

UNIVERSITY OF CALGARY

The Legality of Violence in Ice Hockey: Consent and Assumption of Risk in the Playing Culture
of North American Hockey Leagues

by

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A THESIS

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ABSTRACT

This thesis explores the question of when hockey players should be held legally liable in Canadian tort law for intentionally and/or negligently causing violent injuries on the ice. This question has puzzled the Canadian legal system, which has led to different legal outcomes in various provincial jurisdictions. At the heart of the legal issue in most participant liability cases of hockey violence is the question of consent and the assumption of the inherent risk of injury that comes with playing a competitive contact sport. Throughout this thesis, the main argument is that despite the normalization of risk-taking, pain, and injury in the occupational culture of hockey over decades of widespread violence, it does not warrant a uniform and objective application of consent. The decision to consent to violence and the risk of injury in hockey is deeply subjective and it is shaped by broader structural and occupational requirements for the athletes to put their bodies at risk of unnecessary harm. To resist the hegemony of the National Hockey League (“NHL”) and professional hockey more generally, players are increasingly turning to the law to address the fact that the NHL is doing little to curb the problem of hockey violence and to receive compensation for the serious injuries they suffered while playing hockey. The turn to the law demonstrates that the process by which consent is secured and communicated to do violence on the ice and suffer the embodied consequences of playing such a physical contact sport is not effective. Rather, it serves as evidence that there are limits to a player’s consent to violence in hockey. My research thus explores these limits in more depth through a qualitative research design to provide empirical evidence of the cultural breaches in the normalization of risk, pain, and injury in hockey to show at what point players should be held legally responsible for inflicting injury on another player.

Keywords: Ice Hockey, Violence, Consent, Risk, Injury, Battery, Negligence

PREFACE

This thesis is original and independent work by the author, Martine Dennie. The analyses reported in the research chapters and conclusion were covered by Ethics Certificate number REB 19-0214 issued by the University of Calgary Conjoint Health Ethics Board for the project *The Legality of Violence in Ice Hockey: Consent and Assumption of Risk in the Playing Culture of North American Hockey Leagues* on September 10th, 2019.

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DEDICATION

To my dog and best friend, Heidi, who gave me the support I needed to get to the finish line. Her high puppy energy and need for attention might have delayed my progress, but without her by my side, I'm not sure that I would have made it to the end at all.

“When an eighty-five pound mammal licks your tears away,
then tries to sit on your lap,
it's hard to feel sad.”

- Kristan Higgins

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EPIGRAPH

Dear Ron MacLean, Dear Coach's Corner,

I'm writing in order for someone to explain to my niece
the distinction between these mandatory pre-game group rites of submission
and the rallies at Nuremburg.

Specifically the function the ritual serves
in conjunction with what everybody knows is in the end a kid's game.

I'm just appealing to your sense of fair play.

When I say she's puzzled
by the incessant pressure for her to not defy the collective will,
and yellow ribboned lapels as the soliders inexplicably rappel down from the arena rafters
(which, if not so insane, would be grounds for screaming laughter).

Dear Ron MacLean,

I wouldn't bother you with these questions
if I didn't sense some spiritual connection.

We may not be the same but it's not like we're from different planets.

We both love this game so much we can hardly fucking stand it.

Alberta-born and prairie-raised
seems like there ain't a sheet of ice north of Fargo I ain't played

from Penhold to the Gatineau,

every fond memory of childhood that I know
is somehow connected to the culture of this game.

I can't just let it go.

But I guess it comes down to what kind of world you want to live in.

And if diversity is disagreement

and disagreement is treason,

well don't be surprised

if we find ourselves reaping a strange and bitter fruit.

That sad old man beside you
keeps feeding to young minds as virtue.

It takes a village to raise a child

but just a flag to raze the children

until they're nothing more

than a ballast for fulfilling a madman's dream of paradise

where complexity is reduced

to black and white.

How do I protect her from this cult of death?

Dear Coach's Corner, Propagandhi

INTRODUCTION

The Legality of Violence in Ice Hockey: Consent and Assumption of Risk in the Playing Culture of North American Hockey Leagues

I started my PhD journey in September 2016 at a time when few sociologists examined the question of legal liability for injuries inflicted during an ice hockey game. While there existed voluminous foundational sociological research on violence in sports, including ice hockey, the question of when hockey players should be held legally liable in Canadian tort law for violence done on the ice remained unanswered. The difficulties in answering the question of how courts should assess responsibility for the violent infliction of intentional and/or negligent injuries on other players is seen in the fact that this issue has puzzled the judicial system despite the existing sociological research and doctrinal legal analyses. My research is thus important and timely because current law is difficult to apply due to varying and sometimes conflicting decisions across provincial jurisdictions, and it is unclear to athletes what conduct can lead to legal liability. If the law is unclear and unforeseeable, players cannot adjust their conduct according to existing legal obligations found in legal decisions.

My PhD dissertation is structured as an article-based dissertation. It contains an introduction, which sets the scene for the remaining sections. The body of the dissertation is made up of three research articles, to be published as stand-alone journal articles or book chapters in edited collections. A conclusion is then presented to reiterate the main arguments and present avenues for future research. Throughout my research articles, I address the above-mentioned gap by building off the existing sociological literature and connecting the social with legal doctrine to determine the point at which hockey players can (and should) be held legally responsible for negligently and/or intentionally causing injury to other players on the ice.

The leading precedent in Canada found a hockey player liable in tort law for the intentional tort of battery (*Agar v Canning*, 1965), which has subsequently been adopted in other jurisdictions over the years (see for instance, *Gaudet v Sullivan*, 1992; *Leighton v Best*, 2015; *Leonard v Dunn*, 2008; *Martin v Daigle*, 1969). Meanwhile, the law is ambiguous when it comes to claims made under the unintentional tort of negligence, where provincial courts have come to different decisions. Canadian negligence cases create a jurisdictional divide between provinces, wherein it is easier for plaintiffs to establish negligence in British Columbia using a carelessness standard (*Unruh v Webber*, 1994; *Zapf v Muckalt*, 1997) than in Manitoba (*Johnson v Webb*, 2002; *St. Laurent v Bartley*, 1998), Ontario (*Champagne v Cummings*, 1999; *Levita v Crew*, 2015; *Nichols v Sibbick*, 2005), and New Brunswick (*Michaud v Tardif*, 2017) who have adopted a recklessness and/or intentional standard for liability. The Supreme Court of Canada (SCC) has refused to allow the appeals of prominent civil cases (for instance, *Webber v Unruh*, 1994), which further contributes to the uncertainty surrounding tort liability in Canada and leaves wide open the question of what the appropriate standard of care should be for negligence cases. Consequently, this legal grey area calls for a closer look at how to accurately and fairly award damages to players who are intentionally or negligently injured during a hockey game.

Throughout my research articles, I adopt an interpretivist epistemology to study the subjective reality of individuals in the culture of hockey. Sport is a social phenomenon with individual athletes experiencing it in different and subjective ways. As stated by Donnelly (2000), “the term *interpretive* is used more narrowly to refer to a particular group of sociologies which have as their basis the interpretation and understanding of human meaning and action” [italics in original] (p. 77). Accordingly, the lived experiences of participants who are deeply socialized in the culture of hockey are crucial to fairly assess when and how players should be

held legally responsible for injuring another player on the ice. As argued by legal anthropologist Robert Kidder (1983), legislators and legal decision makers should be deeply concerned with the opinions and practices of the people involved before drafting new laws or making decisions that might go against their custom. This is precisely why Kidder (1983) argues that regulating cultural practices with law should be approached very carefully: “laws could follow all the correct procedures and still fail, because laws that violate custom are resisted with as much ingenuity and zeal as is necessary to preserve those customs” (p. 37). As such, if jurists attempt to curb the problem of hockey violence in ways that ignore the social practices that are well known and accepted in the culture of hockey, it is highly likely that participants will resist the legal changes and continue to play the game as they always have done. That is, a game known for its aggression, violence, and normalization of playing through pain and injury.

However, the game of hockey is quickly evolving in how violence is used and legitimized. For example, Silverwood (2022) shows that fighting has continued to decrease in the NHL since the 2009-10 season. Similarly, Sailofsky and Orr (2021) equally note that the number of fights have decreased in North American hockey “in response to changing opinions and norms about the purpose and place of fighting in the sport, as well as to changing ideas about roster construction and the value of enforcers” (p. 67). As such, while I recognize and appreciate the importance of foundational research on sports violence, I move away from traditional typologies of violence that were theorized at a time when violence in hockey was a much more prominent and accepted feature of the game than it is today. This is not to suggest that the ongoing changes in the game in any way eliminate the harms done over the course of decades of violence and harmful repercussions that current and future players will continue to experience (Silverwood, 2022). Rather, a closer look at “the sport as a whole in terms of the impact that politics, structure,

law, and culture have on those who play it and those who observe it” (Silverwood, 2022, p. 245) is needed to properly unpack the question of consent to violence. Since cultural practices vary across time and space (Allain, 2008) and the line between acceptable and unacceptable violence in hockey is often revised (Silverwood, 2022), it is crucial to gain insights on violence, risk, pain, and injury in reference to the ways that contemporary elite-level hockey is organized and played today.

Hockey has been known as a “fast and routinely violent” (Holman, 2018, p. 26) game since Canadians began playing it. Canadian players quickly became known “as villainous and violent” to international teams and players (Stark, 2018, p. 192). As the game evolved, the violence that was allowed as part of the rules of the game expanded as a legitimate method to help the team win. However, the game is increasingly shifting in light of the dangers that violence poses to player health and safety (Adams et al., 2015). As articulated by sports historian Andrew Holman (2018):

Hockey’s violence is a perennial problem and a staple of discussion among hockey observers and commentators. Hockey rules allow for body contact—the use of the body to separate player from puck—and the ever-increasing speed of the game has made bodychecks that were once innocuous always dangerous. Most recently, the spate of concussions suffered by players from sometimes routine, in-game contact has been a cause of alarm. Moreover, in professional, junior, and senior leagues in Canada, fistfights that emerge from rough play in the game are penalized only minimally, removing the intended deterrent effect of penalties and, de facto, encouraging the threat and use of violence as strategy. (p. 26)

While hockey has historically been characterized with violence, it is increasingly changing to address concerns related to traumatic brain injuries (TBI) and what some scholars have coined a “concussion crisis” (Malcolm, 2019). More and more, the game requires that all players be able to contribute to the team with speed and skill as opposed to having only a distinct ability to play physically hard and fight opponents. This has significantly changed the nature of the game and players’ cultural perceptions of violence as a legitimate strategy to help their team win games. Accordingly, I argue that despite violent practices largely being viewed as part of the game and normalized in the occupational culture of hockey over decades of widespread violence, it does not warrant a uniform and objective categorization of social practices that routinely take place in the game. The decision to consent to violence and the risk of injury in hockey is deeply subjective. The cultural meanings may indeed carry different interpretations to different participants meaning that what is “wanted” or “legitimate” to one player may not be understood similarly for others. Put simply, what may be excessively violent and unacceptable to one player can very well be considered a fun part of the game to another – all of which makes it difficult, if not impossible, to accurately and fairly categorize the various social and cultural practices inherent in the game as legitimate or not.

My research articles thus build on the foundational sociological research by answering the call to frame athletic violence as a social practice shaped by those who control the sport. Recent scholarship is bringing to light the many harmful practices by those who control the game in propagating the continued use of injury-causing violence in the game. In this sense, it is time to move beyond analyses of individual and subcultural responses to violence and turn our attention to broader structural and occupational requirements for the athletes to put their bodies at risk of unnecessary harm. As Silverwood (2022) argues, “violence and other forms of

deviance need to be understood, not in terms of individual pathology or subcultural responses to problems, but rather as activities that are shaped and sustained by the system” (p. 243). William Bridel (2021) is equally cognizant that hockey players are “products of a system” that prioritizes and rewards a certain kind of masculinity (p. 236). As such, Bridel (2021) notes that “taking the focus from individual behaviour to structural and systemic issues that fail to be addressed when accepted as ‘the norm’” (p. 236) is an important task. It is for this reason that my goal is to shed light on the shifting tolerance for violence in the game that has resulted in an increase of players turning to the law for compensation after suffering injury due to a violent act. As I show throughout the research articles, a player’s understanding of violence in hockey is largely shaped by the cultural and occupational expectation to do whatever it takes to win, including using violence. The tendency for hockey leagues, teams, media, and fans to blame individual players for being too violent, rather than placing blame on the “commercial nature of the game” has the effect of exposing hockey as “whitewashed to absolve organizations and corporations of guilt while publicly shifting the focus to individual offenders” (Silverwood, 2022, p. 248).

Considering the important shift in the literature to examine broader institutional practices that work towards maintaining the use of violence as a legitimate tactic to win games in a hypermasculine setting, I am greatly influenced by recent research conducted on various aspects of hockey culture that provide an in-depth understanding of the many overlapping social forces that shape a hockey player’s socialization in the culture of hockey. This includes the toxic working culture of professional sport (Kalman-Lamb, 2018a; Kalman-Lamb & Silva, 2023; Kennedy & Silva, 2020, 2021); an understanding of violence, risk, pain, and injury from a criminological standpoint (Silva & Kennedy, 2022; Silverwood, 2015, 2019; 2022); the cultural phenomenon that is the concussion crisis in sports (Henne & Ventresca, 2020; Malcolm, 2018,

2019; Ventresca, 2019, 2020); race and racism in the culture of hockey (Kalman-Lamb, 2018b; McLeod et al., 2023; McKegney et al., 2021; Szto, 2016, 2020; Szto et al., 2020); masculinity (Allain, 2008, 2011, 2014, 2015a, 2022; Bridel, 2021; MacDonald, 2014; MacDonald and Lafrance, 2018); national identity (Allain, 2015b, 2019); gender and women's hockey (Szto et al., 2021); sexuality (MacDonald, 2018; MacDonald & McGillis, 2021); (dis)ability (Block & MacDonald, 2021) and mental health and wellbeing (Pardy, 2021). I am further influenced by the recent release of anthologies on the culture of hockey aimed at changing the harmful social norms in hockey and working towards positive change in the game (such as Ellison & Anderson, 2018; MacDonald & Edwards, 2021).

In advocating for change, this scholarship provides novel and emerging ways of understanding the socialization processes involved in becoming a member of hockey culture, including broader understanding of violence, risk, pain, and injury in contemporary elite-level hockey. In turn, such research works towards revolutionizing the game for the overall safety and wellbeing of participants and non-participants alike. As seen through Bridel's (2021) lived experiences as a "non-hockey playing Canadian boy," (p. 229) the culture of hockey and the male hockey identity have harmful repercussions for those who do not want to be a part of hockey. Bridel (2021) thus calls for "critical, intersectional conversations for the sake of Canadians who just do not want to be part of 'Canada's game,' but who experience its scope and its influence, nonetheless" (p. 242). As such, by fighting for a safer and a more welcoming and accepting game, scholars and advocates are not only promoting greater protections for hockey players, but they are equally fighting for the safety and wellbeing of those who are not a part of the culture or simply do not want to be.

Consenting to Violence in Hockey

The sport of hockey is known for its aggression and intense bodily contact. Despite the possibility for participants to suffer serious long-term injuries, sports have been awarded significant social value; something that the SCC has recognized in *R v Jobidon* (1991). As Justice Gonthier concluded for the majority of the SCC in a case where the court had to decide whether a fist fight in a parking lot of a bar was lawful:

The policy of the common law will not affect the validity or effectiveness of freely given consent to participate in rough sporting activities, so long as the intentional applications of force to which one consents are within the customary norms and rules of the game. Unlike fist fights, sporting activities and games usually have a significant social value; they are worthwhile. (*R v Jobidon*, 1991, para 128)

Accordingly, it has generally been understood that legal principles require a different application in the sports context (Citron & Ableman, 2003). For instance, contact sports like hockey inherently involve bodily contact that could lead to serious injuries. As expressed in *Agar v Canning* (1965), the first lawsuit between hockey players in Canada, “[h]ockey necessarily involves violent bodily contact and blows from the puck and hockey sticks” (p. 304). For this reason, hockey players must assume the inherent risk of injury simply by playing this risky contact sport.

Despite the shifting tolerance for violence currently taking place in the game, the traditional hockey identity remains deeply embedded in players, and continues to be characterized with doing whatever it takes to win on the ice. Canadian hockey players are expected to embody a particular hockey identity that encourages them “to be polite, humble, gentlemen off the ice, and warriors who are willing to battle on the ice” (Allain, 2011, p. 4). However, in this battle to win, participants may engage in all sorts of behaviours that could be

viewed as excessively violent and fall outside the scope of conduct that is acceptable as part of the game (Citron & Ableman, 2003) to a point where players are no longer willing participants. The issue is seen in how some violent practices can inflict such serious injuries that they end players' careers, if not their lives. Limitations are thus needed, otherwise the use of violence as a normalized strategy to win games will continue to inflict serious harm on (un)willing participants.

For decades, the risk of injury was simply a price that athletes were willing to pay because the overall value and social importance attached to playing the game outweighed these risks (Barnes, 1996). Additionally, decades of sociological research demonstrates that the risk of injury is simply part of the game for individuals who want to play hockey, especially at the professional level, and that pain and injury are deeply normalized in contact sports (Donnelly, 2004; Messner, 1992; Nixon, 1992; Theberge, 1997; Young, 1991, 1993, 2004, 2012, Young et al., 1994) to a point in which refusing to put your body at risk is met with ostracism (Messner, 1990). Young (2012) summarized this research succinctly in saying that "sport occurs in a cultural context that normalizes and glorifies risk, pain and injury, and amid an institutional network of social relationships ... that pressures athletes to play with pain" (p. 102). This complex social context raises the question of whether hockey players genuinely consent to the violent practices that harm their bodies when violence and injury are treated as cultural and occupational norms.

While the normalization of risk, pain, and injury remain key features in the culture of contemporary elite-level hockey, athletes have begun to show resistance to these cultural demands around violence and aggression by turning to the law to address the non-consensual harms inflicted on their bodies. For instance, injured players have filed lawsuits across various

jurisdictions in Canada (see for instance, *Casterton v MacIsaac*, 2020; *Levita v Crew*, 2015; *St. Laurent v Bartley*, 1998; *Unruh v Webber*, 1994; *Zapf v Muckalt*, 1997) and the United States (for example, *In Re National Hockey League Players' Concussion Injury Litigation*, 2018). The families of deceased hockey players have also initiated lawsuits in the United States claiming wrongful death as a result of the National Hockey League's (NHL) promotion of violence (*Boogaard v National Hockey League* 2018; *Ewen v National Hockey League*, 2020; *Montador v National Hockey League* 2020).

It is for this reason that my doctoral research is aimed at determining the scope of consent to violence and at what point players genuinely assume the risk of injury in hockey. My main argument throughout all three research articles is that the process by which consent to the risk of injury is secured and communicated is not always translating into legally valid consent as defined by Canadian law simply because the violent practice(s) has become culturally normalized. In other words, there is no uniform or objective understanding of violence in hockey to a point where it can be said that all athletes consent to the same levels of injury-causing conduct in the game.

The lawsuits filed by injured hockey players provide clear evidence that the traditional cultural beliefs around aggression and violence are being contested from within as players resort to the law as a final appeal for compensation and to influence change in the game. This cultural shift points to a breakdown in the scope of implicit consent to do violence and be on the receiving end of dangerous conduct that has the potential to cause serious injury. The turn to the law is hardly surprising considering that those in control of making and enforcing the rules continue to fail to address even the most egregious acts of injury-causing conduct (Kennedy & Silva, 2020).

To understand how violence is understood in contemporary elite-level hockey and how players may or may not consent to violence, I build off recent research on capitalism, exploitation, and the athletic worker (see for example, Brayton et al., 2019; Kalman-Lamb, 2018a; Kalman-Lamb & Silva, 2023; Kennedy & Silva, 2021; Silverwood, 2022) to frame the hockey player as an athletic labourer who is deeply socialized in the working culture of hockey. When the athlete is framed as a labourer, it is possible to uncover the exploitative practices of sports organizations (Brayton et al., 2019) that mask the “unsafe and unhealthy working conditions [that] are ‘inherent’ attributes of athletic labor” (Kalman-Lamb, 2018a, p. 5). The exploitation of the athletic worker is shaped by the fact that hockey players are largely “commodities of the club for which they play” (Silverwood, 2015, p. 63). This process of commodification and exploitation has led to countless harmful practices within “an industry that is experiencing an injury epidemic” (Silverwood, 2022, p. 242).

Former NHL players have claimed that the league has a history of glorifying violence (NHL Concussion Litigation, 2018), which is especially problematic given the NHL’s tendency to treat egregious acts of violence as isolated incidents rather than a broader cultural problem (Kennedy & Silva, 2021). The tendency to ignore the broader systemic problems sometimes extends to players as well. Ryan and Keepness (2023) have noted that while some elite players have been critical of how they were treated during their hockey careers in their autobiographies, they do not typically address the systemic problem:

Neither [player] explicitly condemns the neoliberal capitalism of elite hockey, and instead they seem to treat moments of failure in hockey structures as exceptions rather than understanding the system is working as it was meant to and that exploitation, or lack of empathy, is intrinsic to how elite-level organizations have always operated. (p. 106-1

In framing the athlete as an athletic worker, the common thread across all three research articles is the question of legal liability and consent to violence in hockey as an occupational hazard. As argued by Silverwood (2022), violence is socially constructed in ways that serve a function for those who control the sport. Other researchers (Adams et al., 2015) have argued professional hockey leagues like the NHL as well as Hockey Canada are gatekeepers that oppose the argument that hockey players face unnecessary risks and that safety should be the priority. Despite having policies in place that suggest athlete safety is taken seriously, organizations like Hockey Canada continue to emphasize “player development, international dominance and producing a particular type of ‘Canadian’ hockey player” (Adams et al., 2015, p. 252). In turn, a player’s consent is shaped by the dominant ideologies and cultural pressures to play with violence and aggression. Accordingly, to properly contextualize the research articles, I will introduce the relevant legal principles and the foundational sociological research below, which ground my research questions.

Violence in Competitive Contact Sports

Sports sociologists have written extensively on the topic of sports-related violence and attempted to place violent conduct into typologies of violence (Smith, 1983; Young, 2012), yet difficulties remain in defining this “culturally mediated term” wherein “not all violent acts are crimes” (Silverwood, 2019, p. 212). There is also the difficulty in differentiating between the terms “aggression” and “violence”. Coakley and Donnelly (2004) define aggression as “verbal or physical actions grounded in an intent to dominate, control, or do harm to another person” and violence as “the use of excessive physical force, which causes or has the potential to cause harm or destruction” (p. 187). In a more juridical sense, Barnes (1996) defines violence as “any intentional or unjustified use of intense physical force that is likely to cause personal injury,

damage or death; in brief, violence means unlawful physical aggression” (p. 251). Broadly speaking, it appears that aggression is more socially acceptable to help the team win by dominating the opponents, while violence is the use of excessive aggression that has the potential to cause injury. As such, any infliction of force against another person that causes injury could result in liability against the person committing the violence if it was done beyond the scope of the rules of the game.

However, defining key terms such as aggression and violence is difficult because individuals and groups can each have their own interpretations of what constitutes violence and what it means to them – all of which depends on the context in which the violence occurs (Silverwood, 2015). Indeed, not all players define aggression and violence in the same ways and not all players necessarily understand and assume the same risks when they choose to play a sport. What is considered legitimate to one athlete may not be similarly understood to the next athlete as it is a subjective experience with individual embodied consequences.

As such, throughout all three research articles, I move away from traditional typologies of violence in light of the fact that “not all consent is created equal” (Weinberg, 2016, p. 5) and therefore cannot be easily bracketed in any meaningful classification system. Each participant may understand violence and communicate consent in contact sports differently (Channon & Matthews, 2021) despite being socialized in a culture that treats consent like a standardized process, leaving no room for individuals to effectively communicate a lack of consent. This is particularly important since the cultural acceptance of violence in hockey is experiencing a dramatic shift in tolerance (Sailofsky & Orr, 2021; Silverwood, 2022) due to ongoing safety concerns, despite internal resistance from those involved in the sport (Adams et al., 2015). Accordingly, this is need of further examination to unpack the question of consent.

Criminologist Victoria Silverwood (2015) offers a rich description of the culture of violence in her ethnographic research on hockey in the United Kingdom (which is played in a similarly violent fashion as North American hockey). Her research is especially helpful in understanding violence in contemporary hockey and why it is nearly impossible for players to communicate a lack of consent (Silverwood, 2015; 2019; 2022). The norms around violence are often unquestioned (Silverwood, 2015), and consequently, consent itself is often pushed beyond consciousness, wherein it becomes taken-for-granted and largely unchallenged (Channon & Matthews, 2021). Silverwood (2015) explains that there are many overlapping social forces that require consideration to understand the socialization processes around violence in hockey, including violence more broadly, masculinity, performance, teamwork, spectators, working cultures, rule-breaking, and emotions (Silverwood, 2015). Accordingly, I build on this informative in-depth research to examine how such overlapping social forces play out in North American hockey and what it means for legal decision makers faced with an injured hockey player asking for compensation. The difficulties in assessing legal responsibility are explored below as I provide an overview of Canadian tort law principles that are relevant to determining the scope of consent and assumption of risk in hockey. This is an important endeavour as more empirical research is needed to understand the “everyday social production and communication of consent” that is “something of an absent presence in sociologists’ understanding of sport; there is plenty of evidence of various problems that arise when consent is violated in sport, but little exploration of how it is constructed to begin with” (Channon & Matthews, 2021, p. 2).

Tort Law as a Tool for Social Change

Athletes who wish to file a lawsuit for compensation against the players who caused their injury typically have two options: they can file a lawsuit for the intentional tort of trespass to the person

(assault and battery) and/or the unintentional tort of negligence. Linden et al. (2018) define torts as private wrongs for which the injured individual seeks redress in the courts for the harms they experienced. In most cases, some form of payment (an award of damages) is required from the offender to compensate for the injury they have caused. The plaintiff is thus compensated for the loss they suffered as a result of the defendant's neglect or intentional misconduct. However, tort law offers more than mere compensation to deserving plaintiffs.

Leading Canadian torts scholars (Linden et al., 2018) outline the goals and objectives of tort law, which are shaped by the social and moral values found in Canadian society. It has been argued elsewhere that it is not the tort system's role to advance social change and that tort law does not have any goals at all because "goals mean a theory of social goals and not advancing a theory of tort" (Weinrib, 1989 cited in Linden et al., 2018, p. 3). This separation of law and sociology as separate disciplines with differing theoretical goals is not as prominent as it once was given that a positivist and "black letter" approach is no longer the dominant approach in legal studies (Creutzfeldt et al., 2019, p. 3). Accordingly, I stand with Linden et al. (2018) who criticize the argument that the law does not serve pragmatic goals. Since law is socially constructed (Litowitz, 2000), it is undeniable that it will have social repercussions, whether these are intentional or not.

Linden et al. (2018) argue that Canadian tort law is broadly framed around the concept of corrective justice, which refers to personal responsibility for correcting harms done to another person. In other words, the person who intentionally or negligently causes harm to another person must put the plaintiff back in the position they would have been in had it not been for their misconduct. This correction is normally in the form of a monetary award. Tort law is equally shaped by five specific objectives that determine the remedies available to a plaintiff

who successfully establishes liability against a defendant. These objectives do not exist in a vacuum; they all work together, and each may not necessarily be achieved in every case. These objectives include compensation, punishment, deterrence, psychological elements, and education.

As outlined by the SCC in *Hall v Hebert* (1993), the most important function of tort law is to provide compensation for losses. Tort law is designed to restore the plaintiff to the position that they would have been in if the tort had not been committed. Compensation is, therefore, tailored to the particular loss that the individual plaintiff has suffered. It seeks to provide a full indemnity for the plaintiff's loss or losses (Linden et al., 2018). There are numerous forms of compensation available, including general and specific damages, punitive damages, aggravated damages, and nominal damages.

Tort law also aspires to express society's disapproval of the conduct of wrongdoers who cause harm to other citizens. An award for damages is not only designed to compensate the plaintiff, but it also acts as a sanction on the defendant. Tort law aims to deter harmful conduct in the future and attempts to influence the conduct of individuals with an award of damages. By imposing liability for wrongful conduct, it hopes to deter both the defendant and other members of society from acting in similar dangerous manners in the future. As articulated by the SCC:

Although compensation may be the primary purpose of tort law, it must be noted that aggravated or exemplary damages which may sometimes be awarded are aimed at punishment and deterrence. Tort actions fulfil a role in appeasing the victim and may serve as a means of educating the public, as well as producers and manufactures as to the dangers involved in the use of certain products or processes. (*Hall v Hebert*, 1993, para 60)

Courts will most often note the role of deterrence in cases where punitive damages are awarded (*Norberg v Wynrib*, 1992). The social significance of deterrence is evident, for instance, in the SCC decision to impose liability on a motor vehicle driver who failed to ensure that a child passenger was wearing their seatbelt:

In this case, if seat belts had been worn, there can be no doubt that the appellant could have led a fulfilling and useful life. If the fixing of responsibility on a driver to ensure that young passengers wear seat belts saves one child from death or devastating injury then all society will have benefited. (*Galaske v O'Donnell*, 1994, para 35)

Similarly, Justice La Forest noted that the decision to impose liability against contractors for defective and dangerous defects in the construction of condominiums “serves an important preventative function by encouraging socially responsible behaviour” (*Winnipeg Condominium Corporation No. 36 v Bird Construction Co.*, 1995, para 37). It is thus undeniable that the law serves important social functions as the country’s highest court is consistently recognizing the social benefits of their decisions. The SCC has equally recognized the power of their decisions in influencing safer practices in society in attempting to meet the goal of deterrence. In *Stewart v Pettie* (1995), Justice Major noted that deterrence has the overall effect of enforcing “reasonable standards of conduct so as to prevent the creation of reasonably foreseeable risks. In this way, tort law serves as a disincentive to risk-creating behaviour” (para 50).

There are also psychological dimensions to tort liability. As explained by Linden et al. (2018), the logic is that the commission of a tort can generate an intense psychological response from the plaintiff such as anger or a desire to enact vengeance. Tort law is thus aimed at providing a more civilized and non-violent way to allow the victims of wrongdoing to secure some appeasement, retribution, and accountability for their suffering.

Finally, “tort law is an educator” (Linden et al., 2018, p. 14). The tort system speaks generally to citizens of the importance of compliance with reasonable standards of conduct in the interests of the safety of others. In this sense, it seeks to educate both the defendant and the general public to think of others and to not cause them intentional or unreasonable harm (*Hall v Hebert*, 1993).

Intentional Torts: Trespass to the Person

An injured athlete can file a lawsuit for the intentional tort of trespass to the person, which encompasses assault and battery. Assault and battery are distinct torts, but they often occur together one after the other (Linden et al., 2018). In Canadian tort law, intent is measured with the consequences of the act. Put simply, an act is intentional or deliberate when the consequences were intended, or it was done knowing that a particular outcome is substantially certain (Barnes, 2010). An act is also intentional under the legal fiction (meaning a presumption made by a court to achieve justice) known as ‘transferred intent’ which applies when the defendant intended to commit the tort against one person, but unintentionally harmed someone else (Linden et al., 2018). For example, pointing a gun at one person and intending to shoot them, but missing their aim and shooting another person instead. The law will deem this act intentional because the intended consequences remain the same, regardless of the victim’s identity. The goal of these intentional torts is to reduce the overall amount of violence in society (Osborne, 2020). Intentional torts thus punish wrongdoers for the intentional and harmful consequences of their actions.

The tort of assault is defined at the imminent threat of harm, while the tort of battery is the actual infliction of harm (Linden et al., 2018). For example, pointing a gun at someone and threatening to pull the trigger is an assault, while actually shooting the person is a battery. The

tort of assault is not normally at issue in the sport of hockey because body contact is built into the rules of the game meaning that the threat of bodily contact is not normally harmful. The tort of battery is therefore more likely to attract a lawsuit in hockey.

Battery is defined as a “direct, intentional, and physical interference with the person of another that is either harmful or offensive to a reasonable person” (Osborne, 2020, p. 268). The tort specifically protects a person’s right to bodily integrity and personal security (Osborne, 2020). The plaintiff need only establish that the defendant applied force to their person in a harmful and offensive manner to establish the tort of battery. It then falls on the defendant to prove a lack of intent or that the plaintiff consented to the contact (*Non-Marine Underwriters v Scalera*, 2000). The requirement that the contact be harmful to the reasonable person is important because it distinguishes actually harmful contact from everyday trivial contact. Since we live in a society with other people, tort law recognizes that we must all put up with certain bodily invasions such as bumping into each other in a crowded hallway, which is not considered harmful in law. Contact must thus exceed what is normally expected in everyday life (*Non-Marine Underwriters v Scalera*, 2000).

Intentional torts in the sports context generally refers to incidents where athletes are no longer behaving like sports participants and intentionally try to inflict injury on an opponent (Moore, 1998). The problem with applying principles of intentional torts in the sports context is the difficulty in proving intent. Even when the athlete is clearly deviating from the ordinary game play, it is nearly impossible to prove that the player intended to cause injury (Citron & Ableman, 2003). In a sport like hockey, it is even more difficult considering the speed and allowable body contact to prove that a hockey player intended to cause serious injury. For these

reasons, it is far more likely that an athlete will succeed in a claim for negligence as opposed to an intentional tort.

Unintentional Torts: Negligence

The unintentional tort of negligence allows plaintiffs to argue that an indirect application of force caused injury to their person that was done by someone who breached a legal duty of care (Fridman, 2012). A successful claim in negligence will compensate individuals who have been harmed by the careless (simple negligence) or reckless (gross negligence) actions of others. A plaintiff is required to prove four elements to establish that the defendant was negligent: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached the duty of care by falling below the standard of care; (3) causation; and (4) remoteness of damage (Linden et al., 2018).

The duty of care owed by sports participants towards each other is well recognized in Canadian law. Previous cases clearly recognize that in hockey, the duty of care between players is to avoid causing foreseeable harm to others. By filing a claim in negligence, the plaintiff is arguing that the defendant breached this duty and failed to take reasonable precautions to prevent foreseeable harm (Barnes, 2010). Causation and remoteness are not normally at issue in sports injury cases grounded in personal liability, with disputes falling primarily under the second element: the standard of care.

The standard of care is a question of conduct wherein courts will ask the following question: what would the reasonable person in similar circumstances as the defendant do? The reasonable person test is an abstract legal test; the reasonable person is not a real person. Rather, it is a fictional person with the defendant's characteristics attached to them (*Arland v Taylor*, 1955). For example, if a defendant is a professional hockey player, the reasonable hockey player will be assigned the knowledge and training expected of a professional player. In contrast, if the

defendant is a 12-year-old player, the standard of conduct expected of them will be lowered to account for their young age and minimal training and experience in the game.

The reasonable person test is an objective test aimed at eliminating the “idiosyncrasies of the particular person whose conduct is in question” (Linden et al., 2018, p. 170). What this means is that everyone is expected to live up to “a minimum level of performance” wherein doing one’s best may not be sufficient: “this may be hard on the dull and awkward person, but the general welfare of society demands reasonable conduct from everyone” (Linden et al., 2018, p. 170). Chief Justice McLachlin reiterated the objective reasonable person test in *Hill v Hamilton Police* (2007) and notes the importance of recognizing professional training:

The general rule is that the standard of care in negligence is that of the reasonable person in similar circumstances. In cases of professional negligence, this rule is qualified by an additional principle: where the defendant has special skills and experience, the defendant must ‘live up to the standards possessed by persons of reasonable skill and experience in that calling’. (para 69)

Once the court determines what the reasonable person looks like in any given situation, the trier of fact must determine whether the defendant met the standard of care. This means determining what the reasonable person would have done in similar circumstances, which is measured according to numerous applicable factors such as the foreseeability of risk, the likelihood of damage, the seriousness of the threatened harm, the cost of preventative measures, the utility of the defendant’s conduct, adherence to recognized customary practices, emergency situations, and statutory violations (Linden et al., 2018). If the defendant did not meet the standard of the reasonable person conducting themselves considering any applicable factor(s) and has instead created an unreasonable risk of harm, then they will be deemed negligent for

failing to exercise the same caution as the reasonable person would have in similar circumstances.

The standard of care in hockey negligence cases was well summarized in the British Columbia (BC) decision in *Unruh v Webber* (1994):

The standard of care test is — what would a reasonable competitor, in his place, do or not do. The words “in his place” imply the need to consider the speed, the amount of body contact and the stresses in the sport, as well as the risks the players might reasonably be expected to take during the game, acting within the spirit of the game and according to standards of fair play. A breach of the rules may be one element in that issue but not necessarily definitive of the issue. (para 31)

Despite this seemingly clear definition of the standard of care, the problem is that Canadian provincial courts have adopted varying and conflicting standards based either in simple negligence or gross negligence. In two prominent tort cases in British Columbia (*Unruh v. Webber*, 1994 and *Zapf v Muckalt*, 1997), the courts ruled that it was sufficient to prove negligence based on a standard of simple negligence, meaning that it is enough to prove that the defendant’s breach of the standard of care was *careless* towards the plaintiff and caused the plaintiff’s injuries. In contrast, courts in Manitoba (*Agar v Canning*, 1965; *St. Laurent v Bartley*, 1998) show a preference for intentional torts, effectively deciding that unless there is intent to cause injury, it is unlikely for a hockey player to succeed in a tort claim. Similarly, Ontario courts appear to follow Manitoba’s lead in requiring a slightly higher threshold than British Columbia. In *Dunn v University of Ottawa* (1995), it was found that negligence between players requires intent to injure or reckless disregard for the safety of others (gross negligence). Gross negligence is a slightly higher threshold of responsibility that falls somewhere between

carelessness and intent to cause injury. The court in *Dunn* (1995) specifically stated that, “only when there is a deliberate intention to cause injury or a reckless disregard for the consequences of one’s actions in an uncontrolled and undisciplined manner will a finding of negligence result” (Cited in Citron & Ableman, 2003, p. 209). However, a more recent decision in *Casterton v MacIsaac* (2020) shows that Ontario courts are willing to move towards a standard of simple negligence after deciding that a careless hit to the head was sufficient to ground liability in negligence, despite moving away from previous Ontario decisions (Dennie, 2020). It remains unclear where courts will land in future hockey injuries cases in either applying a standard based on carelessness or recklessness.

Available Defences in Tort Law: Consent and Assumption of Risk

“Individuals are the masters of their own bodies and properties, and free to forego their rights if they choose to do so. Tort law will not force its protection on anyone who chooses to waive it” (Linden et al., 2018, p. 81).

Further complicating the decision to impose liability on hockey players is that defendants may invoke the defence of consent to intentional torts or assumption of risk in negligence if the elements of the torts are successfully established by the plaintiffs. Both defences are rather similar in that they argue that the plaintiff consented in one way or another to the violence that inflicted their injury. Both defences can be express or implied through conduct (Linden et al., 2018).

The defence of consent to intentional torts is based on the notion that there is no assault or battery if the victim consented, expressly or impliedly, to the conduct in advance. Express consent is typically easier to prove as the player will have either signed a written consent form that is subject to contract law interpretation (Linden et al., 2018). Meanwhile, implied consent is

derived through conduct and will be measured against the reasonable person. In other words, courts will ask whether the reasonable person in similar circumstances as the defendant would have known that the plaintiff was consenting (*Norberg v Wynrib*, 1992). Of importance in the application of both defences is that the consent must be given freely and the nature and the consequences of the conduct that one is consenting to must be known for the consent to be genuine (*Norberg v Wynrib*, 1992, para 130).

Accordingly, the SCC has recognized that consent can be vitiated even if it was objectively obtained if it was obtained by fraud, duress, undue influence, or the person lacked capacity to consent (*Norberg v Wynrib*, 1992). Fraudulent misrepresentation will vitiate consent if the fraud goes to the “nature and quality of the act,” meaning it changed the nature of what the plaintiff was consenting to (*R v Mabior*, 2012, para 40). If consent is obtained under duress, meaning via a threat of harm or actual harm, consent will also be vitiated (*Norberg v Wynrib*, 1992). Of particular importance in situations of power imbalances is the concept of undue influence. The SCC noted that when an individual exercises control or authority over another person, consent may be vitiated. Justice LaForest noted in *Norberg v Wynrib* (1992), a sexual battery case:

As Heuston and Buckley, *Salmond and Heuston on the Law of Torts* (19th ed., 1987), at pp. 564-65, put it: “A man cannot be said to be ‘willing’ unless he is in a position to choose freely; and freedom of choice predicates the absence from his mind of any feeling of constraint interfering with the freedom of his will.” A “feeling of constraint” so as to “interfere with the freedom of a person's will” can arise in a number of situations not involving force, threats of force, fraud or incapacity. The concept of consent as it operates in tort law is based on a presumption of individual autonomy and free will. It is

presumed that the individual has freedom to consent or not to consent. This presumption, however, is untenable in certain circumstances. A position of relative weakness can, in some circumstances, interfere with the freedom of a person's will. Our notion of consent must, therefore, be modified to appreciate the power relationship between the parties.

(para 27)

The SCC presented a two-step process to determine whether or not there has been legally effective consent in cases of undue influence. First, there must be proof of a power dependency relationship that is marked by inequality in the respective power of the parties and second, there must be proof of exploitation of the weaker by the stronger party. When both elements are proven, the consent is not genuine (*Norberg v Wynrib*, 1992). Finally, it should also be noted that consent can be revoked (Linden et al., 2018).

The Defence of Assumption of Risk

The defence of assumption of risk is similar to consent in intentional torts. If an athlete is found to have assumed the risks of the act that caused the injury, there is no negligence (Barnes, 2010; Fridman, 2012). The defence is based on the theory that a plaintiff waives their right to sue the defendant because they indicated, expressly or implied, that they consented to the risk of harm by voluntarily participating in a risky activity. This defence is based on the latin maxim *volenti non fit injuria*, meaning there is no injury done to the willing person (Fridman, 2012).

Ultimately, the defence recognizes that individuals are free to make their own choices, including exposing themselves to danger and bodily harm if they so wish (Linden et al., 2018).

To invoke this defence, a defendant must prove that the plaintiff has assumed both the physical risk and the legal risk. The physical risk is by far easier to prove than the legal risk as it refers to a known risk of physical injury. For the defence of *volenti* to apply, there are two

requirements that must be met as outlined by the SCC: “(1) That the plaintiff clearly knew and appreciated the nature and character of the risk he ran, and 2) that he voluntarily incurred it” (*Kelliher (Village) v Smith*, 1931, para 10). As such, mere knowledge of potential danger is not enough (Linden et al., 2018).

The legal risk refers to proof that the plaintiff waived their legal right to sue in tort law and receive compensation for the physical injury. As explained by Justice Estey in the 1986 SCC decision *Dube v Labar*:

Volenti will arise only where the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant's part. The acceptance of risk may be express or may arise by necessary implication from the conduct of the parties, but it will arise, in cases such as the present, only where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to. (para 6)

As argued by Linden et al. (2018), the legal risk is not easy to prove because it means that the plaintiff must have understood that they gave up their right to sue, which means they cannot claim compensation for their traumatic injuries through the courts. This is incredibly difficult to prove because it requires evidence that the plaintiff has thought about potential legal liability should they incur a physical injury and they opted to waive their right to sue should the injury occur (Linden et al., 2018).

In the context of hockey, the defences of assumption of risk and consent effectively argue that players assume the risk of injury caused by “the ordinary blows and collisions incidental to

play, including contact that is in breach of game rules” (Barnes, 2010, p. 234). Similarly, Linden et al. (2018) suggest that “no consent is given when the conduct of the defendant is beyond the bounds of fair play or when it is malicious and out of the ordinary” (p. 84). Given that *volenti* is based on the idea that the plaintiff has withdrawn their right to legal action by voluntarily participating in risky behaviour or a risky activity, an examination of the inherent risks involved in playing hockey is needed to better understand when and how this defence might apply in sports injury litigation because implied consent is difficult to pinpoint (Channon & Matthews, 2021; Silverwood, 2022).

Accordingly, to determine the legality of violence and whether the defences of consent or assumption are available in any given case, it is crucial to determine the scope of *implied* consent and assumption of risk. In so doing, consideration must be given to the athlete’s standpoint within the culture of hockey to know what conduct is truly part of the game and actually consensual. As I discuss below and throughout my research articles, hockey is rife with unwritten rules within an occupational culture that is deeply characterized with power imbalances that raise the question of whether consent is not only communicated, but truly genuine. This social environment is crucial to understanding the causes of player violence and the socialization processes that have long characterized players’ understanding of risk-taking and consent in hockey.

The Cause of Player Violence in Hockey

It is generally accepted that there is no single cause of player violence. Coakley and Donnelly (2004) argue that the commercialization of sport, the social organization of sport, and the socialization of athletes are among the causes of player violence. The socialization processes involved in becoming an athlete often leads to learning how to play with violence (Colburn,

1986; Silverwood, 2015). This involves, for instance, the fact that parents, coaches, teammates, and media all play a role in influencing player behaviour, including learning to be aggressive (Cusimano et al., 2016), which is hardly surprising given the evidence that parents of young players can display aggression towards referees (Brodeur et al., 2022), which sets a significant example for young players. The tendency to use violence in sports is learned behaviour, in which men appear to be predisposed to violent behaviour and to view aggression as legitimate and natural (Messner, 1990). Similarly, Theberge (1997) states that the use of skill and force in sports is a feature of masculine identity and socialization. It is thus impossible to ignore the impact of masculinity and gender identity on the socialization of athletes.

Athletes learn at an early age that masculine traits such as strength, power, aggressiveness, risk-taking, and dominance are highly valued in the culture of hockey. These have indeed become normalized in competitive male sports (Coakley & Donnelly, 2004; Weinstein et al., 1995; Young et al., 1994). More specifically, the concept of hegemonic masculinity is profoundly used in studies of sports violence (Connell & Messerschmidt, 2005; Messner, 1992, 2002; Whitson, 1990). The concept was introduced by Connell (1987) to explain how dominant gender identities are constructed and “institutionally perpetuated” (MacDonald, 2014, p. 97). It represents the dominant form of masculinity, which generally touches on masculine characteristics including toughness, competitiveness, the subordination of women, and the marginalization of gay men. These identities are not fixed and can vary over time and according to cultural standards (Giulianotti, 2012). Ultimately, hegemonic masculinity teaches men that they are superior to women and other subordinate masculinities. Rather than refer to a hegemonic and subordinate dichotomy, it can be said that there are several masculinities (MacDonald, 2014).

The problem is seen in the fact that not all men can reach the status of the hegemonic male. When athletes overindulge in these ideologies of masculinity, they often excuse the most excessive acts of violence (Weinstein et al., 1995), which becomes “gender-appropriate behaviour” for male athletes (Atkinson & Young, 2008, p. 174). Faulkner (1973, 1974) further shows that hockey players are expected to display these traits to move up the hierarchy of the sport. By displaying masculine characteristics, particularly those that show strength and willingness to take risks, players have a greater chance of ‘making it’ in hockey.

A commonly cited issue with hegemonic masculinity is that it is in fact a dangerous cultural ideal for most men (Allain, 2008, 2011; MacDonald, 2014). Research on hegemonic masculinity demonstrates that dominant masculine identities can damage men in the sense that most men are unable to maintain it, or even achieve it at all (Burstyn, 1999). Socialization into this dominant form of masculinity and gendered behaviours makes men vulnerable to certain risks and dangers and these are potentially destructive (Allain, 2008; White & Young, 2007).

With regards to women in sport, Theberge (1997) suggests that it is played in a cultural context in which men’s sport is hegemonic. She found that women athletes typically incorporate the dominant version of the male game as opposed to resisting it. As such, hegemony effects more than just the men’s game, which is often viewed as the “real” version of the game (Theberge, 1998, p. 186). Simply put, women adopt the playing style of men and tend to rationalize pain and injury in a strikingly similar way despite the difference in rules of women and men’s hockey (Theberge, 1997, 1998, 2000). However, an important finding in Theberge’s (1998) research is what she calls “leaky hegemony” (p. 184). She argues that the mere presence of women in a contact sport like hockey is intruding in one of men’s most exclusive masculine territories.

The normative ideologies around masculinity and the gender order are evident in victimology and workplace studies as well. For instance, it has been argued that hegemonic ideals of masculinity endangers male athletes and further victimizes them since they place them in situations where injury is likely (Atkinson & Young, 2008), where they are expected to use their bodies as weapons (Messner, 1990), and to play through pain and injury (Messner, 1992). Violent conduct has long been rationalized and even promoted by players as a means of impressing coaches and maintaining employment (Faulkner, 1973, 1974; Young, 1993; Young et al., 1994).

Researchers thus point to professional athletes as workers and victims of the “occupational trap” (Stebbins, 1987 cited in Young, 1991, p. 8) as a further cause of player violence. This refers to athletes finding themselves as victims of exploitation in the economical structure that is the institution of professional sport (Brayton et al., 2019; Kalman-Lamb & Silva, 2023; Kennedy & Silva, 2020; Silverwood, 2015). In other words, while players acknowledge that playing injured can lead to permanent damage, they also recognize that they contribute to team profits and expectations of manhood to play through pain (Young, 1991, 2000). It is also argued by Coakley and Donnelly (2004) that the rules in sports are created in favour of the ownership and thus further victimize athletes. In this sense, “victimization is understood as the institutionalized pressure to participate in a form of violent behaviour which can be dangerous to health and safety” (Young, 1991, p. 7). As articulated by Silverwood (2015):

Performance is integral to the employability of players and this performance is framed in certain ways, firstly in terms of winning the game, by scoring goals or defending well, but it is also framed in terms of the entertainment provided to the supporters of the team. This entertainment can be seen in two ways: in terms of winning the game; and in

relation to the entertainment and enjoyment of spectators who pay the gate money.

Keeping supporters happy is an essential element of a marginal sport in order to attract paying fans and a major element of this is the unique physical element of the game. (p. 221)

Ethnographic studies on violence equally demonstrate that there exists a culture of risk in sport in which athletes develop a normalized response to pain and injury (Howe, 2004; Nixon, 1992). Howe (2004) argues that athletes become socialized into taking risks. These risks often seem extreme to outsiders but the cultural response to it is that it is acceptable and normal. As articulated by Howe (2004), “the grip of risk culture is so strong that if you express concern regarding injury, you may become marginalised from the rest of the sporting community” (p. 113). This idea that athletes are marginalized or labelled as a ‘coward’ or ‘unmanly’ is often seen in research on sports violence (Atkinson, 2011). Accordingly, athletes learn how to disregard the risk of injury and to normalize pain as part of the sporting experience (Young et al., 1994).

Yet, players’ responses to pain and injury are not necessarily instinctual or involuntary. They are shaped by the environment and the social context in which pain occurs. In examining the athletic body as the embodied form of the social space and its involvement in sporting practices (Howe, 2004), this can shed light on consensual actions of athletes. In other words, since the responses to risk, pain, and injury are shaped by the social environment in which they occur, I argue that simply because certain conduct is “normal” in a particular time and place, it does not automatically imply continual and universal consent in a strictly legal sense.

Socialization and “The Code” of Violence in Hockey

Silverwood (2014, 2015) highlights that the normalization of pain and injury is deeply entrenched in what has become known as the Code of hockey violence. The Code is made up of

unwritten rules around fighting and retaliation that control the conduct of players on the ice (Harvey, 2016). According to sportswriter Ross Bernstein (2006), who wrote a book on the Code with the help of journalistic interviews with hockey players, fighting is a way for the sport to police itself and it serves as a reminder to players that there are consequences for rule violations. Bernstein (2006) outlines several culturally acceptable reasons for fighting, including retaliation, intimidation, retribution, to send a message to the opposing team, to deter illegal stick work or physical behaviour, to try to draw a reaction penalty, to ensure job security for fighters, to swing the momentum of the game, to make a name for oneself, to protect skilled players from physical play, and historical rivalries between teams and players.

Silverwood (2015), one of the only scholars to explore the Code in academic terms, argues that the Code is pervasive, and it provides players with justifications for the aggression and violence they commit on the ice. The justifications for violence and fighting, such as swinging the momentum or drawing a penalty, operate to legitimize violence with a clear aim of winning the game and exerting dominance over the opposition.

The gendered practices around fighting are also embedded in the Code, including hypermasculinity (Atkinson & Young, 2011). In this setting, players are asked to consent to all kinds of physical contact, which is likely to cause injury at some point, in exchange for a career in hockey. As argued by Atkinson and Young (2011), conforming to these codes of dangerous masculinity can be informally rewarded within teams through salary and contract incentives, praise, and other forms of preferential treatment. These players also get further praise and attention from fans and media broadcasters who idolize them for their toughness and ability to withstand violent contact on the ice, as well as their willingness to come back to the ice after suffering an injury or playing through pain. Indeed, Silverwood (2015) shows that players adhere

to beliefs about appropriate masculine behaviour, such as violence, power, winning, and strength, which is built into the Code. She explains that the Code operates to prioritize the demonstration of hegemonic masculinity and that such ideals as respect, protection, enforcement, retribution, and intimidation all point to playing an effective game.

Taken together, the numerous causes of player violence and adherence to the Code of violence in hockey all work to legitimize violence in hockey and to normalize playing through pain and injury in the name of winning. Accordingly, inherent in the Code is that a player should not complain and must accept the game's unwritten rules. In turn, players who do not buy into the Code or choose not to play through pain and injury are ostracized (Atkinson & Young, 2011; Silverwood, 2015). Put simply, they are unable to voice a lack of consent to do violence and/or be on the receiving end of violent bodily contact. This conflicts with the law's understanding of consent as legal defence to tortious conduct. While players' understanding of violence and consent have shifted in recent decades leading to an increase in participant liability lawsuits, the courts' application of consent and assumption of risk has not always considered the socio-cultural reality of hockey players who are socialized in the culture of hockey and the Code. This has led to complicated legal analyses in negligence cases and the application of defences. For example, without consideration given to the playing culture of the game, a judge is free to make a decision based on their own knowledge (or lack thereof) of hockey, its rules, and its cultural practices to decide whether consent was objectively secured, whether that knowledge is accurate or not. Accordingly, I call for a more harmonized connection of law and society in this context to better inform legal decision-making.

The Intersection of Law and Society: A Sociological Understanding of Legal Ideas

While there is voluminous informative research that has been done on sports violence, there remains a lack of empirical socio-legal research on sports violence that is well suited for use by lawyers and judges. This point is made clear by the fact that courts have adopted varying and conflicting standards over the years and remain seemingly perplexed as to how to handle sports injury cases. Since sports leagues have traditionally enjoyed a certain immunity from the law (Horro, 1982; Young, 2000, 2004), sports litigation is a fairly new phenomenon in need of further guidance. More specifically, there is little clarity on how sociological research can be used to establish and define appropriate legal principles, including the standard of care and the defences of consent and assumption of risk in cases involving injured athletes. My doctoral research addresses this gap.

Throughout my research articles, I focus on empiricism and the need for observable facts to develop effective law. Traditional legal theory is flawed in that it generally ignores the impact that law has on the individuals and communities it directly affects. Accordingly, socio-legal theory encourages the use of sociological methods to investigate the reality behind the assumptions made by law (Leiboff & Thomas, 2014). As argued by Channon and Matthews (2022), “the practical, everyday working-out of consent has received scant attention from sociologists of sport” (p. 2). As such, I aim to bridge the gap between sociological insights on sports violence and doctrinal understandings of legal principles. I build on the sociological research discussed above to theorize violence in ways that are not only more useful to jurists, but equally addresses the lack of sociological research on consent in sports.

There are very few studies that incorporate empirical data to understand how law is produced and reproduced over time with a focus on social and cultural understandings. Weinberg (2016) offers an excellent socio-legal account of violence and consent in mixed martial arts that

bridges law and society unlike most doctrinal legal texts. For instance, Barnes (1996, 2010) presents a comprehensive overview of sports law, but does so in a strictly legal sense without much consideration of the social implications. In contrast, sociological accounts of violence tend to focus on socialization, commercialization, gender, and victimization, without considering what it might mean for litigation and jurisprudence. Following Weinberg's (2016) example, my research provides the needed qualitative data on the playing culture of contemporary hockey to better understand consensual violence in hockey.

The initial stages and overall design of my project were deeply inspired by the thinking of Eugen Ehrlich's theory of "living law" (1962) and that of legal sociologist Roger Cotterrell, who was largely inspired by Ehrlich. The influence of both Ehrlich and Cotterrell is evident across all three of my research articles. I draw on these socio-legal theories to explain that through a pluralistic lens, law is best looked at in the rules of conduct that people obey, and which govern their everyday social behaviour. It is these rules, and not formal law, that give order to social life (Ehrlich, 1962). Legal pluralism is understood as a legal system that co-exists with customary laws or other relatively autonomous normative systems (Davies, 2010). It does not deny written laws or state legal systems, it supplements, expands, interprets, and explains law in a broader social scientific context (Cotterrell, 2002; Davies, 2010).

These rules of conduct were termed "living law" by Eugen Ehrlich (1962). They are formed by the inner orderings of "associations", which are formal or informal social groupings of any kind (Ehrlich, 1962; Banakar, 2002). As stated by Ehrlich (1962), "a social association is a plurality of human beings who, in their relations with one another, recognize certain rules of conduct as binding, and, generally at least, actually regulate their conduct according to them" (p.

39). Ehrlich's overall argument is that state law is not necessarily superior to these rules of association.

Accordingly, like Kidder's (1983) argument that legal change should be approached carefully with consideration of local custom, Ehrlich (1962) argues that formal law can only be effective if it is in line with the living law of the associations it seeks to regulate. For Ehrlich (1962), what governs legal behaviour is not necessarily found in legal documents and doctrines but mostly in the larger social world. As indicated by Cotterrell (2002), bringing the social into the study of law provides a more balanced view of the issue. To illustrate, Cotterrell (1983) makes a distinction between normative legal theory, referring to the more traditional doctrinal approach to studying law, and empirical legal theory, referring more broadly to the sociology of law. Empirical legal theory provides a more 'external' view of the law, meaning it considers the perspectives of those observing legal institutions as opposed to the views provided by those who are actively participating in legal systems, such as lawyers and judges. While Cotterrell (1983) does not discount the importance of doctrinal approaches (or 'insider' perspectives), he advocates for a "scientific distancing" (p. 242) that allows for a sociological understanding to supplement or expand doctrinal analyses.

Traditionally, the field of sociology of law has centred on studying the consequences of law on those who experience them, from a purely external approach. However, Cotterrell's approach goes further. He argues that empirical legal theory does not focus solely on law's consequences, rather it treats law as the "centre of attention," and seeks to develop a more "rigorous concept of law" (Cotterrell, 1983, p. 243). In other words, law is not solely state law or governmental law. Rather, law equally exists within "private legal systems" (Cotterrell, 1983, p. 247), such as within social interaction in groups or institutions – or 'associations' in Ehrlich's

terms – further pointing to the importance of recognizing the plurality of legal systems in the broader social world.

Cotterrell (1983, 1998) defines the “lawyer’s law” as a legal system made up of norms, rules, principles, and concepts, which are interpreted in a doctrinal fashion. This means, for example, presenting a case in court, drafting court documents, presenting evidence, and citing and interpreting precedents – all of which is interpreted with the specific facts of each case in mind. Put differently, the doctrinal approach to interpreting law is centred on the particular “adjudicative needs” of each case in the context of its own circumstances (Cotterrell, 1998, p. 180). In contrast, sociologists of law tend to examine the causes and consequences of legal ideas, and the overall behaviour of law (Black, 1976) in its social and historical context.

The innovation of Cotterrell’s (1983, 1998) approach to the sociology of law is to combine the doctrinal and empirical approaches to interpreting legal ideas sociologically. He moves away from the traditional “division of labour” (Cotterrell, 1998, p. 173) of studying law either as an insider (as a lawyer, for instance) or as an outsider (as a social scientist who is not a lawyer). Instead, he argues that legal ideas should be “understood as the outcome of historical, cultural, political, or professional conditions which sociologists are able to describe and explain” (Cotterrell, 1998, p. 173-174). In other words, sociological insights can explain legal doctrine in ways that supplement, expand, or even replace doctrinal understandings of legal ideas. In fact, he argues that there is no such thing as truth in the law. Legal doctrine is only viewed as the “truth” because it is backed up by the political power of the state, which becomes the “truth” with application in a multitude of social settings (Cotterrell, 1998, p. 181). The point of sociological interpretation of this “truth” is thus captured in Cotterrell’s (1998) words:

Sociological interpretation both reveals law's character and is, like many other forms of knowledge, available to enrich law's debates, colour its interpretations, and strengthen or subvert the strategies of control to which legal discourse is directed. Sociological insight is simultaneously inside and outside legal ideas, constituting them and interpreting them; sometimes speaking through them and sometimes speaking about them; sometimes aiding, sometimes undermining them. Thus a sociological understanding of legal ideas does not reduce them to something other than law. It expresses their social meaning *as law* in its rich complexity [emphasis in original]. (p. 181)

Accordingly, the contribution that my doctoral research offers is effectively to develop a more rigorous understanding of legal principles in the context of hockey litigation that interprets existing legal principles in ways that are 'coloured in' and strengthened with sociological insights. As both an insider (trained with a *Juris Doctor*) and an outsider (a social scientist), I bring the necessary training to tap into the social and cultural context needed to understand the broader socio-legal issue of consent to violence. By bridging law and society, I strive to offer empirical findings that are useful to jurists and to influence legal decisions in hockey injury cases to better reflect the living laws that regulate the conduct of athletes, while leaving space for subjective interpretations of violence and consent to be considered.

Ultimately, law's "truth" is often seen as having a uniform application across all social and cultural settings, despite each legal decision and ratios being made in very specific factual circumstances (Cotterrell, 1998). Yet, participant understandings of a legal idea, such as consent to violence in a particular sport, are deeply subjective. A uniform and objective application of a legal idea may indeed ignore "the empirical conditions of [law's] applications" (Cotterrell, 1998, p. 186). Therefore, a sociological approach to understanding legal ideas must consider both the

‘insider’ and ‘outsider’ views to provide a rich description and nuanced understanding of legal ideas that may indeed have various applications depending on its social and cultural interpretations.

Methodology: Legal Ethnography

To move away from the idea that law and sociology are distinct fields, I framed my research around the argument that legal ideas must be interpreted sociologically (Cotterrell, 1983, 2002, 2018). In calling for “fresh resources” and new legal ideas in the form of sociological insights, Cotterrell argues that law needs sociology. In fact, he suggests that jurisprudence and socio-legal inquiries are inadequate without input from each other and that this interconnection is rarely done. He argues that jurists have traditionally ignored the works of social scientists and social scientists have traditionally undervalued the input of legal theory for social scientific research. Indeed, this separation is evident when examining the question of voluntary risk-taking in the context of a physically violent sport like hockey. As discussed, there is ample sociological research on sports violence, including hockey. And yet, the case law in this area continues to be inconsistent in the sense that it remains unclear what may attract negligence liability in the context of a hockey game due to varying opinions about what is truly part of the game and therefore consensual. For this reason, my primary goal throughout my research articles is to provide empirical evidence as to how risk and consent are constructed in the social context of ice hockey while also offering a conceptual framework for bridging law with society.

To do so, I adopt the qualitative research methodology known as “legal ethnography,” which allows the researcher to uncover what individuals are actually doing in their everyday lives (Treviño, 2017, p. 38). Ethnography is aimed at collecting first-hand experience of particular social or cultural practices through participant observation (Sparkes & Smith, 2014). It

is a methodology that is “not about observing, but about understanding” (Berg & Lune, 2012, p. 205). Ethnography thus refers to “the art and science of describing a human group – its institutions, interpersonal behaviors, material productions, and beliefs” (Angrosino, 2007 cited in Sparkes & Smith, 2014, p. 34). Although participant observation may involve the researcher immersing themselves directly in the culture under study, for instance by living within the community, Sparkes and Smith (2014) explain that ethnographic observation may be achieved through conversations and the telling of stories. As explained by Silverwood (2015), “ethnography is based on the premise that people actively collaborate in the construction of their meanings and maintenance. This requires a research method that can engage with those meanings” (p. 91).

Wolcott (2010) argues that the goal of the ethnographer is to provide a rich description of the culture under study. Since I was interested in examining how rules of conduct are socially constructed in hockey and how hockey players give meaning to the legal ideas of risk and consent, I adopted an ethnographic methodology for my project. Wolcott (1995) has long argued that a suitable approach to such qualitative research designs involves introducing theoretical implications after data collection and reflect on theory over the course of field work and analysis. Sparkes and Smith (2014) explain that such an approach begins by establishing what is known about a particular issue within a social setting under study and then highlighting the theories or concepts that have informed or limited our understanding of it. As such, by following the advice of Corbin and Strauss (2007) to use the literature review to reflect on questions for initial inquiries, I was able to pinpoint gaps in knowledge and generate research questions to explore these gaps in more detail.

Accordingly, I began with the assumption that the socialization of hockey players and their perceptions of risk, pain, injury, and violence are shaped and given meaning according to their own everyday lived realities in the culture of hockey, and not legal meanings found in case law. As I applied this assumption in the context of legal decisions that interpret the use of violence in hockey, I identified inconsistencies in the application of the standard of care in negligence cases and the legal defences of assumption of risk and consent to tortious conduct, which were sometimes at odds with sociological interpretations of the same issues. As I reflected further on Cotterrell's (1998) point that legal ideas must be interpreted sociologically, I generated research questions that would allow me to better examine how sociological and empirical insights can inform legal interpretations. The literature review alongside the theory of living law (Ehrlich, 1962) allowed me to identify such gaps in knowledge, which shaped my research questions and choice of methods to tap into the everyday lived realities of participants in the culture of hockey. By conducting in-depth ethnographic interviews, I was able to gain a cultural understanding of risk, pain, injury, and violence in hockey from the perspectives of players, coaches, and athletic therapists and analyze the collected data with theories that helped uncover important key findings that contribute greatly to existing knowledge on socio-legal understandings of violence in hockey.

Research Questions

Since law and sociology have traditionally been distinct disciplines that tend to ignore each other (Cotterrell, 1983; 2002), it was not surprising to find that while courts have noted the importance of the customs and conventions of a sport in the assessment of risk and consent, the meanings of these have never been explained by courts (James, 2013). Several legal scholars (Citron & Ableman, 2003; James, 2013; Lazaroff, 1990; Standen, 2009) support a legal framework that

considers both the written rules and the playing culture of the sport. Generally, each sport has its own shared values and expectations (Lazaroff, 1990). As stated by James (2013), the playing culture is important:

to ensure that commonly occurring acts that are technically foul play, or foul play that is generally not injury-causing, will be considered acceptable either because it is a prevailing circumstance associated with playing the particular game or because it is an inherent risk associated with it. [...] the introduction of the playing culture of a sport as a relevant circumstance reflects more accurately the way that sport is, in fact, played. (p. 74)

Accordingly, my research questions touch on the playing culture of elite-level contemporary ice hockey to gain an understanding of violence and the ways that individuals who have been socialized by the sport construct meanings of consent and assumption of risk. As such, my specific research questions at the start of my project were framed as follows:

- (1) What are the (sub)cultural norms and practices that contribute to the normalization of player violence in ice hockey and the construction of specific rules of conduct (or ‘unwritten customs and conventions’) obeyed by groups in the game?
- (2) How do individual hockey players construct the meaning of consent and risk in the sport of hockey?
- (3) How might these meanings constructed by players differ from the courts’ applications of implied consent and assumption of risk?

As such, I designed my research to tap into these everyday realities to gain a deeper understanding of the embodied consequences of playing with violence, including risk, pain, and injury. By emphasizing the lived experiences of those who are socialized in the culture of ice

hockey, my aim in this research was to examine the particular ways that hockey players, coaches, and athletic therapists construct meanings of violence and consent in hockey.

Data Collection

To answer my research questions, I received approval from the University of Calgary Research Ethics Board to conduct research interviews. I conducted a total of 32 in-depth, semi-structured ethnographic interviews with hockey players, coaches, and athletic therapists to get at the rules of conduct and unwritten practices that are generally observed in hockey. The goal was to get an understanding of violence and aggression to determine how consent and risk assumption, which are at the heart of the legal issue, are constructed and understood in contemporary North American elite-level hockey.

Participants were recruited through initial personal contacts and via a recruitment poster that was shared on social media. I interviewed a total of 23 men and 9 women. Of the 23 men, 5 were retired players who were coaching hockey at the time of the interviews, and 2 were athletic trainers; the remaining men were former or current players. Of the 9 women, 1 was a coach and 2 were athletic trainers; the remaining 6 women were former or current players. The sample included players from recreational hockey leagues, amateur and minor hockey leagues, and professional hockey leagues across Canada and the United States. Participants ranged from 18 years old to 51 years old. Interviews were conducted in person in various settings such as coffee shops and libraries. However, after the onset of the COVID-19 pandemic, interviews were done over the phone or by video call on zoom. While the focus of this project is on Canadian law, the perspectives of individuals across North America was crucial to gaining a cultural understanding of violence in hockey. For instance, all participants credit the NHL to some degree for teaching them the rules of the game. The NHL is a cross-jurisdictional professional league with teams in

Canada and the United States. The hegemony of the NHL is thus impossible to ignore and plays a large role in shaping a hockey player's consent to violence, regardless of the level of play they participate in Canada and/or the United States.

The population under study consisted of men and women hockey players across various hockey leagues in North America ranging from recreational hockey to professional hockey who are deeply socialized in the culture of hockey. My sample also included coaches and athletic therapists of hockey teams. These individuals have some power over the players and can influence the way that athletes play with or without violence. While women's hockey has traditionally been subjected to several rules that prevent excessive violence such as hitting and fighting, this does not inevitably mean that women's hockey is any less susceptible to violence and serious injury (Theberge, 1997). The reason for including differences in genders, leagues, and positions was because

[i]n-depth research affords the researcher the opportunity to learn how research participants understand the world and interact with each other. A well-designed study will usually also provide findings that capture a broad range of experience rather than from only a few people or situations. (Webley, 2010, p. 934)

The emphasis on the ethnographic interview was to capture the individual's insights, the knowledge that they have in their minds, and beliefs and values that influence their actions in ways that allow the researcher to immerse themselves rather intimately in the life of the interviewee (Hockey & Forsey, 2012). I used a semi-structured interview guide, but the interview itself took on a more unstructured format, especially after the first few interviews at which point I gained experience and increased confidence in my interview guide through the interview process. I began each interview with a broad open-ended question to get the participant

talking. The first question I always asked was “Could you tell me a little bit of your experience in hockey so I can get a sense of who you are as a hockey player?” This allowed the participant to tell me about their trajectory in hockey and trace their history as a participant in hockey and let them set the tone of the interview. I found that beginning the interview with such an easy question got the participant talking and allowed them the space to get comfortable speaking to me. I asked the remaining questions throughout the interview in a similarly broad and open-ended fashion to let the participants decide what they wanted to share with me, and what they considered to be most important in our discussions on violence, risk, pain, and injuries in hockey. In turn, the interviews tended to take on a more conversational flow, which was a great way of getting stories from the participants and allowed for more spontaneous dialogue with the participants, which left room for unanticipated ideas to emerge (Sparkes & Smith, 2014).

I also used follow-up questions and probing questions to draw out more complete stories from participants (Sparkes & Smith, 2014). Following the advice of Berg and Lune (2012), I made sure to know my audience and the culture as much as possible before beginning the interviews. By having some understanding of the groups under study and the culture of hockey before doing interviews, I was in a better position to understand what the interview participants were telling me and when to probe for more. Thorpe (2012) adopted this approach where she used an interview guide that had a selection of themes and questions. She explains that she relied on it a lot at first, especially with more intimidating people, such as professional athletes, but as she gained experience and confidence in her interviewing skills, she found herself using the guide less and less and opting for a more flexible and conversational dialogue. She adjusted the structure of the questions and followed new directions in relation to the participant’s responses and the nature of the interaction. Following Thorpe’s (2012) lead, I always had my semi-

structured interview guide with me but found that I did not need it often. I found that participants who volunteered for this study were eager to discuss the topic and the conversational flow was more advantageous than following a stricter order of interview questions. Since I knew my interview guide well, I knew when to ask follow-up questions or probes to the participant as they spontaneously brought up a theme from my guide.

I also conducted a thorough case law analysis to demonstrate the law as it exists in Canada to supplement the interviews and to conduct a comparative analysis. Ehrlich's theory of living law is equally a methodology, wherein a distinction is made between 'legal propositions' and the living law (Ehrlich, 1962). Legal propositions include statutes and judicial decisions that are aimed at providing guidance to jurists, and not necessarily to regulate everyday social behaviour. Ehrlich (1962) notes that most individuals do not know the law that is found in legal propositions; yet they know their own living law very well. By gaining an understanding of the living law, through observation of social life, Ehrlich's goal was to make decision-making by adjudicators fairer and more efficient to influence the development of better legal propositions (Treviño, 2017).

Through a case law analysis, I provide a thorough examination of existing legal propositions and how these are not always consistent with the living law in hockey precisely to work towards Ehrlich's goal of making legal decision-making fairer and in line with the living law. In doing so, the goal is not for sociological interpretation to take over legal doctrine. Rather, it is meant to inform juristic thinking (Cotterrell, 2018). By providing an empirical understanding of the living law as explained by participants in this study, I provide the socio-legal analysis needed by jurists to effectively understand, interpret, and apply legal doctrine in ways that can achieve better legal propositions for this particular social context.

Data Analysis

Creswell (2007) explains that to achieve the goal in providing rich descriptions of the culture under study, researchers must report on the different realities and perspectives of the group members. This can be done by giving voice to participants and sharing their interpretations by sharing quotes and presenting themes that reflect their voices. Throughout my research articles, I share extensive quotes from participants to share their experiences with risk, pain, and injury. The aim is to share their perspectives, in their own words, on the consequences of playing a violent and hypermasculine sport. In analyzing this data, I proceeded with a thematic analysis which refers to organizing and describing the interviews by identifying and interpreting patterns within the data. This allows the researcher to highlight similarities and differences as well as key features of the data (Sparkes & Smith, 2014).

Upon completion of the interviews and transcription, I generated initial codes across the data set and then sorted these into themes. A 'code' in this sense refers to a specific key word that captures something in the contents of the interviews (Saldaña, 2013, Sparkes & Smith, 2014). I specifically searched for themes that emerged between different participants and used the language of participants as key words to code the theme. For example, nearly every participant who had experience playing in the NHL brought up the code word "business of hockey" and identified it as a problem for various reasons, which became a theme worthy of analysis in my research articles.

Once the themes were identified across the data, I proceeded to analyze the themes with abductive reasoning, which involves a succession of inductive and deductive processes. Berg and Lune (2012) describe this mixed inductive and deductive approach as a research process that is not linear and requires the researcher to re-examine and refine theoretical assumptions as they move through the process. Sports researchers Ryba et al. (2012), further explain that such an analytical

procedure “involves a dialectical movement between everyday meanings and theoretical explanations, acknowledging the creative process of interpretation when applying a theoretical framework to participants’ experiences” (p. 85). Thorpe (2012) adopted a similar approach in her ethnographic research on snowboarding culture, wherein she “refined and developed [her] ethnographic interpretations throughout the research process by engaging insights in dialogue with a number of critical theoretical approaches” (p. 62-63). In adopting a similar approach, I began with a broad observation that the socialization of players in the culture of hockey shapes particular perceptions of violence that differ from legal interpretations. Rather than formulate any given hypothesis on the issue, I was interested in seeing how participants understood and experienced risk, pain, and injury and seeing what themes and patterns emerged from their perspectives and lived experiences.

By analyzing these themes abductively (Ryba et al., 2012; Sparkes and Smith, 2014), I was able to move between the participants’ meanings as presented in the data and theoretical explanations continuously throughout analysis and the write-up. Accordingly, my research design and analysis followed the abductive process of beginning inductively with an aim to broadly understand the socio-cultural processes and meanings of specific phenomena for athletes (violence in hockey) and to establish more deductively whether the athletes’ experiences could be understood in the context of a particular theoretical framework. Each research article, described in the next section, thus draws on different theories to unpack and make sense of the lived experiences and perceptions of participants in this study.

Outline of Articles

In my first article, titled “The Reasonable Hockey Player: Tort Liability for the On-Ice Negligence of Hockey Players in Canada,” I explore the issue of participant liability in hockey

regarding the unintentional tort of negligence. In negligence cases, it must be proven that a duty of care has been breached by the defendant by failing to act according to an appropriate standard of care. In determining the appropriate standard of care in given situations, courts will test the conduct of the defendant against what is said to be reasonable in the circumstances (i.e., the reasonable person test). Here, I explore the following question: how do the established practices and customs of the sport of hockey help courts determine what the reasonable hockey player looks like for the purposes of negligence liability? To answer this question, I explore both the case law (the legal propositions) on hockey negligence and in-depth interviews with hockey players, coaches, and athletic trainers (the living law) to map out the social practices of hockey players that shape their own everyday rules of conduct. Hockey players tend to follow the rules of their sport, which sets a standard of behaviour that might not always be consistent with state law. As such, this article draws on the theory of living to compare formal state law with the living laws as described by the participants in this study.

This paper describes how the principles of the tort of negligence apply in the game of hockey – particularly the duty of care and the standard of care, which are key elements in establishing negligence. This sets the scene for understanding the next two articles. The other two articles focus on assumption of risk and consent to violence in hockey. Assumption of risk is a defence to negligence that is grounded in consent. The defence argues that the plaintiff consented to the ordinary risks of the game and consented to a foreseeable injury by running the risk. If a risk is assumed, there is no liability (Barnes, 2010). This article thus provides an in-depth overview of the elements of negligence required to establish that a defendant-player caused injury to the plaintiff (with consideration to the inherent risks of the game), which sets the

scene for an in-depth discussion on the assumption of risk as a defence to negligence liability and consent as a defence to intentional torts.

My second article, titled “You Just Roll with the Punches”: The Production of Ignorance in Professional Ice Hockey,” examines the various forms of violence that are arguably part of the playing culture of professional hockey and how hockey players assume the risk of injury simply by participating in the game. As players make their way up the professional ranks, they generally assume a greater risk of serious injury, including the risk of career-ending head trauma. In this article, I explore the ways in which risk is constructed in hockey. Drawing on the theory of agnotology, I examine the ways that consent is implied and largely manufactured in hockey. Agnotology is a theory of knowledge that serves as an analytical tool to study ignorance (Barton et al., 2018; Pinto, 2015). I examine how ignorance can be employed by a dominant and powerful group that is used to either minimize or reject responsibility for causing harm to others (Barton & Davis, 2018). Indeed, I argue that hockey leagues work hard to produce ignorance in players by insisting that injuries are simply part of the game and must be accepted. Framed around the class action lawsuit against the NHL for allegedly concealing information on concussions, I draw on interviews with elite hockey players to examine the power relations in play that support the following findings: (1) team management, coaches, doctors, and trainers often prioritize winning over the health of their players and (2) the normalization and glorification of violence in the game contribute to players not fully realizing the extent of their exploitation. While a few players have opted to quit the sport after realizing the extent of the harm being done to them, the majority of players find it is easier to live in ignorance while sacrificing their bodies for the dream of making it to the NHL.

This article focuses on the ways that hockey leagues produce ignorance in the players around a specific injury: concussions. The article is framed around the concussion litigation brought forward by former NHL players against the league and the overall shifting attitudes around concussions and concussion safety. The overall argument is that players cannot consent to injury when leagues deliberately conceal information about the type of injury and, more importantly, when the league doctors, trainers, and administrators convince players to return to the game before they fully recover from head injuries. The focus of this article is on the leagues and how the individuals in positions of authority deliberately evoke ignorance in the players to downplay the seriousness of concussions and to encourage players to continue participating in the game to help the team win games.

The third and final article, titled “Personal Sacrifice or Exploitation on Ice? The Code of Hockey Violence and a Win-at-all-Costs Mentality”, builds on this second article and looks at injuries more broadly with a particular focus on the players’ socialization in the culture of violence in hockey. While players engage in a sort of willful ignorance around the risk of injury, their consent to violence and injury must be understood in the context of a social environment that promotes a win-at-all-cost mentality wherein players are rewarded for sacrificing their bodies for the game and playing through pain and injury. Drawing on the sociology of consent (Channon & Matthews, 2021; Weinberg, 2016), theories of masculinity, and Gramsci’s (1975) concept of hegemony to frame professional hockey as the dominant force controlling the game more broadly, I argue that consent is best understood as a subjective process shaped by the culture of hockey that legitimizes violence which may or may not be consensual for everyone.

Through the learning process of becoming a hockey player, players become seemingly ignorant of the occupational and embodied consequences of violence. However, their love of the

game does not mean that they are willing participants in their exploitation. Players clearly consent to a relatively high degree of pain and injury in the name of the game, but the socialization process that takes place as a player moves up the ranks in competitive hockey is shaped by an imbalance of power and an unquestioned adherence to a set of unwritten rules known as the Code of violence in hockey that makes it difficult, if not impossible, to communicate a lack of consent.

Taken together, all three articles provide a rich description of participants' experiences with risk, pain, injury, and violence in hockey. As argued by Fowler et al. (2023), player voices are "especially important to challenging hockey culture" (p. 452). By sharing the experiences of participants in this study and offering a unique socio-legal approach to understanding violence in hockey, I hope to challenge the hegemony of professional hockey and the many harmful norms and practices that encourage participants to continue inflicting violence on each other.

ARTICLE 1

The Reasonable Hockey Player: Tort Liability for the On-Ice Negligence of Hockey Players in Canada

The sport of ice hockey is competitive, physical, and violent (Silverwood, 2022). Violent conduct is commonplace in hockey, which means risks of injury are expected and inherent in the game. Injury is a price that athletes sometimes pay because the overall value and social importance attached to playing the game outweigh these risks (Barnes, 1996). It has been argued that hockey is shaped by a “culture of risk” (Nixon, 1992, p. 128) that works to normalize risk-taking, pain, and injury (Zacher & Bridel, 2022). Hockey players undergo a learning process within the culture of hockey that socializes them to do whatever it takes to win, even if that means using violence and playing through pain and injury (Silverwood, 2015; Young et al., 1994). While aggressive and violent practices are arguably part of the game and regulated by a set of unwritten rules known as the “Code” of hockey violence (Atkinson & Young, 2011; Bernstein, 2006; Silverwood, 2015), players are increasingly turning to the law for compensation after suffering traumatic injuries during a hockey game (Dennie & Young, 2019).

In this article, I argue that the broader culture of hockey should be considered when determining legal liability on defendants who negligently cause injury to other players. In other words, while violence can be tortious (Rubin, 1999), tort liability should only be imposed if the violence goes beyond the scope of what is customarily consented to by participants in that sport. Generally, each sport has its own shared values and expectations (Lazaroff, 1990), which demonstrates the need both for a standard of care unique to hockey and a standard that considers the playing culture of the game.

In the law of negligence, the standard of care is based on the objective test of the reasonable person. Case law involving hockey players has recognized that the standard to be

applied is that of the “reasonable competitor” in similar circumstances (*Unruh v Webber*, 1994, para 31). To determine the reasonableness of participant conduct, then, courts are required to examine the inherent risks of the game and to consider what is and is not part of the game. The case law involving negligent hockey players has resulted in varied decisions. Courts in Manitoba, Ontario, and New Brunswick have traditionally relied on a standard based on recklessness or intent, while courts in British Columbia have allowed findings of liability based on carelessness. A recent decision in Ontario (*Casterton v MacIsaac*, 2020) has shifted the standard in Ontario to include liability for careless acts. Not only are the standards themselves in dispute, but courts are not consistently applying the standard of care with consideration to the inherent risks of the game.

This article thus aims to address a gap in traditional legal scholarship by arguing that external insights should factor into the application of the standard of care in negligence cases involving hockey players. With a focus on empiricism, it is argued that decisions can be made more fairly and in line with the ways that the game is actually played. Accordingly, I adopt a sociological approach aiming to obtain a broader external understanding of legal obligations in hockey by drawing on lived experiences of hockey players to inform the development of more effective law. The goal of this chapter is not to negatively judge precedents, but to interpret the obligations they create and understand them in the context of the living law (Ehrlich, 1962) to inform more consistent and fair decisions in the future.

Sports Negligence: Who is the Reasonable Competitor in Ice Hockey?

The standard of care is one of four elements to be established by the plaintiff in a negligence case. Negligence is an unintentional tort, which allows plaintiffs to argue that the defendant created a reasonably foreseeable risk of injury and caused injury to their person. As an

unintentional tort, a successful claim in negligence will compensate individuals who have been harmed by the *careless* actions of others who owed the plaintiff a legal duty of care (Linden et al., 2018). Carelessness is the standard adopted in simple negligence cases, while recklessness is a slightly higher threshold used in cases of gross negligence. As described by Lazaroff (1990), a standard based on carelessness means that a defendant did not intend to commit the act that caused injury to the plaintiff, but rather failed in exercising caution to avoid causing foreseeable injury to the plaintiff. In contrast, a standard based on recklessness means that the defendant intentionally committed a dangerous act knowing that it could injure the plaintiff.

The first element required to prove that a defendant was negligent (careless or reckless) is the existence of a duty of care. The duty of care is a legal obligation to act with care and prudence towards the plaintiff. It is based on foreseeability of harm and the proximate relationship between the plaintiff and the defendant (*Cooper v Hobart*, 2001). The duty of care is not at issue in sports injury negligent cases since it has already been recognized in law. Courts have previously determined that a legal duty of care exists in sports and this duty is to avoid causing foreseeable harm to a fellow participant (Barnes, 2010). The case law on this point is undisputed as players understand that they can harm each other in physically aggressive contact sports. Most disputes turn on the standard of care.

The second element needed to establish negligence is evidence of a breach of the legal duty of care by the defendant who failed to act according to the appropriate standard of care in the circumstances. If both elements are satisfied, the defendant will have been deemed negligent. However, this alone is not sufficient to ground liability in tort law. The defendant's negligence must also be a cause of the injury (*Clements v Clements*, 2012) and the injury must not be too remote a consequence (*Mustapha v Culligan of Canada Ltd.*, 2008).

The standard of care measures the defendant's conduct against the objective 'reasonable person' test¹. Put simply, the test asks the following question: *What would the reasonable person in similar circumstances as the defendant do or not do?* This test was first introduced in *Vaughan v Menlove* (1837), where it was explained that the defendant must "adhere to the rule which requires in all cases regard to caution such as a [person] of ordinary prudence would observe". If the reasonable person would have exercised more caution than the defendant, then the defendant was negligent. The reasonable person is an abstract legal concept: it is a fictional person that does not consider the defendant's own subjective thought process. This objective reasonable person test has a general application, but courts have left room to recognize certain characteristics of the defendant in each case (Linden et al, 2018). For instance, if the defendant has special expertise, then the standard of care will be elevated to account for that special knowledge. Ultimately, the courts can adjust the standard based on the level of intelligence or other relevant personal or professional characteristics of the defendant, which might be necessary to measure whether their conduct was reasonable or not in the circumstances. If the defendant's conduct fell below the standard of care, meaning their conduct was unreasonable in the circumstances, the defendant will be deemed to have acted carelessly; that is, they were negligent.

The question of whether the defendant has breached the standard of care will be analyzed by courts according to a series of factors identified in case law. In this article, I will focus on the factor that introduces customary practices into the negligence analysis. I argue that the playing

¹ Judge Laidlaw, in *Arland v Taylor* (1955), defined the reasonable person as follows: The reasonable person is a "mythical creature of the law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time. He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. He does nothing that a prudent man would not do and does not omit to do anything that a prudent man would do".

culture of hockey and its numerous customary practices should be considered in the measuring of the reasonableness of the injury-causing conduct in a hockey game.

Courts outside of Canada have developed certain approaches to the standard of care in sports cases. For example, American courts typically examine the following elements: the nature of the sport itself, the rules of the sport, the generally accepted customs and practices of the sport, which includes the accepted levels of violence, the inherent risks of the sport, the equipment worn in the sport, the circumstances of the incident in question, including the age of the parties, their physical attributes, their skill levels, and their knowledge of the rules and customs of the sport (Citron & Ableman, 2003). English courts have also adopted a requirement to look at all the circumstances of the incident, including the rules of the sport, its conventions and customs, and the skills and judgment reasonably expected of a participant (James, 2013).

The customs of a sport are also recognized as relevant in Canadian cases (Fridman, 2012), yet this factor is not always applied consistently. Athletes typically consent to “the ordinary blows and collisions incidental to play, including contact that is in breach of game rules” (Barnes, 2010, p. 234). Indeed, hockey players are known to abide by a set of unwritten rules around violence that players respect and work to legitimize violence in the game (Atkinson & Young, 2011; Bernstein, 2006; Silverwood, 2015). The sport of hockey is equally marked with a cultural and occupational expectation to do whatever it takes to win (Allain, 2020; Silverwood, 2015; Weinstein et al., 1995; Young, 1993). This hypermasculine cultural space (MacDonald, 2014) is characterized by a “culture of risk” (Nixon, 1992) that normalizes pain and injury as part of the sporting experience (Young et al., 1994). As such, the cultural context that shapes the use of aggressive and violent practices in hockey must be considered when determining the appropriate standard of care in negligence cases involving hockey players.

Theoretical Framework: Living Laws of Hockey

To tap into the complex social reality of hockey negligence cases, I draw broadly on the concept of sociological jurisprudence. The term was first introduced by Roscoe Pound (1959), who aimed to challenge legal positivism. Pound's approach was to go beyond the rules and principles found in formal law and draw on knowledge and experience to gain a deeper understanding of law. Pound was concerned that law was being stifled by a mechanical application of past judicial decisions without consideration of current social needs. The goal was to make law more effective by recognizing the social needs the law seeks to regulate. However, Pound's (1959) theory of sociological jurisprudence was limited in the sense that it only recognized law's social *function*. Beyond this functional element, this approach did little to incorporate sociological insights into legal analysis. Years later, Cotterrell (2018) adopted the term sociological jurisprudence, seeking to advance the theory in ways that would offer a deeper and more meaningful relationship with sociology. Cotterrell argues that the world has dramatically changed since Pound initially coined the term sociological jurisprudence and is thus critical of his approach since it focused primarily on the courts, whereas most experiences with law occur in everyday life.

Cotterrell (1998) was deeply influenced by Eugen Ehrlich's (1962) theory of living law when he insisted that legal ideas should be interpreted sociologically. He placed emphasis on the social context of the law to challenge the conventional legal tradition centred on doctrinal analyses as a means to understand the law. Such a critical socio-legal approach questions the law's ability to be objective and welcomes external insights to understand how individuals actually make sense of law in practice.

Ehrlich (1962) drew a distinction between legal propositions, meaning statutes and judicial decisions, and living laws, which include the norms and rules of conduct that regulate the daily life of participants in communities. For Ehrlich, the role of legal propositions was not to

regulate societal codes of conduct, but rather to provide guidance to officials who are tasked with settling disputes and making judicial decisions. Legal propositions are not meant to guide the regular citizen to behave a certain way in everyday life; they are aimed at legal decision-making by official regulatory bodies. In contrast, the living law is what actually regulates the daily lives of individuals. The reality is that most individuals do not even know the law that is found in legal propositions; rather, individuals know and understand the rules that govern their daily activities. The living law is, therefore, what individuals experience as law on the ground (Treviño, 2017), which may or may not be consistent with legal propositions. By gaining an understanding of the living law, through observation of social life, Ehrlich's goal was to make decision-making by adjudicators fairer, more efficient, and ultimately to influence the development of better legal propositions (Treviño, 2017).

Ehrlich conceived of the law primarily as a “sociological phenomenon” (Treviño, 2017, p. 47). Traditionally, a sociological conception of law meant that an outside observer is examining the law. This observer seeks to explain both the historical and social conditions of the law ‘from the outside’ (Lieboff & Thomas, 2014). While law has its own ways of interpreting the world in a professionally presented specialized discourse, sociology can be helpful. As Cotterrell (1998) explains:

Sociological understanding is simultaneously inside and outside legal ideas, constituting them and interpreting them; sometimes speaking through them and sometimes speaking about them; sometimes aiding, sometimes undermining them. Thus, a sociological understanding of legal ideas does not reduce them to something other than law. It expresses their social meaning *as law* in its rich complexity. (p. 181)

In this sense, law can be seen as embedded in social relations and in institutional practices (Cotterrell, 1983). Ehrlich indeed viewed the living law as rules of conduct which become institutionalized. In other words, there are agencies that create, interpret, develop, and enforce these rules at an institutional level. The goal is thus to negotiate legal doctrine (i.e., official state law) with the living law (Treviño, 2017).

To do so, empirical evidence of the living law is needed to understand how legal propositions can be understood sociologically. Cotterrell (2018) argues that law is drastically changing in context and form; as such, we need new resources in juristic thought. These new resources refer to the sociological and political contexts of law. A sociological understanding of law means taking an empirical look at the social reality of law in terms of practice and experience. Accordingly, Cotterrell puts forward a concept of law that places sociological insights at the heart of the theory, which allows the researcher to uncover how normative orders created within a given social space can be juridically established and recognized by the individuals living in this space.

A sociological concept of law is not meant to take over doctrine, but rather it is aimed at informing juristic thinking (Cotterrell, 2018). Lawyers tend to rely strictly on norms, rules, principles, and concepts (or, in Ehrlich's terms, legal propositions) that have been developed over centuries in legal doctrine. The result is that this 'insider' perspective is limiting when it comes to influencing change or introducing new legal ideas. Meanwhile, sociologists can equally focus on normative patterns but their insistence on empiricism can go a step further in revealing and explaining the context of judicial decisions. Indeed, it is equally argued that these sociological insights are needed by lawyers if they are to be well-equipped to understand, interpret, and apply legal doctrine (Cotterrell, 2018).

This juristic thinking can be especially useful for the common question in law of testing the reasonableness of a defendant's conduct, wherein "it can be difficult for the legal system to ascertain what reasonable may mean in any given context" (Silverwood, 2015, p. 56). Cotterrell (2018) argues that this "empty concept" of reasonableness is to be "coloured in" with social scientific knowledge (p. 59). Sociological context is helpful then to inform what is reasonable in given circumstances and to provide guidance in the analysis of a very complex legal concept. Cotterrell (2018) uses the example of sports organizations as social space wherein members of the sporting community abide by their own rules of conduct per the rules of the sport. While sports participants will respect the living laws of their sport in ways that regulate their everyday conduct and ultimately create the obligations owed to others in the same social space, these are commonly poorly understood, if not entirely excluded, from the traditional application of legal propositions. It is suggested that an empirical look at these organizations provides an understanding of how legal authority operates within these spaces, and the ways that participants work with these legal ideas in practice (Cotterrell, 2018). Accordingly, by providing empirical data that touches on what is 'reasonable' in a particular social space, this knowledge becomes available for lawyers to build their arguments and for judges to justify their decisions.

Methodology: Legal Ethnography

To learn about the living law in a particular social space, Ehrlich (1962) proposed a two-step methodology. The first step is to closely examine the "modern legal document," (Treviño, 2017, p. 37) which includes case law. The second step is to study the living law by directly observing social life and the customs of the individuals living in this space. Ehrlich argued that this two-step "legal ethnography" is required for lawyers and judges to learn about what individuals are actually doing in their everyday lives (Treviño, 2017). This calls for empirical data on the social

practices of individuals as well as the customs that shape their experiences as members of a community. Ehrlich's theory of living law is thus equally a theory of method.

To examine the living law found in hockey leagues, I adopt Ehrlich's two-step methodology. I begin with case law analysis of tort cases involving negligently injured hockey players who sought compensation from the player who caused their injury. I then analyzed qualitative semi-structured interviews that I conducted with hockey players in comparison to the case law findings. Each participant was assigned a pseudonym to protect their identities.

Qualitative interviews can be seen as a social encounter that aims to construct knowledge in conversation between the interviewer and the participant (Thorpe, 2012). The knowledge that I looked to construct in my in-depth interviews with hockey players is a cultural understanding of hockey violence and players' consent to violence. I conducted 32 interviews with hockey players, coaches, and athletic therapists who are deeply socialized in the game of hockey to tap into their knowledge of the customs and practices of the game.² Participants included men and women between the ages of 18 and 51. Participants' experiences with hockey ranged from recreational hockey to professional hockey. Participants were recruited through personal contacts and via a recruitment poster, which was shared on social media. These interviews were coded to learn about the living laws as they exist in the game. These are the rules of conduct that the players tend to follow, which may or may not be consistent with the rules that are developed in legal propositions.

I began each interview with broad, open-ended questions to allow the participant to share their opinions on violence, injuries, and the law in hockey. I found that most participants were eager to discuss the topic and openly discussed the customary practices around aggression,

² Research ethics approval was received from the University of Calgary Conjoint Faculties Research Ethics Board.

violence, and their lived experiences with injuries in the game. This allowed the interview to take on a conversational flow and allowed me to ask follow-up questions and probing questions to draw out more complete stories from participants (Sparkes & Smith, 2014). Several important themes emerged from these interviews and, when analyzed alongside the case law from Canadian jurisdictions, the findings demonstrate a need for courts to meaningfully consider the customs of the game in applying tort principles in cases involving injured hockey players.

The next section outlines the legal propositions found in cases across Canadian jurisdictions. The courts typically examine the inherent risks of hockey and other relevant factors associated with the game of hockey to determine whether a defendant has breached the duty of care owed to the plaintiff. As will be discussed, relevant factors include the physical nature and the speed of the game, the age and skills of the players, and the inherent risks. However, some cases fail to consider all the practices of the game that inform whether a player is playing within the customary nature of the game, leading to decisions that are not necessarily in line with the living law.

The Legal Propositions

The first step in Ehrlich's methodology is the examination of the legal document. In negligence cases, legal authority lies in judicial precedents. As such, I conducted a review of case law involving plaintiff hockey players who were injured by another player on the ice and subsequently filed a lawsuit against that player. I searched for cases across Canadian jurisdictions and found relevant cases in British Columbia, Manitoba, and Ontario.³ It is

³ Other provinces have dealt with hockey cases, but they systematically follow the precedents set in Manitoba and Ontario. For example, in *Michaud v Tardif* (2017), the Court of King's Bench of New Brunswick applied the principles that are well developed in Manitoba.

important to reiterate here that the goal is not to place judgment on whether the precedents were “good” or “bad” decisions. It is possible that a close examination of the living law would render the same outcomes or that a careless act could be construed as being reckless if analyzed under the proper framework based on the living law. The goal here is to highlight the obligations that these precedents impose on hockey players and how these legal propositions may lead to unfair outcomes for hockey players. Hockey players tend to follow the rules and customs of their game, and these should be important elements in the application of the standard of care in negligence lawsuits.

The first precedent involving a hockey player suing for compensation against the player who caused their injuries is a 1965 decision from Manitoba, *Agar v Canning* (1965). While this case was founded in intentional torts, it is an important decision because it recognized that hockey players are not immune from the law. In this case, the plaintiff was a 17-year-old hockey player who lost sight in his right eye and sustained injuries to his nose after colliding with the defendant during an amateur hockey game. The facts of this case are that the defendant bodychecked the plaintiff, took possession of the puck, and skated away towards his opponent’s net. To slow down the defendant, the plaintiff hooked him with his stick from behind, and caught him in the back of the neck. In response, the defendant stopped, turned around, and hit the plaintiff with his stick. The defendant used both hands to lift his stick up to bring it down and struck the plaintiff. The stick caught the plaintiff between the nose and the right eye. The plaintiff fell to the ice and the game was terminated. The trial judge found that the defendant struck the plaintiff in retaliation for the hook that occurred prior. This being the first case of its kind, the trial judge relied on traditional tort principles, primarily an oft-cited quote, which is worthy of repetition, from Halsbury’s as follows:

An unlawful blow which is struck in anger or which is likely or is intended to do bodily hurt is actionable, but a blow struck in the course of a lawful sport is not actionable; thus, boxing with gloves in the ordinary way does not involve an assault; but a blow in a prize fight is an assault and battery notwithstanding the consent of the person struck. (cited in *Agar v Canning*, 1965, para 4)

In hockey, it is thus reasonable that body contact which is ordinarily accepted in the game would not be actionable. In *Agar*, the trial judge ultimately found that while players tend to act instinctively in the heat of the game, there are limits to a player's legal immunity. Each case is to be decided on its own facts, but a "definite resolve to cause serious injury to another, even in provocation and in the heat of the game, should not fall within the scope of implied consent" (para 8). The trial judge concluded that the defendant was liable for striking the plaintiff in the face with his hockey stick, and considered provocation in the mitigation of damages. The judge reduced the damages by one third in light of this provocation. The Court of Appeal of Manitoba (1966) dismissed the appeal.

A second Manitoba decision involving a negligence claim against a hockey player, *St. Laurent v Bartley* (1998), involved two players who were opponents in a no-contact recreational hockey league. The case law involving no-contact leagues is quite widespread as players in these games tend to assume the risk of body contact is much lower. However, courts have recognized that the no-contact version of the game does not mean there is no body contact at all. The sport of hockey is still a contact sport no matter which version is played. In the *St. Laurent* case, the league was made up of highly skilled players who were "competitive, aggressive, and experienced" (para 3). The trial judge found that the description of the league being "no-contact"

was misleading.⁴ Indeed, the game in question was particularly rough as the two teams were the top teams in the league and were competing for a guaranteed spot in the playoffs.⁵

As is the situation in most similar cases, the trial judge was tasked with making several findings of fact (*St. Laurent v Bartley*, 1998). The judge found that the two players were skating for the puck as they repeatedly bumped into each other and exchanged profanities. St. Laurent was behind Bartley. To slow him down, St. Laurent wrapped his stick around Bartley's waist. Bartley lifted his stick while being hooked and hit St. Laurent with either the butt-end of his stick or his glove. The plaintiff lost an eye. Bartley acknowledged that he swung his stick back, but that his intention was not to hit the plaintiff. Rather, he did it to prevent the plaintiff from hooking him again and to create some space between them. When St. Laurent was hit, he fell to the ice and the referee called a penalty for roughing and later called a game misconduct when he noticed that St. Laurent was bleeding, although, the referee did not interpret this as intent to injure. The trial judge determined that while Bartley's action did indeed constitute a penalty, it was not an action outside the scope of what is ordinarily expected in the game of hockey: "it's a roughing penalty but not intentional butt-ending" (para 20). Penalties of all kinds were evidenced as being common in this league and the trial judge recognized that an unfortunate injury could result at any given time without intending to cause injury. As such, the injury was accidental and within the risks that hockey players assume in playing the game.

⁴ The description included evidence that showed that the players wore full equipment and often participated in aggressive body contact. Both the plaintiff and the defendant were experienced players having played the game since they were young children. They both participated in this league for recreational reasons, but equally took the game seriously with the goal of winning. The no-contact rule primarily meant no hitting, cross-checking, crashing opponents into the boards, and no fighting: *St. Laurent v Bartley*, [1998] M.J. No. 159; [1998] 8 W.W.R. 373 at paras 4-5.

⁵ To define rough in this case includes trash talk between players; fast, physical, and competitive play with pushing, shoving, clutching, and grabbing; players being shoved into the boards; slashing; hooking; and some fights: *St. Laurent v Bartley*, [1998] MJ No 159; [1998] 8 WWR 373 at paras 7-8.

On appeal, the court was tasked with deciding whether an in-game rule violation followed by an accidental injury is enough for liability to attach in negligence or whether such an injury is an accepted risk. The Manitoba Court of Appeal reviewed the relevant precedents including *Agar* and a baseball decision titled *Temple v Hallem*⁶ (1989) to come at the conclusion that Bartley did not intend to cause injury to St. Laurent. Despite the factual similarities to *Agar*, Bartley did not deliberately aim to injure the plaintiff. He simply meant to bat St. Laurent away as he was being hooked by the plaintiff, unlike Canning who held his stick with both hands and brought it down on the plaintiff's face. The Court of Appeal indicated that there must be intent to cause injury to the plaintiff or a reckless disregard for the plaintiff's safety for liability to attach. In the end, Bartley's actions did not fall below the standard of what is reasonable in the circumstances. An accidental injury is not enough for liability to attach.

A more recent Manitoba decision, *Johnson v Webb* (2001), confirms the Manitoba approach to require intent to cause injury as a crucial element for tort liability. Here, the plaintiff was injured in a recreational no-contact hockey game after being body checked by the defendant. Witnesses testified that the check appeared to be accidental with the defendant testifying that his intent was not to body check the plaintiff. The referee did not call a penalty. Only the plaintiff testified that he was hit after he shot the puck out of the zone; all others testified that the plaintiff

⁶ In *Temple v Hallem*, [1989] MJ No 203; 58 Man R (2d) 54, the court was faced with a baseball incident wherein the plaintiff was injured when the defendant slid into home plate. The rules of this game included a rule that simply said "sliding is allowed". The plaintiff was playing catcher. The ball was thrown from the outfield to the catcher. The plaintiff moved up the base line to catch the ball and tag the runner (the defendant). In the meantime, the defendant rounded third base and was heading to home plate in an attempt to score. He decided to slide home and collided with the plaintiff. The collision knocked the plaintiff back a few feet. She was injured, although not seriously. The trial decision found that the defendant had been negligent: "The action of a 180-pound young man, hurtling down the base line towards a 117-pound woman, and going into what is, virtually, a professional slide, and violently colliding with the plaintiff, in my view, goes beyond the rules of good conduct and fair play demanded by the league" at para 5. However, the Court of Appeal of Manitoba disagreed as it found that the broad rule indicating that "sliding is allowed" was enough to justify the slide as done by the defendant. What is important here is that the Court of Appeal went a step further to indicate that even if sliding was not allowed, a simple rule violation was not sufficient for liability to attach. The precedent set in *Agar* suggests that only deliberate rules violated intended to cause injury will give rise to tort liability. Otherwise, participants in sports assume the risk of accidental harm.

remained in possession of the puck when he was hit. The trial judge determined that the act was unintentional; it was neither reckless nor careless. While the injury was serious, the plaintiff assumed the risk of injury caused by such actions through voluntary participation. The Manitoba Court of Appeal dismissed the appeal, indicating that the trial judge followed the correct legal principles relying on *Agar*, *Temple*, and *St. Laurent*.

The Ontario cases have been greatly influenced by the Manitoba decisions discussed above and yielded similar outcomes. In *Champagne v Cummings* (1999), the parties were opponents in a no-contact hockey tournament. The no-contact rule prohibited body checks, but the trial judge acknowledged that “the game of hockey is such that body contact inevitably occurs” (para 4). The evidence from witnesses was varied, but it was found that there was incidental contact between the plaintiff and the defendant. Following this contact, the plaintiff yelled at the defendant and approached him while lifting his stick higher and higher as he moved closer. The defendant braced himself with his foot and raised his stick to protect himself. When the plaintiff reached the defendant, their sticks collided. The referee gave them each a minor penalty for high-sticking. As a result of this collision, the plaintiff lost or broke a total of seven teeth. The plaintiff claims the defendant was negligent. The trial judge relied on the decisions in *Agar*, *Temple*, and *St. Laurent* to determine that this incident, which happened “quickly and instinctively,” (para 9) was not intended to cause injury to the plaintiff. The defendant’s intent was simply to “ward off” the plaintiff’s “aggressive tactics” (para 10). The defendant was not liable.

There are several other Ontario cases that are worthy of analysis given their discussions of what is considered reasonable in hockey, including a pair of cases which touched on important questions relating to negligence in hockey and the reasonable competitor standard. In *Nichols v*

Sibbick (2005), the plaintiff suffered a serious injury in a no-contact hockey game. Prior to the injury, witnesses described the game as a clean game as there had not been any evidence of aggression or penalties. Players in the league in question were described as “above average” and played competitively (para 2). The incident occurred when Nichols was standing in front of the net waiting for a pass while the defendant guarded him. Nichols either had the puck or was waiting for the puck to come to him when Sibbick attempted to stick check him. The defendant missed the check, and his stick caught the plaintiff’s left eye, causing permanent injury. Despite varied witness testimonies, the court concluded that the stick check, which was delivered well above the plaintiff’s shoulders, was a rule violation. As such, the plaintiff argued that the defendant was careless in attempting the stick check from behind. The argument was that the defendant should have known that such an attempt could cause serious injury. The court was thus tasked with deciding whether a violation of the written rules of the game in this league was enough for liability to attach.

The critical question in this case came down to the standard of care. The defendant argued that he was simply acting on instinct and his actions were that of a reasonable defenceman. Both referees also described the act as part of the game, despite the rule violation. The reality is that contact still occurs in no-contact hockey leagues. Based on this evidence, the court concluded that the defendant had not been reckless, but rather had “a momentary lack of carefulness” (*Nichols v Sibbick*, 2005, para 11). Citing another Ontario decision (*Sexton v Sutherland*, 1991), the court identified that there must be evidence of recklessness or intentionally harmful conduct in order for the standard of care to be breached. As such, Nichols assumed the risk of his injury. He knew that the risks of unintentional injury were possible, and he chose not to wear protective gear. The evidence indicated that the defendant’s actions were

not intentionally malicious. The plaintiff attempted to bring in the case law from British Columbia, which suggests that carelessness is enough to prove a breach of the standard of care, yet the court indicated that “there is clearly a different view on our Western coast than there is in Ontario” (*Nichols v Sibbick*, 2005, para 16). The court ultimately decided that the defendant was not liable in negligence because he was neither reckless nor intentional in causing injury to the plaintiff: “Nichols and Sibbick were involved in a recreational match of no-contact hockey. The no-contact nature of the match does not eliminate the inherent dangers of the sport of ice hockey. Players will inevitably collide, sticks will inevitably clash, pucks will fly in unforeseen directions” (*Nichols v Sibbick*, 2005, para 18). What the defendant attempted to do was “a legitimate tactic” (*Nichols v Sibbick*, 2005, para 19) in hockey, although a penalty, but was within the scope of the risks assumed by the plaintiff.

A similar decision was articulated in *Levita v Crew* (2015), where the plaintiff suffered a broken tibia and fibula while playing a no-contact recreational hockey game. He filed a lawsuit in negligence against the player who caused the injury and the hockey league—True North. Levita claimed that Crew intentionally or recklessly checked him into the boards causing his injuries. The claim against the hockey league was that they knew or ought to know that Crew was a dangerous player, and they should have disallowed him from participating in the game. The trial judge recognized that no-contact hockey still carries inherent risks, and the very fact that True North required players to sign a waiver was evidence that the game carries a risk of injury. While the waiver included collisions with boards, being struck with sticks and pucks, as well as physical contact with other players, the waiver was between True North and Levita. It did not release Crew from any liability. As such, the court was required to conduct an analysis related to the risks that are expected in this league. It began by closely analyzing the rules of the

game, the role of the referees and their extensive training, the penalty system that True North implemented to protect players, and player statistics. Levita failed to prove that Crew breached the standard of care.

The trial judge found that the injury was an unfortunate consequence of a regular hockey play. Relying on *Nichols*, the trial judge explained:

[T]he standard of care in a hockey game is informed by the speed, amount of body contact, and stresses of the sport as well as the risks the player might reasonably be expected to take during the game [...] [A] non-contact hockey game does not eliminate the inherent risks of playing hockey”. (*Levita v Crew*, 2015, para 69)

It is crucial for the court to conduct a thorough analysis of the sport because “the inherent risk in an activity may operate to modify the standard of care” (*Levita v Crew*, 2015, para 82). It is well recognized that an inherent risk of hockey is body contact, even in no-contact hockey games – a fact that was recognized in the *Nichols* and *Champagne* cases. The trial judge applied the law from Manitoba and previous Ontario decisions to conclude that intentional and reckless conduct is not an inherent risk of hockey and therefore falls outside of the standard of care. The question came down to whether Crew believed Levita was in possession of the puck or not. Was Crew playing the puck or was he attempting to cause injury to Levita? There was conflicting evidence as to the location of the puck, but it was clear that the battle between the two parties was indeed for possession of the puck, even if the plaintiff had just shot the puck. As such, there was no evidence that Crew acted recklessly or with intent to cause injury. There was no evidence that he acted maliciously despite being aggressive; the manner of play was what one could expect from a competitive hockey player. The defendant was not liable for the plaintiff’s injuries.

The case against True North was also dismissed as the court found that the liability waiver was valid.

What is particularly notable in this case is that the judge provided a summary of the risks that hockey players assume when they play hockey. These include injuries in the course of play, meaning for the advancement of the game and not with the intent to cause injury. Players also assume the risk of injury caused in violation of the rules if these are not intended to cause injury. Players equally assume the risk of injury that began as an act meant to advance the game, but by the time the act was completed, the game had stopped, or the puck had been shot away. Finally, players never assume the risk of intentional or reckless acts. The degree of risk is to be analyzed according to the type of league and the level of play.

A different outcome was reached in *Leonard v Dunn* (2006). In this case, the plaintiff hit the defendant while both were chasing the puck. The referee stopped the play as it was a no-contact hockey league. During the stoppage, the defendant punched the plaintiff in the face causing teeth damage. The court drew on previous decisions to reiterate that injuries do happen in no-contact hockey and rule violations will occur. However, the trial judge found that the punch to the face was an “unprovoked battery unrelated to the advancement of the game” (*Leonard v Dunn*, 2006, para 19) and imposed liability on a theory of intentional torts. Indeed, given the timing of the punch during a pause in the game, such violence could not be legitimately done as part of the game. What is noteworthy in this case is that each player had signed a waiver to play in this league. However, the trial judge interpreted the waiver to exclude batteries:

However fraught with potential for injury, hockey is nevertheless a sport, a contest of skill and strategy to be carried out in competitive but sportsmanlike manner. It is not a bar room brawl. When a player signs the game sheet agreeing to the terms of the waiver,

he is assuming the risks inherent in playing the game; he is not volunteering to be the recipient of a battery. (para 20)

It is thus clear that there is no room for intentional torts in hockey, or what the trial judge in *Leonard* referred to as a “deliberate unilateral attack” (*Leonard v Dunn*, 2006, para 23). This was made clear in *Agar*, and subsequent decisions in both Manitoba and Ontario. The court in *Leighton v Best* (2009) followed this direction in finding intentional batteries to be outside the scope of consent to injuries in hockey.⁷

While it appeared as though the Ontario courts were unified in finding that rule violations alone are not enough for a finding of liability, the trial judge in a 2020 decision, *Casterton v MacIsaac*, found the defendant liable for delivering a hit to the plaintiff in a non-contact hockey game. The plaintiff suffered a concussion. The collision occurred with only seconds left in the game. Casterton had control of the puck as he skated along the boards behind the net. The collision occurred slightly behind the net. The defendant was given a ten-minute penalty for misconduct and a few minutes later, the referee added a seven-minute penalty for intent to injure. It was noted that this additional penalty was added after the plaintiff’s teammate told the referee that the hit was delivered in retaliation for a tripping that occurred earlier in the game. The trial judge accepted as fact that the defendant delivered to the plaintiff “a blindside hit to the face,” (para 123) which is strictly prohibited by the rules of the game. Accordingly, the trial judge found the defendant liable: “[E]ven if I concluded that the hit was neither intentional nor

⁷ This case dealt with a high sticking incident and a retaliatory blow to the face, which led to a fractured jaw to the plaintiff. The plaintiff sued for damages in battery; therefore the court was tasked with unpacking the defence of implied consent. The defendant argued that by dropping his gloves, the plaintiff consented to the fight. The trial judge accepted this argument, and the onus thus shifted to the plaintiff to prove that the defendant’s actions went beyond the scope of implied consent. Ultimately, the plaintiff succeeded in proving that fighting was unusual in this type of game, and that the defendant exceeded the scope of implied consent when he removed the plaintiff’s helmet and full facial cage, which led the court to believe the defendant wanted “to expose [the plaintiff’s] mouth and face to an injury”: *Leighton v Best*, [2009] WDFL 4509, [2009] OJ No. 2145 at para 14. The fact that the plaintiff kept it on at the start of the fight effectively negated the implied consent.

reckless, [...] MacIsaac would be liable for Casterton's injuries because he failed to meet the standard of care applicable to a hockey player in the circumstances” (para 123). However, it is notable that the judge in this case failed to rely on relevant precedents.⁸ In *Casterton*, the defendant was found liable in negligence regardless of whether there was evidence of intent or recklessness, which drastically deviates from the precedents described above.

The trial judge in *Casterton* founded her decision on cases published in British Columbia, which indicate that carelessness is enough for liability to attach. Previous plaintiffs in Ontario attempted to introduce this case law to support a standard based on carelessness to no avail (until *Casterton*). The development of hockey cases in British Columbia began in the early 1980s⁹ with *Herok v Wegrzanowski*, a 1985 decision involving hockey players leading the way for negligence claims in British Columbia. The parties were participants in a no-contact league known as the “Fun League,”¹⁰ which was comprised of players of varying skill sets. The trial judge accepted the following facts: during the first period, the defendant had possession of the puck while the plaintiff attempted to check the puck away, and eventually succeeded. He passed the puck and skated to the bench. The defendant, who was skating behind the plaintiff, swung his stick out as a last attempt at regaining control of the puck. The defendant’s stick caught the plaintiff from behind, which fractured his left cheek bone and injured his left eye. He lost sight in that eye. The defendant was given a seven-minute penalty for slashing (*Herok v Wegrzanowski*, 1985). The question was whether the defendant had been negligent by slashing the plaintiff. The judge

⁸ For instance, the judge did not consider the precedents set in *Levita* and *Nichols*, which indicate that certain elements such as the inherent risks of the game and the speed of the game should be considered.

⁹ In *Holt v Verbruggen*, [1981] BCJ No 1427, [1982] BCWLD 109, the defendant was found liable in intentional torts for breaking the plaintiff’s forearm with his hockey stick. The slash done by the defendant was found to be a battery; one that no player can be said to consent to when they play hockey. This case suggests that the province initially followed the example of older cases which indicate that intentional acts clearly fall outside the scope of implied consent.

¹⁰ In this league, “no-contact” meant no body checking, no sticks above the waist, and using the stick only to attack the puck: *Herok v Wegrzanowski*, [1985] BCJ No 1778, [1986] BCWLD 131 at para 3.

referred to *Agar* and said that players accept the risk of injury arising from unintentional conduct.¹¹ Injuries caused by a body check or being struck by the puck fall within the assumed risks of playing hockey. The question is thus “how much inadvertence in the use of a hockey stick amounts to negligence” (*Herok v Wegrzanowski*, 1985, para 7). The trial judge found the defendant liable in negligence because this league specifically disallowed using the stick for anything besides playing the puck. On appeal, the defendant argued that as long as the injury occurred during the ordinary course of play, whether there was a rule violation or not, then there should be no liability. In other words, he argued that only intentional acts should attract liability. The British Columbia Court of Appeal dismissed the appeal, indicating that it is “not every careless act causing injury that will give rise to liability. It is only careless acts quite outside the risks assumed that could be a foundation of such liability” (*Herok v Wegrzanowski*, 1985, para 16).

The standard based on carelessness was further developed in *Unruh v Webber* (1994). This case was the first to award a substantial amount in damages – over \$3.7 million. The case dealt with two players in an amateur hockey game for 17- to 19-year-olds. Unruh was 17 years old and was the smallest player on his team. Webber was the biggest player in the league. The injury occurred midway through the second period. The puck went into the end zone, close to the boards. Unruh went after the puck with Webber close behind him. Webber hit Unruh from behind and was assessed a five-minute penalty. Unruh had not reached the puck when he was hit. Unruh went head first into the boards and broke his neck. He was rendered a C4 quadriplegic.

¹¹ An example of a British Columbia decision recognizing that accidental injuries are not liable is *King v Redlich*, [1984] 6 WWR 705, [1984] BCWLD 2952. The defendant shot a puck during warm-ups of a non-contact recreational hockey game and hit the plaintiff in the temple. The court found that there is always a risk of injury with flying pucks in hockey. The same is said during warm-ups: all witnesses who played in this game agreed that they take shots during the warm-ups while other players are skating around. An “ordinarily prudent player” (para 8) would have taken the shot. The shot to the plaintiff’s temple was an accident. There was no negligence.

The hockey league had special rules to address spinal injuries and introduced Rule 53 (“Checking from Behind”), which prohibits all hits from behind. The trial judge found that the defendant had intentionally pushed the plaintiff into the boards and thus broke his neck. However, it was noted that the intent was not to cause injury to the plaintiff, but rather the intent referred to intentionally violating Rule 53. The trial judge indicated that “[t]he push or check was thoughtless, not vicious” (*Unruh v Webber*, 1994, para 13). The fact that the type of hit was banned by the league in order to protect players against spinal cord injuries meant that the defendant had a duty to avoid contacting Unruh from behind, especially being so close to the boards. The defendant should have foreseen the likelihood of serious injury. The defendant was thus liable.

There was conflicting evidence as to whether the plaintiff had reached the puck, but it was likely that he had not yet gained possession of the puck when the defendant pushed him into the boards. It was found that the defendant was an experienced player who understood the risk involved in checking someone from behind and into the boards. The trial judge thus concluded that the defendant had been reckless because the rule violation was intentional, and the plaintiff did not assume the risk of the rule break. On appeal, the defendant claimed that the judge committed an error by failing to consider the inherent competitiveness and bodily contact in the sport of hockey. The defendant argued that the intentional rule violation was not enough to ground liability, and that greater consideration should be given to acts committed in the heat of the moment, which can be reduced to a mere error of judgment. The Court of Appeal recognized the following as the correct approach:

The standard of care test is — what would a reasonable competitor, in his place, do or not do. The words “in his place” imply the need to consider the speed, the amount of body

contact and the stresses in the sport, as well as the risks the players might reasonably be expected to take during the game, acting within the spirit of the game and according to standards of fair play. A breach of the rules may be one element in that issue but not necessarily definitive of the issue. (*Unruh v Webber*, 1994, para 31)

Relying on this standard, the Court of Appeal rejected that the defendant simply made a mistake. Relying on evidence from a spectator who said she “felt that it could have been avoided,” (para 33) the Court held the opinion that Webber had plenty of time to stop and avoid the collision. The appeal was dismissed; the defendant had been reckless.

Another BC decision yielded a similar outcome. In *Zapf v Muckalt* (1997), the facts were similar to *Unruh*: the parties were chasing the puck when the defendant hit the plaintiff into the boards and the plaintiff became a quadriplegic. The plaintiff was injured in a Junior A hockey game, which was played under the same rules as the *Unruh* case, meaning another Rule 53 violation. There were three notable differences between *Zapf* and *Unruh*: Zapf anticipated the hit and turned slightly to protect himself; the referee did not call a penalty; and Muckalt did not intend to hit the plaintiff from behind and rather meant to hit him from the side. The hit was thus accidental. Despite the factual differences, the trial judge awarded over \$4 million in damages based on a carelessness standard. The Court of Appeal confirmed that in applying the standard of care, the trial judge appreciated all of the necessary factors, including the positions of the parties; the force of the hit; the point of contact; the plaintiff’s awareness of the impending contact; the defendant’s awareness of the risks of hitting a player from behind; the rules of hockey; the standard of care in the circumstances; and the assessment of the defendant’s conduct against this standard. The trial judge concluded that “Muckalt was at worst reckless, at best careless. Either is

sufficient to found liability in all the circumstances of this case” (*Zapf v Muckalt*, 1997, para 11). The Court of Appeal dismissed the appeal.

The indeterminate statement that a defendant can be “either reckless or careless” can be conflicting when considered alongside the living law discussed below. Players assume the inherent risks of the game, which includes common rule violations if that conduct is done to advance the play. The case law out of British Columbia, and the recent decision in *Casterton* in Ontario, suggest that carelessness is susceptible to legal liability, yet this is not consistent with the living law. The living law recognizes that should a careless act be considered negligence, there must be the additional element of intent to cause injury or reckless disregard for the plaintiff’s safety. However, the *Casterton* decision might very well reflect the shifting tolerance around violence that is occurring in the game of hockey with a greater focus on athlete safety in light of the ongoing “concussion crisis” (Malcolm, 2019).

Lived Experiences with Violence and Injury

Several important themes emerged in the interviews that are relevant to the application of the standard of care and the ways that the rules and the customary practices of the game can inform the reasonable competitor test. This data is helpful both in determining the appropriate standard of care and to determine the relevant factors in the application of this standard of care. The interviews provide empirical evidence of the living law based on the lived experiences of the participants in this study.

The players in this study often discuss that there is a fine line between acceptable conduct and unacceptable conduct in the game. The key determinant is usually intent to cause injury as opposed to whether the conduct violated the rules of the game. If there is intent to cause injury to another player, then it is clearly outside the scope of the game, and consequently, outside the

realm of reasonableness. Where it becomes less clear is in the difference between a careless and a reckless act. As will be discussed, the line between an accidental act, a careless act, and a reckless act is unclear, but a common theme shared by the participants is that there is absolutely no room for intentional injuries.

The Written (and Unwritten) Rules of Hockey

The rules of the game are inevitably important in the way players play the game and no one disputes the relevance of the rules in terms of the repercussions that players may face for potentially tortious conduct. The importance of the written rules can be seen in the experiences of players in leagues that tolerate fighting and those that explicitly ban fighting. For instance, Jack, a former National Hockey League (“NHL”) Player, spoke quite a bit about fighting in professional hockey and explained that, in his opinion, because fighting was within the rules in the NHL, players were expected to know how to fight. In Jack’s view, while fighting is a five-minute penalty in the written rules of the NHL, players know that fighting is tolerated under the customs of the league. If fighting was truly banned, then referees would immediately intervene, and players would be removed from the game. Players believed that an act is a penalty in the rules as it is expected to occur from time to time. For some players like Jack, since fighting was ‘only’ a five-minute penalty, then it was a part of the game if the player is willing to take the penalty. In contrast, fighting is not allowed in university hockey in the sense that players are ejected from the game for fighting and repeat offenders are suspended. The effectiveness of such sanctions is demonstrated by Charlie, a former NHL player with some coaching experience in university hockey, who explained that he had never seen a fight in university games.

Courts have clearly communicated the importance of rules in the standard of care analysis, but the written rules of the game are only one element. As noted, hockey is

characterized with a set of unwritten rules (Silverwood, 2015) that dictate when violence is justified. Generally speaking, some of these unwritten rules refer to protecting one's teammates and the requirement to fight fairly (Bernstein, 2006; Silverwood, 2015). Benjamin, a former NHL player, spoke of the unwritten rules in hockey and explained that players are expected to know them and to have their guard up if they commit a violation of an unwritten rule.

The case law assigns some importance to retaliatory conduct,¹² which is certainly in line with the living law, since the Code dictates when retaliation is allowed (Silverwood, 2015). As explained by Kennedy:

I think there's certainly an unwritten code, especially in pro men's hockey where... you don't have to say anything, nobody has to... you know, acknowledge it but players just know what's coming in certain scenarios in terms of enforcing the rules of the game, and protecting your teammates.

Daniel also referred to the unwritten rules as the type of conduct that encompasses the "policing of the game," meaning retaliation and repercussions for those who play dirty. In fact, Benjamin used the unwritten rules of hockey to discuss whether he's ever crossed the line in the game. He provided an example of a time when he got suspended for physically abusing an official. He told a story of when his teammate got into a fight with a much larger opponent. The official did not intervene to end the fight, so Benjamin got involved in protecting his teammate:

So I'm watching their big guy pounding our little guy. I'm not OK with that either. I ended up getting tackled and a bunch of people got tackled. So there was a big pile on and I ended up at the bottom of it. Finally, the bodies get dragged off me and I see the scrap between the big guy and the little guy are still happening. The linesmen are

¹² For example, in *Agar*, when the defendant struck the plaintiff in retaliation for the hooking penalty.

grabbing me and escorting only me to the penalty box. I turn around and witness...

there's a very clear mismatch. A lone heavyweight in the league is beating up on the smallest guy on the team.

Benjamin instructed the official to go break up the fight, and when he refused, he tried to fight off the grip of the official to go protect his teammate in this mismatched fight. In trying to get loose, he struck the official unintentionally and was suspended. He explained that according to the unwritten rules, he didn't deserve the suspension: "That one I actually don't feel like I crossed the line at all. In the unwritten rules of hockey and like being there for your teammates, I would do it a thousand times over again." This player clearly assigned great importance to the unwritten rule that one must protect their teammate and should not be held to repercussions for simply respecting the rule that you must defend your teammates.

Ultimately, while the written rules of the game are crucial, players also instinctively play by the unwritten rules that are ingrained in them as they learn to play the sport. As such, when looking to apply the standard of care and to determine what is reasonable in the circumstances, courts should be aware that there are possible unwritten rules informing player conduct. As explained by Caleb, a former Canadian Hockey League ("CHL") player:

I don't know what you use as a barometer of what's legal and what's not. But as far as within, you know, the unwritten rule of hockey, I think a lot more is seen as OK than most people think.

There are clearly numerous factors to be taken into consideration when looking at the issue from the perspective of those involved in the sport. It is important, however, to note that a distinction must be made between true unwritten rules of the sport and norms which are purely a subjective interpretation of the rules. The Supreme Court of Canada ("SCC") (*Waldick v*

Malcolm, 1991) has recognized that a customary practice will only be considered in the application of the standard of care if it is clearly established among the participants on a balance of probabilities. That said, even an established custom can be evidence of negligence if the custom itself is negligent. Consequently, since the players are quick to excuse a lot of potentially harmful acts as part of the game, especially given the speed, emotions, and aggression that are all inherent in the sport, it is possible for the courts to decide that it remains negligent even if there is sufficient evidence that the custom is well-established among participants if they decide it would be harmful to allow such practices to go on.

The Game is “Lightning Fast”

The game of hockey is a fast sport. The players wear sharp skates to get to the puck sliding across a sheet of ice. The speed that players travel is a big factor in the players’ understandings of injuries sustained during the game. Accordingly, when asked about harm as a result of playing hockey, players are quick to point to the speed and the fact that players are required to make decisions in a split second. It is evident based on the interview data that the speed and acting on instinct are key parts of the game. It is possible for emotions to take over, given the intensity, speed and physical nature of the game, and players can subsequently behave in ways that could lead to injury. Indeed, Denzin (2006) argues that an understanding of violence requires an examination of emotions. Silverwood (2015) further notes that “a good understanding of the emotions that lead to violent behaviour and the feelings of aggression, anger, fear, dominance and danger” is needed to fully capture “the myriad of emotions and feelings that occur in the commission of a particular act” (p. 86). Ultimately, players in this study realize that opponents can conduct themselves in certain emotional ways in the heat of game and it is typically accepted that accidents happen in this contact sport.

The speed of the game was a big factor for John, an NHL player, who described professional hockey as “lightning fast” which has led to body checking and hitting becoming a difficult and potentially dangerous skill set:

The speed of the game is crazy. Like I can't even describe. It's like lightning how fast it is out there. And I think the contact is disintegrating because everyone is getting faster. And you have to be extremely fast and extremely talented to hit now. Hitting right now in this game is an art form. For me, it's always been an art form, but especially in today's game because it's so hard to catch people. With hits... it needs to be an art. It's like a science. You need to know exactly how to position yourself so, one, you don't get hurt, two, you're going so fast you need to really think on how you're gonna hit him because if you hit him going so fast in an awkward position, that could lead to suspension.

Interestingly, John attaches importance to not getting a suspension, as opposed to exercising care to avoid hurting an opponent when delivering a hit. Players are not taught to play cautiously. They learn to play intensely, competitively, and aggressively to dominate the opponent and win the game, which often means using one's body as a weapon (Messner, 1990).

The speed is, however, not something to be eliminated as it is often cited as an exciting part of the game and a reason why people choose to play hockey over other sports. Indeed, the risk of injury that comes with playing a speedy game is often something that athletes enjoy. Allain (2020) found that pain is often rationalized by hockey players as a welcomed consequence of a risky sport that they deeply enjoy playing and that the overall risk of injury is largely disregarded by participants since the game is “tied to feelings of enjoyment and pleasure” (p. 5). McCallum et al.'s (2023) findings are similar wherein they found that ‘risky play’ is a form of

play rationalized as thrilling and exciting for sports participants despite the risk that it may result in injury.

As Benjamin, a former NHL player said, “The speed and the energy and physicality of it are things that I always just really enjoyed”. Consider the experience that Paul, a former CHL player, had with a violent encounter with an opponent, which led to a broken wrist:

We were playing an exhibition game. I got the puck in the corner, and I got hammered from behind and my hand went into the boards and jammed my wrist. So, the guy got 5 minutes, got kicked out of the game but it was an exhibition game, so he got like one game suspension, but I was done, I was out. My NHL camp, my trial was done because of a broken wrist. But was it fair, like was it understandable? Yeah, sure, because you know what? Yeah, did I turn towards the boards? Sure. Did he hit me from behind but at high speeds if I’m turning? I don’t know, I understand it, I understand it. Yeah, I think for me personally like it’s... we’re playing a high impact sport and that is a fact and that is... if you don’t wanna play the high impact sport, go play soccer, go play something else that doesn’t have that. I think that... that’s where, you know, I was never across the line... I never sucker punched, all my fights were fair. I wouldn’t say that I was really... that the game did me wrong in any of those injuries. I would hold no ill will towards anyone that I played the game against. Just for the fact of saying that hockey is a highly intensive, highly competitive, high impact sport and all of those factors will blur that line a little bit. If you’re crossing a little bit, not egregiously crossing then I can’t really fault you for it.

Similarly, Andrew, a former CHL player described the inherent risks of playing such a speedy game:

I would say no one really talks about it, but there is this inherent risk that exists like... I would say especially now, even when I played, like the speed of the game... it's so quick. And so fast. And guys move at such high velocity with so much weight behind them and yeah... it's like when two opposing things clash together and then going in opposite directions. There's gonna be... something's gotta give, right? So yeah, I feel like it's an inherent risk that you just kinda accept and I wouldn't say more often, but there's a good likelihood that you could get hurt playing. And that's just part of the game.

While speed and the ability to hit is seen as an asset in professional hockey, recreational players are more aware of the ways that playing with speed can lead to injury and they adapt their playing style to protect themselves from harm. Yet, despite the excitement attached to risk-taking in professional hockey, the embodied consequences of playing a violent sport should not be undermined, particularly with increasing evidence that contact sports are facing a “concussion crisis” (Malcolm, 2009, 2018, 2019; Ventresca, 2019, 2020). Despite hockey players showing a willingness to sacrifice their bodies for the game, particularly as they work towards a professional career, the risk-taking approach of hockey players must be understood in its cultural context that prioritizes winning at the expense of the player health and safety.

Samantha, a recreational player in mixed-gender leagues, provided an insightful illustration as to the importance of player safety in any level of hockey. She explained that some players tend to skate too fast, and they lose control of their bodies:

So they'll go full speed in the corners or full speed into the net and I'm gonna end up on the wrong side of that equation because I'm smaller than them. So there's guys that I... so I play defence now and there's guys if I see them going into the corner, I'll let them get the puck, I'll let them win the race and then I'll fight for it. Because if I go in first,

I'm getting shmooshed. And I've had a few more concussions than I'd like to admit, and I can't really afford another one. So there's aspects of the league that I'm currently playing in that makes it less enjoyable. It takes some of the fun out of hockey when I have to think about who I'm going up against and if it's safe for me to go up against them.

There is clearly a difference between professional and recreational hockey in the sense that speed is something players are more likely to recognize as part of the game in professional settings. Without the competitive edge to win a championship for which the players are paid well to win, recreational players are less likely to assume the risk of injury. As recognized in the case law, recreational players tend to participate in the sport for leisure, exercise, and the fun of it. As Jan, a recreational player, explained, the win-at-all-cost mentality that is present in professional hockey appears to trickle down into recreational leagues:

Probably the thing that comes up in women's league is always saying everybody has to go to work the next day. So what is up with these people who think this is the NHL and they have a bone to pick or something to prove. That generally makes it not fun and that's one of the rare times that it's just not fun playing the game. You can kind of see it with your teammates and you don't even wanna go there because of the fear of getting injured.

An example that occurred in a Junior A hockey game involving a speedy player came from Jason who is currently an athletic therapist for a hockey team:

A player almost died on the ice because there was a 20-year-old player who was known for dirty hits. He finally connected with this young player who wasn't experienced enough to see this guy coming and sure it was a clean hit, but he was like 20 or 30 pounds heavier travelling at full speed, caught him like shoulders square to the chest but

threw him into the boards. Helmet came off. Had a fractured skull with internal cranial bleeding and the guy actually got kicked out of the league. Like... what if he had died. There was a video of him circling the ice running at the guy. But he knew he was big enough and strong enough to severely hurt somebody.

These stories are important to the analysis of the standard of care. While the speed of the game is something that players often describe as fun and exciting, it is equally recognized as something that can lead to serious injury, particularly when emotions run high. As Jimmy, a former Junior A hockey player said, “it’s kind of when those emotions take over is when things can get a little chippy”. It is for similar reasons that Roger, a former NHL player said, “no one lets their emotions get high; no one lets the intensity get up there,” because that’s when players start taking penalties and violence escalates. As David, an NHL player who was playing in the American Hockey League at the time of the interview explained, “your emotions just get the best of you sometimes” and gave the example of a time when he received a two-game suspension after getting into a “scrum” with an opponent and “a couple punches were thrown but it was nothing, like, crazy”.

John also shared the following story that illustrates the emotional state he prefers to be in when engaging in a fight:

I like to fight off my emotions. You know, if you’re gonna cross check me, like cross check me hard enough so I feel it to piss me off, if you’re really looking for that. Then you might get a rise out of me. But you just asking me – “hey buddy, you want to fight?” like off the draw, no I don’t. One, I’m not pissed off. And if I’m not pissed off in a fight, that’s how I’ll get beat. And to me, right now, the game is fighting on emotion and I think that’s what they were looking for. And I think they got it now. [...] No one can fake an

emotion. That's why I don't think it's a bad thing. Because it's natural. It's a natural part of being human. It's a natural part of the game. And emotions... you start off so high for the game, you come down slowly after the first, and your emotion will bring you up high, and your emotion will bring you just back to neutral, then you go up to really high, and go back to really low. And that's just human behaviour for everyone in the world is emotion. And it just so happens that if you're emotionally frustrated enough, you can take it out. And that's ok.

The speed of the game is indeed an inherent risk that comes with playing hockey: no matter the level of hockey, it is a fast game. The speed at which players travel means that collisions are expected, and players understand getting hit can lead to injury, particularly when "emotions boil over" (Paul, a former CHL player) and it causes players to fight or do something overly violent in retaliation. As such, it is recognized that players need to be in control of their emotions and their bodies. Where conduct can be considered tortious, then, is when a player has lost control of their own speed and emotions, and is no longer paying attention to the risk of injury they are exposing others. Players need to remain in control and maintain awareness of their surroundings, particularly in recreational hockey where players come to the game with varying skill sets and bodily sizes and players are not paid to play with violence.

The Scope of Reasonableness in Hockey

It is clear in the participants' experiences that intentional injurious conduct is outside the scope of the game. In other words, the living law supports a legal claim in intentional torts. There is no room for players who intentionally cause injury to other participants. As expressed by Jack, a former NHL player, "you don't go out to intentionally hurt somebody. That's the line". This was

echoed by a majority of participants who explained that excessive violence is when there is intent to injure.

Greg, a former CHL player, stressed the importance of intent when we discussed the *Casterton* decision that had been published a few weeks before the interview and had made headlines across the hockey world. Greg found it difficult to fathom that a player could recuperate over \$700,000 in damages for a concussion. He pointed to a floodgates argument for being hesitant to say that hockey players should be able to receive compensation for unintentional injuries. He explained that, to him, intent matters:

It doesn't matter if it's a non-hitting league... there's always gonna be body contact in hockey. And there's gonna be unintentional and intentional body contact even in non-contact leagues. Two guys going for the same puck, they run into each other, one guy gets a concussion... let's say that's the hypothetical, I get a concussion, now I can sue this guy, precedent's been set... So now I'm expecting a big pay day for me.

As such, intent is the distinguishing factor for many players that determines whether the conduct is negligent or simply a hockey play. Since intent is difficult to prove, it all boils down to the factors surrounding the hit that led to the injury. Perhaps unknowingly, Jason referred to the reasonable competitor standard to explain when there is intent to cause injury using the example of elbowing a fellow participant:

I think a lot of times you can kinda see like what would a normal average hockey player do here? Would a normal play be to, you know, lift your elbow? No. So if you're gonna do that, there's no hockey reason to do that. The only reason you're doing that is to injure someone.

Other commonly cited examples of violence that have no place in hockey included using a stick as a weapon, sucker punches; swinging a stick at someone, and using a stick like a baseball bat and smashing it over someone's head, as well as intentionally hitting someone who is in a vulnerable position. All these examples would lead to liability as shown in the case law as they are intentionally injurious acts.

The case is less obvious where the incident in question is either careless or reckless. Players often pointed to the idea that conduct should have a "hockey reason" to commit that act. Players also pointed to conduct that is not a "hockey play" as something that has no place in the game. This typically include examples of egregious violence where the offending player is no longer vying for the puck. For instance, Charlie, whose professional hockey career ended early after receiving a concussion, explained that the player who caused his concussion likely acted outside the scope of reasonableness:

There's definitely some plays... where players were attacking other players outside of the game, right? And I'm sure if we have some of these instances where players are stick swinging, or going after a player and punching them from behind, you know those are extreme cases. They're not every day plays. Those aren't hockey plays. If you look at my situation, you could say my hit was just a guy trying to play the body, like he wanted to get the puck. But if you watch the replay, he disregards the puck, he hits me, gets ejected from the game, and he got suspended for one game. Others will look at it and say that guy should have been suspended for the year. And when you end up a player like I end up¹³... that player should... I should be able to sue the player, right? For the damage that he caused.

¹³ This player was still experiencing post-concussion symptoms at the time of the interview, which was six years since initially suffering the concussion.

Yet, when asked why he did not pursue legal action, he explained that he had never thought about it. This was a common comment made in the interviews: the thought of pursuing legal action against an offending player simply does not enter the minds of injured players. This could be due to players knowing and understanding that they have assumed the risk of injury, but it is also likely because players know that violence occurs in this game. Unless there is clear intent to cause injury, players can justify the act as simply part of the game. Indeed, MacDonald (2014) argues that as players are socialized in this hypermasculine sport, they learn to practice “silent complicity” (p. 101) to avoid being targeted by others. Consequently, players may fear being ostracized for pursuing legal action against a fellow player.

Discussion and Conclusion

The standard of care in negligence is a flexible legal concept. It will be applied on a case-by-case basis, and it will consider numerous factors. The rules of hockey are clearly very important in assessing the reasonableness of the defendant’s conduct. However, policy-related reasons support the conclusion that the customary practices of the game should be given important consideration as well. For example, in *St. Laurent*, the defendant clearly acted outside the rules of the game when he hit the plaintiff with his stick. Yet, the court did not impose liability on the basis that the act was still within the nature of the game. If the rules of the game were definitive of liability, then this case would have had a different outcome and defendants would be liable for simply breaking a written rule of the game. Since hockey is a fast sport where players and sticks collide, it is not unreasonable to expect some stick-related infractions to occur, hence the finding in *St. Laurent* (1998). Another example is the *Nichols* (2005) decision where the defendant attempted a stick check, missed, and injured the plaintiff. The stick check was a rule violation,

but it was not outside the scope of the game. Accordingly, the rules of the game are important, but they are not definitive of liability.

Rule violations can be committed very quickly and without the intent to cause injury. As Caleb explained, “people do make mistakes and, you know, when things are happening that fast, sometimes you don’t have time to make the decision that you would have... it’s not like they’re gonna stop the play for five seconds so you can contemplate.” Similarly, Benjamin shared the same thought in the context of NHL hockey:

In some of those hits you’re already committed to making the hit, and you’re pulling moves last second and... you’re already on your trajectory, on your path. It’s hard to like deviate and stop last second... ‘Oh I can’t hit you now ‘cause I don’t want to hurt you.’

That’s not realistic in all situations of hockey to consider that.

It is, however, crucial to remember that players who have never suffered a catastrophic injury might be quick to suggest that their ways of playing the game should not be subject to legal liability. It only takes one life-altering injury to make a player realize that playing with more care would have been reasonable. But it does not negate the importance of considering the customary practices and the types of conduct that are expected in the game of hockey to ensure that decisions are informed, consistent, and fair in light of the entire social context.

The living law as presented in these interviews suggests that in a lawsuit for negligence, recklessness may be the appropriate standard of care. It is not to say that a careless act could not lead to liability if the living law supports it; injured players need to be protected and deserve compensation for acts that are clearly outside the scope of the game. However, in cases where the act in question is careless, perhaps bordering on reckless, the reasonableness of the act should be closely analyzed factoring in the living law to ensure that the plaintiff did not assume the risk

of injury. If the act was indeed part of the inherent risk of playing the game, then it would be difficult to justify a finding of liability on the player who delivered a hit or committed an act that was foreseeable as part of the playing the game. As described by the players, it is a very fine line between a reasonable act and an unreasonable act. An intentional or reckless act is clearly not part of the game, but carelessness could be construed as part of the game depending on the facts of the case. That is why it is imperative to examine every relevant factor to ensure that liability is not imposed on a player who simply exercised a moment of thoughtlessness during the heat of the game. It is, of course, possible that a close examination of these factors, including the rules of the league, the physical nature of the game, the level of the league as well as the age and skill level of the players, would lead to the same outcome, but at least then the judgment would have been made fairly and in line with the living law.

ARTICLE 2

“You Just Roll with the Punches”: The Production of Ignorance in Professional Ice Hockey

Introduction

The sport of ice hockey in North America is often characterized with violence. As players in a contact sport, those who participate must willingly assume the risk of injury. The voluntary assumption of risk doctrine, also known as *volenti non fit injuria*, is a legal maxim that means there is no injury done to the willing person. It is an extension of the defence of consent to the intentional tort of trespass to the person (assault and battery) to render it applicable in negligence actions (Barnes, 2010). In a lawsuit for negligence, assumption of risk means that the plaintiff has consented to the risk of injury caused by defendant’s carelessness. This defence can be invoked when one participates in a risky activity and consents to waive their legal right to sue for compensation should they suffer an injury. The agreement can be express or implied through conduct (Linden et al., 2018). The requirements needed to establish assumption of risk are that the plaintiff knew the nature and character of the risk and that they voluntarily incurred that risk. When it comes to sporting activities, Canadian law recognizes that participants consent to the ordinary or obvious risks of the sport in question (Barnes, 2010; Dennie & Young, 2019). Where conduct falls outside the scope of what is reasonably expected in a sport, the defence will fail (Citron & Ableman, 2003).

The assumption of risk doctrine effectively operates to negate liability in negligence because the individual has waived their legal right to sue for any risk of injury suffered during a risky activity. However, the risks must be known to the injured party before taking part in said activity or be foreseeable to the reasonable person. To invoke the defence of assumption of risk, the defendant must prove an express or implied agreement that the plaintiff has consented to

accept both the physical risk and the legal risk of harm from the defendant's negligence. Put simply, the physical risk is the danger of being injured, while the legal risk is the agreement to abandon the right to sue the wrongdoer in negligence (Linden et al., 2018; Osborne, 2020).

In this chapter, I examine the social relations and practices that shape hockey players' assumption of risk. While hockey players assume the risk of injury, the notion of consent embedded in *volenti* remains a largely subjective experience that is embodied within the injured athlete. As argued by Weinberg (2016), "even though courts interpret the law, legal meaning also becomes constructed, interpreted, and transformed in ordinary, everyday interactions and in organizational settings" (p. 94). Accordingly, this chapter examines how hockey players make sense of consent and impliedly assume the risk of concussions. Drawing on interviews with elite hockey players, I explore how an understanding of this risk is blurred with ignorance around the causes of traumatic brain injury ("TBI") and the severity of repeated concussions. I argue that hockey leagues are responsible for producing and maintaining ignorance that leads players to assume risks of serious injuries, which can lead to severe and long-term health outcomes. More specifically, the research question is whether a hockey player can legally assume the risk of TBI considering the production of ignorance by hockey leagues around sports-related concussions and brain damage.

Drawing on the theory of knowledge known as agnotology (Proctor and Schiebinger, 2008), I explore how hockey players, coaches, and administrators work together towards a cultural production of ignorance. I argue that hockey leagues are responsible for producing ignorance – both on their own part and on the part of players. While players maintain a certain level of agency in their own willful ignorance, it must be understood in the context of power

relations between the leagues and the players and the ways that ignorance is needed to preserve the violent game that is professional hockey.

Agnotology: The Cultural Production of Ignorance

Agnotology is a theory of knowledge that serves as an analytical tool to study ignorance (Barton et al., 2018; Pinto, 2015). Proctor and Schiebinger (2008) remind us that not all ignorance is bad. In fact, ignorance can be useful (Croissant, 2018). While ignorance can mean an absence of knowledge, it is often more than a simple void. Ignorance is thus deeply connected with knowledge, but equally with uncertainty and doubt (Michael, 2015). For instance, Ogien (2015) defines agnotology as “the social construction of ignorance through the strategic and systematic expression of suspicion about scientific truths” (p. 191). In this sense, ignorance can refer to the uncritical adherence to claims made by people who seek to instill uncertainty and doubt about scientific research that threaten their own interests (Ogien, 2015), which may include business interests and/or profits (Tuana, 2006).

Pinto (2015) suggests that it is possible for ignorance to be manufactured precisely to deceive others. The causes of ignorance are varied across different social spaces and there are numerous ways of knowing and unknowing. As argued by Proctor (2008), the study of ignorance needs to consider the structural production of ignorance, including its causes and distributions. Indeed, theories of ignorance are properly structured around power relations, given how ignorance is produced and maintained by authority figures (Gilson, 2015). Those in leadership positions may rely on false beliefs, myths, and manipulated information, if not outright lies, to produce ignorance that will work to their own advantage (Barton et al., 2018). As such, theories of ignorance allow us to unpack the social dimensions of knowing and unknowing, and ultimately how ignorance is cultivated in given social spaces (Gilson, 2015). In pursuit of such

analyses, Proctor (2008) identifies a type of ignorance as something that is intentionally produced and manipulated. It is an active construct, usually by a dominant group. The focus is on ignorance as knowledge that someone somewhere does not want subordinate groups to know. Consequently, they actively work towards producing doubt, uncertainty, or misinformation to help produce and maintain ignorance. Ignorance thus refers to manipulated knowledge, as opposed to a void or an absence of knowledge and it can be an organizational strategy (Croissant, 2018). As articulated by Proctor (2008), “they know, and may or may not want you to know they know, but you are not to be privy to the secret” (p. 8). Put simply, ignorance is employed by a dominant and powerful group that is used to either minimize or reject responsibility for causing harm to others (Barton & Davis, 2018).

This intentional and manipulated form of ignorance is particularly important in studying the ways that hockey leagues cultivate ignorance in their players, particularly in the ways they insist that some injuries are not that bad. Barton et al. (2018) suggest that strategies can be invoked to maintain ignorance around real risks of harm associated with a given activity simply because this ignorance is required for the activity to continue operating. Proctor (2008) uses the example of tobacco companies and how they deny the health issues associated with smoking cigarettes. These companies argue that more research is needed before a direct link can be made between smoking and serious health outcomes. These efforts are done strategically to manufacture doubt about the hazards of smoking. In the same vein, Pinto (2015) draws on the arguments often made in relation to climate change and the calls for more scientific evidence before political leaders implement any radical changes to address the climate crisis. Yet, this doubt and need for more research is not a lack of evidence, and it is not an excuse for doing

nothing. Despite scientific uncertainties, precautionary measures are justified in the name of health and safety (Goldberg, 2013).

The National Hockey League (“NHL”) adopted a similar approach when faced with a lawsuit filed by former players. In 2013, former NHL players filed a class action lawsuit against the NHL claiming negligence, fraudulent concealment, failure to warn, and medical monitoring in the NHL’s dealings with concussions when players suffer head trauma (NHL Concussion Litigation 2018). The lawsuit was settled for a total of \$18.9 million dollars (Westhead, 2018), but the NHL did not admit any legal responsibility. The players claimed that the NHL had not done enough to protect them against concussions and brain damage, which has led to serious health issues in retired players, including Alzheimer’s, Parkinson’s, and increased speed and severity of mental decline following retirement. Ultimately, the players contended that the NHL knew or should have known of the growing body of scientific evidence linking repetitive concussions to long-term neurological problems and they failed to inform the players of these risks.

Concussions are defined as a TBI, which usually results from a direct blow to the body. A TBI can also be caused by subconcussive hits, which refer to hits that fall below the threshold of being a concussive blow; they cause the brain to shake but not quite hard enough to cause a diagnosable concussion (Malcolm, 2019; Liston & Malcolm, 2019). In fact, the greatest risk for TBI comes from repetitive subconcussive hits that are simply a routine part of contact sports (Kalman-Lamb, 2018; Kirk et al., 2013). A concussion may cause neurological impairment, which can include symptoms such as attention disorders, memory issues, sleep disruption, headaches and dizziness, sensitivity to light, problems with impulse control, substance abuse, personality change, anxiety, depression, suicidal ideation, and other mental health problems

(Kalman-Lamb, 2018; Ventresca, 2019). Those who suffer one or two concussions become more susceptible to concussions and the greater the risk of permanent brain damage (Kong, 2013). The prevalence and seriousness of concussions in sports have led to academics pointing to a “concussion crisis” (Malcolm, 2009, 2019, 2021; Miller & Wendt, 2015; Ventresca, 2019, 2020). The concussion crisis, however, refers to more than just the odd concussion. It includes post-concussion syndrome, which refers to prolonged symptoms long after the initial injury and a form of dementia known as chronic traumatic encephalopathy (“CTE”). CTE is a neurodegenerative disease that is associated with repeated blows to the head. It is related to an abnormal production of tau protein in the brain, which can only be diagnosed after death (Ventresca, 2020). For these reasons, Malcolm (2019) points out that the concussion crisis is far more than a blow to the head or what sports officials and participants often refer to as “getting your bell rung”. Indeed, the concussion crisis is a cultural phenomenon (Ventresca, 2020).

Sociologists of sport have been studying the normalization and glorification of pain, injury, and violence within the culture of sport for decades. Violence is learned behaviour, which is deeply rooted in masculinity and socialization processes (Atkinson, 2019; Messner, 1990; Theberge, 1997). As argued by Young (2012), “sport occurs in a cultural context that normalizes and glorifies risk, pain, and injury, and amid an institutional network of social relationships [...] that pressures athletes to play with pain” (p. 102). This pressure can come directly from the league executives as they may not have any interest in minimizing the amount of violence in hockey because the fans enjoy it, and it helps sell tickets (Jones et al., 1993; Oh, 2005). Accordingly, these normalization processes and the overall “culture of risk” (Donnelly, 2004; Liston & Malcolm, 2019; Nixon, 1992) in sport continue to encourage players to accept the risk of pain and injury, even if these may lead to long-term health outcomes. Donnelly (2004)

explains that within the culture of risk in many sports, the acceptance of risk is directly linked to the relationship of trust that athletes have with experts: “In sport, it is necessary for athletes to trust in expert systems – sport scientists, sports medicine, doping control, manufacturers and testers of safety equipment such as helmets, etc.” (p. 48). This trust equally extends to trusting one’s teammates and opponents. The act of risk-taking places trust in others that they will be “competent participants” who play by the rules and exercise safety (Donnelly, 2004, p. 48).

In countering these normalization processes, the players in the NHL Concussion Litigation argued that the NHL promoted violence as part of the game. They claim that the NHL has permitted, even encouraged, violence in the game since the league was first formed in 1917. The players alleged that the NHL has “developed and promoted a culture of gratuitous violence” in its game and it has been part of their strategy to sell the sport to fans (NHL Concussion Litigation, 2018, para 6). They promoted brutality and violence by glorifying the violent aspects of the game, including hits to the head and fist fighting. This includes the promotion of violence by featuring hits, fights, and other injury-causing conduct in television commercials for the game. In this context, the NHL is effectively attempting to promote socially and culturally produced ideologies around violence that shape its meaning to the players. The ideologies tend to translate into an acceptance of violence as part of the game. Atkinson and Young (2008) describe hockey as a total institution (Goffman, 1962) and show that hockey comes with “a culture of ideological insularity regarding violence in the sport” and that “discursive strategies are deployed within the sport in order to publicly frame violence as noncriminal and socially unthreatening” (p. 171). But this acceptance of violence as part of the game does not imply consent to all violence. As argued by Weinberg (2016), not all consent to violence is created equal. Consent is an embodied and culturally produced phenomenon that has meaning to those experiencing it. In

this sense, the NHL is achieving what Barton et al. (2018) call the “propagation of agnosis,” which refers to successfully creating doubt around the evidence of risk of harm (p. 16). The promotion of violence thus works as a “belief-forming practice” (Gilson, 2015, p. 229) that cultivates ignorance and lends players to believe that the risk of serious injury is simply a non-negotiable part of the game. If this is done successfully, it comes with many rewards, such as the continuation of profiting off the violence done by the players and the implied consent of the players to continue doing violence.

In response to the Concussion Litigation, the NHL denied the players’ allegations and claimed that they have maintained a high degree of protection in the name of player health and safety. They also argued that the plaintiffs knew the risks that they were taking by playing this game and that players could have done their own research regarding concussions (Westhead, 2018). The NHL also denied a cause-and-effect relationship between brain injuries and mental health diseases such as Alzheimer’s and Parkinson’s. They claim there is not enough research to make this connection. A similar strategy was adopted by the National Football League (“NFL”) when they were faced with a similar lawsuit from former NFL players. The NFL held the belief that there is no evidence of causation between playing football and concussions, even to the point of attempting to conceal the existing research, despite numerous players being diagnosed with CTE after death (Ventresca, 2019). Similarly, several NHL executives have been vocal in mainstream media to deny knowledge of sports-related TBI and long-term neurological issues, including CTE (Belson, 2018; Westhead, 2018), despite the fact that several former NHL players were suffering from severe mental health issues and faced untimely deaths, including Derek Boogaard who died of an accidental drug overdose (Branch, 2014); Rick Rypien and Wade Belak who both died of suicide and were diagnosed with CTE (Malcolm, 2019); and Steve

Montador who was found dead in his home (Fitz-Gerald, 2015). The families of Boogaard and Montador filed lawsuits against the NHL for wrongful death (*Boogaard v National Hockey League* 2018; *Montador v National Hockey League* 2020).

The NHL also argued that the players have numerous other health conditions that likely contributed to their health outcomes in retirement. As part of discovery in 2015 (NHL Concussion Litigation, 2015), the NHL requested access to all the plaintiffs' medical records. The NHL argued that substance abuse may be a cause of TBI and that players with a history of substance abuse might have neurological deficiencies due to their own substance dependencies. This ignores the fact that substance abuse is also a symptom of post-concussion syndrome and is often used as a coping mechanism for players with extensive bodily damage from the game (Ventresca, 2019). The NHL also argued that players knew the risks of the sport and that they voluntarily chose to expose themselves to such hazards. In other words, they claimed that the defence of assumption of risk applied in this case and players effectively waived their legal right to sue for compensation.

Despite the fact that concussion research has been ongoing since the 1920s (NHL Concussion Litigation 2018), hockey leagues can continue to argue that more research is needed to understand the connection between repeated hits to the head and brain damage to instill just enough doubt to reap the rewards of a profitable violent game despite allowing harmful practices to continue inflicting damage on the players. As argued by Stocking and Holstein (2015), efforts to produce ignorance about scientific research "can be a powerful weapon" (p. 108). This production of ignorance can be designed to suppress knowledge or even prevent certain areas from being researched at all. The doubt that is created through the supposed need for more research to make the causal connection between violence and serious health outcomes leaves just

enough room for players themselves to live in ignorance in their pursuit of playing of professional hockey. Ignorance is bliss, after all.

The NHL relies on this ignorance to continue promoting a violent game with so-called willing participants. This often means that players themselves choose to live in ignorance of the risks of playing a game that has a concussion problem. It has been argued that “injury is a structural feature of team spectator sport [...] through the very fact that violence, pain, and injury are literally enacted upon the bodies that participate” (Kalman-Lamb, 2018a, p. 12). Hockey players are thus not ignorant of the fact that pain and injury are commonplace in the game. However, they can be ignorant of the more serious injuries and their long-term consequences, such as concussions and the symptoms of TBI. Players undoubtedly understand that taking hits to the head is a serious consequence of playing a violent contact sport, but their ignorance about the severity and long-term effects of TBI is largely manufactured by the leagues. This is due to decades of ongoing research and denial of scientific evidence by prominent sports leagues, which is a known strategy that businesses might employ to advance their own interests, particularly when “big money is at stake” (Kleinman & Suryanarayanan, 2015, p. 185).

Athletes know that sacrificing their bodies leads to revenue for the leagues that employ them and that their workplace conditions can be exploitative when the business of sport takes over (Kalman-Lamb, 2018a). Yet, they generally remain ignorant of the socio-cultural conflict that is shaped by the concussion crisis. Ventresca (2019) argues that this crisis, and most notably CTE, has become characterized by “scientific uncertainty” (p. 77). He argues that a lack of scientific evidence around concussions and CTE has led to a production of uncertainty on the part of sports organizations. He further argues that athletes experience brain trauma in ways that defy these uncertainties. In other words, while professional leagues continue to attack the cause-

and-effect relationship between sports-related concussions and brain damage, the players themselves are experiencing this correlation and living with its embodied consequences every day. As such, the players' lived experiences should be taken as "counter-knowledge to scientific uncertainties around CTE" (Ventresca, 2019, p. 78).

A look at the embodiment of the injured athlete (Gairdner, 2019) provides a critical examination of the cultural production of ignorance to unpack the ways that hockey leagues deliberately manufacture ignorance to maintain the status quo. The players' lived experiences provide a body of knowledge that is crucial to understanding the concussion crisis in hockey. While hockey leagues continue to invoke doubt on the causes of TBI in their players, the players themselves are suffering the consequences. Researchers have noted elsewhere the contested causal relationship between CTE and sports-related brain injuries in that scientists have yet to definitively confirm that CTE is a direct result of hits to the head (Henne and Ventresca 2020; Ventresca, 2019, 2020). Due to these scientific unknowns, the leagues can argue that the players are assuming the risk of injury, including head trauma, because they don't even know the connection between contact sports and TBI. Yet, as argued by Bachynski and Goldberg (2014), an "absence of evidence is not evidence of absence" (p. 327). Nonetheless, as long as there is some absence of knowledge, the league can continue to maintain ignorance that leads to manufactured consent in the players.

In turn, the NHL relies on this agnosis to keep profiting from the violence done by the players. Ignorance is thus socially constructed around knowledge of phenomena and knowing enough about it to know what information to conceal. Ignorance is not a passive process. Rather, "it is an active accomplishment requiring ever-vigilant understanding of what not to know" (Gross & McGoey, 2015, p. 5). Hockey leagues thus know enough about brain trauma caused by

violent sports to know that they do not want their players to have the full scientific knowledge related to sports-related TBI. If players were given the scientific evidence and provided with the necessary education to understand the science to secure informed consent, they may opt to not participate in this game and the leagues may lose profit and/or be faced with the challenge of removing the violence that fans apparently enjoy so much.

Methodology: An Ethnographic Approach to Studying Ignorance

To examine how ignorance is produced in the hockey arena, I draw on qualitative interviews conducted with elite hockey players. High et al. (2012) argue that as researchers, we must take our participants' own accounts of their ignorance seriously. In recognizing ignorance, not as something that is unknown, but rather something that is built upon a history of knowledge, ethics, emotions, and social relationships, it is possible to uncover the ways that ignorance has a unique role in the development of social practices that lead to a way of living shaped by blissful ignorance. Accordingly, they argue that the starting point of examining ignorance through an ethnographic lens is to look at the substance of ignorance in its own setting and as a product of specific social practices. It is thus possible for individuals to produce ignorance in themselves and to produce it in others. In these efforts to produce ignorance, what is happening is that individuals are promoting emotional, habitual, and social ways of being ignorant.

The sample for this chapter is made up of 15 men hockey players who have experience in organized and competitive hockey at semi-professional and/or professional levels. Given that the focus of this chapter is centred on the NHL Concussion Litigation and the production of ignorance in professional men's hockey, the sample consists of adult men with relevant experience in elite leagues. Participants were recruited through personal connections and open calls for participants on social media via a recruitment poster. Interviews were done in-person,

over the phone, or online via zoom, depending on the participants' preference. Interviews were transcribed and pseudonyms were assigned to each participant. The sample includes players with experience in the NHL and/or the Canadian Hockey League ("CHL"). CHL players spend their junior careers working towards the NHL. As such, the CHL adopts a nearly identical style of play as the NHL and the players are consequently subjected to the same production of ignorance.

The interviews were designed as semi-structured interviews, which allowed for enough flexibility to ask probing and follow-up questions in conversation with the participants (Adler & Adler, 1994; Berg & Lune, 2012; Sparkes & Smith, 2014). As such, I designed my interviews around a series of topics as opposed to pre-determined questions. The topics included the following: the player's trajectory in hockey; learning the rules and practices of the game, including learning how to play with violence and aggression; embodied experiences with pain and injury; and legal intervention. Following the advice of Thorpe (2012), my goal was to treat the interviews like a conversation. In numerous interviews, participants were eager to discuss the topic of violence and injuries and they were given the opportunity to decide what they wanted to talk about before I asked any questions to limit any disruptions to the conversational flow of the interview. I found this to be a useful approach as much of the knowledge gained in these interviews largely came from simple conversation. It is in this manner that I learned much about the cultural production of ignorance.

The interview data produced several emerging themes that describe the embodiment of pain, injury, and risk-taking in professional hockey, all which of serve as localized knowledges that suggest there is causation between sports-related head hits and long-term brain trauma. The production of ignorance begins at an early stage: players are subjected to doubt around the risk of serious injury long before they join the professional ranks. There are many power relations in

play that support the following findings: (1) players are generally willfully ignorant to the consequences of playing this violent game; (2) league and team leaders often prioritize winning over the health of their players; and (3) the normalization and glorification of violence in the game all contribute to players not fully realizing the extent of their exploitation. While a few players have opted to quit the sport after realizing the extent of the harm being done to them, most players find it is easier to live in ignorance while sacrificing their bodies for the dream of playing in the NHL.

Findings

“Hockey’s a very twisted world”: When the Business of Hockey Takes Over

A common theme that emerged in the interviews was around the business of hockey being a problem for most players, which undoubtedly contributes to the production of ignorance. I often asked players what they like about hockey and, subsequently, if there’s anything they don’t like. A common response to the latter question was the ways that leagues and teams would allow the business to take over. For example, consider the words from Eddie, who has experience in several professional leagues, including the NHL: “the business side of it, I don’t like that. But I do like hockey, [...] the sport in its pure form is beautiful but the business side of it is pretty ugly”. When I probed for details on what he meant by this, he explained:

I just don’t like the way some management or coaching types talk to players. They forget we’re human and we’re not robots or machines. I just think the way they handle, you know, like you’re basically a piece of meat and you’re treated that way more often than not. That’s the way I feel about, you know, the business side of things.

Similarly, Daniel, who played in the CHL and quit hockey to attend university explained:

Hockey's a very twisted world in a sense that like... there's a lot of manipulation and it's just... I don't know. It didn't seem like the right environment for me [...] I wanted to move on. I took a lot of great things from that, I learned everything. And I kinda felt like I was at the point where I gathered everything that I could from that experience. And it was time to move on to the next thing.

When asked what he meant by manipulation, he talked about the coaches and the lack of communication. He explained that it gets worse the higher you go up in hockey and that the toxicity and the constant focus on winning games just wasn't worth it for him:

I know people can make a living off of it and stuff like that, but I just don't like what it does to people in that sense. And I think the effects... it's only going to get worse in my opinion of what we're going to see come out in the years to come with CTE and stuff like that. It's so unhealthy. And the mental health side of it. Like, on a personal note, I gained a lot of anxiety from the sport. Just at that very high level like that. Cause it's not fun anymore. And it's just... you're afraid to make mistakes, and it's just the worst kind of environment, right?

Daniel was not the only one to describe similar experiences with anxiety due to the treatment from coaches that takes the fun out of the game. Roger was a player who held a traditional "enforcer" role for much of his time in professional hockey, including several years in the NHL. The job of an NHL enforcer is to use force, including fighting, to protect star players from the risks of violence in the game (Kennedy & Silva, 2019). Like Eddie, Roger also used the phrase "piece of meat" to describe the ways that his coaches and team personnel have treated the players. He described feeling very anxious ahead of games and experiencing symptoms of anxiety throughout the game, including vomiting during intermissions:

No one's got a gun to your head, but yeah if you feel the pressure to do it [fighting], I mean, I've felt the pressure to do it because that's my job and I'm supposed to do it. And... I liked doing it while I did it during the game but afterwards, like the night before a game, and the day of a game, I was a freakin' mess for a lot of it! I mean, I battled anxiety in my career, and I didn't know what it was early on. I didn't know how to put a name on it. I just knew I felt like nervous and shitty and this squeezing feeling in my legs and this weight on my chest and why would I throw up in intermissions and why would my food not go down to my stomach. It would sit in my throat it felt like. And it wasn't just the fighting. It was just the game in general. And it was those coaches that I was talking about that treat you like shit and don't respect you. They were in my mind, so bad that I almost... I would like wish that the game got cancelled. Like wouldn't that be amazing if there was a power outage and the game got cancelled? And I had that much anxiety about the game and it's a terrible freakin' feeling. I hated it [...] And it's weird with the fighting and you'd think that would be the obvious thing that would give me the most anxiety but um... it wasn't, to be honest. It was more just the game itself and the coaches and the pressure.

Other players also expressed concern over the ways that hockey leagues are handling the issues related to concussions and CTE and letting the business take over. As articulated by Patrick, a former CHL player:

CTE is getting more attention in football, you know, they should be dealing with it now and showing that they care and whatever but ultimately, it's a business. We know historically that not just in sports that people are slow to react when there's money

involved and everything else. It's... I don't know where that starts but you would think at the NHL level, that would be the first place.

What Patrick is getting at is that the NHL could lead the way in implementing change in hopes that a top-down approach will have the ripple effect of influencing positive change in other hockey leagues as well, but as a capitalist enterprise, the NHL is not interested in removing a profitable aspect of the game.

The player interviews clearly indicate that the business side of hockey gets in the way of player health and safety. Whether it causes anxiety in players who are no longer having fun playing a game they love or whether it results in players suffering needless injuries, there is a clear divide between the ways that the business of hockey is conducted and the consequences of these actions on the experiences of the players. It is hardly surprising given current events in professional hockey. For example, during the 2010 Stanley Cup playoffs, hockey player Kyle Beach was sexually abused by the team video coach and the team covered it up. As Beach explained in an interview with reporter Rick Westhead, the team executives essentially told Beach that “the playoffs and trying to win a Stanley Cup was more important than sexual assault” (Beach & Westhead, 2021). Similarly, in 2020, a class of former CHL players filed a statement of claim against the CHL, its three regional affiliates, and individual teams alleging rampant hazing and abuse of teenage rookie players. The players claim that senior players, coaches, and team staff perpetuated a toxic environment that included violence, discrimination, racism, sexualized and homophobic conduct, and physical and sexual assault on underage players that the teams were obligated to protect. The plaintiffs further claim that coaches and team staff knew about the abuse and chose to chalk it up to team bonding and rookie experiences. Some adults in authority positions also allegedly took part in the abuse (*Carcillo v*

Canadian Hockey League, 2020). If these leagues are willing to overlook violence that is occurring outside the scope of the game, then it is hardly surprising that they are actively trying to produce ignorance around the risks of injury for on-ice violence that is arguably part of the game.

“I personally think it’s very barbaric”: The Risk of Injury in Professional Hockey

The production of ignorance had led to an environment wherein players are subjected not only to the inherent risk of injury, but equally to increased risk and severity of long-term injuries. The lived experiences of players with injuries demonstrates that players are willing to sacrifice their bodies in the name of the game, but this willingness is not easily translated into consent to the violence done to their bodies.

Every player interviewed for this study reported a rather long list of injuries, many of which were labelled as “just normal stuff” or “little things,” which further demonstrate the normalization of pain and injury in the game. The list of injuries includes injuries to shoulders, hands, hip, feet, and nose, with most needing surgery to repair the damage. Players also reported lost teeth, broken elbows and wrists, high ankle sprains, cuts, bumps, and bruises, MCL tears, sprained knees, pulled groins, arthritis, fractured jaws, broken clavicles, broken and dislocated thumbs, tightness in the neck, broken ribs, broken fingers, knee issues, ankle damage, and lots of “wear and tear”. Concussions were often cited as the more serious injuries, although many players pointed out that they have never been diagnosed. They simply assumed that as professional hockey players, they have been recipients of concussive and/or subconcussive hits over the years. This assumption was not always present, however, as it took time for players to come to the realization that head injuries can lead to permanent damage.

A former NHL player, Jack, who played during the 1990s, articulated that “they taped an aspirin to our forehead and said, ‘get out there’. So, we didn’t know we were concussed. The trainers didn’t even know we were concussed. The doctors didn’t know we were concussed. Cause we didn’t know anything!” Awareness on the seriousness of concussions was still minimal in the 2010s as another former NHL player, Charlie, whose career ended due to a hit to the head which knocked him unconscious on the ice and caused a serious head injury, explained:

There was a time where not much... they started doing baseline testing, I believe in 2006. I’m just thinking of the year. Not much was given to us. Not much was said about concussions. I always thought concussions were, you know, the odd headache. Here and there. It’s kind of what you hear. And they’re not that. Some situations are a lot worse. [Silence]. There’s a time when, you know, you’re just expected to go back on the ice. And that’s kind of changing today with concussion spotters and you have to pass protocol to get back on the ice. I think teams are a lot more careful in that sense.

Yet, baseline testing is not always a useful approach. Baseline tests typically include background information on the player; physical, cognitive, and emotional symptom questionnaires; a cognitive test; a neurological exam; and testing for the stability of balance and posture (Hänninen et al., 2021). Daniel shared stories about teammates who would “dumb down” their baseline tests so that if they do get a concussion, it will likely not be evident in the concussion protocol testing:

The problem is at the start of the year, you do a baseline test, right? [...] As far as the players, they’ll go to this extent... if you’ve already dumbed it down per se and then you do get a concussion, but your data is the same as the baseline... There’s gonna be no red flags there. Which sounds barbaric and silly.

Charlie shared similar concerns with regards to baseline testing as well as concussion treatment overall:

We did the baseline testing in 2006 or 2007. Um... not much information was given to us, yeah. When I came back, I had to do some testing, but very brief with the doctor. They let me come back and play a month and a half later. But it was not right... I knew something wasn't right. But I didn't know. Doctor said you can play, I passed some of their tests that they made us do. But now... after meeting with a lot of doctors, a lot of that testing is not great. It's not a good evaluation to determine if the player's good enough to come back. You know, you repeat some numbers back, you do twenty push-ups, but I can remember getting knocked out pretty hard one time and I did that testing and I was back playing. But something wasn't right. You just didn't know. [...] Yeah, I was getting a lot of headaches, and fevers at night. I couldn't work out, I couldn't get my heart rate up, couldn't go outside. Yeah. [Silence]. But at the same time, I saw the doctor a day after I got hit and knocked out, and I felt fine. I said, "I can play". And the doctor was like, "you're not ready to play". So you really don't know as a player. Yeah. I could... yeah, it's a little bit awkward, like I said, I was told not to play, I said I was fine to play, but that was not even 48 hours after getting knocked out on the ice, unconscious. So... The players need someone to protect them. They need a set of rules, you know, to... they need a system in place to protect them. And, you know, hopefully that happens.

Charlie's experiences led to the team doctor removing him from the game, which is an uncommon occurrence. Players often discussed the difference between a visible and physical injury and a head injury. For example, if a player has a broken leg, then it becomes impossible to skate and play the game. It is thus easy for both the player and the doctor to take the player out of

the game. However, with a concussion, the injury is less evident, and the onus largely falls on the player to take themselves out of the game. Yet, players are unlikely to remove themselves from a game. Several players discussed their experiences with injuries and choosing to continue playing through the injury. When I asked Greg, a former CHL player, to explain the reasoning behind playing through a broken foot, for example, he said:

Yeah, I mean, you don't think of that. Number one. You think you're gonna go help your team. But if you can play with a broken foot... let's say you're the best player on the team, you can play... you become the third best player on the team with a broken foot. That's still a pretty productive guy to have. Like Sidney Crosby with a broken foot is a guy I want to have on my team. Me with a broken foot is a guy I don't want to have my team [*laughs*].

In other words, winning is more important than player safety. The prominence of both the business of the game and the normalization of playing through pain and injury are both evident in this quote. Players may fear losing their spot on the roster if they remove themselves from the game, which encourages them to play through an injury. Further, through the NHL's efforts to promote violence, players are continuously reminded that violence and injuries are common in hockey; it is simply part of the game. As such, players often feel as though they need to play through it.

Yet, even when a player attempts to remove himself from the game due to prolonged symptoms six weeks after suffering a concussion, the team still prioritizes winning over the player's health. Andrew was a CHL player who suffered three concussions in a 12-month period, and left hockey because the risk of another concussion simply wasn't worth it. Upon suffering

his third concussion, he missed about six weeks as he recovered. Afterwards, the doctors cleared him to return to play despite Andrew still experiencing symptoms:

I was still having really bad symptoms even though the doctor has cleared me. They just wanted me back in the lineup. [...] I remember my first game back [...] I remember looking up at the score board and like the score board just started spinning. So, like clearly, I wasn't ok. But they had convinced me... the trainer and the doctors and everyone... that I was fine.

Andrew was later traded because the team was impatient in waiting for him to recover from the concussion. Prior to the trade, Andrew was approached by a coach who accused him of playing badly on account of his concern for a family member who battling an illness back home. Andrew explained that the coach told him “to suck it up and stop moping about it”, yet he knew that “it wasn't because of that. I knew it was because my head wasn't ok. But they just didn't understand that”. Other players also discussed in the interviews that coaches will reach a point in which they just expect players to get back in the lineup.

A recent example from the NHL further shows the ways that a team is willing to ignore a player's health. Jack Eichel, formerly the captain of the Buffalo Sabres, suffered a herniated disc in his neck. Eichel preferred a disc replacement surgery, which had never been done on an NHL player, though the team asked him to get a fusion surgery instead. The collective bargaining agreement between the NHL and the Players' Association gives the NHL final say over player medical treatment. The Sabres refused to sign off on the player's preferred treatment, so Eichel sat out games while the injury went untreated, he was stripped of his captaincy, and was eventually traded to the Vegas Golden Knights. His new team allowed him to get the surgery of his choice and he is now cleared to play (The Associated Press, 2021; TSN.ca, 2021). Given that

Eichel is a star player in the NHL and received this treatment, it is not surprising to see that third- and fourth-line grinders receive the brunt of exploitation.

Daniel shared a similarly disturbing experience with medical treatment following a ruptured testicle caused by a blocked shot. He discussed abusive practices throughout the interview. He explained that it was this experience that led him to his “breaking point,” and he quit hockey not long afterwards. Upon suffering the injury, the team doctor advised him that it was “just a laceration”, and he was sent back out to finish the game. After the game, the team got on the bus to travel overnight to their next game in another city while he was in immense pain: “this was horrible. I’m like dying. Not dying, but like... I’m in terrible pain! I’ve never experienced pain like this”. He told his coaches that he wouldn’t play the next game, but they wanted him to try: “I’m telling them, like I’m not playing. I’m told to take warm up. I’m like... I’m still not playing. Don’t play. Leave after warm-up. They make me do a bike work out. With this”. The team travelled back home after the game and Daniel took himself to the hospital:

Get back at like 3 in the morning. And I’m like – I’m going to the hospital. Go to the hospital, and yeah, it was ruptured. So that’s a serious injury. And I got told to suck it up, essentially. Like, that’s so wrong. I think that’s like... it’s just shameful, really. And stuff like that... that’s where I was like... this is not right and I’m above this. I’m not sticking around for this. But like that whole thing and like... it’s funny because in the hockey world it’s called ‘suck it up’ right? It’s just barbaric, I think. [...] like what goes on behind the scenes, like this is so wrong.

In light of this empirical data suggesting that teams and coaches are actively trying to convince their players that they’re healthy enough to play through serious injuries, the question of consent gains further prominence. Nearly every player interviewed for this study discussed the

personal sacrifices that they're willing to make to live out their dream of playing professional hockey. John, an active NHL player, put it succinctly: "that's the territory. I'm willing to sacrifice my body to live out my dream". It is precisely this mentality that hockey leagues count on to maintain ignorance around the risk of injury in a violent game.

Yet, these sacrifices and the level of willful ignorance on the part of the players are symptomatic of something much bigger: The social construction of ignorance is equally shaped by the NHL dream. Players are willfully ignorant to many risks because they don't want the fear of brain damage stopping them from chasing their dream. The NHL dream is so highly sought after that even the CHL uses it to justify free labour. CHL players sued the league arguing that they are employees of the CHL and that they are entitled to minimum wage (*Berg v Canadian Hockey League*, 2017). In turn, the CHL argued that the players are independent contractors who receive compensation in the form of scholarships to attend educational institutions and they are also given a pathway to the NHL. Following the filing of the lawsuit, provinces amended employment legislation (for example, see Section 2.1 of the Manitoba *Employment Standards Regulation* which amended the *Employment Standards Code*) stating that major junior hockey players are exempt from employment standard legislation. As a result, there is no obligation on the CHL to treat the players as employees and pay them a wage.

The exploitation of student-athletes for free labour is well documented (Kalman-Lamb et al., 2021), and while it is often difficult to imagine professional athletes as exploited workers (Brayton et al. 2019), the league's denial of the concussion crisis is further achieved through these labour politics. Consequently, it becomes easier for leagues to manipulate and exploit players on the promise that the NHL dream is within reach. And once players make it to the NHL, the easier it is to buy into the doubt and uncertainties when the players are paid well for

their participation. Consider this exchange with John about whether he thinks about the risks of concussions:

John: Every day. Every time I'm on the ice. Because they brought more awareness to it. And I think that's why they got everyone thinking like that. But if they didn't tell me about any of this stuff, I would never think of it. Never ever think of it. I would never have stress about it. [...] But they brought awareness to it so everyone's, you know, stressed out about it or worried about it or taking precautions about it now.

Martine: It's still a risk that you're willing to take?

John: [*Silence*]. Yeah. It has to be [*laughs*]. If I want to stay in the league, it has to be, right?

The personal sacrifices that players make to achieve a dream are taking place within an environment that is controlled by league executives who instill doubt and denial around the seriousness of head injuries. This mentality, as described by John, is precisely what the leagues want in their efforts to produce doubt and ignorance. It is clear that players assume the risk of injury caused by ordinary and expected body contact in hockey. However, consent based on a lack of information related to TBI, coercion (i.e., assume the risk or don't play), and a failure to give players the time to fully recover is hardly legally valid consent.

The argument is not that players don't consent to violence, but rather consent to violence does not automatically imply consent to *all* violence (Weinberg, 2016). In many instances, players assume the physical risk of injury, such as a bodycheck that causes a concussion. However, players do not consent to being manipulated into believing that contact sport is not a cause of TBI or being convinced by team doctors and trainers that they are ready to return to play

before they've fully recovered. Players may indeed only assume the risk of concussions on the promise that team doctors will take care of them and that they will be able to fully recover.

This trust put into the league is particularly crucial when it comes to serious outcomes related to TBI. Players are aware that head hits and concussions may lead to long-term health issues, largely due to information becoming increasingly available in public realms, as opposed to the leagues providing education. This awareness is translating into knowledge in those who have retired with relatively little bodily damage. The words provided by Caleb summarize a common mentality among the players:

I think that I was lucky to not have long term effects from my hockey through fighting, through anything else. But I have seen teammates and people that I played against; you know higher level professionals. I'm sure you know the stories of suicides and mental health issues and all that, that come with it. You get to see that and recognize what's happening and you know, I'm thankful that it isn't me, but you know, you don't want people to play the game and dedicate their life to it and, you know, regret it the rest of their life. You know, not being able to play with their kids or enjoy their work beyond hockey or enjoy their life the way they should. I think that was the big factor for me. You know, I have teammates that can't play sports, can't exercise, can't have a job with physical exertion. You know, and beyond that with head injuries, there's knees, shoulders, and everything else that comes with it that can hinder you for your life too. I do think the safer the game is, the better it is for everyone. I think anyone who knows hockey knows the game has transitioned to more skill and passing in general but it's... it's got a long way to go.

Several players echoed the sentiment of being “lucky” for reaching retirement without brain damage. These narratives around “luck” suggest that there’s a shifting tolerance for head injuries in hockey. As information around the seriousness of TBI becomes publicly available, players in this study are realizing that the prioritization on the business of hockey and the win-at-all-cost mentality is more harmful and exploitative than anything else. The NHL Concussion Litigation (2018), which has brought greater awareness to current players about concussions and brain damage, thus attacks the league’s ignorance around causation and the seriousness of head injuries. Indeed, failing to warn players about the risks and the constant attempts at concealing the information would breach the league’s duty of care owed to the players. The assumption of risk defence would be difficult to invoke given this production of ignorance surrounding the handling of player health and safety in elite hockey leagues.

Conclusion

Drawing on player accounts of their knowledge as it relates to serious injuries in hockey, this chapter aimed to tap into the culture of hockey and the social relations that produce ignorance around head injuries. Hockey leagues rely on players consenting to the violence that is inherent in the game. Yet consent that is shaped by agnosis and manufactured ignorance is not legally valid consent. As presented in the Concussion Litigation (2018), the players argued that the NHL has failed to warn them about the risks associated with TBI and long-term neurological disorders. Similarly, the player accounts in this study confirm that not much knowledge has been shared with them. Indeed, much of what players do know about concussions come from public reports regarding TBI in contact sports, particularly following the litigation against the NFL (NFL Concussion Litigation, 2016). The player interviews further suggest that some teams and

coaches actively conceal information to produce and maintain ignorance to keep players in the game and work towards winning a championship.

Many participants in this study indicated that there is a place in the game for aggression and violence, which can lead to injury, such as Paul who talked about violence and fighting:

You know, talking about it, it seems kind of barbaric. But at the same time, I always felt that it was just something that people understood it was part of the game. You knew going into it that that is a possibility.

Similarly, John explained that the NHL dream shapes his own risk-taking approach: “You just, you know, roll with the punches. And I’m still in the league so it’s all that really matters”. It is with this mentality that, with most hockey-related injuries, players are willing to assume the risk on the promise that the injury will heal. Accordingly, players assume the risks of concussions on the basis that teams will care for them properly before returning to the game.

However, TBI is often a career-ending, if not a life-ending injury. While the scientific evidence for sports related TBI is still ongoing, it is become public knowledge that sports that include regular body contact are largely shaped by an ongoing concussion crisis (Malcolm, 2019). The ignorance that is embedded in the handling of concussions in professional hockey can hardly translate into legally valid consent of the players. The production and maintenance of ignorance is aimed at maintaining players’ consent, but this consent is built on misinformation, or at best, a lack of information. In this sense, it is not an absence of knowledge, but actively concealed knowledge, which effectively vitiates consent: since consent must be freely and voluntarily given without undue influence or coercion. Similarly, the risks associated with hockey must be well known and not concealed as the game’s dirty secret.

ARTICLE 3

Personal Sacrifice or Exploitation on Ice? The Code of Hockey Violence and the Win-at-all-Costs Mentality

Introduction

On September 28th, 2017, a Philadelphia Flyers rookie, Nolan Patrick, engaged in a fistfight with (“NHL”) veteran David Krejci. Following the fight, Patrick received a nod of approval from then Flyers captain Claude Giroux (O’Brien, 2017). The narrative surrounding this fight in the media was that Patrick fit in as part of the Broad Street Bullies: a Flyers team from the 1970s which often received more attention “for a punch on the chin than a puck in the net” (Schiller, 2003, p. 244). The importance of this fistfight for a rookie is the ritualized display of manhood demonstrated through a form of legitimized violence (Silverwood, 2015). Other forms of dangerous physical contact are arguably part of the game, including body contact and stick infractions, such as cross-checking and high-sticking (Weinstein et al., 1995). As articulated by Silverwood (2015), “hockey is unusual in this manner that it permits forms of violence and pugilism both within the rules and beyond the rules, within the culture of the game” (p. 5). While these actions may appear violent and beyond the scope of the sport to some viewers, the players seemingly accept the risk of violence through a set of unwritten rules known as “the Code” (Bernstein, 2006; Atkinson & Young, 2011; Silverwood, 2015). Yet, in December 2023, a 25-year-old Nolan announced his retirement from professional hockey after a six-year career due to health issues (Robillard, 2023), illustrating both the embodied and occupational consequences of risk-taking in hockey.

In this article, I build on my second research article above where I examined the ways that hockey leagues work towards a cultural production of ignorance around a specific injury – traumatic brain injury (TBI) – and its long-term consequences for players suffering from

permanent brain damage. By looking at injuries more broadly, I examine more closely the player's own ignorance in the manufacturing of consent to the occupational and embodied consequences of playing a physically aggressive contact sport. More specifically, I draw on in-depth interviews with hockey players, coaches, and trainers who shared their experiences with risk-taking, suffering injuries, and how pain and injury are often considered part of the game.

However, Silverwood (2015), the only scholar to empirically examine the Code of violence in hockey, explains that there are many overlapping social forces that work together to socialize players in the culture of hockey, which is characterized by a culture of risk wherein risk, pain, and injury are deeply normalized (Nixon, 1992; Zacher & Bridel, 2022). Dangerous body contact is commonplace in hockey, which means that risks are expected and inherent in the game. The risk of injury is often simply a price that athletes will pay because the overall value and social importance attached to playing the game outweighs these risks (Barnes, 1996). Yet, perceptions of risk-taking and the overall acceptance of violence as part of the game are increasingly evolving in contemporary elite-level hockey.

Defining Key Terms: Aggression and Violence

Researchers have been examining sports-related violence for decades (Colburn, 1986; Smith, 1983; Young, 1993, 2012), but violence has many variations in how it is defined and understood. Individuals and groups can each have their own interpretations of what constitutes violence and what it means to them – all of which depends on the context in which the violence occurs (Silverwood, 2015). The distinction between violence and aggression is especially important because, as Weinberg (2016) explains, “[t]he characterization of violence versus physical aggression reflects broader cultural values about what is acceptable or objectionable behavior”

(p. 5). In other words, violence tends to be viewed as morally and legally reprehensible while aggression is more socially acceptable.

Violence in sports is largely defined as using “excessive force, which causes or has the potential to cause harm or destruction” (Coakley & Donnelly, 2004, p. 187) or “any intentional or unjustified use of intense physical force that is likely to cause personal injury, damage or death; in brief, violence means unlawful physical aggression” (Barnes, 1996, p. 251). The emphasis in differentiating violence from aggression tends to be on the force used, whether that force falls within the scope of the rules of the game, and whether it can cause harm. In contrast, aggression tends to emphasize physical dominance or control within the rules that is aimed at helping the team win (Coakley & Donnelly, 2004). Since aggression does not typically include conduct that can cause harm or injury, it is usually considered to be part of the game. However, due to its ability to cause harm, violence typically exceeds the scope of what is accepted as part of the game because it is no longer about dominating an opponent to gain an advantage, but rather it is aimed at inflicting pain or injury.

The Legitimization of Aggression and Violence in Professional Hockey

Hockey leagues have long enjoyed a sort of immunity from the law for violence done on the ice (Baxter, 2005). More recently, Kennedy and Silva (2020) conducted a case study of the National Hockey League’s (NHL) supplementary discipline regime and found that NHL administrators largely support fighting in hockey and work hard to keep ‘outsiders’ (such as the legal system) from interfering in their pursuits to maintain violence as a defining feature of the game. They found that the NHL ultimately puts the onus on the players to police themselves to ensure safe working conditions.

This approach to controlling violence in hockey is not only visible in the NHL. The NHL has a significant influence on lower levels of the game, such as the Canadian Hockey League (CHL), which has three regional leagues with teams across Canada and the United States: The Quebec Major Junior Hockey League (QMJHL), the Ontario Hockey League (OHL), and the Western Hockey League (WHL). The CHL is a developmental league and a “top supplier of talent” to the NHL (CHL.com, n.d.). The CHL has developed a similar style of play as the NHL in that they allow bodychecking and other forms of conduct that can be described as violent. However, the leagues have recently been deviating from the NHL’s style of play as seen in the QMJHL’s recent announcement of new sanctions for fighting aimed at discouraging fighting altogether (Séguin, 2023). This decision was made in consultation with government officials who have been vocal about the need to ban fighting in the QMJHL (Nugent-Bowman, 2023). While the OHL has not banned fighting entirely, it also introduced new rules to diminish the overall amount of fighting in the game by imposing a suspension for every fight after a player has reached 10 fights in a season (Nugent-Bowman, 2023). Meanwhile, the WHL Commissioner has indicated that there are “no plans” to change the rules around fighting (Sportsnet, 2023).

The importance of the NHL and its approach to violence is equally seen in its influence on youth athletes. Minor hockey in Canada is regulated by the national sports organization, Hockey Canada, who has implemented a “4-step progression” model to introduce body contact in hockey as an essential skill to help win games:

Checking is a critical skill that, when performed properly, can create quality scoring opportunities or help a team regain control of the puck. Just like skating, puck control, passing and shooting, there are key progressions to the skill of checking that, when taught effectively, can enhance the love of the game. (hockeycanada.ca, n.d.)

The progression model begins at the Under 7 (years old) level with basic skills such as skating and positioning and continues through the levels of hockey as the players move up the ranks in age and skill. Body contact is introduced at the Under 13 level, while bodychecking is now introduced at the Under 15 level (Ontario Minor Hockey Association, n.d.).

Young players quickly learn to model the behaviour of the professional hockey players and they adjust their attitudes according to the observation that society has a special tolerance for violence on the ice (Jones & Stewart, 2002). Once young players learn how to use body contact and violence as a hockey skill, they are often encouraged by their coaches to continue to play in that manner (Horrow, 1982), which ultimately contributes to the cultural acceptance of violence across all levels of the game. Accordingly, while hockey leagues are free to implement their own rules, the hegemony of the NHL cannot be ignored.

The Socialization of Players in the Culture of Hockey

Researchers (Gruneau & Whitson, 1993; Silverwood, 2015) found that both aggression and violence are often justified in hockey through a process of socialization (Colburn, 1986). There is no single cause of player violence in hockey. Existing literature demonstrates that the commercialization of sport (Coakley and Donnelly, 2004), the institution and business of sport (Coakley and Donnelly, 2004; Kennedy and Silva, 2021); hegemonic masculinity (Allain, 2010; Atkinson and Young, 2008; MacDonald, 2014; MacDonald and Lafrance, 2018; Messner, 1990, 1992; Theberge, 1997, 1998, 2000; Young et al., 1994); nationalism and national identity (Allain, 2014, 2020; Bridel, 2021; Kennedy & Silva, 2020), the spectator's role in justifying the use of violence (Silverwood, 2015), profit margins and the economics of violence (Jones et al., 1993; Jones & Stewart, 2002; Kennedy & Silva, 2020), the occupational requirement to play with violence (Weinstein et al., 1995; Young, 1993), the exploitation of professional athletic

workers and amateur athletic labourers (Kalman-Lamb & Silva, 2023) all contribute to an athlete's acceptance of aggression and violence as part of sports.

Ethnographic studies on violence further demonstrate that the culture of risk in sport is responsible for generating a normalized response to pain and injury (Howe, 2004; Nixon, 1992). Howe (2004) defines risk as “the consequence of ignoring both physical and psychological pain. In other words, risk is noticing a danger but carrying on despite it” (p. 75). This approach to risk-taking is learned behaviour and part of the development of becoming a hockey player (Silverwood, 2015). As articulated by Howe (2004), “the grip of risk culture is so strong that if you express concern regarding injury, you may become marginalised from the rest of the sporting community” (p. 113). Accordingly, athletes learn how to disregard the risk of injury and to normalize pain simply as part of the sporting experience (Young et al., 1994).

Messner (1990) further points to men being particularly predisposed to violent behaviour and to view aggression as legitimate and natural. Athletes learn at an early age that masculine traits such as strength, power, aggressiveness, risk-taking, and dominance are highly valued and have become normalized in competitive men's sports (Coakley & Donnelly, 2004; Weinstein et al., 1995; Young et al., 1994). MacDonald (2014) suggests that the socialization of hockey players creates “harmful forms of masculine identity” (p. 96), which is made worse when coupled with hockey's deep connection to Canadian nationalism. Since hockey holds a prominent place in Canadian culture, Canadian hockey players and fans alike tend to favour a particularly aggressive version of the game that prioritizes a win-at-all-cost mentality (Allain, 2020). MacDonald (2014) highlights that “this socialization becomes problematic when boys begin to embody traits of a dominant masculinity,” (p. 96) meaning traits of hegemonic masculinity (Connell, 1987). As described by MacDonald (2014):

As a consequence of this socialization, hockey players are expected to be aggressive, stoic, competitive, independent, to show little emotion, and to police the maintenance of these traits amongst themselves, especially in the context of the game. Further, they hold other players to the same standard. (p. 96-97)

When athletes overindulge in these ideologies of masculinity (Atkinson & Young, 2008), they often excuse the most excessive acts of violence (Weinstein et al., 1995), which are rationalized as a skill to help their team win (MacDonald, 2014). Hegemonic ideals of masculinity endanger men athletes and further victimize them since it places them in situations where they must use their bodies as weapons (Messner, 1990) and play through pain and injury (Messner, 1992). While women are increasingly participating in this traditionally male-dominated sport, the culture of hockey remains characterized by a masculine style of play (MacDonald, 2014). As indicated by Theberge (1998), the cultural acceptance of player violence is not only a feature of men's hockey. While intentional body checking is prohibited in women's hockey, Theberge (1997) shows that women simply resort to other means to achieve their goals: "Checking is part of the repertoire of a hockey player's skills. When it is not available, players resort to other tactics to accomplish their task. These tactics include illegal and sometimes dangerous practices" (p. 80). Regardless of who is playing the game, little concern is typically given to athletes who are injured in the sports context since they are said to be willing participants in an environment where aggression and violence are culturally accepted by players, coaches, leagues, and fans, especially in professional setting where athletes are paid to win games. Violent conduct is thus often rationalized, even promoted, as a means of proving manhood, impressing coaches, and maintaining employment (Faulkner, 1973, 1974; Young, 1993; Young et al., 1994).

These rationalizations are problematic, especially around the normalization of risk, pain, and injury since the civil rights of players are seemingly absent. Young (1993) demonstrates that athletic workers are worthy of legal protection for safe working conditions, particularly given the relatively recent degree of intolerance towards violence and players turning to the law. The NHL is indeed failing to implement meaningful change to curb the harmful consequences of violence (Kennedy & Silva, 2020), even in the aftermath of the Concussion Litigation (2018) where former NHL players sued the league for failing to inform them of the risks associated with repeated heads to the head leading to TBI.

The Code of Violence in Hockey

Silverwood (2015) points to the socialization processes in hockey as responsible for players' adherence to a set of unwritten rules that are learned and internalized through the culture of hockey. These rules have been coined as "the Code," which is a term that was first brought up by hockey players and journalists to refer to the unwritten rules around fighting and retaliation in hockey (Bernstein, 2006). This refers to an unwritten code that is well known to players, based on "culturally-mediated rules of hockey violence" (Silverwood, 2015, p. 58). The Code governs the function of the fistfight in hockey along with other forms of violence, which ultimately determines when a player's conduct crosses the line from acceptable to unacceptable.

Regulated sports come with a set of written rules that outline conduct that will be met with in-game penalties imposed by the referee and/or supplemental discipline in the form of a fine or suspension imposed by the league after the game when necessary (NHL Official Rules, 2023-24). The rules aim to draw a line between acceptable and unacceptable conduct. Yet, there remains a grey area in the written rules of the game. For example, a fistfight is against the rules and punishable by a 5-minute penalty (NHL Official Rules, 2023-24, Rule 46). Yet, it has been

argued that the NHL “seems to tacitly permit fighting by imposing a relatively lenient penalty” (Colburn, 1986, p. 63), which further encourages the use of violence as a strategy to win games (Holman, 2018). Players will agree to break the rule to fight each other and accept the penalty if there’s a good reason for the rule violation. The ‘reason’ in question, however, is not typically left open-ended, and rather, it is governed by the Code (Silverwood, 2015).

The importance of rules, both written and unwritten, is not to be understated in the ways they work to normalize aggression and violence in sports, and ultimately, how they shape an athlete’s consent to such violence. As Weinberg (2016) explains:

[T]he structure and substance of rules are situated within a particular context; consequently, they become a conduit through which unique cultures of consent are produced, realized, and enacted in everyday life. The meaning of consent violations, or what constitutes a rules breach, is equally important and becomes critical to how groups enforce and sanction those who step outside the bounds of acceptability. For these groups the meaning and practice of consent reflect the respective values and ideologies of each group and ultimately have become legitimized, concretized, and have lasted over time. (p. 14)

The unwritten rules of hockey are based on traditions, customs, and codes of conduct that are followed by players, coaches, and referees. According to Bernstein (2006), fighting is a way for the sport to police itself, which serves as a reminder to players that there are consequences for so-called “dirty” plays. For example, the Code states that there are no sucker punches, you stop punching when a player is down, and you always fight fair. Fighting fair in this context means a respectful fight between willing combatants who take their gloves and visors off before fighting

to prevent unnecessary injuries, and players communicate with each other throughout the fight to ensure it remains consensual (Silverwood, 2015).

That said, the Code is not solely about fighting. Adherence to the Code is a way for players to demonstrate hegemonic forms of masculinity and respect for each other (Weinstein et al., 1995). It also touches on the requirement to play physically hard as a tactic to intimidate the other team, to send a message by demonstrating strength, to draw a reaction penalty for a power play, and to gain momentum by exciting the fans (Silverwood, 2015).

Silverwood (2015) argues that the Code is useful in “maintaining cultural solidarity” (p. 218) within a context characterized by an imbalance of power. Those who control the sport are the ones who dictate the rules of the game, profit off the players’ skills, and frame dangerous workplace hazards as simply part of the game that all players must accept if they want to play. The players gain a spot on the team through their performance, meaning their ability to help the team win games, whether that is by scoring goals or engaging in physical play that provides a momentum swing, drawing a penalty, or getting the fans involved. The unequal power dynamics between leagues and players are furthered by the fact that hockey is a business (Kalman-Lamb, 2018a) and coaches sometimes dictate when a player should play with intense physicality (Silverwood, 2015). In turn, this encourages players to not only accept the risk of injury and play with violence to help the team win, but equally to play through pain and injury to maintain their employability – all of which illustrates the need to unpack the question of consent and at what point an individual player is no longer voluntarily consenting to the risk of injury in light of the institutional, occupational, and cultural requirement to play with violence that may or may not be found within the rules of the game.

A Legal Definition of Consent

The question of consent is gaining prominence in light of injured players who are increasingly turning to the law for compensation (Dennie & Young, 2019), which suggests that the traditional cultural beliefs around aggression and violence are being contested from within. This cultural shift equally points to a breakdown in the scope of implicit consent to do violence and be on the receiving end of dangerous conduct that has the potential to cause serious injury. The turn to the law is hardly surprising considering that those in control of making and enforcing the rules continuously fail to address even the most egregious acts of injury-causing conduct (Kennedy & Silva, 2020).

The cultural shift towards litigation points to a broader need for greater protections for athlete safety. At issue in most sports' litigation cases is the question of consent in intentional torts (assault and battery) and voluntary assumption of risk in negligence cases. The defence of consent is based on the notion that there is no assault or battery if the victim consented, expressly or impliedly, to the conduct in advance. The consent must be given freely, and the consequences associated with the consent must be known (Linden et al., 2018). Meanwhile, assumption of risk is available as a defence to the unintentional tort of negligence. The assumption of risk doctrine is based on the legal maxim *volenti non fit injuria* ("volenti"), meaning there is no injury done to the willing person (Citron & Ableman, 2003). If an athlete assumes the risks of injury by voluntarily participating in a risky activity, then there is no liability (Barnes, 2010). Both defences are rather similar in arguing that the plaintiff either consented to the bodily interference that caused the injury, or they assumed the risk that such an injury could occur as part of playing the sport.

It is generally recognized in legal decisions that hockey players consent to the reasonably foreseeable injuries that may arise by participating in hockey games (Barnes, 2010). In *Agar v*

Canning (1965), it was acknowledged by the Manitoba Court of King's Bench that "[a] person who engages in this sport must be assumed to accept the risk of accidental harm" and that "[t]he conduct of a player in the heat of the game is instinctive and unpremeditated and should not be judged by standards suited to polite social intercourse" (p. 304). The judge further noted that limits must be placed and that participating in a sport does not give anyone the license to inflict intentional injury: "injuries 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 the implied consent" (p. 304).

Subsequent negligence cases (*Unruh v Webber*, 1994; *Zapf v Muckalt*, 1997) demonstrate that assumption of risk is equally subject to limitations and will only apply when the plaintiff knew "of the virtually certain risk of harm" (*Dube v Labar*, 1986, para 6) and withdrew any right to sue the player who caused their injury. The Supreme Court of Canada ("SCC") further noted that the defence will only apply when "there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to" (*Dube v Labar*, 1986, para 6). Put simply, the SCC clearly indicated that parties must *know* the risk of harm they are accepting for the defence of *volenti* (express or implied) to apply. Meanwhile, if it is proven that the conduct being complained of is substantially different in nature or degree from which the plaintiff reasonably could have consented to, then the defendant might be liable (Linden et al., 2018). The question of whether a player consents to the intentional infliction of harm is easily answered in the negative, but the question of what risks are assumed in the context of negligence simply by playing hockey is less obvious.

As stated by the Manitoba court in *Agar*, “[h]ockey necessarily involves violent bodily contact and blows from the puck and hockey sticks” (p. 304). As such, a player must consent to certain levels of violence and assume the risk of some harm. However, there are some risks that are potentially unknown to the players (Miller & Wendt, 2015). While single, severe, and career-ending injuries are not that frequent, injuries are cumulative. Minor injuries and short-term damage are standard in hockey and generally accepted by the players. However, a player who suffers a multitude of injuries throughout their career could face long term effects long after they retire. Individuals who have suffered one or two concussions, for example, become more susceptible to concussions, and the more risk they face at sustaining permanent brain damage (Kalman-Lamb, 2018a; Malcolm, 2019). While individuals are free to make decisions regarding their own bodily integrity and assume the risk of harm (Linden et al., 2018), the courts are not wrong in acknowledging that limits must be placed in contact sports.

At issue, however, is the fact that the law’s approach to applying the defences of implied consent/*volenti* is that it is a purely objective test where it is difficult to pinpoint when players are no longer voluntarily consenting. Express consent/*volenti* is easier to prove since written consent is usually provided, often in the form of a consent form or liability waiver. However, implied consent/*volenti* is complex. It is based on the objective and abstract legal test of the reasonable person, which asks the question of whether the reasonable person in the place of the defendant would know that the plaintiff was consenting based on their conduct (*Norberg v Wynrib*, 1992), which is difficult to apply in the context of contact sports.

Accordingly, I argue that a sociological understanding of consent is required to move beyond looking at how courts have interpreted consent to “include a much wider observation of the particular social context” (Cotterrell, 1998, p. 191) that shapes the meanings that participants

attach to the concept of consent and how they communicate consent. Law is often seen as having a uniform application across all social and cultural settings, despite legal decisions being made in very specific factual circumstances (Cotterrell, 1998). Yet, participant understandings of a legal concept, such as consent to violence in a particular sport, is deeply subjective (Weinberg, 2016) and “shaped and sustained by the system” (Silverwood, 2022, p 243) of professional sport. A uniform and objective application of a legal concept may indeed ignore “the empirical conditions of [law’s] applications” (Cotterrell, 1998, p. 186). Therefore, a sociological approach to understanding consent to violent practices in hockey is needed since it has various applications depending on its social and cultural interpretation. Indeed, there are many social and cultural forces that shape the hockey player’s consent, including the near impossibility of communicating a lack of consent on account of the power imbalances, institutional pressures to sacrifice one’s body for the game, and the overall normalization of risk, pain, and injury.

Theorizing Consent: A Socio-Legal Understanding of Consent in Contact Sports

Channon and Matthews (2021) point to the construction and communication of consent as a particularly important question in the context of contact sports since most are characterized by a “near inevitability of injury in competition and training,” (Channon & Matthews, 2021, p. 901). This effectively means that a uniform and objective application of consent will almost always lead to a finding that a hockey player is not responsible for the harms they cause since injury in contact sports is inevitable and must be accepted just to participate. However, it is not always evident if conduct done in the name of sport participation is always a *voluntarily* act, as is required for the legal defence of consent or *volenti* to apply.

As such, a sociological examination of how consent is constructed and understood can help make sense of the ways that the culture of hockey legitimizes violence, which may or may

not be consensual for everyone socialized by the culture of hockey. As explained by Weinberg (2016), consent must be understood as a subjective process because “not all consent is created equal” (p. 5). The meaning of consent is not derived from any single source: it is a process wherein consent is shaped by individuals and groups, their relationships with each other, and the social context of the activities in which they participate. Weinberg (2016) further explains that legal definitions of consent play a crucial role in individuals’ understanding of consent, but these are not always considered in environments where individuals and groups enact their own rules and norms when participating in activities that are likely to result in pain and/or injury, such as physical contact sports.

The question of whether athletes consent to violence is particularly complex considering the cultural and occupational expectation to play with aggression and violence and to do whatever it takes to win. The win-at-all-costs mentality in a game that is characterized by masculine traits and a set of both written and unwritten rules that dictate when violence is legitimate further complicates the ability of a player to resist the cultural expectation to assume the risk of pain and injury in a violent game. In this context, Gramsci’s (1975) concept of hegemony is crucial to understanding the ways that the NHL and professional hockey more generally secures the consent of players to inflict violence and to accept the consequences of that violence. As explained by Giulianotti (2012),

[h]egemony describes the fluid power relationships, methods, and techniques by which dominant groups secure their position, by obtaining the ideological consent, rather than the physical coercion, of dominated groups. Hegemony functions most smoothly when dominated groups are persuaded that the exploitative social order is ‘natural’ or ‘common

sense' and thus come to accept their position and to 'live their subordination' as an everyday fact of life. (p. 59)

In this context, the hegemony of the NHL and professional hockey's control of the game operates to secure consent from the players. The NHL, as the dominant group, has cultural, political, and economical ideas and practices that become relatively normalized, and which are maintained through force and largely unquestioned by the subordinate groups – the players. This works against the legal notion that consent must be given freely and voluntarily. When consent is effectively manufactured through a process of hegemony, it furthers pushes consent beyond consciousness, and it becomes taken-for-granted and remains largely unquestioned (Channon & Matthews, 2021; Weinberg, 2016). Indeed, the consent that hockey leagues and participants rely on is often a result of what Weinberg (2016) refers to as consent that operates “implicitly or as an institutionalised and ritualised process where consenting individuals have little input or knowledge about what they are consenting to” (p. 101).

It is, however, possible to resist hegemony (Giulianotti, 2016), and evidence of resistance is seen in some players who have turned to the law and lower-level leagues like the QMJHL who have implemented rule changes to gain some power in influencing change to protect the players' bodies from unnecessary and non-consensual harm. This ultimately shows that there exists not only a breakdown in consent within the hegemonic structure of hockey, but also that the process of securing consent is no longer functional. Accordingly, Weinberg's (2016) conception of consent allows one to see how consent is constituted and to provide a more nuanced understanding of how individuals and groups give meaning to consent within a particular social context shaped by an imbalance of power. In turn, the meanings that participants give to injury

can inform whether consent is truly voluntary or not for the application of consent and *volenti* as legal defences to tortious conduct in the context of a hockey game.

Methodology

To tap into the meanings that hockey players give to injury and consent to violence in hockey, I conducted qualitative, semi-structured, in-depth interviews with hockey players, trainers, and coaches who are deeply socialized in the culture of hockey. As explained by qualitative researchers of sporting cultures (Atkinson, 2012; Donnelly, 2000; Thorpe, 2012), knowledge about the practices and the meanings given to these is gained by asking people about how they experience and see the world from their perspectives. As such, my interviews aimed at gaining an understanding of the meanings that participants in hockey give to risk, pain, and injury. The emphasis on the ethnographic interview for this project was to capture the participant's insights, the knowledge that they have in their minds, and beliefs and values that influence their actions in ways that allow the researcher to immerse themselves rather intimately in the life of the interviewee (Hockey & Forsey, 2012).

I followed the advice of Sparkes and Smith (2014) who point to the importance of creating space for spontaneous dialogue with the participants and leaving room for unanticipated ideas to emerge. To achieve this, I invited participants to share their experiences with broad and open-ended questions. I found this to be a productive way of getting stories from the participants and ultimately getting at what Sparkes and Smith (2014) point to as the goal: getting their understanding of reality, their place in that reality, and the meanings they give to events, emotions, or behaviours in their own words. In turn, I allowed participants to speak freely on what they thought was most important to the topic. I then used follow-up questions and probing

questions to draw out more complete stories from participants (Berg & Lune, 2012; Sparkes & Smith, 2014).

The sample under study (n=32) consists of both men and women who are participants in the culture of hockey, including players, trainers, and coaches. Participants for this study were recruited through personal contacts and via a recruitment poster shared on social media. In total, I interviewed 32 individuals in total: 23 men and 9 women. Of the 23 men, 5 are retired players who were coaching hockey at the time of the interviews, and 2 were athletic trainers. Of the 9 women, 1 was a coach and 2 were athletic trainers. The sample includes players from recreational hockey leagues, amateur and minor hockey leagues, and professional hockey leagues. Participants ranged from 18 years old to 51 years old. While this article is aimed at understanding consent shaped primarily in professional hockey, the perspectives of players who never played professional hockey are equally important to trace the historical and cultural development of the many ways that the hegemonic group(s) secure consent from their players. Further, as Webley (2010) points out,

[i]n-depth research affords the researcher the opportunity to learn how research participants understand the world and interact with each other. A well-designed study will usually also provide findings that capture a broad range of experience rather than from only a few people or situations. (p. 934)

Once completed, the interviews were transcribed verbatim and coded for analysis. Each participant was assigned a pseudonym to protect their identity.

Findings

The Hegemony of the NHL in Canadian Hockey

The dominance of the NHL is omnipresent across all levels of hockey in terms of the ways that players – men and women – are first introduced to the sport and how they initially learn the rules of the game. Individuals begin the socialization process at an early age considering players are typically introduced to the game well before they lace up their own skates and step onto the ice. As Greg, a former CHL player, said, “I knew the rules before I even got a chance to play” thanks to the NHL. Indeed, most participants credit the NHL for teaching them how to play hockey. For example, Claire, now a hockey coach, learned how to play by watching her favourite NHL team and her coaches later filled in any gaps in her learning. However, now working as a referee in youth hockey, Greg explained that “it’s funny how surface level you knew the rules”. Several others also pointed to their fathers for helping them learn the game in addition to watching hockey on television, such as Kennedy, a former professional hockey player, who learned to play with her father and brothers on an outdoor rink and by watching NHL games.

Throughout the interviews, it became quite clear that there is no uniform pathway into learning how to play hockey besides a general expectation that players will learn the rules on their own (typically through the teachings of a parent and/or by watching the NHL), and coaches then supplement their own individual learning and training. As Claire explained, players receive training and development when they play under coaching leadership, but she also noted that “it’s more around the preparation and expecting that they’ve been taught previously in some cases how to hold their own I guess”.

The control that the NHL has in educating future and current players is pervasive and teaches players a particular version of the game that undoubtedly translates in how they play in their respective minor and recreational leagues. For example, I recall a moment when I was chatting with my friend’s daughter (around 7 or 8 years old at the time) who played youth

organized hockey in Ontario. Her favourite NHL player was Chris Neil who played for the Ottawa Senators and was well known for his ability to fight on the ice (Warne, 2023). I once told her that Neil was an NHL enforcer – that is, a player hired specifically to fight and protect teammates – and I told her about a time where I saw him fight three times in a single game that I attended in Ottawa in 2011. During her next game, she wore her Senators t-shirt with Neil’s name and number on the back under her hockey gear and played an unusually physical game, taking several penalties over the course of the game because she wanted to be just like him. While children cannot be faulted for imitating their favourite players, it demonstrates the hegemony of the NHL and its influence on young players who play in leagues that don’t yet allow such body contact to occur within the rules.

Further increasing the problem with young players learning the NHL’s version of the game is that body contact can appear worse on television, thereby teaching young players only a portion of the Code of violence. The Code is deeply shaped by honour and respect (Silverwood, 2015). As explained by Jimmy, a former junior hockey player, “there are two willing combatants in a controlled environment. You can’t step on them, you can’t pull hair, you can’t bite...” and Jack who said that “when you fight somebody, you look them straight in the eye, and you say – hey you wanna fight? Yep, alright, drop the glove”. Yet these practices around fighting are not often seen on television. John, an NHL player at the time of the interview, and well known as a high-energy and physical player, explained that he has received numerous suspensions over his career for delivering hits to opponents:

All my suspensions have been hits. And it’s been during the play, he has the puck, I don’t have the puck, type of hits. It’s never been, you know, I hit a guy centre ice when he’s not looking cause I’m a cheap artist. No, all my suspensions have been like – hitting the

guy with the puck or he literally just got rid of the puck. Or like head contact where I didn't mean to hit him in the head but that was the position that we both ended up in in that split second.

John went on to explain that NHL executives would often tell him that these hits could be a suspension or not, but they “err on the side of caution” by imposing a suspension. Later in the interview, he explained that it was common for players to apologize to each other for such late hits or an accidental hit to the head due to the speed of the game. However, since these apologies are not shown on television, he says these hits “might look bad on TV,” further demonstrating the kind of conduct young players are learning. David, a former NHL player who was playing in the American Hockey League (“AHL”) – the NHL’s farm system – at the time of the interview, also confirmed that players are always in communication with each other throughout the game, but this isn’t always evident on television.

The NHL and professional hockey more generally also maintain its hegemony in other ways. Caleb, a former CHL player, discussed the level in which teams recognize and reward talented players who do whatever it takes to help the team win (and, consequently, bring in money for the team) and points to the control that teams have in a player’s future career in professional hockey as problematic for players:

It’s really interesting cause I was probably one of those players when I was 18, 19, 20, I would have been good enough to go play pro. Maybe not the NHL, but I could play pro. But you’re not allowed to do that. And guess how you’re allowed to do that? If you’re Connor McDavid and they keep making money off you. It’s the ridiculous stuff... Connor McDavid can go play in the NHL, but I have to go back to the OHL where they don’t pay me. I could go to the East Coast [Hockey] League and make a pretty good

living and arguably have just as good a chance to progress. People pointed out a few things to me like that, as you're playing "Oh, that's the way it is". Even this thing of ownership of players and, you know, if you don't make... like the player that gets drafted to the London Knights they have a pretty deep pool of good players. If you get cut from that team but they still wanna hang on to you for a couple of years, you can't go play for, you know, another team in the league that isn't as strong. You're like a 16-year-old kid that's just trying to play hockey at the highest level and you're limited. You know, part of this violence thing, this fighting thing especially, it plays into that too. These teams essentially own you and control more of your future than you think.

This control and ownership of players is consistent with Silverwood's (2015) finding that players tend to be treated as "commodities of the club for which they play" (Silverwood, 2015, p. 63), further contributing to their exploitation as unpaid athletic workers and putting players at greater risk of injury. For example, David provided the following experience:

One time someone jumped me. He basically said I cross-checked him in front of the net trying to box him out. We shared some words and I probably said, you know, I probably pissed him off with what I said. He told me he was gonna jump me: "I'm gonna end your career". He jumped me and so, I basically like squirmed out of it. I was a 20-year-old rookie at the time. I basically squirmed out of it, and he got kicked out of the game. I never ended up playing against him again which was good cause I feel like he would have... yeah I don't know what. Then I found out from someone that played with him that he was basically pissed off because the team he was playing for wasn't gonna re-sign him next year. He wanted to end things with a bang there, so he basically just picked me to say he was gonna end my career. So I have no respect for that guy.

Other participants discussed the control that teams have on their career opportunities and their long-term health. Andrew, a former CHL player who suffered multiple concussions over the course of his career explained that the team “just wanted [him] back in the lineup” despite continued concussion symptoms. He was traded to another team because his team was impatient with his recovery time, but noted that his new team took his injuries seriously and allowed him to recover before returning to play. In this sense, individual team subcultures are just as important as the broader culture of hockey in ensuring healthy playing conditions.

When players learn how to play hockey, particularly through the teachings of the dominant professional group, they inevitably learn how to fit in as part of the broader culture of hockey, which often means sacrificing one’s body. Adam, a recreational hockey player, said that he “really, really can’t stand a lot of the culture around it [hockey]”. Others shared this sentiment, particularly due to the cultural expectation to do whatever it takes to win, often at the expense of player safety. In turn, players may be required to submit to the occupational and cultural requirement to assume the risk of pain and injury and deal with the long-term embodied consequence of playing hockey because winning is everything. The win-at-all-cost mentality is well displayed in the interviews in two primary ways, discussed below: (1) The rewarding feature of playing physically and aggressively; and (2) the cultural and occupational expectation to sacrifice one’s body to help the team win by playing through pain and injury.

The Legitimization of Violence: The Occupational Hazard and the Win-at-all-Cost Mentality

Consistent with Weinberg’s (2016) argument around the importance in the difference between violence and aggression, most players in the sample tended to justify using aggression as a

strategy to win by labelling violence solely as conduct intended to cause injury, leaving all other conduct to fall under the umbrella of 'aggression'. Participants generally argued that there is no place in hockey for violence when defined as a deliberate infliction of injury. In this sense, it is clear that no one consents to being intentionally injured by another player, which is consistent with the decision in *Agar* that deliberately causing an injury exceeds the scope of implied consent. Players offered the following definitions of violence:

- Charlie, former NHL player: violence in hockey is whenever you're trying to hurt someone.
- Kennedy, former professional player: Violence in hockey goes over and above the rules of the game that were set out to keep the game fair and safe for players. Violence is when another player intends to injure or to be overly aggressive full well knowing what they're doing.
- Samantha, a recreational player: I think violence is the intent, explicit intent to either injure or do something unnecessary.
- Greg, former CHL player: I think violence... I don't really know what the definition of violence is... [laughs] but I think everybody probably has their own way of seeing what a violent play would be. I think there's some pretty clear-cut ones. You know, anytime someone uses their stick, swinging or cross-checking into the face, anything like that. No place for stuff like that.
- Christine, an athletic therapist: Violence is when you're going out there with your number one priority to hurt somebody versus going out there with your number one priority to score a goal or prevent a goal from being scored if you're a defenceman.

- Jason, a former CHL player: I would say again anything that's more malicious or anything more like the intent to injure.
- Ryan, a recreational player: I would say that the level of violence that you're sort of consenting to because of the way the league's played or whatever league is played and whatever is in the realm of normalcy.
- Roger, a former NHL player: I think violence... to me is... intent to injure. If you're trying to hurt somebody, you know, if you're going after someone in a vulnerable position and you're trying to hurt them

At first glance, these responses draw a sharp line between acceptable and unacceptable conduct in hockey: there is no place in hockey for players who deliberately inflict injury on an opponent. That is, intentionally causing injury is unacceptable. Beyond the general consensus from most players who define violence with intent to cause injury, it is not clear that everyone subscribes to the same definitions of what it means to play aggressively and/or violently. For example, Greg said that he didn't "really know what the definition of violence is... [*laughs*]" and that everyone likely has their "own way of seeing what a violent play would be". John also explained what he thinks it means to play with aggression, which is part of the game, despite teammates likely believing he crossed the line of acceptable play:

Being aggressive is almost like being tenacious. And having tenacity. That's my definition of aggressive. You know what I mean? Being aggressive is like... that mean fuckin' look on your face. You being first on the puck is being aggressive. You getting in the corner before everybody else is being aggressive. Um, [...] my teammates... They've probably looked at me and thought – "This guy's fuckin' nuts! What's he doing?!"

John, however, also pointed to hockey being a great sport to release frustration, something that Silverwood (2015) notes is something that many players use to support fighting in hockey, because “fighting paradoxically reduces the amount of violence by allowing pent up aggression to be released” (p. 197). John discussed that he always enjoyed playing hockey since he was a young boy because he “could go on the ice and [he] could let frustrations out on the ice and [he] wouldn’t be in trouble for it”. He later explained that using the fistfight to release frustration has “always been a part of the game” and provided the following illustration:

If you’re pissed off about how you’re playing or a mistake that you made, you’re able to take your frustrations out and *fight* someone. That’s... it’s crazy! I mean, not crazy in a bad way, it’s crazy in a good way.

As explained by Silverwood (2015), the logic is that by allowing a player to fight an opponent, the players are effectively policing the game by using a ‘cathartic’ tactic (the fistfight) to reduce the possibility of other forms of violence. For example, if one player delivers a dangerous and overly violent hit, they will have to answer for it by fighting the opposing team’s tough guy. In contrast, if fighting is banned in hockey, players will be allowed to deliver more dangerous forms of contact, such as dangerous stick work, because they will not be required to face repercussions in the form of a fight or they will not have a legitimate tactic to release their frustrations.

As articulated by Benjamin, a former NHL player: “In general, I feel that there is some responsibility in the unwritten rules of sport. If you are responsible for the physical elimination of an elite player on an opposing team, you have to be aware of retaliation”. Similarly, Matt, a recreational player, explained that

When you ride that line when you play that ‘way’ you’re gonna get a retaliation out of the players. So if you throw a predatory hit and you’re hitting guys when you know that they’re in a vulnerable position, that’s when I think it’s really crossing the line.

This is equally present in women’s hockey. Penny, a professional hockey player, explained that “even in girls’ hockey like... If one of us gets hit really bad like, somebody’s gonna step in and protect and stand up for each other. And that’s just a pretty special thing, I think”. However, Silverwood (2015) found that fighting in retaliation to defend a teammate is hardly as simple as the Code suggests. While it is possible for players to answer for dirty plays by fighting, she points to the fact that retribution and retaliation often lead to rivalry, which leads to even more violence on the ice every time rival teams play against each other.

To illustrate, John shared a story involving a rivalry in the NHL. He gave an example of a time where his team was playing their biggest rival in the league and a line brawl broke out while he was on the bench. As an enforcer, he could not just sit back on the bench and watch the brawl go on without him:

I was on the bench, and I don’t know if you saw, but we played [NHL team] and [Opponent 1] got hit in open ice. And there was a big brawl. And it was a big brawl! And I was on the bench for it. And it was *killing* me that there was like this line brawl going on and I’m not involved. So... I put one leg over the bench, and [teammate] is sitting right beside me, and he’s like, “don’t go”. He’s like, “No, don’t go”. I looked at him, and I’m like – “Fuck this shit!” And I hop the bench. And I went into the scrum. And I got kicked out and I almost fought [opponent 2]. But... he’s probably thinking to himself – “this guy’s a fucking idiot for jumping the bench. What’s he doing? That’s overly aggressive”. I’ve been overly aggressive. That is the definition of being overly

aggressive. But... Not to me. And everyone has a different opinion of being overly aggressive. To me, in that situation, I was definitely over aggressive in [teammate's] eyes.

The apparent contradiction in describing something as overly aggressive by definition, but the player himself describing it as acceptable is also seen in Benjamin's experiences as a former NHL enforcer when attempting to inflict pain on opponents. Benjamin explained that he deliberately attempted to inflict pain on opponents as a strategy to win games yet seems to suggest that this intentional infliction of pain is not the same as injury:

I don't wanna put my team down. Yeah, I'm absolutely trying to inflict pain, like 100% I'm trying to inflict pain. But I'm not... I'm trying to hurt them, I'm not trying to injure. Because when I injure or I do something that's maybe too close to injuring, that's where I might get a penalty. That's where penalties are called to protect player's safety. And I'm not trying to injure. I'm also not trying to do something that might be deemed injuring because that's a penalized offence and that penalized offence means that I hurt my team. So beyond not wanting to injure the other player, I also would rather just not hurt my team. Because if I hurt my team more than a few times I might not have a job anymore. [...] But typically yeah within the confines of the rules for me that means being able to inflict basically like all the harm and hurt and pain you want without trying to injure a guy. Without knowing it's actually going to like... like long term, I could completely destroy a guy in the boards and give him a separated or dislocated shoulder. To be honest I've got no problem with that, like he should have been stronger [laughs]. If it's a clean hit, it's a clean hit. If your body unfortunately breaks from a clean hit, I mean I've had the exact same happen. There's no... to me, there's no difference than me breaking your

hand with you blocking my shot. You know, there's injuries that are bound to happen in a contact sport. As long as I'm not trying to like intentionally injure somebody then everything is kind of like as far as that physicality goes, it's fair game.

A similar mindset is apparent in women's hockey as well. Penny shared a similar story of a time where she resorted to "pretty vicious" cross-checks to set the tone and inflict pain heading into their next game against this opposing team:

There was... I want to say like 5 seconds left in the game. And the puck went behind the net and the girl kinda fell on it and when she was down on the puck, like I gave her a good five cross-checks in the back. Like they were pretty vicious. And um... I knew what I was doing. I ended up getting a penalty on the play. But I... to me, and to our coaching staff and to the rest of the team, that was me being like – you know what? I'm setting the tone for game 3. Like we're not here to get pushed around. Some people did not like it. Some people thought it was very very dirty. And I think that was one of the times that I definitely crossed the line. But um... I wouldn't say that there was intent behind it. It wasn't like I was going to try to hurt her, or injure her, but I was definitely trying to make her hurt a bit. [...] I was never trying to harm her. Or injure her. But definitely wasn't gonna be disappointed if she wasn't feeling great by the end of it [*laughs*].

The distinction between 'harm' or 'pain' and 'injury' as inherently disconnected is questionable at best, and certainly not something that all players buy into. As Silverwood (2015) states, players "frame the code in a way that will suit their team, allowing them to break the code if it leads to a positive result for their team, while simultaneously berating another team for breaking the code for similar behaviour" (p. 212). It is notable as well, as mentioned above, that injuries are cumulative. As expressed by Claire, a hockey coach who lost several players to

concussions who couldn't return to play, "it doesn't take much once you're already prone to it". Even reoccurring bumps and bruises can take a toll and eventually cause a serious injury. The attempt to justify intentionally inflicting harm or pain on an opponent as being justifiable is ignorant of hockey culture more broadly in that players are expected and encouraged to play through pain and injury, thereby increasing the risk of more serious injuries.

Sacrificing Your Body for the Team: Playing through Pain and Injury

The cultural expectation to sacrifice one's body for the game is equally evident in the data. Despite the potential for different interpretations and understandings of what it means to play with aggression and/or violence, it appears that using one's body as a weapon (Messner, 1990) is still a rewarding feature of the game and those who refuse to sacrifice their bodies are labelled as weak. For instance, Daniel, a former CHL player, shared a story of a game where he fought an opponent and was later rewarded with more ice time:

I fought once. And the ironic thing is... this was another one of my beefs with hockey [...] when I fought... like it was me and one other young defenceman, we were like the 6th and 7th defencemen, so we'd rotate in and out. And after that, I've heard about it before and so I just said, you know what, I'll try it. And it's kind of inevitable cause like... lunatics on ice like... this guy, I was not playing the rest of the game without him trying to fight me so... it's one of those things where I did it. And what was interesting and so backwards about it is instead of going one game in, one game out, I would play two games, and he would play one. Then I play two. So my ice time increased because of that. Which is just ridiculous. [...] Because it shows that I'm willing to sacrifice, or whatever. I don't know! It's really ridiculous, in my opinion. It's pretty archaic.

Other participants also shared personal stories about playing through pain and injury or talked about times where a teammate has done so. Indeed, Weinstein et al. (1995) argue that coaches are more likely to consider their players as athletically skilled if they engage in physical exchanges. Similarly, they note that athletes who suffer injury are often viewed as displaying strength wherein the injury itself serves as a badge of honour worthy of respect from teammates and fans alike. For example, Caleb used the same label of being “soft” to describe players who aren’t willing to sacrifice their bodies for the game: “The guys that do take care of their bodies they’re labelled [...] like a soft player”. Ryan recalled a game where he broke his wrist and continued playing through the injury and described it as the “honourable thing” to do despite suffering long-term repercussions for worsening the injury by playing through it:

I guess the idea would be that if I am willing to push through with an injury, then others who are fully healthy and fully ready to go will give it their all, you know. Also for my own, um... street cred points. Yeah, I’ll get street cred for not giving up. So I didn’t give up on the game and give up on my teammates, sort of willing to do whatever it takes to be in this last game of the year [laughs]. I still can’t do a proper bench press because of it; thanks to that honourable feeling.

When I followed-up with a question about why he would risk long-term pain and injury by playing through the broken wrist, he pointed precisely to the hegemony of professional hockey:

I guess I was kind of upholding what I think should happen on the most professional of hockey teams right? So what I envisioned, what I imagined it would be like in a team that was like that. If somebody didn’t play through an injury they’d be called all kinds of

names. They would be sort of... maybe be ostracized, we definitely looked at it as being soft.

It is noteworthy that recreational players are pointing to the professional leagues to justify playing through injury. While the game of hockey is shifting towards speed and skill with less emphasis on violence and fist fighting (as discussed in Article 2), the changes currently being implemented by lower level leagues to minimize violence do not appear to overcome the dominance of the NHL and professional hockey more generally as playing aggressively and playing through injury continues to be rewarded.

The fear of being labelled as soft or weak for not sacrificing one's body was well articulated by Eloise, a former professional player, who discussed the difference between 'visible' injuries like a broken leg that makes it acceptable for a player to miss ice time and 'invisible' injuries like diabetes or concussions that make teammates and coaches question why you're not playing. She explained that such 'invisible' injuries make it "really hard to show to your teammates but also yourself that like you're not weak. [...] like you don't wanna let your teammates down and it's a big psychological battle". The logic behind this cultural and occupational requirement to play through pain and injury was explained by Greg:

You love to play. Like you enjoy the game. You want to compete. You're part of a team. You have an opportunity to win. It's a unique mindset to have. I didn't play professional, but to be on the path to professional, you have to have a different mindset than most other people. You have to be willing... to sacrifice, fight through the pain, and continue to do your job. Some guys are really good at it, and some guys are really bad at it. But when you get to the higher levels, there's money on the line. It's a lot different then. Like what if you're in a contract year and you need to play? So everybody has their own reason for

it. But I would say the culture of hockey is... there is an expectation that you are going to have to play through pain. You're going to have to play through injuries.

Daniel took issue with such expectations. He explained that hockey is very manipulative and instilled a lot of anxiety and frustration; all of which led him to quit hockey altogether. He described hockey as "unhealthy" and that "it can turn very... dark". This sentiment can perhaps be understood in the context of Jack's words as a former NHL player, when he said that winning was "what we were paid to do" and that "when I go out to play, I play to win, I don't play fun. I don't know how to play for fun". For Daniel, this culture of winning took the fun out of the game and he was always "afraid to make mistakes" further increasing his anxieties. While Jack was able to find purpose in this way of playing after playing thousands of NHL games, the same situation led Daniel to quit the game because he wasn't willing to sacrifice his long-term health for the game, unlike most other players who are unlikely to remove themselves from the game when suffering from pain and/or injury.

The majority of players are afraid to leave the game out of fear of getting cut from the team and losing their shot at a professional career, being labelled as 'soft,' or being responsible for letting their team down. As expressed by Paul, a former CHL player, "if you want to play, you play" regardless of pain and/or injury and later explained that "you just try and suck it up and play through it" when the injury is already at a point where it can't get worse. Justin, a former CHL player, who experienced numerous injuries over the course of his hockey career, told stories of how professional hockey is a job, and that most players are just happy to receive a paycheck so when they get injured, it's "so what, who cares, suck it up". David also explained that in many instances, the onus is on the player to take themselves out of the game because the coaches and trainers "can't know what you're feeling in your body like it's impossible to tell"

and said that “you don’t wanna give up your spot, you know, if you leave the game you’re basically saying ‘I’m hurt’”.

The onus is not, however, solely on the player as shown by the following former CHL players. Daniel explained that he was told by coaches to suck it up after blocking a shot and rupturing a testicle: “in the hockey world it’s called ‘suck it up’ right?”. Similarly, Andrew explained that a coach “told [him] that [he] needed to suck it up and stop moping about it” after suffering long-term concussion symptoms. Justin also experienced a coach who encouraged him to play through injury:

That's how it works, he will say... he'll give you his speech and the trainer will say hey are you good, or, you know, you always want to fight through it regardless anyways, you're that... you're stubborn in a way to the choices you make at that age all you want to do is impress your peers, impress your coach, and it doesn't matter how much so... yeah, battle though those injuries, those injuries you know, they kept harping on you.

Eloise also recalled a time when her coach would bench a player for the remainder of the period if they made a mistake. After making one, she decided to hit an opponent as hard as she could to regain his trust. She missed the opponent and broke her wrist when she ran into the boards and decided to hide the injury from her coach:

I was in an abusive environment, and I purposely didn’t tell my coach that I broke my wrist or else I’d have serious consequences. So I continued playing with a broken wrist and when I was finally “Like my wrist hurts and it’s broken,” I still had to play, and I was... my coach was yelling at me “What the frig is wrong with you?” I’m like my wrist is broken. I had to skate extra. And I had to continue doing battles until I couldn’t feel my wrist anymore.

Eloise further discussed how pervasive the culture of winning was in terms of facing repercussions for losing:

There were other abusive ones like when we would lose games, there was one time [...] We had to wear like 12-pound scuba diving belts. And we would skate for 60 minutes straight. Then we'd take the belts off and we'd do more skating. Then afterwards we all got a shovel and we had to shovel the soccer field during a snowstorm for like 5 hours. And then that was our coach's way to say like "Did you learn a lesson?" It's like, that was not ok.

These examples show how pervasive the socialization processes involved in learning the Code can be and how it continuously works to further legitimize violence in hockey, particularly when one moves up the ranks in hockey and aims for a job in professional hockey. Once internalized, the Code is used to justify violence and the infliction of pain as simply part of the game, which is equally evident in women's hockey. For instance, Kennedy shared the following story about a time where she got physical with an opponent:

I was a player that people wanted to shut down. So often times they would do whatever they could to stop that. So that's hooking, hitting, cheap shots, tripping, you know, there was a time when [an opponent] ... we were playing [team name], and that player was taking liberties on other players with head shots, and hitting them from behind. And I sort of took matters into my own hands, and if that player wanted to be physical, I could be physical right back. So I body checked her, she slashed me with her stick, and it kind of turned into a bit of fight if you will in the corner. But it was warranted, because of what she was doing to our players, in my opinion, and the opinions of my teammates. And so those things happen a lot in the game, and that's the way it is.

Claire also shared several stories of players that she coached who suffered serious injuries, including a player who suffered a concussion and was not able to return to the team: “she was coming into the neutral zone, and she got kind of a blind side pass a little bit. The girl just ran right through her. She went straight elbow to the head and there was no call”. Similarly, she lost another player due to a similar play:

The other one who is sitting out the rest of this year... she got hit, like a bad elbow to the head, same kind of thing. She was just... a hard battle but the girl just didn't stop and hit her straight in the head with an elbow.

Another example of violence provided by Claire included using a stick as a weapon:

We have one where a girl was coming up the ice and passed the puck and hurled in towards and the girl decided to wrap her stick around our girl's neck and throw her to the ground. There was no call.

Despite the small sample of women players who participated in this study, their experiences provide some insights around violence, injuries, and the overall expectation to play physically to help win games. Silverwood (2015) asked the question of whether there are less injuries in women's hockey given the difference in rules. Since women's hockey had traditionally prohibited intentional bodychecking (Theberge, 1997), this version of the game is a good site to examine the question of whether the use of the fightfist to release frustration reduces the prevalence of other forms of violence that may cause injury. While Silverwood (2015) was unable to address this question based on her interviews with men, the women in my sample shed some light on this question. Their stories suggest that a version of the game without fighting is not necessarily less violent, and therefore less injurious, than men's hockey – all of which does little to support the argument that fighting in hockey reduces the overall amount of violence.

Indeed, they appear to adopt their learnings from watching NHL hockey and by playing with boys and men over the years to further internalize the Code in drastically similar ways as those who participate in men's hockey. It is noteworthy that the newly-created Professional Women's Hockey League (PWHL) allows bodychecking when there is a clear intention of playing the puck (Professional Women's Hockey League, 2023). It remains to be seen how this rule might influence the prevalence of violence in women's hockey moving forward and further test the catharsis argument.

Conclusion: Winning at the Expense of Player Safety

The Code in hockey has long provided justifications for violence and the infliction of pain in the game as a legitimate tactic to win games. In turn, the win-at-all-cost mentality that appears ingrained in participants deeply socialized in the culture of hockey works to further normalize pain and injury. Playing physically and sacrificing one's body tends to be rewarded by coaches and fans, whereas choosing to protect one's health and safety is labelled as being 'soft'. In this sense, winning is more important than player safety. This effectively places hockey players in a position where they must assume the risk of injury and consent to violent practices that can potentially cause serious injuries – all of which is labelled as simply part of the game in the name of winning. The emphasis on winning and the normalization of pain and injury are embedded in players at an early age through a deep socialization process that begins with learning the rules of the game to learning how to play physically; and from chasing the NHL dream all the way to living it out and doing whatever it takes to ensure it continues as long as possible. Players thus seem to resort to violence to help the team win and secure their roster spot.

This process of socialization creates difficulties in applying the legal defence of consent and assumption of risk in a purely objective fashion as outlined in Canadian law. If the

barometer for acceptable conduct in hockey is that anything goes except intentionally injuring someone, it means that a lot of aggressive and violent practices will go unchecked. The binary presented by participants in this research that aggression is part of the game and violence as excessive force that is beyond the scope of the game essentially means that any conduct that is not aimed at deliberately causing injury is placed under the label of acceptable aggression.

Through this learning process, players become seemingly ignorant of the occupational and embodied consequences of violence. However, their love of the game does not mean that they are willing participants in their exploitation. It is clear that players consent to a relatively high degree of pain and injury in the name of the game, but the socialization process that takes place as a player moves up the ranks in competitive hockey is shaped by an imbalance of power. The dominant group made up of those who control hockey, primarily the NHL and professional hockey more generally control the rules of the game and the subordinated players themselves in ways that don't allow them much space, if any, to communicate a lack of consent to violence. Since players continue to be socialized in this cultural space, the dominant group can continue relying on players' apparent willingness to use violence, despite criticisms that they are not doing enough to protect players, which is perhaps well summarized in David's own words:

The NHL does a terrible job of penalizing players for bad hits and violence, let's say. I think it's brutal, I think it's not even close, it's not even close. [...] Yeah, I just don't think they care to eliminate garbage from their game. I think it still generates story lines for them, it generates interest and, you know, the more story lines, the more interest you have, the more money the league makes.

CONCLUSION

A Critical View of Canadian Law and the Importance of Interpreting Legal Ideas Sociologically

My PhD research began with an aim to gain a cultural understanding of violence in hockey and at what point players who violently injure others can be held liable in Canadian tort law for their conduct. Sport sociologists have long demonstrated that hockey violence is “socially acquired normative conduct” (Smith, 1975, p. 72) and that learning how to use aggression and violence as a tactic to win games is learned behaviour (Colburn, 1986; Messner 1990, 1992; Silverwood, 2015). Scholars have long argued that the causes of player violence include numerous factors such as the commercialization and business of sport; hegemonic masculinity; emotions; occupational requirements to sacrifice one’s body; and the normalization of pain and injury. Hockey players thus learn how to use violence and aggression through a socialization process that begins the moment they become a member of the culture of hockey (Silverwood, 2022). While the game has traditionally been characterized with violence as a legitimate tactic to help win games (Holman, 2018), my research findings support the argument that there is a shift in tolerance for violence and injury-causing conduct in hockey in that players are no longer willing to risk their long-term health for the sake of the game to the same extent as in the past. As such, the game is experiencing a cultural shift wherein hockey players are deviating from the traditional practice of remaining silent and complicit to ‘fit in’ as part of a well-socialized hockey player that embodies the characteristics that make up the hegemonic hockey player. That is, traits associated with hypermasculinity such as strength, power, aggressiveness, risk-taking, and dominance (MacDonald, 2014) and a willingness to do whatever it takes to win.

To resist the hegemony of the NHL and professional hockey more generally, players are increasingly turning to the law to address the fact that the NHL is doing little to curb the problem

of hockey violence and to receive compensation for the serious injuries they suffered while playing hockey. The turn to the law demonstrates that the process by which consent is secured and communicated to do violence on the ice and suffer the embodied consequences of playing such a physical contact sport is not effective. Rather, it serves as evidence that there are limits to a player's consent to violence in hockey. My research thus explores these limits in more depth and provides empirical evidence of the cultural breaches in the normalization of risk, pain, and injury in hockey to show at what point players should be held legally responsible for inflicting injury on another player.

It should be noted that there are limitations to my research approach. Ethnography inherently has limitations due to the fact that it involves the interpretation of “copious mounds of documents, notes, boxes of video and audio recordings, pictures, and memories. Interpretation is almost certainly chaotic and (literally and figuratively) messy” (King-White, 2017, p. 486). Interpretation of such data may raise questions related to validity and reflexivity throughout the research process and write-up. Validity in qualitative research emphasizes the degree that the researcher can claim their interpretations as reality and this points to trustworthiness and accuracy (Sparkes & Smith, 2014). In turn, reflexivity points to awareness of one's own presence in the research and how the researcher may influence the process. Berg and Lune (2012) indicate that the researcher should understand that they are part of the social world that they are investigating, and that reflexivity “implies a shift in the way we understand data and their collection” (p. 205).

To minimize such limitations, I remained aware about how my gender and outsider position might impact the interview process (Fontana & Frey, 1994). Indeed, there is evidence that being a woman researcher interviewing men hockey players can be deeply uncomfortable due to potential sexism (Allain, 2014) or may lead to different treatment during the course of the

interview (Fowler et al., 2023). In light of such evidence, I relied on previous experiences interacting with members of hockey culture, including previous graduate work (Dennie, 2019) and other research projects, which involved observations and interviews with hockey players, fans, spectators, and parents (Dennie, 2021; Wong & Denmie, 2021). This experience was crucial to building rapport with participants by following Thorpe's (2012) advice to wear clothing commonly worn by athletes in the sport under study and using their argot, that is, the specialized language of the group (Berg & Lune, 2012; Thorpe, 2012). By managing impressions accordingly and avoiding academic jargon, I began each interview with easy, open-ended questions and found that participants tended to become comfortable with me rather quickly and be open to sharing vulnerable stories.

I also made sure to keep my focus on the goal of the ethnographic interview, which is understanding social phenomena from the perspectives and lived experiences of participants (Berg & Lune, 2012), rather than attempt to control the interview with my own preconceived ideas of what might be important. I let the participant lead the conversation by asking broad, open-ended questions that allowed them to decide what they wanted to share with me based on what they perceived as significant. I also minimized the limitations around credibility and validity by including extensive quotes throughout the write-up to remain true to the participants' words and viewpoints alongside my theoretical and analytical interpretations.

Other limitations include sampling procedures. The sample consists of participants who came forward with interest and willingness in sharing their experiences with violence in hockey. The sample includes representation from men and women, different age groups with different skillsets, and players with experiences in all levels of hockey. Limitations are thus recognized in

terms of ability to generalize findings and player accounts are taken together to provide a look into the playing culture of hockey as represented by the participants in this study.

The findings are especially limited in the context of women's hockey given the particularly small sample, making it difficult to make any generalizations. However, the lived experiences of women players are hardly reported in sociological research on hockey violence and even limited participation from these players makes an insightful and important contribution to the literature. Despite these limitations, the strengths of ethnographic methods to produce rich descriptions of lived experiences and perspectives justified their use for this study aimed at understanding risk, pain, injury, and violence in contemporary elite-level hockey in North America.

Through a qualitative research design framed around in-depth, ethnographic interviews and a case law analysis, I provide a look inside the culture of hockey from the lived experiences of players who are deeply socialized in the culture of hockey. In my first article titled "The Reasonable Hockey Player: Tort Liability for the On-Ice Negligence of Hockey Players in Canada", I review the most prominent case law involving hockey players and compare these findings with the lived experiences of players interviewed for this study. I conclude that Canadian courts are clearly willing to award significant damages in compensation for intentionally and negligently inflicted injuries during a hockey game. However, there is a jurisdictional divide between Canadian provinces and how they have thus far made decisions around the application of the standard of care in negligence cases. While it remains unclear how courts will decide such cases in the future, the data presented alongside the case review is intended to inform future decisions and encourage judges to write decisions that reflect more broadly the social context that frames hockey players' understanding and consent to violence.

The ‘living law’ (Ehrlich, 1962) that hockey players follow as their own guiding rules of conduct suggests that players are indeed willing to sacrifice their bodies for the sake of the game. However, I argue that this does not automatically imply consent to all violence to a point where players should be relieved from legal liability entirely. The living law effectively provides an insightful look inside the cultural and occupational expectation to take risks in a violent sport. The players that I interviewed discussed in detail that the speed of the game and emotions involved in playing hockey mean that it is an inherently dangerous sport and that players will sometimes make mistakes. In this sense, players are willing to excuse mistakes even if they lead to injury because they willingly participate in this risky and speedy activity. However, as I show in this article, the player’s consent is shaped by an imbalance of power wherein those who control the rules of the game and dictate how the game is played prioritize winning at the expense of player safety. As such, while players do consent to putting their bodies at risk of injury, they are critical of what they refer to as “the business of hockey” that puts their bodies and careers at even greater risk of harm.

Players are not, however, consenting to deliberate inflictions of injury. Players generally defined the term ‘violence’ to mean any act that is done to intentionally cause injury to another player, which has no place in hockey. In contrast, it is far more difficult to define the scope of what constitutes ‘aggression’ in hockey. A close look at the unwritten rules in hockey, or what has become known as the Code of violence (Silverwood, 2015), offers further insights into the aggressive and violent practices commonly used in hockey. In two other research articles, I explore these so-called unwritten rules in greater depth.

In the article titled “Personal Sacrifice or Exploitation on Ice? The Code of Hockey Violence and a Win-at-all-Costs Mentality,” I provided a look at how players are socialized into

consenting to the cultural, occupational, and embodied consequences of violence. There are many causes of player violence (Coakley & Donnelly, 2008; Silverwood, 2015), including masculinity (Allain, 2011; MacDonald, 2014; Messner, 1990, 1992; Theberge, 1997; Young et al., 1994), emotions (Denzin, 2006); occupational pressures (Brayton et al., 2019; Young, 1993); economics and the business of sport (Jones et al., 1993; Jones & Stewart, 2002; Kalman-Lamb, 2018; Kennedy & Silva, 2020); nationalism and national identity (Allain, 2014, 2020); and an overall culture of risk (Howe, 2004; Nixon, 1992) that normalizes pain and injury (Young et al., 1994; Weinstein et al., 1995). Learning how to become an effective member of this culture means undergoing a deep socialization process that works to label violent practices as an acceptable part of the game, reinforce a win-at-all-cost mentality, and instill an unquestioned adherence to the Code of violence in hockey – all of which is done at the expense of player health and safety.

By theorizing consent as a subjective process (Weinberg, 2016) that must be communicated (Channon & Matthews, 2022), I draw on the concept of hegemony (Gramsci, 1978) to explain how the dominance of the NHL, masculinity, and the overall normalization of pain and injury in hockey all work towards the manufacturing of consent on the part of the players. The socialization processes involved in becoming a hockey player effectively lead to an unquestioned and taken-for-granted adherence to the norms around violence (Channon & Matthews, 2021; Silverwood, 2015). In turn, players who buy into the Code are able to rationalize and justify sacrificing their bodies by doing whatever it takes to dominate the opponents and win the game.

Similarly, in my article titled “‘You Just Roll with the Punches’: The Production of Ignorance in Professional Ice Hockey”, I examine these processes more specifically in the

context of concussions in professional hockey. Framed around the class action lawsuit filed by former players against the NHL for allegedly concealing the risks associated with TBI and contact sports, I argue that hockey leagues effectively depend on this manufacturing of consent to continue profiting off the professional game that is characterized with violence. Put simply, leagues purposefully instill doubt and ignorance in their players by claiming that there is not enough evidence to prove causation between TBI and contact sports.

Throughout my research, players spoke candidly about their willingness to sacrifice their bodies for the game, especially those who play professionally or are hoping one day to be drafted by the NHL. However, the cultural production of ignorance around the seriousness of concussions that the NHL works hard to maintain simply means that players can remain ignorant of their own exploitation. Players are put in a situation where the only choice is to assume the risk of injury if they want to play hockey, especially in the professional ranks. The culture of hockey is thus characterized by an imbalance of power between those in control of the game (primarily the administrators of hockey leagues and coaches of hockey teams) and the players, wherein players have little to no control in changing what they are consenting to. Consequently, the hegemony of professional hockey leading to the manufacturing of consent and the production of ignorance around the seriousness of injuries in hockey all work to vitiate the consent of players who are no longer willing participants in this violent game but were unable to communicate a lack of consent for fear of being ostracized, punished by a coach, or cut from the team entirely.

Significance of the Contributions to Sociology and Law

Taken together, all three articles point to the fact that defining key terms of violence and aggression and the meanings given to consent and assumption of risk are deeply subjective. By

shedding light on the legal complexities of applying objective legal principles to such subjective experiences, I offer an in-depth analysis that is useful for both individuals who work within the hockey industry and jurists alike. The lack of consistency across legal precedents outlined in Article 1 means there is a lack of foreseeability in the law in the sense that it is unclear to athletes what might lead to liability. In turn, the educational and deterrent goals of tort law have failed: without knowledge of the decisions and any consistent outcome, current and future players cannot alter their on-ice conduct to exercise more safety and precaution in ways required by Canadian law. Rather, they continue to live by their own rules of conduct learned through a deep socialization process while the social and cultural issues with violence and injuries remain unchanged.

Players in this study who were aware of legal decisions involving injured hockey players did not always agree with the outcomes of the decisions and in fact showed some resistance to them. For example, when Greg and I discussed the *Casterton* decision that had recently been published at the time of the interview, Greg expressed frustrations and criticisms with the result of the decision:

When that guy signed up [the plaintiff], he signed up for non-contact hockey, but he signed up for hockey. He signed up knowing that... there's the option for major collisions during the course of a game. So yeah. I don't know. I'm speaking a lot about something I don't know the full details of but, it's just frustrating to hear that yeah. It's very frustrating that that decision came out. But again, who knows. I don't [*he had not read the actual decision*].

It is important to note that most participants in this study were unaware that there was a body of case law involving injured hockey players. Those who did know about such cases only

knew of those that were heavily reported on in the media. This speaks to the importance of the media to relay this information to athletes since they rarely, if ever, read published legal decisions. Yet, Greg's reaction to the *Casterton* decision highlights the precise disconnect between the legal propositions and the living law: if players are completely unaware of legal decisions and the legal obligations to exercise care that they create, how can the law be effectively used to influence positive change in the culture of the game? My research addresses this gap and makes an important contribution in theorizing and analyzing legal principles in ways that can inform both players' legal obligations in ways that are more accessible than the published decisions themselves.

This analysis is not only intended to provide guidance on legal obligations for players, but it is equally meant to provide guidance to lawyers to shape their legal arguments and to judges who must deliver a decision in sports injury cases. The inherent risks of the game and the socio-cultural context that shapes consent to violence is vital information that can make the difference between a fair decision for a deserving plaintiff who did not consent to the act that caused their injury and a decision made without consideration of the playing culture leading to an unfair decision.

I argue throughout the research articles that there must be room for subjectivity in the legal analysis to account for the fact that simply because something is normalized in the culture of the game, it does not automatically imply objective consent on all players. Yet, there is little room for subjectivity in law. Law's tendency to apply legal principles objectively across different social landscapes and factual situations is at odds with the subjective meaning-making processes and lived experiences of individuals affected by legal decisions and legislative change. As scholars have already pointed out, it is difficult to determine what is objectively reasonable in

sports (Silverwood, 2015), which applies to the negligence analysis as well as the application of the defences of consent and assumption of risk as all are measured according to the objective reasonable person test. As such, I make the potentially radical suggestion to introduce subjective elements into the legal analysis to account for the fact that not all players interpret and experience violence and injury in the same ways. This importance of subjectivity is furthered by the fact that players are largely unable to communicate a lack of consent in the culture of hockey and this should be considered in the context of sports litigation.

I use the word radical in this context because, interestingly, I have been labelled as a radical thinker at past law conferences for suggesting that the lived experiences of individuals affected by legal obligations should be considered in the decisions that affect them. I view this resistance to sociology and social sciences more broadly as a demonstration of how far the legal field (encompassing both academics and practitioners) has yet to come in making itself more accessible and useful to broader society. In my experience, I am usually met with criticisms about why empiricism and critical approaches that bring the social context at the forefront of the analysis matters. To that question, I draw on Cotterrell's (2018) work to explain that the law is incredibly slow to evolve and is lagging behind modern society, which is failing the individuals who are affected by legal decisions and legal obligations. Cotterrell (2018) strongly argued for the introduction of new legal ideas because the legal system risks being stifled without new resources in juristic thought. By insisting that such concepts as reasonableness and consent be measured objectively across time and space and resisting empiricism to understand the social context of legal decisions, the law is effectively being stifled by failing to meet its social goals and advance knowledge.

In other words, until legal practitioners and scholars alike are open to external observations and insights from other disciplines, the law will be stuck in time with its insistence that conduct be measured purely objectively across all social contexts. In turn, the legal propositions and the obligations created in legal decisions will not have any meaning to those in social groups who simply observe their own living law, while remaining ignorant and/or resistant of state law. Ultimately, without an examination of the social context and the lived experiences of those affected by legal change, the law will be ineffective in influencing social change in the very social settings it seeks to address, like attempting to curb the problem of violence in hockey. Similar to feminist legal scholars who argue that the reasonable person is biased against women because it ignores women's perceptions that are shaped by years of oppression and vulnerability (Dimock, 2008), the application of the same objective test in the context of a sport ignores the deep socialization and cultural processes that shape an athlete's perception and understanding of risk, pain, injury, and consent.

This is not to suggest that the living law should replace the legal propositions, but rather that player perceptions and institutional understandings of violence are crucial to ensuring that decisions are made fairly and consistently in ways that provide positive social benefits. This also means following the advice of Kidder (1983) that lawmakers, including judges, should draft their regulations to only incrementally modify cultural practices, if they wish their laws and rulings to be accepted by those involved; like Greg who quickly grew frustrated in hearing about a hockey player who received over \$700,000 in damages for a concussion sustained in a non-contact hockey league (*Casterton v MacIsaac*, 2020). He showed resistance to the decision by referring to this case as a "pay day" for players who suffer common injuries in the game because the precedent for such a high award of damages has been set. By failing to take into account the

social context of the sport and by delivering a decision that falls entirely outside the living law, the goals of tort law will not be met (including deterrence and education intended for the broader public), and any possibility of social and cultural change to increase player safety will not occur through legal obligations. As such, it is not sufficient to rely on our legal system to educate hockey players, coaches, and trainers through legal propositions that typically ignore the social context of the case. Rather, a proper bridging between the legal propositions and the living law can inform future legal decisions in ways that can be met with less resistance. In turn, individuals within the culture of hockey may learn about the legal propositions and adjust their conduct to exercise greater safety when they play hockey.

My alleged radical take on the legal system is equally important to the advancement of sociological knowledge. By building off foundational sociology of sport research, I show that hockey players experience the game in very subjective ways in that not all players consent to the same levels of violence. Similarly, not all players are willing to sacrifice their bodies and quality of life for the game. As such, the process by which consent to violence is both secured and communicated is not effective since it is primarily treated as a uniform process shaped by immense power relations and pressure to play through pain and injury to win games.

Players who participated in this research identified numerous factors that make consenting to violence complex. This includes the speed of the game, emotions, masculinity, the business of the sport, the inherent risk of injury, the occupational pressures to play through pain and injury, the hegemony of professional hockey, and the cultural and occupational requirements to make sacrifices and do whatever it takes to win. This is consistent with Silverwood's (2015) findings that there are many overlapping social forces in play that explain how a player is socialized into the culture of violence in hockey.

Overall, the primary and innovative finding that emerged from my research and which makes a significant contribution to the socio-legal study of violence in hockey is that players largely expressed leniency towards unintentional injuries and, rather, they do not consent to the harms caused by their exploitation. Players understand that accidents happen in hockey and that a brief lapse in judgment by an opponent may cause them injury, meaning that a reckless act is more likely to attract legal liability. This not to suggest that careless acts could never attract liability – it falls entirely on the plaintiff’s subjective understanding and knowledge of the risks they were impliedly assuming. Players often rationalize accidental, even some careless, injuries on account of voluntarily playing an aggressively physical contact sport with an inherent risk of injury. However, what most players remain unaware (or ignorant) of is the many ways that hockey league administrators, team administrators, coaches, and others who may hold power over them prioritize winning and put players’ bodies at greater risk of serious and long-term injury. This includes, for instance, key findings identified in the research articles that players are rewarded by their coaches with more ice time for playing physically, facing repercussions for losing, being afraid to tell a coach about an injury for fear of punishment, feeling coerced into assuming risks to maintain their professional career or to be drafted by the NHL at all, among others. These power imbalances mean that in many cases, a player’s objective consent may very well be vitiated on account of undue influence, coercion, and/or fraud as outlined in *Norberg v Wynrib* (1992).

As explained by Weinberg (2016), whose influence is present across all three research articles, consent is an embodied and culturally produced phenomenon wherein everyone may interpret it differently. Therefore, when consent and assumption of risk are presented as a non-negotiable part of the game or when there are negative repercussions for failing to adopt a style

of play demanded by an authority figure like a coach, the player is not given a choice to communicate a lack of consent. Similarly, through the production of ignorance and the manufacturing of consent through the denial of scientific research around concussions and contact sports, players may not have the required knowledge to fully understand the scope of what they are consenting to by playing hockey. Relatedly, given the evidence that some coaches and trainers reach a point where they simply expect injured players to return to the lineup to the point of attempting to convince players that they have fully recovered when in fact the player is still experiencing symptoms of injury, it raises the question of fraudulent misrepresentation that changes the nature of what the players is consenting to. These findings are thus important for players to understand their positions in this social context and how their occupational exploitation is likely causing non-consensual harms that is worthy of resistance and even legal action in some cases.

Law as a Tool for Social Change

My research is thus equally important in highlighting the potential for law as a tool for social change. As law and sociology have long been treated as distinct disciplines, I advocate for what Cotterrell (1983, 1998, 2002) has long argued, which is the introduction of sociological insights in the legal analysis. In fact, he argues that law *needs* sociology because law is at risk of being stifled by the continued recycling of the same dated ideas in jurisprudence. For this reason, law needs new ideas and fresh resources in the form of sociological insights. Put simply, rather than ignoring each other, it is time for law and sociology to inform each other.

My research questions were framed around constructions of risk, consent, and violence in both North American hockey and Canadian tort law. I was interested in learning more about how formal law, through an examination of published legal decisions in Canada, constructs and gives

meaning to the concepts of risk and consent and, simultaneously, how the culture of hockey – captured by the term living law (Ehrlich, 1962) – constructs and gives meaning to the very same concepts according to their own cultural interpretations. This approach helped uncover the ways that formal law and living law are sometimes at odds with each other. Other times, these rules of conduct appear to be consistent with each other. However, upon closer examination, they sometimes remain analytically different in the sense that they tend to operate in practice very differently and often carry different meanings to different participants. By unpacking these theoretical and analytical differences between formal law and living law, I offer a framework for how these two traditionally separate fields can work together to inform each other.

By shedding light on the living law, this inherently includes the toxic and harmful practices of exploitation in the culture of hockey. As such, my research is not intended to suggest that some violent practice is a well known rule of conduct, and therefore should be viewed as legally consensual. Rather, it is aimed at shedding light on so-called consensual conduct that is not necessarily consensual in practice when it is understood in its entire social context. For instance, when violence is understood in the context of a production of ignorance wherein the player is controlled and manipulated by the business the sport, the normalization of pain and injury, and the expectation to adhere to a set of unwritten rules that prioritizes winning over their safety, the question of consent is analyzed accordingly. Consequently, consent to violence understood in this context may lead to the conclusion that consent was vitiated on account of undue influence. In contrast, consent understood in the superficial argument that conduct such as hitting and fighting are normalized practices that are simply part of the game, which is ignorant of the social context and lacks critical examination, may lead to the conclusion that the plaintiff

genuinely consented to the violence, leading to an entirely different outcome that may not be fair to the plaintiff.

By having an understanding of this social context and keeping it in view throughout the legal analysis, courts then have the opportunity to make a more effective decision that has the power to influence change more broadly. Rather than provide a blanket statement that violence in hockey must be curbed, a judge who acknowledges and understands the social context is in a better position to use their decision-making power to send a powerful message across the hockey world. For instance, by recognizing that a plaintiff was not consenting to a violent practice that caused them injury because there was undue influence on account of the league's manufacturing of consent, it would directly challenge the harms that leagues have thus far been allowed to enact.

This equally presents another layer of complexity uncovered in my research. The social context can not only help reveal when there was a lack of consent in a particular case, but may equally highlight the fact that it can be just as unfair to hold the defendant liable in tort law. In some cases, the defendant is also a victim of hockey culture and was encouraged to use violence in the first place. Accordingly, the living law is helpful in determining who is actually responsible in a given case. A close look at the living law sheds light on the league's guilt by highlighting its role in the production of ignorance, for example, and offers the plaintiff the opportunity to name the league as a defendant to hold them responsible for their exploitation and potential breach of their legal duty of care owed to them. This would not only ensure that the plaintiff will actually receive compensation since leagues typically have greater means to pay an award for damages, but it would also send a stronger message with a greater potential for deterrence.

My research thus contributes to the discussions in the literature that point to the ways that players are harmed by being blamed individually for using too much violence rather than blaming the commercial nature of the game (Silverwood, 2015) or acknowledging that egregious violent incidents in hockey are not isolated incidents (Kennedy & Silva, 2021). Indeed, a finding of liability on a defendant-player for violently causing injury to another player may be, in some cases, contributing to these very harms by holding them responsible in cases that may be viewed as isolated incidents. The emphasis on pursuing legal action against the player who causes injury can thus operate to further victimize the defendant who must pay compensation to the plaintiff when the injury-causing conduct was done under the same occupational pressures to do whatever it takes to win, the same hypermasculine unwritten code of violence and retaliation, and the very same production of ignorance that vitiated the plaintiff's consent. This is not to suggest that all defendant-players should be relieved of liability for intentionally or negligently injuring another player, but rather that holding the player solely responsible may be unfair when there are other actors who contributed to the plaintiff's injuries. As such, the social context of the legal case is important to identify all those responsible for causing harm to the plaintiff, which may mean the league, team, coach or other individuals, particularly in cases where both the plaintiff and defendant are equally socialized in the culture of hockey that prioritizes winning over player safety.

Canadian athletes are beginning to recognize various ways that sports organizations exploit them for their own benefits. In the last decade alone, numerous athletes in Canada have turned to the law to address harms they experienced while participating in sports. This includes, for example, Daniel Carcillo, a former NHL player, who has taken the lead as the representative plaintiff in a proposed class action lawsuit against the CHL for abusive hazing practices and

discrimination (*Carcillo v Canadian Hockey League*, 2020). Carcillo has been very vocal about the need for informed consent in hockey when it comes to the seriousness of TBI and is actively working towards protecting athletes from the harms the game causes. His advocacy has led to the NHL executives asking him to “soften” his narrative (Lazerus, 2019). When discussing the consequences he has faced since he began speaking out against professional hockey, he said that “It’s been hard [...] I can’t lie. Fuck, man, it’s cost me a lot. But I know I’m doing the right thing” (Lazerus, 2019). Despite having retired from the NHL in 2015 (Carcillo, 2015), he continues to face backlash and ostracism from the NHL, including formerly close friends he had during his playing career for advocating for change (Lazerus, 2019). This backlash has not prevented Carcillo from pursuing legal action against the CHL, its three regional affiliates, and every team in the CHL for hazing and abuse.

In the statement of claim (*Carcillo v Canadian Hockey League*, 2020), it is alleged that “Canadian major junior hockey has been plagued by rampant hazing, bullying, and abuse of underage players, by coaches, team staff and senior players” and that the CHL, OHL, QMJHL, WHL, and all their teams “have stubbornly ignored or failed to reasonably address this institutionalized and systemic abuse” (para 1). The plaintiffs also noted that the defendant leagues and teams have “perpetuated a toxic environment that condones violent, discriminatory, racist, sexualized, and homophobic conduct, including physical and sexual assault, on the underage players they are obligated to protect” (para 2). Since the Ontario Superior Court has refused to certify the lawsuit as a class action (*Carcillo v Canadian Hockey League*, 2023), it remains to be seen how the plaintiffs will alter their legal strategy moving forward. Regardless of the eventual outcome, it has been argued elsewhere (Dennie et al., forthcoming) that the hypermasculine environment of the CHL is structured in ways that “primes players for the

exploitation required to gain the appearance of consent to hazing” (p. 97). This exploitation often means that violent hazing practices persist to the point where players may not recognize the extent of the harm that they commit and that is committed against them. Interviewees in this study (Dennie et al., forthcoming) pointed specifically to the importance of hearing other peoples’ stories, including through the filing of the Statement of Claim in 2020 in *Carcillo v Canadian Hockey League*, to learn about the extent of the harms that players have experienced. In turn, we concluded that a better understanding of abuse and consent may lead to a cultural shift where participation in hazing can be done differently and become a more positive experience for those who genuinely consent to participate. In this sense, we argue that “the simple act of filing the statement of claim in 2020 has worked to challenge the code of silence and to demonstrate the lack of consent to various hazing practices” in hockey (Dennie et al., forthcoming, p. 98). This is similar to the aftermath of the NHL Concussion Litigation (2015) where players became more aware of the scientific evidence on concussions and this awareness has led to greater calls for athlete safety to better protect them from brain damage across the sports world.

The *Carcillo* lawsuit was not the first that named the CHL as a defendant. Several CHL players filed a lawsuit against the league for minimum wage claiming they are exploited employees deserving of compensation (*Berg v Canadian Hockey League*, 2017). The CHL fought hard to preserve their right to exploit the labour of young hockey players in exchange for education and a pathway to the NHL. Similar problems of abuse and exploitation exist in other sports as Canadian sport is facing a safe sport crisis with ongoing calls for a judicial inquiry into abuse in sports (Giannitsopoulou et al., 2023) and a newly created Office of the Sport Integrity Commission aimed at handling complaints of abuse in national sports organizations in Canada

(Office of the Sport Integrity Commissioner, n.d.). There have also been ongoing safe sport hearings undertaken by the Standing Committee of Canadian Heritage aimed at addressing the safe sport crisis (Standing Committee on Canadian Heritage, n.d.). Despite these ongoing changes to address violence, abuse, harassment, discrimination, and exploitation in Canadian sports, athletes continue to take action against the sports organizations that failed to protect them by turning to the law. This includes a proposed class action lawsuit against Gymnastics Canada. Amelia Cline, a former Canadian gymnast, is the representative plaintiff in a proposed class action lawsuit against several defendants, Gymnastics Canada (*Cline v Gymnastics Canada*, 2023). The statement of claim (*Cline v Gymnastics Canada*, 2023) refers to the culture of gymnastics as a “culture of cruelty” (para 1). The claims include the following:

Factors such as a ‘win-at-all-costs’ approach, young and mostly female gymnasts, and inherent power imbalances, along with a culture of control and an overarching tolerance of abusive behaviour have all led to the creation of an environment where abuse and mistreatment of athletes are commonplace and the physical and psychological health of gymnasts is consistently subordinated to performance. (*Cline v Gymnastics Canada*, 2023, para 1)

As athletes continue to turn to the law as a last resort to address the harms caused by their exploitation, the importance for the legal system to bring the focus on the social context of the litigation gains further prominence. As lawsuits such as *Carcillo v Canadian Hockey League* and *Cline v Gymnastics Canada* are filed against those responsible for creating and maintaining toxic sporting cultures, the potential for social change is becoming increasingly clear. Consequently, a similar social response as we have seen in the aftermath of the *Carcillo* lawsuit thus far and the NHL Concussion Litigation is indeed possible through further lawsuits filed by athletes against

those responsible for fostering a toxic cultural environment that normalizes and glorifies violence, risk-taking, and playing through pain and injury. While individual lawsuits against the players who cause injuries are often met with resistance, it is more likely that imposing responsibility on those in power and who abuse the labour and skill of players for profit will lead to greater awareness surrounding the harmful exploitation that players continue to experience, despite ongoing ignorance of these exploitations.

Future research should thus focus on the viability of such lawsuits to push for greater cultural change in the game of hockey around violence through the means of a legal system in need of new resources. Future research should aim to address the toxic sporting cultures that are leading to lawsuits against sports organizations and leagues that breach their duty of care owed to them. Comparative analyses across international jurisdictions would be equally beneficial to examine how various countries are handling legal disputes and debates on safe sport to determine best practices moving forward. In doing so, such research can be helpful to athlete-plaintiffs and their lawyers who are crafting legal arguments to establish liability on negligent sports leagues and organizations. In turn, the informed decisions made in such cases will have greater likelihood of meeting the social goals of tort law: that is, deter sports organizations and leagues from exploiting their athletes as well as educate them on implementing changes that prioritize player safety and treat injuries seriously. Without such deterrence and education, those responsible for causing unnecessary and non-consensual harms on athletes may continue to exploit and harm athletes for their own benefits without legal (or other) repercussions. By introducing new resources and ideas into the legal analysis – that is, a sociological interpretation of legal ideas – the legal system will be in a better position to address hockey’s “injury epidemic” (Silverwood, 2022, p. 242) and influence positive social change.

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