

ULRR

Sports violence, consent and the criminal law

Item Type	Article
Authors	McCutcheon, Paul J
Citation	Northern Ireland Legal Quarterly;45, pp. 267-284
Publisher	Queen's University Belfast, School of Law
Download date	2026-05-20 14:08:07
Item License	https://creativecommons.org/licenses/by-nc-sa/1.0/
Link to Item	https://hdl.handle.net/10344/3396

SPORTS VIOLENCE, CONSENT AND THE CRIMINAL LAW¹

It is generally accepted that in the course of sporting endeavour the use of force is permitted which in other circumstances would be unlawful. Applications of force which would normally be criminal assaults are lawful when inflicted in the course of a game. The traditional explanation has been that the law recognises the consent of the participants as providing a defence. By the same token, it is accepted (with increasing regularity) that there are limits to the amount of force which might lawfully be inflicted in the course of a game and it is said that participation in sport does not confer a licence to abandon the restraints of civilisation. Thus, there is a point beyond which the consent of the participant is considered immaterial and the conduct is treated as unlawful. The issue has been highlighted by recent well-publicised incidents in both rugby union and soccer.² A realisation of the serious consequences, in terms of injuries³ and economic loss,⁴ of violent play reinforces public concern. In this essay I propose to examine the issue of criminal liability for violent conduct in the sports arena. In particular, I shall

1. This is a revised and expanded version of a paper delivered at the Irish Association of Law Teachers' conference in Dublin, November 1993. My gratitude is due to those who participated in and made valuable contributions to the discussion. The assistance of Eoin McCann, former cricket selector and rugby referee, must also be acknowledged. All errors remain my sole responsibility.
2. In the past few months a number of incidents have been highly publicised. The tour of the New Zealand "All Blacks" was accompanied by allegations of violent fouls being committed by them on England players Phillip de Glanville and Kyran Bracken. Some months earlier controversy attended the British and Irish Lions' tour to New Zealand where English player Dean Richards was accused of raking Frank Bunce, whose ear required stitching. In November 1993 John Fashanu, then of Wimbledon FC, was reported to the Football Association for an elbow challenge which seriously injured Tottenham Hotspur player Gary Mabbutt; see *The Independent*, 1 December 1993; also *The Guardian*, "This sporting strife", 15 December 1993. For a summary of similar recent controversies in North America see Nielsen, "Controlling sports violence: too late for carrots — bring on the big stick" (1989) 74 *Iowa L Rev* 681 at 683-86; also Hechter, "The criminal law and violence in sports" (1979) 19 *Crim LQ* 425.
3. A recent survey of sports injuries in Ireland attributes 14 per cent of injuries to foul play and "unsportsmanlike" conduct; a further 6 per cent are the result of foul tackles; see Watson, "Incidence and nature of sports injuries in Ireland" (1993) 21 *Am J Sports Med* 137. An earlier survey of sports injuries in Irish schoolchildren concluded that illegal play was a major cause of injury in schools matches and a call was made for stricter enforcement of the rules by referees and other officials; see Watson, "Sports injuries during one academic year in 6799 Irish school children" (1984) 12 *Am J Sports Med* 65.
4. A number of civil actions between professional soccer players have been initiated in England. Paul Elliott of Chelsea brought an action against Dean Saunders of Aston Villa; see [1992] All ER Rev 365. Drake J dismissed Elliott's claim; see *The Guardian*, 11 June 1994. Most recently Peter Beardsley of Newcastle United was reported to be considering action against Neil Ruddock of Liverpool; see *The Independent*, 26 November 1993.

focus on the liability of participants for offences against the person. The potential liability of coaches, clubs, officials and sports associations is beyond the scope of the essay, as is the question of liability for public order offences.

DEVELOPMENT OF A LEGAL FRAMEWORK

The background to the application of the criminal law to sport can be traced to the old writers who acknowledge the lawfulness of certain activities as being “manly diversions”.⁵ This must be read in the context of a concern to declare activities such as duelling, prize-fighting and fencing with naked swords unlawful. Moreover, at the time the organisation and regulation of sport with which we are familiar today was unknown.⁶ But in practice the intrusion of the criminal law into the sports arena was minimal and little authority existed on the point. By the end of the last century, however, it had become judicially acknowledged in these islands that the criminal law applies to sports conduct. In *R v Bradshaw*⁷ the accused during a football game jumped in the air and struck an opponent in the stomach with his knee; the latter died from a rupture of the intestines. Although the case resulted in an acquittal, Bramwell LJ’s direction to the jury that the act would be unlawful if it was intended to cause serious hurt confirmed the applicability of the criminal law to sport. A successful prosecution was brought 20 years later in *R v Moore*⁸ where the accused was convicted of manslaughter, when death resulted from a violent tackle during a football game. While those cases involved fatalities resulting from violent play the broader reach of the criminal law implicit in the rulings is confirmed in the celebrated decision in *R v Coney*.⁹ There the “sport” of bare-knuckle prize-fighting was held to be unlawful, with the result that those attending thereat were guilty of aiding and abetting. Included amongst the reasons for holding prize fighting unlawful were the potential threat to the public peace which the activity

5. See Foster *Crown Law*, p 260; per *Russell on Crime*, 12th ed (London, 1964) p 679: “[t]hus if two, by consent, play at cudgels or single-stick, or wrestling and one happens to hurt the other, it would not amount to a battery, as their intent was lawful and commendable in promoting courage and activity” (footnote omitted).

6. The modern organisation of sport began in a semi-formal fashion in the English public schools in the 1820s and 1830s. In the latter half of the last century the major sporting associations were founded. The Football Association was founded in 1863, the Rugby Football Union in 1871, the Queensbury rules were drafted in 1865-67. A sense of the earlier robust nature of sports contests is found in Crudden, *Macmillan Dictionary of Sport and Games* (London, 1980) p 32, who notes a football game in 1793 between six players from Sheffield and six from Norton which lasted three days and ended in a brawl in which serious injuries were inflicted. Gaelic football shares a similarly combative history and during the eighteenth and early nineteenth centuries inter-parish games, often involving hundreds of participants, frequently bordered on faction fighting. The rules of gaelic football were drafted by Daniel and Maurice Davin (in consultation with others) after they had witnessed an especially violent 34-a-side match between two teams from Tipperary and Waterford. The Gaelic Athletic Association was founded sometime thereafter in 1884.

7. (1878) 14 Cox CC 83.

8. (1898) 14 TLR 229.

9. (1882) 8 QBD 534.

posed, that the blows were struck in anger and that the blows were calculated to cause harm. Prize-fighting was distinguished from other forms of sporting activity which the court indicated are lawful.¹⁰ Thus, Cave J referred to “boxing with gloves in the ordinary way”, Stephen J to “sparring with gloves”, and Hawkins J to “an amicable spar with gloves”. The distinction between that which is lawful and that which is not was summarised by Stephen J:¹¹

... the consent of the person who sustains the injury is no defence ... if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many grounds. Therefore the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults. ... In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football and the like. ...

While these remarks must be read in the context of boxing as it was then known they indicate an acceptance by the law of the use of some degree of force in sport. By the same token use of excessive force is unlawful despite the rules of the game or the consent of the participants. Thus, the consent of the fighters which could clearly be inferred from their participation in the prize-fight had no bearing on the question of its lawfulness, as the degree of force clearly exceeded that envisaged by the court as being permissible.

This trilogy of cases set the framework for the application of the criminal law to violence in the sports arena. Moreover, the courts expressed the view that the accused would be liable whether the violence was within the rules of the game or not. *Coney* confirms that the law does not confine itself to fatal violence and that the law sets limits to the capacity of participants to consent to the imposition of violence. The broad approach was endorsed in subsequent decisions which dealt with the defence of consent on a more general basis. While it has been established that consent to force which is likely to result in bodily harm does not afford a defence, the courts have recognised lawfully constituted sports and games as an exception to that rule. This point which was implicit in *R v Donovan*¹² became explicit in *Attorney-General's Reference (No 6 of 1980)* where the English Court of Appeal stated:¹³

... in our judgment it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports ... [The] exception can be justified ... as needed in the public interest ...

10. See also *Hunt v Bell* (1822) 1 Bing 1; *R v Young* (1866) 10 Cox CC 371; *R v Orton* (1878) 39 LT 293.

11. (1882) 8 QBD 534 at 549.

12. [1934] 2 KB 498.

13. [1981] QB 715 at 719.

More recently, the House of Lords confirmed the general rule in *R v Brown*.¹⁴ In the course of their speeches several of the Law Lords expressly noted that sporting contests and games remain an exception where the consent of the recipient of the violence negates liability.¹⁵

Despite the development of this legal framework for sports violence few prosecutions were brought until comparatively recently. This might well reflect a traditional reluctance to invoke the law in sport and a view that the question of sports violence is better dealt with by disciplinary action on the part of the relevant governing bodies. Nevertheless, the seriousness and quantum of injuries caused through violence, coupled, no doubt, with an awareness of their economic consequences, probably made a change in prosecutorial policy inevitable. The trickle of cases that emerged in England and Wales in the late 1970s has gradually but steadily increased. It began in *R v Billinghamurst*¹⁶ where the accused punched an opponent during a rugby game, breaking his jaw. He was found guilty despite testimony from Mervyn Davies, the Welsh former international, that punching is a common occurrence in rugby. In *R v Bishop* the accused, a Welsh international rugby player, pleaded guilty to common assault for an "off the ball" incident in which he punched an opponent while the latter lay on the ground. His sentence of one month's imprisonment was varied to one of 12 months' suspended by the Court of Appeal. In *R v Johnson* the accused who bit an opponent's ear during a rugby tackle was found guilty of grievous bodily harm and sentenced to six months' imprisonment.¹⁷ The intrusion on the criminal law has not been confined to rugby football; association football players, both amateur and professional, have been convicted.¹⁸ In *R v Birkin*¹⁹ the accused ran after and struck an opponent who had late-tackled

-
14. [1993] 2 All ER 75. The bodily harm threshold has been accepted in a number of common-law jurisdictions: see *R v Raabe* [1985] Qd R 115; *R v Watson* (1986) 69 ALR 145; *R v Nazif* [1987] 1 NZLR 122; *R. v Jobidon* (1991) 66 CCC (3d) 454. Despite the abundance of authority the rule has been criticised by commentators: see eg Glanville Williams, "Consent and public policy" [1962] *Crim LR* 74 and 154; Leigh, "Sado-masochism, consent and the reform of the criminal law" (1976) 39 *MLR* 130; Devereux, "Consent as a defence to assaults occasioning bodily harm — the Queensland dilemma" (1987) 14 *UQdLJ* 151.
 15. *Ibid.*, 79 (per Lord Templeman); 89-90 (Per Lord Jauncey of Tullichettle); 108-9 (per Lord Mustill).
 16. [1978] *Crim LR* 553.
 17. These and other cases are recorded in Grayson, "The day sport dies" (1988) 138 *NLJ* 9; see also Grayson, "Keeping sport alive" (1990) 140 *NLJ* 12; Grayson, *Sport and the law*, 2nd ed (London, 1988) pp 125-36; Gardiner, "The law and the sports field" [1994] *Crim LR* 513; Osborough, "Sport, freedom and the criminal law" in Whelan, ed, *Law and Liberty in Ireland* (Dublin, 1993), p 37. *R v Gingell* (1980) 2 Cr App R (S) 198 involved a guilty plea and the report mainly concerned the question of sentence. Sports violence has also been considered by the English Criminal Injuries Compensation Board who drew attention to the matter in their 23rd report. An award made to a rugby player whose injury resulted from a severe blow is noted in (1991) 141 *NLJ* 1725. Reports of the Irish Criminal Injuries Compensation Tribunal do not disclose such information, but I am aware of several such claims having been initiated.
 18. *R v Kamara* (1989), professional soccer player fined £1200 and ordered to pay £200 compensation; *R v Chapman* (1989), 18 months' imprisonment for kicking an opponent's head in a soccer game; see (1990) 140 *NLJ* 12.
 19. (1988) 10 Cr App R (S) 303.

him. On a plea of guilty to assault occasioning actual bodily harm he was sentenced to eight months' imprisonment, reduced on appeal to six months. In *R v Shervill*²⁰ the accused who kicked an opponent and pleaded guilty to unlawful wounding was sentenced to six months' imprisonment, reduced by the Court of Appeal to two months. In both cases the Court of Appeal was emphatic in its view that violence on the sports field would be considered to be as serious a matter as violence off it. But despite the volume of sports violence cases the law still remains vague. In particular, the point at which force becomes criminal has not been clearly identified, nor has the question of the participants' consent been satisfactorily resolved. This, no doubt, is a consequence of several factors: most of the recorded cases were decided at first instance; most cases involve that which could only be regarded as excessive violence which caused quite serious injuries; and in many cases the accused pleaded guilty and, thus, the principal issue was that of sentence.²¹

In Ireland few cases have reached the courts and the law is correspondingly undeveloped. Gaelic football provided the setting for one case, *The People (DPP) v McCarthy*.²² There the accused was said to have kicked an opponent on the ground. A team-mate of the latter pushed the accused away and received a punch for his efforts. The accused was dismissed by the referee and the victim suffered a fractured jaw. The accused was found guilty of common assault and, having paid the victim £5,000 compensation prior to sentencing, was fined £50. Another case, *The People (DPP) v O'Driscoll*,²³ emerged from the more genteel sport of bowling. A spectator, who cheered for the accused's opponent, alleged that he was attacked by the accused and his son, causing him extensive facial injuries. The accused's son stated that the dispute arose over a bet and that the complainant had initiated the force. The accused was acquitted by direction. Between 1987 and 1992 four other cases were referred to the Director of Public Prosecutions. However, no prosecution was directed in three cases and charges were withdrawn by the prosecution in the fourth.²⁴ These cases establish little, other than confirming that sports violence has raised questions of criminal liability in Ireland. However, the issue has been treated more extensively in other common law countries and assistance can be derived from the resulting jurisprudence.²⁵ It is convenient at this stage to

20. (1989) 11 Cr App R (S) 284.

21. Indeed, where the accused pleads not guilty the prosecution faces a considerable burden to convince the jury that the force used was criminal; it appears that juries are prepared to accept explanations such as that the force employed was accidental or "in the heat of the moment"; see *R v Davies* [1991] All ER Rev 313; *R v Rees* [1992] All ER Rev 365; *R v Blissett*, *The Times* 5 December 1992. See also *R v Hardy*, *The Independent*, 27 July 1994, where the accused was acquitted of manslaughter.

22. Dublin Circuit Court, 20-22 October 1987.

23. Cork Circuit Court, 10-11 February 1993.

24. I am indebted to the Director of Public Prosecutions, Mr Eamonn Barnes, for his permission to use the foregoing information and to Ms Caitlín Ní Fhlaitheartaigh, Legal Assistant, for her work in searching files and collating the material.

25. The issue is not confined to the common-law world. A French rugby player, Georges Metbach, received a three-year suspended sentence and a FFr10,000 fine for a punch which broke an opponent's nose; see *Irish Times*, 13 November 1993.

consider the general issue of unlawful sports violence in relation to the rules of the game, and this in turn raises two discrete issues. One concerns unlawful violence which is tolerated by the rules of the sport, the other concerns unlawful violence which also violates the rules of the sport.

UNLAWFUL VIOLENCE WHICH IS WITHIN THE RULES OF THE SPORT

The decisions in *R v Bradshaw* and *R v Moore* indicate that the unlawfulness of the violence was determined independently of the question whether the attack was within the rules of the game. In *Bradshaw* the relationship between the rules of the game and the lawfulness of the force was expressed thus by Bramwell LJ in his instruction to the jury:²⁶

No rules or practice of any game whatever can make lawful that which is unlawful by the law of the land; and the law of the land says that you shall not do that which is likely to cause the death of another. . . . But, on the other hand, if a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But, independent of the rules, if the prisoner intended to cause serious hurt to the deceased, or if he knew that, in charging as he did, he might produce serious injury and was indifferent or reckless . . . then the act would be unlawful.

In any event in both cases the force employed was clearly and unquestionably outside the rules of the game. Nevertheless, the possibility is raised that that which is permitted by the rules might be unlawful. *R v Coney* might be useful in this respect, although it is problematic in that it is difficult to classify prize-fighting as a "properly constituted" sport; what occurred is more appropriately classified as fighting rather than sport. But it is helpful in as much as it indicates various underlying concerns on which the decision to declare the force unlawful was based. If these concerns are present in a particular incident it is arguable that it is equally unlawful whatever the rules of the game might provide. Intent to cause serious injury, the element of anger or hostility and the threat to public peace might be associated with certain episodes of sports violence. For instance, the public peace concern, which was discounted in *Attorney-General's Reference (No 6 of 1980)* principally to allow private violence to be declared unlawful, might have a bearing. If a nexus could be demonstrated between on-field violence and crowd disorder would it not be permissible to declare the former unlawful?²⁷ Since the principal concern in the case-law was with violence which is intended or likely to cause serious injury the point is largely academic, as such force is in any event beyond the rules of most sports. But the issue could

26. (1878) 14 Cox CC 83.

27. The concern here is not just the belief that sporting heroes are role models for others. In some cases on-field violence might "spill over" into the crowd. During an ice hockey match between the New York Rangers and the Boston Bruins a fight broke out between the players. A Rangers fan reached into the arena and punched one of the Bruin players whereupon his team-mates climbed into the stands to avenge him; the resulting fight between players and fans lasted for 15 minutes; see Rains, "Sports violence — a matter for societal concern" (1980) 55 *Notre Dame Lawyer* 796.

arise in boxing and, possibly, some other codes which permit robust body contact.

The Supreme Court of Victoria considered the matter in *Pallante v Stadiums Pty Ltd (No 1)*,²⁸ a tort action the result of which depended on the lawfulness of professional boxing. While it is violent in the extreme, it is generally accepted that boxing is lawful.²⁹ Nevertheless in *Pallante* McInerney J indicated that applications of force which are within the rules of a sport might nevertheless constitute an assault where the blows are intended to cause injury. This can be applied with some ease to boxing as there is a stage, often intuitively identified, at which a boxing match becomes a fight; it has passed from being an exhibition and testing of respective skills of the participants to being a blood bath. In principle, this sentiment can govern any sport although its application might prove difficult in practice. McInerney J provided an example from cricket, when he suggested, without deciding the issue, that “bodyline bowling and bouncers may raise . . . separate problems.”³⁰ While the raising by an Australian of bodyline bowling is as predictable as the questioning by him of bouncers in the mid-1970s is ironic, the point is that the unlimited bowling of bouncers was at the time permitted by the rules of test cricket.³¹ Was McInerney J hinting that it might nevertheless have attracted criminal liability?

UNLAWFUL VIOLENCE WHICH BREACHES THE RULES OF THE GAME

The question which has been considered more frequently concerns the lawfulness of foul play by a participant. A simple solution is that all foul play is unlawful since a participant’s consent is limited to that which is permitted by the rules of the game. This, however, is untenable for several reasons. The first is that the acceptability of violence is a matter of legal policy not of private regulation. To use the rules of the sport as a test would be to confer on a private agency, the sport’s governing body, the power to licence violence. A second difficulty is that such an approach would be impracticable. Trivial fouls which involve force would be unlawful while applications of greater force which are within the rules would be lawful. Third, that approach would not conform with social reality. Sports participants (and indeed all involved in sport) know and realise that they will be fouled in the course of their endeavours; and depending on the particular code these incidents might involve considerable degrees of force. Nevertheless they participate and thus accept (and even expect) the inherent risks. Given this position how can it be

28. [1976] VR 331.

29. See *eg R v Brown* [1993] 2 All ER 75 at 79 per Lord Templeman “violent sports including boxing are lawful activities”.

30. [1976] VR 331 at 339.

31. Controversy over the use of bouncers and short-pitched bowling as a form of intimidation has persisted in cricket. In 1991 the International Cricket Council introduced a three-year experimental regulation in test cricket limiting bouncers to one per over; see *Wisden Cricketers’ Almanac 1993* p 1211. Nearly 60 years earlier, in the aftermath of the infamous “bodyline” test series between England and Australia (1932-33) rule changes were introduced restricting field placings which would assist “leg theory” bowling.

said that they do not consent to being fouled? This presents a dilemma but it seems clear that the law must recognise as lawful certain, if not all, foul play which can be expected to occur in the course of the game. If a sport is of such intrinsic worth as to merit legal recognition as being "properly constituted" it must follow that its normal attributes, incidents and inherent spirit attract equal legal recognition. The English case-law on the matter provides little guidance as to where the line is to be drawn. In as much as it provides any indication *R v Billingham*³² suggests that the fact that a particular type of foul is commonly experienced in a sport (in this case punching in rugby) has little bearing on the matter. However, that case can hardly be considered strong authority for the proposition. Nor are *R v Bradshaw*, *R v Coney* and *R v Moore* of any greater assistance. The principal concern in those cases was to eliminate force which is intended or likely to cause harm, suggesting that that is the dividing line. The indications in Stephen J's judgment in *Coney* are that he had in mind force which was likely to cause serious harm³³ but more recent cases seem to indicate the lower threshold of force which is likely to cause bodily harm. But if, therefore, force in sport is lawful because, not being intended or likely to cause harm, the consent of the participants is operative, that is no different from the general rule which obtains about consensual violence.³⁴ On that view sport is not an exception to the rule. However, expressions of the rule have incorporated sport as an exception and thus the degree of force to which participants consent must be different. But what is the threshold?

*The Canadian experience*³⁵

Canadian jurisprudence is of some assistance in this regard, the courts there having dealt with the issue on many occasions.³⁶ It is no surprise that the splendidly robust sport of ice hockey provides the background. A now legendary (or infamous) fight between Ted Green of the Boston Bruins and Wayne Maki of the St. Louis Blues provided the starting point. During a collision between the players Green struck Maki in the face with his glove and the referee signalled a delayed penalty. It seems that Maki then "speared" Green and a stick fight ensued with Green swinging his stick at Maki. Maki returned the blow, striking Green on the head and causing him quite severe injuries. The entire incident lasted about ten seconds. Both players were charged and tried separately. In *R v Maki*³⁷ the accused was

32. [1976] *Crim LR* 553.

33. See *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331 at 340.

34. *R v Brown* [1993] 2 All ER 75; *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715.

35. See generally White, "Sports violence as criminal assault; the development of doctrine by Canadian courts" [1986] *Duke LJ* 1030.

36. Section 265(1)(a) of the Canadian Criminal Code provides that a person commits an assault when "without the consent of another person" he intentionally applies force to that other, directly or indirectly. Although absence of consent is an ingredient of the actus reus it is now established that the law imposes limits on a person's capacity to consent, and the position is broadly similar to that which obtains at common law; see *R v Jobidon* (1991) 66 CCC (3d) 454.

37. [1970] 14 DLR (3d) 164.

charged with assault causing bodily harm. He was acquitted since the trial judge entertained doubts as to whether he intended to injure Green, whether he was under a reasonable apprehension of bodily harm and whether he used excessive force in the circumstances. But had there been no doubt on the self-defence question Carter PCJ stated that he would have convicted the accused. He endorsed the view that the consent given by sports participants is limited, citing Stephen J's judgment in *R v Coney*. He concluded that when a player participates in a sport he accepts certain risks and hazards and that the defence of consent would normally be applicable. But this was a question of degree and no player should be considered "to accept malicious, unprovoked and overly violent attack."³⁸ The companion case *R v Green*³⁹ also resulted in an acquittal, with the trial judge in that case taking a somewhat different view of the facts. Fitzpatrick PCJ found as a fact that Maki "speared" Green in the lower abdomen and that Green's almost immediate response amounted to nothing more than instinctive self-protection. His earlier "gloving" of Maki was an ordinary happening in ice hockey which had no criminal significance. On the general question of consent, Fitzpatrick PCJ observed that players consent to a considerable number of assaults because ice hockey could not be played with its customary speed, force, vigour and competitiveness without a great degree of forceful body contact.

Whilst *Maki* and *Green* resulted in acquittals they established that there is a threshold of unlawful violence in sport. However, no clear dividing line was drawn and few indications as to its identification emerge, other than an implicit suggestion in *Green* that the nature of the sport would be a criterion. Subsequent Canadian decisions generated a number of different formulae. In *R v Leyte*⁴⁰ it was said that players are deemed to consent to acts resulting from instinctive reactions closely related to the play since such reactions usually negative intent. In *R v Watson*⁴¹ consent was limited to routine body contact in the game. In *R v Maloney*⁴² it was held that a participant consents to assaults which are inherent in and reasonably related to the normal playing of the game; if, however, the accused's intent was to inflict serious injury he would be guilty whether or not that injury in fact resulted. In *R v St Croix*⁴³ the accused who struck an opponent after play had stopped was found guilty as the act went "beyond foreseeable consented to behaviour" and was not done instinctively or in self-defence. This variety illustrates the difficulty in devising a workable formula which reconciles the legitimacy of socially acceptable (and beneficial) violence with the equal need to protect participants from wanton violence. In effect these decisions left considerable leeway to triers of fact who were to determine whether the violence was related to or connected with the playing of the game. This has the merit of attempting to recognise as lawful that which is within the nature and spirit of

38. Citing *Agar v Canning* (1965) 54 WWR 302, a civil action.

39. [1970] 16 DLR (3d) 137.

40. (1973) 13 CCC (2d) 458.

41. (1975) 26 CCC (2d) 150.

42. (1976) 28 CCC (2d) 323.

43. (1979) 47 CCC (2d) 122.

the sport but is open to the criticism of being unworkably vague and, in consequence, of allowing too much latitude to overtly violent players.⁴⁴

More recent appellate decisions in Canada have attempted to provide clearer guidance and in so doing have possibly restricted the level of lawful violence. In *R v Cey*⁴⁵ the accused cross-checked an opponent from the rear pushing his face into the boards surrounding the ice-rink; the opponent suffered facial injuries, concussion and whiplash but rather sportingly indicated that the experience would not deter him from playing in the future. The accused was acquitted on the basis that he had not intended to cause injury or to apply any force greater than that which is customary for the game. The Saskatchewan Court of Appeal overturned the acquittal and ordered a retrial. The relevant question, according to the majority, was whether the force employed was "so violent and inherently dangerous as to have been excluded from the implied consent." The court set out a framework within which the scope of the participant's implied consent is to be considered. It identified the conditions in which the game is played, the nature of the act, the degree and risk of injury and the probability of serious harm occurring as relevant criteria when determining the extent of the consent implied by participation. Moreover, the majority considered *Attorney-General's Reference (No 6 of 1980)*⁴⁶ to be applicable in Canada and saw no reason in principle that it should not apply to sport, but with the modification that it would be confined to force in which injury is intended rather than that which causes harm.

The significance of *Cey* is twofold. First, by spelling out the factors which should be taken into account it attempts to provide the detail necessary to depart from the vagueness of the tests suggested in earlier decisions. Second, it marks a shift in emphasis in that it is considerably less tolerant of sports violence. It is not improbable that had it applied in earlier cases fewer acquittals would have resulted. It clearly establishes that violent and dangerous conduct which can be expected in the course of the game exceeds the implied consent. In this respect the identification of the concern which underlies the issue, namely the risk of serious injury, is instructive. Thus, where the conduct is such as to carry a high risk of injury it will be unlawful regardless of consent or of the frequency with which it occurs in the sport. With that in mind the threshold of permitted force will vary according to the game's circumstances. It is conceivable that force which is permitted at one

44. In practice prosecutions were more likely to be successful where force was applied after play had stopped or where the victim was uninvolved in a melee or was withdrawing from it: see *R v Henderson* [1976] 5 WWR 119; *Re Duchesneau* (1978) 7 CR (3d) 70; *R v Gray* [1981] 6 WWR 654; *R v Côté* (1981) 22 CR (3d) 97. Delayed retaliatory action has received a mixed response; *R v Watson* (1975) 26 CCC (2d) 150 resulted in a conviction while *R v Maloney* (1976) 28 CCC (2d) 333 resulted in an acquittal. In *R v Tevaga* [1991] 1 NZLR 296 a fight developed during an under-21 rugby game; the accused chased an opponent 25 yards from the brawl, struck him breaking his jaw; in upholding the conviction the New Zealand Court of Appeal considered this to be worse than some assaults committed in the heat of a maul. See also *State v Floyd* (1991) 466 NW 2d 919 discussed below at nn 57-59.

45. (1989) 48 CCC (3d) 480.

46. [1981] QB 715, citing the passage quoted at n 13 above.

level in a sport would be impermissible at a different level. For instance, there are indications that that which is acceptable in a professional game might not be permitted in an amateur setting;⁴⁷ likewise greater latitude could be expected at senior level than at junior or underage level.⁴⁸ However, the decision creates a conceptual difficulty, which will be considered later, in its view that implied consent is to be determined by reference to objective criteria.⁴⁹

R v Cey has been adopted in two Ontario decisions. In *R v Ciccarelli*⁵⁰ the *Cey* test was considered to be preferable to one which permits that which can be expected to happen during a game. The latter, in the view of Corbett DCJ, panders to the public appetite for violence.⁵¹ In *R v Leclerc*⁵² the Ontario Court of Appeal applied the same test but added as a criterion the question whether the rules of the game contemplate contact.⁵³ However, the latter would not be dispositive of the issue as indeed the case itself demonstrates. There the force was inflicted during an industrial league ice hockey match the rules of which excluded body contact. The trial judge concluded that the blow inflicted was an instinctive reaction and of a type which all players at that level expected and accepted as part of the game. On appeal the court refused to overturn the acquittal since the blow was not of an inherently violent nature. The application of *Cey* to sports has been confirmed by the Supreme Court of Canada in *R v Jobidon*,⁵⁴ where the court adopted the test in *Attorney-General's Reference (No 6 of 1980)* as applicable in Canada and rejected the so-called "fair fight" defence. It stated that, unlike fights, sports have a significant social value and endorsed *Cey* as apposite.

The American experience

In contrast to Canada the criminal law on sports violence is comparatively undeveloped in the United States. A prosecution was brought for aggravated assault allegedly committed during a professional ice hockey

47. See *R v St Croix* (1979) 47 CCC (2d) 122.

48. This is partly reflected in the rules of certain sports which restrict the contacts permitted at underage and junior level. *Lenfield* [1993] Aust Torts R 81-222, a criminal injury compensation application involved a junior form of rugby league called "tackle"; a game was joined by two older boys one of whom "spear" tackled the applicant (*ie* lifted him into the air and drove him head first towards the ground); the Supreme Court of ACT took account of the disparity in height and weight between the boys. In *Sibley v Milutinovic* [1990] Aust Torts R 81-013 a distinction was drawn between friendly and competitive matches.

49. See below at nn 70-71.

50. (1989) 54 CCC (3d) 121.

51. The court rejected the test suggested by Glanville Williams, "Consent and Public Policy" [1962] Crim LR 74 at 81.

52. (1991) 67 CCC (3d) 563.

53. See also *Smith v Emerson* [1986] Aust Torts R 80-022, a civil action the outcome of which depended on whether the blows delivered fell within the rules of the game.

54. (1991) 66 CCC (3d) 454.

game in *State v Forbes*.⁵⁵ There, as they returned to the ice having served a time penalty, the accused swung at an opponent striking him in the face with his stick; the opponent fell to the ice covering his seriously injured face while the accused repeatedly pummelled him on the ground until pulled off by other players. The opponent required three operations to repair a damaged eye socket and he suffered double vision for eight months. The trial, somewhat amazingly, ended in a hung verdict and the District Attorney declined to order a retrial. As in *R v Green, State v Freer*⁵⁶ illustrates the difference between consensual violence and that which is non-consensual. There a New York District Court convicted the accused youth for an assault committed during an American football game. The accused had been punched by the complainant during a tackle. When the resulting pile-up had been cleared the accused, in obvious retaliation, punched the complainant in the eye. The court held that while the first punch might have been consented to, the accused's punch fell outside the ambit of the implied consent since his act was clearly intentional. Somewhat different reasoning was employed by the Iowa Court of Appeals in *State v Floyd*⁵⁷ where the accused became involved in a bench-clearing brawl following a break in play during a basketball game. Iowa law provides that an act is not an assault when the parties are "voluntary participants in a sport . . . and such act is a reasonably foreseeable incident of such sport . . . and does not create an unreasonable risk of serious injury or breach of the peace . . ." ⁵⁸ The court concluded that the accused and some of his victims were not voluntary participants in sport at the time of the brawl — they had been on the sidelines and were not engaged in play when the brawl began.⁵⁹

Little assistance can be derived from the American decisions. However, developments in tort liability have some potential and might provide a useful test in the criminal sphere.⁶⁰ The *Restatement (Second) of Torts* draws a distinction between rules which are designed to secure the better playing of the game as a test of skill (game rules) and those which are designed to protect players (safety rules). Players are considered to consent to, and assume the risks inherent in, violations of game rules. However, liability

55. No 63280 (1975, Minnesota District Court). Although unreported, the case is much discussed; see *eg* Binder, "The consent defence: sports, violence and the criminal law" (1975) 13 *Am Crim L Rev* 235; Kuhlmann, "Violence in professional sports" [1975] *Wis L Rev* 771; Note, "Consent in criminal law: violence in sports" (1976) 75 *Mich L Rev* 148; Hechter, "The criminal law and violence in sports" (1977) 19 *Crim LQ* 425.

56. (1976) 86 *Misc 2d* 280.

57. (1991) 466 *NW 2d* 919.

58. Iowa Penal Code §708.1.

59. Even had the accused been a participant the court would not have been disposed to finding that his acts were reasonably incident to basketball or that there was no risk of serious injury or breach of the peace; (1991) 466 *NW* 919 at 923.

60. See *eg Hackbart v Cincinnati Bengals Inc* (1979) 601 F 2d 516 — professional footballer held liable for reckless misconduct during game; *Bourque v Duplechin* (1976) 331 *So 40* — player held liable for reckless lack of concern during amateur softball game; see generally Prosser and Keeton, *Torts*, 5th ed (St Paul, 1984) pp 112-15. In these islands tort liability for sports conduct has been considered in *McComiskey v McDermott* [1974] *IR* 75 and *Condon v Basi* [1985] 1 *WLR* 866.

would attach to a breach of a safety rule.⁶¹ Support for this approach can be found in *Nabozny v Barnhill*⁶² where the court held that the standard of care owed to a fellow competitor is to refrain from conduct proscribed by a safety rule. The assumption of risk defence was negated by the violation of a safety rule causing a dangerous situation to which the plaintiff could not consent. This approach, it would appear, applies with equal force to amateur and professional sports.⁶³ The advantage of this approach is that it draws a readily identifiable line between permitted force and that which attracts liability and thus should facilitate ease of application. Moreover, it shares with the criminal law a concern to protect participants from excessively dangerous play.

A WORKABLE TEST FOR SPORTS VIOLENCE?

The more workable tests are the Canadian *Cey* test and the violation of safety rule test which emerges from the *Restatement (Second) of Torts*. In practice there would probably be little difference in application between them, as both are ultimately concerned with player protection. The relevant factors in determining which violence is inherently dangerous are expressly incorporated into the *Cey* test: age, level of experience, conditions of play and the like. Thus, it is likely that different thresholds will apply in different sports contexts. What is acceptable in, say, international rugby would be unacceptable at underage level. The adoption, albeit in modified form, in *Cey* of the *Attorney-General's Reference (No 6 of 1980)* is, however, somewhat problematic. It could be taken to mean that the application in sport of force which is intended to result in bodily harm is unlawful, but that seems to set the threshold too low. Many commonly accepted contacts are deliberately forceful or intimidatory. For instance, many accept that a rugby tackle can have the dual purpose of preventing an opponent from gaining an advantage and of "softening up" the opponent; the latter purpose is considered to be part of the physical challenge, to be essential to the contest between rival players. In this regard, the lawfulness of professional boxing proves most difficult to rationalise. It is clear that boxers, as an inherent part of the contest, intend to inflict degrees of force which, on any reckoning, exceed the bodily harm threshold. McInerney J's careful analysis in *Pallante v Stadiums Pty Ltd (No 1)*⁶⁴ of the lawfulness of professional boxing centred on the absence of hostility from boxing which distinguished it from unlawful fighting. Although admirable in its efforts it is difficult to be convinced by

61. *Restatement (Second) of Torts*, §50, Comment b states that "[t]aking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill. This is true although a player knows that those with or against whom he is playing are habitual violators of such rules."

62. (1975) 31 Ill App 3d 212. See Rains, "Sports violence: a matter for societal concern" (1980) 55 *Notre Dame Lawyer* 796.

63. But see Beumler, "Liability in professional sports; an alternative to violence?" (1980) 22 *Ariz L Rev* 919 arguing that different standards apply.

64. [1976] VR 331.

McInerney J's reasoning, especially as hostility has been rejected as being a central element of unlawful violence.⁶⁵ A better, but intellectually less satisfying, explanation is provided by Lord Mustill in his dissenting speech in *R v Brown*, namely that boxing is a special case which "stands outside the ordinary law of violence because society chooses to tolerate it".⁶⁶

The advantage of the violation of a safety rule test is that it draws a clear and distinct line between that which is lawful and that which is not. Although it defers in part to a private agency to determine the scope of liability — safety rules are enacted by the governing body of the sport — the function of safety rules coincides with the primary concern of the criminal law in this sphere. Indeed it is difficult to imagine any circumstance where the intentional or reckless violation of a safety rule would not be criminal, applying any of the tests which have emerged. Moreover, the test adequately differentiates trivial fouls, which might incidentally result in injury, from calculatedly dangerous play. For instance, a high tackle violates a safety rule and its inherent danger is obvious. On the other hand, obstruction violates a game rule; it is not in the ordinary course of events inherently dangerous but in unfortunate circumstances serious injury might result due, say, to the state of the pitch or the manner of the player's fall. The distinction between the two fouls seems to be sufficiently obvious as to justify penalising the offender in the former case while absolving him in the latter. A further advantage with this test is that by not focusing on the presence of intent to inflict bodily harm it is sufficiently flexible to preserve the fundamental characteristics of different sports within the legal framework. The safety rules of some sports permit the infliction of force from which bodily harm is likely to result. If bodily harm were the general threshold many inflictions of force allowed by the rules would be potentially criminal. On the other hand, to define lawful violence in terms of a higher threshold, say serious bodily harm, would allow too much scope in sports where the safety rules are more exacting. Of course, this is subject to the residual power of the criminal law to declare unlawful that which is permitted by the rules if it conflicts with some aspect of the public interest.

THE QUESTION OF CONSENT

So far the issue of permissible violence has been considered in relation to the consent which is to be implied from participation. This, of course, is central to much of the jurisprudence and commentaries on the subject. Thus, it is said that when a player participates in a sport he impliedly consents to a certain degree of body contact associated with the sport — this is the threshold of permissible violence with which much of the jurisprudence is concerned. By the same token it is said that there is no consent, or what consent might be present is ineffective, where the violence exceeds the threshold. One can identify several conceptual difficulties with this view.

65. See *Faulkner v Talbot* [1981] 3 All ER 468; *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1. The suggestion in *Wilson v Pringle* [1987] QB 237 that hostile touching is an essential element of an assault is inaccurate.

66. [1993] 2 All ER 75 at 109; but see per Lord Slynn of Hadley at 121, considering passages in *Pallante* to be helpful.

The first is that an implied consent may be expressly revoked. However, it could hardly be said in the context of sports that participants could revoke their consent to the routine body contacts of the game any more than a pedestrian could revoke his implied consent to the routine body contact which results from the normal hustle and bustle of the High Street. The second, which is related, is that the notion of implied consent is increasingly falling into disfavour as an explanation for the lawfulness of particular applications of force and recourse is had to other explanations.⁶⁷ Third, consent is inferred from the belief that a player assumes certain risks by participating in the game.⁶⁸ But to do something in the knowledge that a certain consequence is either probable or likely does not automatically mean that the actor has consented to that consequence occurring. I might choose to walk home late at night through a violent district but it does not follow that I consent to the near-inevitable mugging which I receive, much less that the assault is rendered lawful by my supposed consent.⁶⁹ What this example illustrates is that often the question of consent is determined by reference to other legally relevant criteria. Thus, a player who participates in a notoriously violent game cannot be considered, from his participation alone, to consent to its inherent risks. If in fact he consents effectively, that is a conclusion drawn as a matter of legal policy and invokes interests other than those of the individual participant. Fourth, in relation to team sports it would seem that there should be a uniform consent from all players rather than as many different consents as there are players; in other words, the threshold must be the same for all. It was with this in mind that the court in *R v Cey*⁷⁰ held that the scope of the implied consent must be determined by reference to objective criteria. There is nothing objectionable in evaluating the lawfulness of violence in relation to such criteria, and there is much to be said in support of the *Cey* test. But to formulate the resulting rule in terms of implied consent is inappropriate since consent, being a state of mind, is necessarily subjective. In reality, this consent, or lack of consent as the case may be, is attributed to the participant by operation of law; it is a supposed or deemed consent rather than a real consent. It would be better to explain the lawfulness of force which falls beneath the threshold on the ground that it is

67. See *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1; Prosser and Keeton, *Torts*, 5th ed (St Paul, 1984) pp 117-18; but see Stuart, *Canadian Criminal Law*, 2nd ed (Toronto, 1987) p 476 suggesting that contact sports provide the best example of implied consent.

68. There is some confusion between consent and voluntary assumption of risk and it might be more accurate to speak in terms of assumption of risk rather than consent. A player accepts the risk that he will be tackled within (and sometimes beyond) the rules of the game but his endeavours are directed towards avoiding that occurrence. Nevertheless the law has employed the concept of consent to evaluate the lawfulness of the force applied. The question was alluded to in an Australian civil case, *Smith v Emerson* (1986) *Aust Torts R* 80-022 where it was stated that consent is the proper defence to raise in an action for an intentional tort, while voluntary assumption of risk is appropriate in an action for negligence.

69. See Note, "Consent in criminal law: violence in sports" (1976) 75 *Mich L Rev* 148 at 154-5.

70. (1989) 48 CCC (3d) 480.

tolerated by society as being acceptable in the course of sporting activity.⁷¹ If a player chooses to participate he will not be heard to object to lawfully inflicted force, whatever his subjective state of mind might be. This might not be intellectually appealing but at least it is closer to social reality than the alternative. Of equal importance, it brings to the surface the policy issues which underlie the law in this area.

THE POLICY ISSUES

The questions of policy which underlie the law in this area are largely shaped by those which govern the law of violence generally. They are modified by the recognition of the social benefit and value which is derived from competing in, or witnessing, sport. Hence the tolerance of a threshold of violence which would be otherwise unlawful. But in attempting to identify the appropriate level at which to set the threshold consideration of the policy issues is unavoidable. A number can be identified and outlined. The first is a concern that private agreement or regulation cannot override or negate the demands of the criminal law.⁷² This concern is met by the law in two ways. In some, albeit limited, instances violence which is permitted by a sport's rules will nevertheless be adjudged unlawful usually because it exceeds that which as a matter of legal policy is tolerable.⁷³ In other instances the tests employed to identify which foul play is also unlawful meet the concern of the law to punish needlessly violent conduct. In particular, we have seen that the more workable tests, the *Cey* test and the violation of a safety rule test, share with the criminal law a concern for player protection.⁷⁴ In other words, the danger which is inherent in the conduct is considered sufficiently grave as to merit legal regulation, a matter which is recognised in the jurisprudence.⁷⁵ An alternative formulation is that conduct which exceeds the bounds of human decency is a matter of public concern,⁷⁶ as is conduct which tends to diminish self-restraint and to reduce the inhibitions to the point where the actor might not care about the consequences of his conduct.⁷⁷ While these policy concerns overlap

71. See Note, "Consent in criminal law: violence in sports" (1976) 75 *Mich L Rev* 148 at 155 and 160 applying to sport a German concept "Sozialadäquanz" which focusses on the inconveniences which society will allow its members to tolerate. An athlete is expected to suffer certain inconveniences (injuries) in order to facilitate the playing of the game; but the game is part of a wider society and must necessarily conform to the standards which that society demands or allows.

72. See *R v Donovan* [1934] 2 KB 498.

73. See text at nn 26-31 above.

74. See text at nn 45-54 and 60-63 above.

75. See *R v Coney* (1882) 8 QBD 534; *State v Brown* (1976) 364 A 2d 27; *R v Cey* (1989) 48 CCC (3d) 480.

76. See Gross, *A Theory of Criminal Justice* (Oxford, 1979) pp 184-85.

77. See Fletcher, *Rethinking Criminal Law* (1978) pp 770-71; see also *State v Brown* (1976) 364 A 2d 27. Similar reasoning is found in some of the speeches in *R v Brown* (1993) 2 All ER 75.

significantly they might suggest a greater or lesser degree of tolerance.⁷⁸ However, since their common purpose is to identify a threshold of unacceptable behaviour it is better to express the rule in terms of the danger posed by the assault rather than in terms of conduct which is intended or likely to cause harm of a specified degree. Therefore, I suggest that the better tests are the *Cey* test and the violation of safety rule test. Both are directed towards protecting participants from inherently dangerous conduct and, at the same time, meet the pragmatic concern of being sufficiently precise to allow ease of application in courts of trial.

CONCLUDING REMARKS

The subject matter of this essay might make depressing reading for those who are imbued with a sense of Corinthian idealism. While most who display a passion for sport might share that romantic dream, it must be tempered with a dash of realism. Recent experience, sporting, judicial and legislative, has amply demonstrated the fact that the law and sport are well nigh impossible to divorce. It is possible that many of the concerns which have been identified in this essay can be adequately dealt with through other mechanisms. For instance, rule and equipment changes could conceivably reduce the risk of injury to participants and, consequently, the temptation to use dangerous violence. Such measures have been adopted by different sports in recent years, the most notable being the "one bouncer per over" rule in cricket and the compulsory wearing of shin guards in soccer.⁷⁹ But despite these efforts, sports administrators and establishments have not always shown themselves to be capable of appropriately exercising self-regulation.⁸⁰ The serious problems of crowd disorder and spectator safety in English soccer eventually required legislative action.⁸¹ With regard to participant violence it would seem that the law will inevitably play a controlling role. It is not improbable that the imposition of civil liability will have a greater deterrent effect in many sports contexts and that recourse to criminal prosecution will prove happily infrequent. Nevertheless, as the criminal law is the forum through which communal standards of acceptable conduct are enforced the sensitive exercise of prosecutorial discretion will

78. Another, different, concern, namely preserving public peace, was alluded to earlier; see text at nn 26-27. No doubt it would be considered permissible to penalise on-field violence which has a propensity to encourage spectator unrest, even where that conduct might not threaten the safety of participants. Nevertheless, recourse to public order offences might be more appropriate. Indeed, in several cases in Scotland soccer players who made "unwarranted" gestures towards spectators have been prosecuted for public order offences.

79. Hechter, "The criminal law and violence in sports" (1977) *Crim LQ* 425 at 441 suggests that the wearing of batting helmets has eliminated "beanball" wars in baseball; but see Nielsen, "Controlling sports violence: too late for carrots — bring the big stick" (1989) 74 *Iowa L Rev* 681 at 684 noting more recent "beanings" in baseball.

80. See Horrow, "Violence in professional sports; is it part of the game?" (1982) 9 *J Legislation* 1.

81. Sporting Events (Control of Alcohol etc) Act 1986; Public Order Act 1986; Fire Safety and Safety of Places of Sport Act 1987.

be both necessary, and it is hoped, will prove educative and socially beneficial.

J. PAUL McCUTCHEON*

* Senior Lecturer in Law, University of Limerick.