many actions which breach the rules that are not considered assaults. For example, bowling a ball at someone's upper body without the ball bouncing, in cricket is a breach of the guidelines and is punishable by the umpire.⁹⁹ However, this often occurs in a cricket game and is considered an unfortunate part of the game. While it does breach the guidelines, it is unlikely ever to be considered criminal.

⁹³ At [69].

⁹⁴ At [71].

⁹⁵ See *R v Adamiec* 2013 MBQB 246, [2014] 2 WWR 817, 297 Man R (2d) 92 at [31]; *R v TBN* 2009 BCPC 117, [2009] BCWLD 4105, [2009] BCJ No 708 at [29].

⁹⁶ *Cey*, above n 61, at [32].

⁹⁷ Levitt, above n 18, at 93.

⁹⁸ *TBN*, above n 95, at [29]–[50].

⁹⁹ Marylebone Cricket Club “Law 41 – Unfair Play” (2017) Lords The Home of Cricket <www.lords.org> at [41.7].

The unwritten code is only useful as a clarifying element in the *Cey* test. The unwritten code should be included in addition to the *Cey* test in the New Zealand context, as it adds clarity and flexibility to the test.

5. *Whether the actions occurred within the playing culture of the sport*

This test states that no conduct is actionable when it falls within the playing culture of the sport. This test takes into account all of the relevant circumstances of the sport, including the level of ability of the players.¹⁰⁰ While this test seems similar to the *Cey* test, it has some crucial differences that make it an inferior choice in the New Zealand context.

There is a higher level of uncertainty in this test than in the *Cey* test. The term “playing culture” has caused confusion. Academics disagree on even the simplest part of the test, whether it has the rules as its starting point¹⁰¹ or not.¹⁰² It is nearly impossible to fix the overbearing level of uncertainty this disagreement creates. The test’s level of flexibility cannot overcome this level of uncertainty. For this reason alone, it can be considered a worse version of the *Cey* test.

The uncertainty of this test is due to the entirely subjective nature of the test.¹⁰³ The *Cey* test can overcome the subjective nature of the unwritten code element, through the objective elements, and creates a level of certainty. Without any objective criteria, this test does offer great flexibility but lacks any semblance of certainty. This test does not balance certainty and flexibility nearly as well as the *Cey* test does.

Additionally, this test has found little favour in case law. The case of *Adamiec* uses the term “playing culture”.¹⁰⁴ However, it is clear that this term was used as a blanket term to describe the *Cey* test¹⁰⁵ and the addition of the *McSorley* unwritten code clarification.¹⁰⁶ A distinct playing culture test has received no legal backing. It has merely been used to describe an existing test.

¹⁰⁰ Livings “Legitimate sport”, above n 24, at 500.

¹⁰¹ Livings “Legitimate sport”, above n 24, at 501.

¹⁰² Proctor, above n 87.

¹⁰³ Proctor, above n 87.

¹⁰⁴ *Adamiec*, above n 95, at [30].

¹⁰⁵ At [36].

¹⁰⁶ At [31].

Due to the combination of factors this test is not a good test in the New Zealand context. The test is extremely uncertain and has little judicial backing. When compared to the *Cey* test, the playing culture test is worse in nearly every aspect.

6. *The action was a reasonably foreseeable hazard of the sport*

The reasonably foreseeably hazardous test is the test advanced in the United States of America. Any reasonably foreseeable incident of the sport is one which a participant impliedly consents to,¹⁰⁷ taking into account people's expectations and the circumstances of the game.¹⁰⁸ There will be implied consent when the contact is contemplated within the rules of the game, and it is incidental to the furtherance of the goals of that particular game.¹⁰⁹

This test is fundamentally flawed when applied to a non-contact scenario. In the basketball example, suppose the league was previously limited contact and had transitioned into a non-contact league. Assume that in regular basketball, it is a reasonably foreseeable hazard that someone may be elbowed in the face. Under this test, the participant impliedly consents to this action. This is despite the rule change enacted to protect participants because being elbowed remains a reasonably foreseeable hazard of the sport. It becomes impossible to alter the nature of the games,¹¹⁰ leaving the ruling body with no ability to adapt their rules to modify player behaviour.¹¹¹

Moreover, just because an act occurs with regularity, which makes it a foreseeable hazard, it does not mean that consent should automatically apply.¹¹² Using the basketball scenario above, suppose that elbowing someone in the face is a regular occurrence. There are incidents of elbowing which should be criminal, such as deliberately throwing elbows when the player was on the ground. Thus, while the action occurs regularly, it cannot be said that consent should automatically apply.

¹⁰⁷ *State v Floyd* 466 NW 2d 919 (Iowa Ct App 1990) at 923.

¹⁰⁸ *State v Shelley* 929 P 2d 489 (Wash Ct App 1997) at 493.

¹⁰⁹ *Shelley*, above n 108, at 491.

¹¹⁰ Jeffery Standen "The Manly Sports: The Problematic Use of Criminal Law to Regulate Sports Violence" (2009) 99 *Journal of Criminal Law and Criminology* 619 at 632.

¹¹¹ Standen, above n 110, at 631–632.

¹¹² *Cey*, above n 61, at [37].

The test is far too rigid and incompatible with non-contact sports. This test is inapplicable in New Zealand, because of the lack of flexibility and issues surrounding non-contact sports. This test cannot add any elements, because of these issues, to the superior *Cey* test.

7. Conclusion

The *Cey* test should be the dominant test in New Zealand. It should learn and adapt from other tests, including things such as the unwritten code and incidental to the sport elements, but at the core, it should be the whole of the circumstances test advanced in *Cey*. The test should be advanced due to the high flexibility and the relatively low uncertainty of the test.

There are other tests which do not have their roots in the rules and practices of the games. These tests will be discussed to determine whether they are better than the *Cey* test in the New Zealand context.

B Whether the Actions Occur Off the Ball or Not

There has been a test advanced that contact off the ball will be actionable, but any contact on the ball will not. The case of *Leyte* held that implied consent only extends to the actions of the player which are instinctive and closely related to the play.¹¹³ This test has also found favour in Australia where consent will not cover force used off the ball.¹¹⁴

However, this test also has been judicially discouraged. *Cey* expressly rejected this test¹¹⁵ in favour of a more comprehensive test. Furthermore, there is precedent in New Zealand where actions on the ball have been held to be an assault. A rugby league player was convicted of assault when he attacked another player on the ball.¹¹⁶

Furthermore, the test faces some serious practical problems. Using the basketball example, any elbow on the ball will be covered by the defence whereas any elbow off the ball will not. This distinction can lead to absurd consequences where an elbow that lightly brushed the face can be actionable and an elbow that was intentionally thrown to cause harm cannot merely because in the latter case the player was in possession off the ball whereas in the former they were not.

¹¹³ *R v Leyte* 1973 CarswellOnt 1098, 13 CCC (2d) 458 at [3].

¹¹⁴ David Lanham and others *Criminal Laws in Australia* (The Federation Press, Sydney, 2006) at 253.

¹¹⁵ *Cey*, above n 61, at [23].

¹¹⁶ *Crichton*, above n 52.

However, it is not to say that the test is worthless. It is useful as an element of the *Cey* test. A player is much less likely to have consented to an action when the play is off the ball¹¹⁷ compared to when the action is on the ball.¹¹⁸ There is judicial precedent in New Zealand which runs counter to this test as well as critical practical consequences if this test was to be independent. The *Cey* test proposed for New Zealand should include the element of whether the contact was on the ball or not.

C *When the Activity Itself is Dangerous*

This test states that if the contest endangers life, then it may be illegal.¹¹⁹ Contests are allowed as long as the sporting contest was reasonable and not dangerous.¹²⁰ This test focuses on the sport itself and not any specific action within the sport.

Nowadays, dangerous sports, including non-contact sports such as motor racing, are commonplace and generally accepted.¹²¹ Merely because of this reason the test is wholly unsuitable and should not be considered the primary test when looking at implied consent.

This test can provide a benchmark as to the limits of implied consent. When an action is inherently dangerous, such that there is a grave risk of harm out of all proportion to the purpose and nature of the activity,¹²² then it may be appropriate to remove the test on public policy grounds.¹²³ If an activity is dangerous, then the defence of implied consent cannot survive. Unless the activity is dangerous, the *Cey* test should determine the level of implied consent.

D *Conclusion*

The most appropriate test to use in New Zealand is the *Cey* test. While it should add other elements, including whether the contact occurred on the ball or not, it is the dominant test. This test applies to both implied consent and goes towards the reasonableness of the honest

¹¹⁷ *R v Henderson* [1976] 5 WWR 119 at 123–124.

¹¹⁸ *Mayer*, above n 9, at [7].

¹¹⁹ Beale “Consent in the Criminal Law” (1895) 8 HLR 317 at 324–325.

¹²⁰ *People v Fitzsimmons* 34 NYS 1102 (Ct Sessions 1895).

¹²¹ Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA63.15].

¹²² *Lee*, above n 41, at [271].

¹²³ *Lee*, above n 41, at [306].

belief, which is useful but not determinative of an honest belief of consent.¹²⁴ Thus, the *Cey* test should be the dominant test in New Zealand for actions which cause mere bodily harm.

V *Removing the Consent Defence From the Jury*

When the actions cause more than mere bodily harm, the judge can remove the defence of consent on public policy grounds. The removal of the defence will only occur if the public policy concerns outweigh the social value of the activity and the personal autonomy of the person consenting to the activity.¹²⁵ While virtually impossible to determine a single test which encompasses all sports and actions, it is useful to discuss areas where the defence cannot survive and reasons why a judge may withdraw the defence.

A *The Public Policy Reasons to Withdraw the Defence*

Public policy concerns depend on factual findings relating to the intentional infliction of harm or reckless disregard for safety.¹²⁶ The rationality of any belief in consent may be taken into account when looking at the public policy concerns.¹²⁷ These factors imply that, in non-contact sports, the participants will often consent to the risk of what naturally occurs in the sport, and thus covered by the *Cey* test, and not specific incidents of harm.

Participants involved in activities with health and social benefits, such as non-contact sports, impliedly consent to some level of harm.¹²⁸ However, there are growing concerns about the risks and harms in sport, especially relating to head injuries.¹²⁹ Public policy may require the defence to be removed earlier when there are head injuries, due to the public's perception of the potential consequences. Public policy does not look at the sport as a whole, merely at the action which causes the harm.

The sporting field must not become an area where lawless violence is freely allowed.¹³⁰ Public policy requires that the defence not extend to actions which make the sporting field

¹²⁴ *Nazif*, above n 53, at 128.

¹²⁵ *Ah-Chong*, above n 6, at [50(d)].

¹²⁶ *Lee*, above n 41, at [307].

¹²⁷ *Lee*, above n 41, at [327].

¹²⁸ Matthew Rogers "A Critical Analysis of the Doctrine of Implied Sporting Consent" (1 December 2013) <www.sportslawmatt.wordpress.com>.

¹²⁹ *Adamiec*, above n 95, at [31].

¹³⁰ *Watson*, above n 79, at [19].

“entirely too hazardous a place for the conduct of sport.”¹³¹ Non-contact sports are generally low-risk activities. If the intentional infliction of grievous bodily harm is allowed, then the risk of harm would be so high as to create a hazardous environment when playing the sport. There are strong public policy reasons to disallow any intentional infliction of grievous bodily harm when playing non-contact sport.

There is a strong public interest in maintaining sporting contests, and the criminal law should be wary about restricting what can occur, to avoid alienating players and observers.¹³² There is also an underlying social desire for allowing a physical contest to flourish.¹³³ However, it is possible to have a physical contest without the intentional infliction of harm. For example, there can be physical contests in tennis. The physical contest is one of endurance, during a baseline rally for example, and does not require any form of intentional infliction of harm to be captivating to the audience.

Furthermore, it is dubious whether the appetite for such contact remains as strong as it once was. Due to the increase in broadcasting sports, to a wider audience, there is a perception that participants involved in sporting violence should face harsher punishments for their actions than they have previously faced, in order to maintain social order.¹³⁴ There is also a perception that players are committing, essentially, criminal acts on the sports field without fear of prosecution.¹³⁵ The dwindling appetite for a physical contest, especially relating to non-contact sports, means that public policy should intervene to ensure there is minimal intentionally inflicted harm.

However, it is challenging in sport to ascertain an intention to inflict the harm.¹³⁶ For example, in cricket a bowl bowled at someone’s head could cause grievous bodily harm. There is difficulty in ascertaining whether the ball was bowled intentionally at the head or was a mere accident. These deliveries, while uncommon, are not unheard of in cricket and it is incredibly difficult to differentiate the intentional deliveries with the unintentional

¹³¹ *Watson*, above n 79, at [22].

¹³² *Henderson*, above n 117, at 127.

¹³³ *Shelley*, above n 108, at 492.

¹³⁴ Rogers “Critical Analysis”, above n 128.

¹³⁵ Livings “Sports violence”, above n 5, at 433.

¹³⁶ *Standen*, above n 110, at 612.

ones.¹³⁷ The courts, with less specialised knowledge, will undoubtedly struggle to determine intention when even seasoned professionals disagree on the intent behind the actions.¹³⁸

Despite this difficulty, public policy requires the removal of the defence for every intentional infliction of grievous bodily harm. Furthermore, as there is no longer a healthy appetite for the intentional infliction of harm, especially relating to head injuries, in non-contact sports, public policy requires the removal of the defence in the majority of cases where there is the intentional infliction of harm. However, the decision to remove the defence is a balancing test. While there are incredibly strong public policy reasons to remove the defence, the social utility of the action and the personal autonomy of the participants may outweigh these concerns.

B The Social Utility of Non-Contact Sports

Participating in sport is a socially valuable activity.¹³⁹ Sports are “worthwhile” activities¹⁴⁰ as they provide exercise and entertainment within a rule-controlled environment.¹⁴¹ Sports teach valuable life lessons, and society has faith in the “diversionary and educational functions” of sport.¹⁴² These lessons are equally valid for both contact and non-contact sports.

Despite having these valuable functions, sporting violence does have a detrimental effect on society.¹⁴³ The intentional infliction of harm is not socially valuable when the sport’s rules severely limit or prohibit contact. Sport can teach these valuable lessons without requiring the participants to be subjected to the intentional infliction of harm. Further to this, the detrimental effect on society, caused by the intentional infliction of harm, outweighs the benefits gained by the lessons sport teaches. There is little to no social utility of intentionally inflicting harm in non-contact sports.

¹³⁷ Mike Selvey “A deliberate beamer is just throwing a punch by proxy” *The Guardian* (online ed, London, 3 August 2007).

¹³⁸ “Bowlers fire up on Lee’s beamer” *The Age* (online ed, Melbourne, 2 March 2005).

¹³⁹ Livings “Sports violence”, above n 5, at 431.

¹⁴⁰ *R v Jobidon* [1991] SCR 714, [1991] SCJ No 65, 66 CCC (3d) 454, 7 CR (4th) 233 at [128].

¹⁴¹ John Barnes *The Law of Hockey* (LexisNexis Canada Inc, Markham, 2010) at 204.

¹⁴² Barnes “*The Law of Hockey*”, above n 141, at 204.

¹⁴³ William Gillespie and Jeff Yates “The Problem of Sports Violence and the Criminal Prosecution Solution” (2005) 12(145) *Cornell Journal of Law and Public Policy* 145 at 150.

Fighting on the sports field illustrates the lack of social utility when there is intentional infliction of grievous bodily harm. Unsanctioned fights offer no social utility,¹⁴⁴ and there is strong judicial language which implies the removal of the defence in cases of fighting.¹⁴⁵ When a sport's purpose is to minimise physical contact, it appears to solidify the idea that the removal of the defence is justified. There is a changing social climate against fighting,¹⁴⁶ which would be amplified when the sports themselves disavow any form of contact. There is no social utility in fighting in non-contact sports, and the defence should never be allowed in these cases.

Sports, in of themselves, are incredibly socially valuable activities. However, this does not mean that the actions within the game are. The social utility of actions which intentionally inflict harm is low in non-contact sports. There is no social utility when the actions are intended to cause grievous bodily harm. To defeat the public policy concerns, the social utility and personal autonomy factors need to outweigh the concerns. There are very few situations where the social utility, alone, would be enough to override the public policy concerns relating to the intentional infliction of harm.

C Personal Autonomy of the Participants

While personal autonomy of a participant is an important factor in the defence of consent, it is not an overriding factor.¹⁴⁷ While people can consent to any action, the courts may still remove the defence if they feel that the public policy concerns outweigh the right of an individual to consent to any harm.

Individuals, regardless of any moral obligations, are entitled to decide their actions.¹⁴⁸ The personal autonomy of a player must be respected, but it cannot be the deciding factor. It is merely an important factor when deciding to remove the defence.

D Conclusion

The defence should be removed in the majority of cases when actions are intended to inflict harm. There are strong public policy concerns when the harm is allowed in non-contact

¹⁴⁴ *Jobidon*, above n 140, at [128].

¹⁴⁵ *Lee*, above n 41, at [296].

¹⁴⁶ *Lee*, above n 41, at [296].

¹⁴⁷ *Lee*, above n 41, at [300].

¹⁴⁸ Jane Dryden "Autonomy" Internet Encyclopaedia of Philosophy < www.iep.utm.edu >.

sports. These concerns may be outweighed by the personal autonomy factor, combined with the minimal social utility these actions bring. These factors combine to defeat the public policy concerns in a minority of cases.

However, when there is the intentional infliction of grievous bodily harm in a non-contact sport, the defence should be removed in every case. The intense public policy concerns outweigh the personal autonomy factor, save for an unusual fact scenario, and the non-existent social utility resulting from the action.

VI Conclusion

The criminal law should only intervene in sporting violence when the punishment offered by the sporting body is ineffective compared to the punishment offered by the criminal law. Sporting bodies can effectively punish players but, because of their commercial nature, they may not have fairness at the heart of their decisions. While there are disproportionate impacts on amateur players, the fact that only the criminal law can punish amateur players effectively justifies these impacts.

Once the criminal law has intervened, the defendant can argue the defence of implied consent. New Zealand should adopt the *Cey* test for the test relating to implied consent for actions that occur on the sports field. The New Zealand version of the test should adopt the elements of the unwritten code, reasonably incidental to the sport, whether the rules contemplated contact and whether the contact was off the ball or not. While these additions are useful, they merely add to the whole of the circumstances test developed in *Cey*. The *Cey* test is the test best suited in New Zealand for non-contact sporting violence.

The removal of the ability to argue the defence should occur in the majority of cases where there is intentional infliction of harm and in all cases of intentionally inflicted grievous bodily harm in non-contact sports. The public policy concerns are so significant that they outweigh the social utility and the personal autonomy of the participants in the vast majority of cases. The criminal law should be wary about allowing the defence to extend too far for acts which were intended to inflict harm in non-contact sports.

The criminal law should only intervene in sporting violence in these scenarios. However, until there is conclusive law on these points, the law in New Zealand will remain unclear. These recommendations attempt to clarify the law until a law-making body decides it is appropriate to answer the questions conclusively.

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Word Count

The text of the paper (excluding table of content, non-substantive footnotes, abstract, front page and bibliography and including 65 words from substantive footnotes) comprises exactly 7,997 words.