

Application Of The Principle Of Informed Consent In The Sports Contexts

(Aplikasi Prinsipal Kerelaan Bermaklumat Di Dalam Konteks Sukan)

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ABSTRACT

Every player who participates in a game is deemed to have given their consent for any possible risk of injury. The aggression that causes the injury must be a legitimate sports activity and not performed beyond the norm of ordinary sports. This principle is known as implied consent. However, there is another type of consent that is more concrete and clearer compare to implied consent which normally applies in medical law known as informed consent. By using doctrinal and qualitative method, this article aims to analyse and discuss the principle of implied consent and informed consent and suggesting how informed consent can be applied in sports. Hence, the study found that, although there were some differences in the application of informed consent in the medical field and sports, the principal of informed consent is applicable in sports contexts.

Keyword: Sports law, injury in sports, consent in sports, implied consent, informed consent

ABSTRAK

Setiap pemain yang menyertai mana-mana kejohanan akan dianggap telah memberi kerelaan bagi setiap risiko kecederaan yang mungkin berlaku. Kekasaran yang menyebabkan kecederaan tersebut mestilah satu perbuatan bersukan yang sah dan bukannya perbuatan yang luar daripada perbuatan yang biasa dilakukan didalam sukan. Prinsipal ini digelar sebagai kerelaan tersirat. Walaubagaimanapun, terdapat satu lagi bentuk kerelaan yang lebih terang dan jelas jika dibandingkan dengan kerelaan tersirat, dimana kerelaan ini diguna pakai didalam undang-undang perubatan iaitu kerelaan bermaklumat. Dengan menggunakan kaedah doktrin dan kualitatif, artikel ini akan menganalisa dan membincangkan prinsipal kerelaan tersirat dan kerelaan bermaklumat dan mencadangkan bagaimana kerelaan bermaklumat boleh diguna pakai di dalam konteks sukan. Kesimpulannya, kajian ini mendapati bahawa walaupun ada sedikit perbezaan pengguna pakai kerelaan bermaklumat di dalam bidang perubatan dan sukan, prinsipal kerelaan bermaklumat boleh diguna pakai didalam konteks sukan.

Kata Kunci: Undang-undang Sukan, kecederaan di dalam sukan, kerelaan di dalam sukan, kerelaan tersirat, kerelaan bermaklumat

INTRODUCTION

Minor injury and grievous hurts are a regular occurrence in sports, especially for sports that involve body contact such as rugby, American football, football and martial arts sports. Those types of sports accepting the act of violence and aggression, for example tackling and scrum in rugby, punching and kicking in martial arts sports, and are considered as a part of their game rules. Sometimes, the act of violence and aggression might be the skill that the athlete needs to master or to become a good player. Jack Tatum, the legendary American football line-backer, said that:

As a defensive player, I had resigned to the fact that I was never going to rush for 1,000 yards during a season and I would never score many touchdowns. But at the same time, I vowed to earn my reputation in professional football with aggressive tackling ... I never make a tackle just to bring someone down. I want to punish the man I'm going after, and I want him to know that it's going hurt every time he comes my way.¹

This statement shows that players are accepting that sometimes aggression is necessary to show how good they are.

Sometimes, players and coaches had a plan how to use aggression in their tactical plays. Players and coaches think up aggression plays during the night and practice them during the day. During the match day, they will be intimidating their opponent before they are being intimidated. That is what sport means. The weakness of the opponent is an opportunity and does not excite compassion. Showing mercy towards the opponent is a road to defeat. Colburn introduces what he calls as 'the strategic use of violence' in ice hockey where the players routinely 'test' opponents by using physical intimidating (body checks) in order to distract or interfering with the performance of the opposing player. At the same time, they expect to be tested. However, sometimes, the opposing player might not be intimidated by the body checks and retaliate with equivalent or more significant body check. When this situation happens, it is likely to lead to further and more excessive intimidation which may result in the violence and aggression that cannot be considered as a sports activity.² On the other hand, when players and coaches detect any physical weakness, lack of skill, or lack of enthusiasm of aggressive and violent aspect in their opponents, they will try to take advantage of this weaknesses.

Besides, the acts of violence and aggression (involvement of body contact and physical intimidations) is an attraction, enjoyment, and fun elements in the sports that being sought by the athletes, spectators and fans. John coted the interview made by Messner with an American football lineman who said that he is enjoying the moment that he knocked down his opponent and when his opponent knocked him down. They show respect to each other, and they never play any cheap shot or unnecessary stuff. They play a good clean game of football.³ However, sometimes some

players love to exploit the rules of the game, which allowing them to use physical intimidation and body contact. The football world has been shocked by Roy Keane, a legendary football player, who is former Republic of Ireland and Manchester United captain, admission in his autobiography that he is intentionally causing injury to Norwegian player Alf Inge Haaland, during derby match between Manchester United and Manchester City in 2001. Keane mentioned that:

'I'd waited almost 180 minutes for Alfie, three years if you looked at it another way,' ... 'I'd waited long enough. I hit him hard. The ball was there (I think). Take that.'⁴

The act of Keane who made a tackle at knee hight with two feet and studs showing and caught Haaland hard on the leg show it was cold, calculated and intentionally done in order to take revenge on what Haaland had done in game three years earlier. Keane also mentioned in one interview that he did no regrets and will also do the same thing again.⁵

A similar situation happens during UEFA Champions League 2018 final between Real Madrid and Liverpool, when Sergio Ramos seems to intentionally keep Mohamed Salah's arm under his armpit, causing dislocation of his shoulder. This incident causing more than 500,000 people have signed an online petition demanding FIFA and UEFA to punish Ramos for his challenge on Salah.⁶ In one interview, Giorgio Chiellini, former Italy centre-back, commented that Ramos always said that he did not mean to injure Salah, but he (Ramos) was aware that falling that way and without letting go of his grip, nine times out of ten you can break your rival's arm.⁷ However, Frank Lampard, former Chelsea and England midfielder, and Rio Ferdinand, former Manchester United and England defender back up Ramos action where they

said that it is a good defending by Ramos, but it is unfortunate for Salah to suffer injury from that clash.⁸ Regarding the incident, Ramos said that he is not concerned about any possible adverse reaction from fans, especially Liverpool fans, because he never intended to hurt Salah.⁹ Everyone just exaggerating the incident¹⁰ and Liverpool's manager, Jurgen Klopp, using the incident as an excuse for the 3-1 losses that they suffer during the final.¹¹ Although the aggression in Keane and Ramos incident did not violate any rules, sometime, they are players who are intentionally violating the rules such as the incident of Zinedine Zidane headbutting Marco Materazzi during FIFA World Cup Final 2006 between France and Italy,¹² and the incident of Luis Suarez biting Georgio Chiellini during FIFA World Cup game between Uruguay and Italy.¹³

When violent act and aggression is something that acceptable by players and coaches, even by the fans and spectators, the injuries that happen during games is also something that acceptable and foreseeable to happen. Therefore, most of the academicians such as John,¹⁴ Charles¹⁵ & Parry¹⁶ (2019) agree that violent acts in sports should be approached differently comparing to violent acts that been considered as a criminal offence. Whenever an athlete or players participating in any games or tournaments, they had been considered to give their consent to any injury and risk that might be occur during the game. This type of consent is called implied consent.¹⁷ Implied consent can be apply if the violence act did not against any rules of the game, or the act is not an action that cannot be considered as a legitimate sports act and it is beyond the norm of the sports.¹⁸ For example, pulling the opponent shirt and pushing others in football is something that against the rules of the game, it still can be considered as a legitimate sports act. However, the act of Suarez biting Chiellini cannot be considered as legitimate sports act, and it is way beyond the norm of

football for someone to biting their opponent. It might be easy to determine that implied consent cannot be applied in Suarez case, but it might be challenging to determine whether implied consent can be applied in Keane case because he did not break any rules. The tackle might be harsh, but the act of tackling the opponent is something allowed in football. Therefore, this article discusses the concept of informed consent and suggest its application in accordance with medical law, into sports in order to have a more concrete and more exact concept of consent in sports.

IMPLIED CONSENT

Hazel Hartley, in his book, cited Gardiner's view regarding violence in sports which he agrees that the player deemed to have given their consent whenever they participate in a game. Gardiner said consent to aggression and violence depends on the rules and norms of the games. Every player foresees that during the heat of the game, injuries might occur even severe injury. Players might have no intention or recklessness towards the resulting injury. The conduct may well call for the penalty but not a criminal charge. Penalties exist within the rule of the game to penalise infringement and violation. Therefore, in such an integral part of the game, players cannot expect to avoid it and must be deemed to have given his consent.¹⁹ Although every player has been considered impliedly given their consent whenever they participate in any games and tournaments, there should be some limits to the "magnitude" and "dangerousness" of blow for the consent given to be valid.²⁰ Jeffrey said that the injury must be a result of a "reasonably foreseeable hazard" which indicate that the violence must be a basic standard of play in sports.²¹ Having a broken nose after being punched in boxing can be considered as a reasonably foreseeable hazard but not in football. Meanwhile, the act of biting

opponent is something that is out of a basic standard of play in sports such as in Suarez incident and famous incident of Mike Tyson biting Evander Holyfield's left ears in 1997.

In *R v Brown*,²² the court discussed whether the concept of implied consent in sports could be applied to the act of hurting other people for the sexual pleasure of sadomasochists. The court stated that in sports, the athletes and players deem to have given their consent whenever they participate in games, however, sometimes, the violence might be excessive, and the law cannot tolerate with it. The court in *R v Cey*,²³ has laid down the circumstances to be considered in order to apply implied consent, which are:

- i. The condition under which the game in question is played;
- ii. The nature of the act;
- iii. The extend of the force employed;
- iv. The degree of risk injury; and
- v. The probabilities of serious harm.

The same circumstances have also been laid down in *R v Barnes*²⁴ where the court mentioned that during the heat of the game, especially in highly competitive sports, it has to be borne in mind that the conduct outside the rules of games might occur and whether the conduct is within the rules and practice of the game and does not go beyond it, it is something objective and does not depend upon the views of the individual player. There are some circumstances that should be consider in order to determine whether the aggression and violence act goes beyond the threshold, which are:

- i. The type of sport,
- ii. The level at which is played,
- iii. The nature of the act,
- iv. The degree of force used,
- v. The extent of the risk of injury, and
- vi. the state of mind of the defendant.

In order to determine whether the nature of the act as mentioned in *Cey*²⁵ and *Barness*²⁶ we can refer to how John discussing aggression in sports. John in his book has divided aggression and violence into two; which are "sanctioned aggression" and "unsanctioned aggression"; in order to decide whether the conduct can be considered as legitimate sports act and did not go beyond the norm of the sports. Sanctioned aggression concerning aggression and violence that has been include in both the written rules or laws of sports and any unwritten rules or formal players norm in sports. On the other hand, unsanctioned aggression refers to any activities outside the written and unwritten rules or laws and players norm.²⁷ Keane's tackle against Haaland at the first place can be considered as sanctioned aggression because tackle is within the rules of games in football. However, when he admitted that the tackle is intended to injure Haaland, his tackle is considered as unsanctioned aggression because it is beyond the norm of football to intentionally injure another player. It might be different in martial arts sports that it is within the norm of the sports to inflict injury to their opponent. The issues of consent might arise if the aggression and act of violence, causing grievous hurt or death.

Therefore, it can be concluded that implied consent is a presumption of a norm in sports that whenever a player participate in any games, he or she deems to give their consent to any risk of injury that might occur during the game. The injury might be the result of conduct that include in the written rules or laws of the sport, or it might be a result of conduct that outside the rules or it is considered part of the unwritten rules and laws of the sports, but it is something expected to occur in the heat of the moment. If the conduct is beyond the norm of the sports, the consent is invalid.

The principle of implied consent that been apply in sports is a presumption that whenever players participating in any games and tournaments, the players are deemed to give their consent to any foreseeable injury that might occur during the games. However, players can give their consent clearly by using the principle of informed consent that been applied in the medical field. Before the medical world recognised patient autonomy, doctor's conduct is based on the paternalism principle "A doctor knows best" which allowed the doctor to decide what is the best treatment for their patient without disclosing the risk of the treatment to the patient.²⁸ This principle has been applied in *Bolam v Friern Hospital Management Committee*.²⁹ The Court of Appeal, in this case, viewed that it is not negligence for a doctor not to disclose the risk of the treatment to the patient especially the risk can be considered remote such as in this case, the risk of fracture is one in ten thousand. *Bolam* also indicates that merely by showing that the defendant's action was supported by the expert's medical opinion will automatically exculpate him from negligence. The expert medical opinion that supports him must have a sufficient logical basis. At the same time, the opinion must also be "responsible" where when forming the opinion; the expert has reached a defensible conclusion on the risk and benefit.³⁰

As the medical laws develop, the court decline to follow the principle that been laid down in *Bolam*, the courts have adopted the principle that, while evidence of the accepted medical practice is a useful guide for the court, it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to the paramount consideration that a person is entitled to make his own decision about his life. This principle has been laid down by Australian's Court of Appeal in *Rogers v Whitaker*³¹ wherein this case, the respondent, who blind on the right eye,

might not undergo the treatment if she knows there was a risk for her to lost the sight of her left eye. In Malaysia, this principle has been applied in *Foo Fio Na v Dr. Soo Fook Mun & Anor*³² wherein this case, the court decided doctors have a duty-bound by law to inform his patient, who is capable of understanding and appreciating such information, of the risks involved in any proposed treatment to enable the patient to make an election of whether to proceed with the proposed treatment with knowledge of the risks involved or decline to be subjected to such treatment. In this matter, doctors only have to disclose the "real risk" to the patient, but they do not have any duty to disclose "possible risk" or "minimal risk" to their patient.³³

Doctors duty to inform their patient on the risk involved in the treatment will not only limited to real risk but also on the possible risk involved in the treatment if they conduct clinical research on their patients. This additional duty to inform about possible risk to their patients shows that in clinical research, high disclosure of the information is required compared to when doctors conducting a normal treatment procedure to their patients. Therefore, doctors or medical researchers have to give good opinions, advice and explanations where they are obliged to inform and explain to their patients or research subjects about the purpose of the research conducted, the risk that involved in the research which includes any real risks and possible risks, and also benefits that the patients or research subjects can obtain when they were participating in the research, as to enable the patient to make an election of whether to participate in the research or not.³⁴

Informed consent in clinical researcher consider to be valid, when three conditions below are fulfilled, which are:

- i. **The research subjects must be competence:** The research subject must have the ability to reason, have

- the capability to consider and take into account all factors related to themselves, can understand the treatment or research procedures, risks and benefit involved in the research and deciding after carefully considering all the facts and information presented to him.
- ii. **The research subjects must be informed:** The terms “informed” means the researcher must convey complete information about the purpose, procedure, risks and the benefit of the research. At the same time, the subjects must be able to understand all the information presented to him. In addition, the language used during the negotiation process and the language used in the Patient Information and Consent

Form must be easily understood by the public and not in scientific or professional terms.

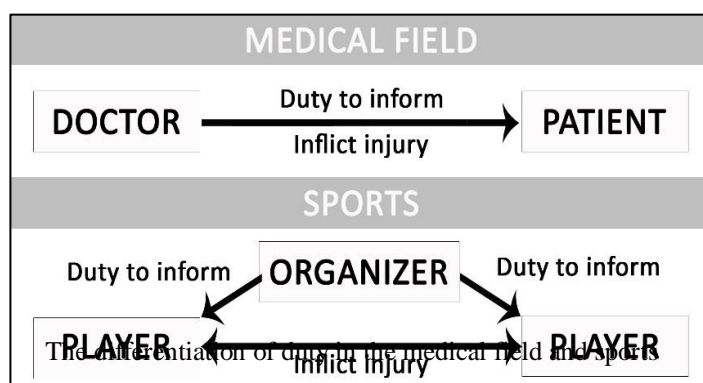
- iii. **The research subject's consent must be voluntary:** voluntary informed consent refers to the consent given by the subject is not due to being manipulated or forced to participate in the research. Coercion not only refers to acts committed in the form of violence such as threats and intimidation, but coercion can also include subtle coercion which involving rewards, offers or encouragements.³⁵

Therefore, all the principals and conditions of informed consent that been applied in the medical field should become guidance and guidelines on how to apply informed consent in sports contexts.

APPLYING INFORMED CONSENT IN SPORTS

In order to apply informed consent into sports, there are few circumstances that need to be considered. This requirement is necessary because the parties involved in the sports field are different compared to the medical field. The most distinguishable difference is, in the medical field, it only involves two parties, i.e. the doctor and the patient but in sports, it involves at least three parties, i.e. the organiser, and two different sides of players. Second, in the medical field, the doctor is the one who has

a duty to inform the risk of the treatment to the patient, at the same time, he is the one who inflicts the injury or using violence towards the patient during the treatment. Suppose the treatment ends up causing disability or death to the patient, the responsibility rest with the doctor. However, in sports, the one who holds a duty to informed about the risk in the game is organiser, while the player is the one who inflicts injury or using violence against another player. If the injury is the result of player recklessness, it is unfair to blame the organiser for the injury. The responsibility is on the player. The differentiation of the relationship in the medical field and sports is shown in the following image:



The principle of informed consent that should be applied in the sports context is the principle that been apply in medical research and not principal that been apply in the ordinary course of treatment. The reason is sometimes the risk of injury in games is not only real risk but also a possible risk. For example, in a boxing match, broken nose, bruise and some bones fractures can be considered as a real risk, but brain injury and death are something remote in boxing, but the risk is there. So, the organizer has the duty to inform the player about the real risk and possible risk involved in the games.

For informed consent to be applicable in sports, similar to the medical field, there are three conditions that need to be fulfilled which are:

- i. **The player must be competence:** The organiser must ensure that everyone who is participating in the game or tournament has the ability to think rationally, has the capability to take into account and consider all factors related to themselves, has the capability to understand the nature and rules of the game, the risk involved in the game and making the decision after carefully consider all the facts and information presented to him. In addition, the organiser also needs to ensure that the participant does not have any chronic illness or severe injury that can become worst if they participate in the game.
- ii. **The player must be informed:** The organiser needs to remind the participant about the rules of the game relating to 'do's and don'ts' in the game. The organiser also needs to inform the participant not only about the real risk but also the possible risk that might occur in the game. For example, in boxing, having broken nose or some fracture is a real risk in the game, meanwhile having a brain injury, concussion or death can be considered a possible risk. At the

same time, the participant must be able to understand all the information presented to him. In addition, the language used during the briefing process and the language used in the Participant/Player Information and Consent Form must be in a language that is easily understood by the public rather than scientific or professional terms especially on the type of injuries they may experience.

- iii. **The player consent must be voluntary:** Although in the medical field include subtle coercion which involves rewards, offers and incentives to invalidate the consent given, it is different in sports where apart from the excitement and enjoyment of sports, athletes participating in games and tournaments in order to win prizes and rewards offered. Sometimes, becoming famous and well-known also encourage them to keep participating in games and tournaments. Some participate in tournaments and competitions at the orders of their sponsors. Therefore, coercion and manipulation that cause a player consent to be considered involuntary is coercion and manipulation in the form of violence and intimidation.

In addition to the three conditions above, the other important matter to be a highlight in order to apply informed consent in sports is the organiser and players duties and responsibilities. Both organisers and players have a duty to practice what is commonly done by a reasonable person in a sports world where the organisers must provide a good and safe facility throughout the tournament, ensuring every participant is competent to participate in the games and tournaments, appoint qualified and accredited referees, and also provide medical and emergency team to act in the event of an accident or injury that requires immediate action. At the same time, the players must also abide

and follow the rules of the game where they cannot cheat or modify the equipment they use. They also must refrain themselves from committing foul play when playing.

Informed consent considered to be more concrete and clearer compares to implied consent because it is in written form. Usually, whenever an organiser wants to organise a tournament, one of the requirements that they need to provide for the participant is Personal Accident Insurance Covers Note.³⁶ This requirement shows that there is a risk for accident happen during the event, whether it is because of the defect on facilities or accident during the games. Therefore, it is not a burden to the organiser if they provide the participant with another document i.e. Participant Information and Permission Form, in order to adopt the principle of informed consent in sports. This form does not need to have a uniform format and content, but there is some information that must be included in the form to enable informed consent to be applied. The most important information that must be included in the form is the rules of the game which include some type of aggression that can be considered as sanctioned and unsanctioned aggression; the injury risk which includes real risk and possible risk; and lastly the consent of the player which stated that the consent had been given voluntarily, they are informed and understand the rules of the game, the do's and don'ts, the risk involved, and they will not take any legal action if he suffers an injury during the game as long as the injury is not caused by something that cannot be considered legitimate sports act and it is beyond the norm of sports.

NOTES

¹ John H. Kerr, *Rethinking Aggression and Violence in Sport*, Routledge Taylor & Francis Group, 2005, pg.49-50.

² John H. Kerr, *Rethinking Aggression and Violence in Sport*, pg.50-51.

CONCLUSION

The application of informed consent in sports might seem unnecessary and only complicates the situation because the organiser has no responsibility and duty to explain and inform the risk that exists in sports as well as the rules of the game to the players. Every player who participates in one type of sport has knowledge on the nature and rules of the game of the sports, the do's and don'ts, and all the risk involved whether it is a real risk or possible risk. Indeed, those players have understood the rules of the game before they participate in any games and tournaments. Therefore, it is enough to presume those players have been given their consent when they participate in the games based on the principle of implied consent. However, informed consent is a type of consent that is more concrete and clearer compared to implied consent that bases on presumptions. The players can no longer argue that they have no knowledge of the risk and they did not give their consent for the injury they suffer because they have been briefed and informed on the real risk and possible risk in the sports by the organiser. Besides, if there is any legal action taken because of injury in sports, the procedure might become more manageable because there is written consent been given by the players. Although informed consent is more concrete and clear than implied consent, similar to implied consent, the consent is given by the player will be considered invalid if the injury is the result of an action that cannot be considered as a legitimate sports action and it is beyond the norm of the sports.

³ John H. Kerr, *Rethinking Aggression and Violence in Sport*, Routledge Taylor & Francis Group, 2005, pg.52.

⁴ John H. Kerr, *Rethinking Aggression and Violence in Sport* pg.72.

⁵ John H. Kerr, *Rethinking Aggression and Violence in Sport*, pg.72.

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¹⁴John H. Kerr, *Rethinking Aggression and Violence in Sport*, Routledge Taylor & Francis Group, 2005, pg. 7- 8.

¹⁵Charles Haray, Aggressive Play or Criminal Assault - An In Depth Look at Sports Violence and Criminal Liability, 25 Colum. *J.L. & Arts*, 2001, pg.201.

¹⁶Hazel Hartley, *Sport, Physical Recreation and the Law*, Routledge, 2009, pg.94.

¹⁷R v Cey, (1998) 48 CCC (3d) 480.

¹⁸Simon Gardiner, *Sport Law in the United Kingdom*, Wolters Kluwer Law & Business, 2014, pg.24.

¹⁹Hazel Hartley, *Sport, Physical Recreation and the Law*, Routledge, 2009, pg. 96-97.

²⁰Charles Haray, Aggressive Play or Criminal Assault - An In Depth Look at Sports Violence and

Criminal Liability, 25 Colum. *J.L. & Arts*, 2001, pg.205 – 209

²¹Jeffrey Standen, The Manly Sports: The Problematic Use of Criminal Law to Regulate Sports Violence, *Journal of Criminal Law and Criminology*, 99(3), 2009, pg.631

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²⁴[2004] EWCA Crim 3246.

²⁵(1989) 48 CCC (3d) 480.

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²⁷John H. Kerr, *Rethinking Aggression and Violence in Sport*, Routledge Taylor & Francis Group, 2005, pg.8.

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