

There are many forms of sportsfield violence. These include participator / spectator violence (such as the Jamie Carragher coin throwing incident¹), spectator violence, violence committed by participants that is not connected with the actual playing of the sport, and the main focus of this research – participator violence.

“Participator violence [includes] the intentional, reckless or negligent touching by one sports participant of another, which causes personal injury to that other and occurs during the participation of that sport”², although this proves to be a rather general definition. Statistics show that today’s sports are more violent than those in the past, with increased disciplinary tribunals and litigation between participants as well as an increase in career ending injuries. Reasons have been suggested for this increase, ranging from stricter refereeing and harsher punishments for technical offences, to the fact that modern day athletes and players are bigger, faster and stronger than in the past, making incidental injury more serious than ever before. The statistics could also be attributed to a greater knowledge of legal rights generally in today’s modern world. This point was mentioned in *The Observer*³, where professional players were deemed to be of the opinion “It wasn’t me Guv. Or, if it was, have a word with my lawyer”.

Statistics, by their nature, offer very little assistance in showing the whole picture. Participator violence can only be truly judged by looking at the sport being played from the point of view of “contemporary society and deciding whether what occurs during the course of a game is an acceptable way of playing it”⁴.

The most obvious way of controlling participator violence in sport is through systems such as yellow and red cards in football. However, this carding system is hardly sufficient in controlling violence. In January 2001, Chelsea FC’s Mario Melchiot was given a 3-match ban for a red card mistakenly shown to his team-mate Jimmy Floyd Hasselbaink. Far from this type of insufficiency, the main focus should be on whether or not the criminal law should help to control participator violence, or incidents occurring inside sport should be dealt with within sport by its governing bodies.

“Throughout the United Kingdom, there is a growing trend for the criminal law to be used to resolve issues of violent conduct that occur on the sportsfield”⁵. The criminal law aims at protecting individuals from harm as well as upholding moral values and punishing offenders who breach this code of conduct. In certain instances, it has to be said that sports participators are no exception to this aim, and the following are brief examples of violations of the criminal law during the playing of a game.

In *R v Davies*⁶, the defendant struck the victim in the face during an off-the-ball incident in a football match, causing a fractured cheekbone. This offence was held to be an unprovoked and deliberate assault. The defendant was found guilty of assault occasioning actual bodily harm.

¹ *Sport and the Law Journal*, Volume 10, Issue 1, page 31

² *Sports Law*, 2nd edition, Simon Gardiner et al, page 653

³ *Cheating Superstars Thrive – Thanks to Their Legal Eagles*, *The Observer*, 12th August 2001

⁴ *Sports Law*, 2nd edition, Simon Gardiner et al, page 652

⁵ *Touchlines and Guidelines: The Lord Advocate’s Response to Sportsfield Violence*, Mark James and Simon Gardiner, [1997] Crim LR 41

⁶ [1991] Crim LR 70

*R v Moss*⁷ is an example of maliciously wounding or inflicting any grievous bodily harm⁸. This case involved an off-the-ball incident in a game of rugby union, in which the defendant punched the victim in the face causing a fractured eye socket.

Section 18 of the Offences Against the Person Act 1861 can be seen in *R v Johnson*⁹, where the defendant was found guilty after biting off the victim's ear lobe while they were grappling for the ball.

There have been no convictions for murder in sports cases, but in *R v Moore*¹⁰ the defendant was found guilty of manslaughter.

It is in the area of defences where sports law and criminal law have a difference of opinion, and it is this area in which I am basing this essay. There are two main sports related defences. These are consent, an important issue in this area – “playing culture”¹¹. It should be noted that “no rules or practice of any game ... can make that lawful which is unlawful by the law of the land”¹², but also that committing a foul is not proof of guilt.

The English position should be contrasted with that in the United States of America in *People v Fitzsimmons*¹³. The defendant had killed his opponent by a punch thrown in a boxing exhibition match. The judge stated –

“If the rules of the game and the practices of the game are reasonable, are consented to by all engaged, are not likely to induce serious injury, or to end life [and as a result of this game] and accident happens, it is excusable homicide”.

It was found that the defendant was fighting within the rules of boxing and that those rules were reasonable, therefore lawful. The verdict was not guilty.

The English position uses the rules of the game as a means for assessing the defendant's mens rea at the time of the offence. If a defendant was trying to play within the rules of the game, a jury is more likely to decide that the defendant did not inflict criminal injuries. However, if the defendant was clearly in breach of the rules of the game, then it is easier for the jury to establish or infer criminal culpability on the defendant. The American Courts have adopted a stance protecting participants from culpability by only looking at the rules and reasonableness of the game.

⁷ [2000] 1 Cr App R (S) 64

⁸ *Offences Against the Person Act 1861*, Section 20

⁹ [1986] 8 Cr App R (S) 343

¹⁰ (1898) 14 TLR 229

¹¹ It cannot be said with much certainty whether or not consent and playing culture should be classified as defences in their own right. Although it is feasible for them to be used separately, as I shall point out further on, playing culture is a vital component in the defence of consent and as a result it is easy for them to work as one and the same thing.

¹² Per Bramwell LJ, *R v Bradshaw* (1878) 14 Cox CC 83

¹³ (1895) 34 NYS 1102

The main defence to cases of participator violence is consent. Without consent, every time an opponent touches a player during the playing of a contact sport, a battery is committed. Obviously, the offences become more serious in proportion with the extent of the injury, but this is still an unacceptable position to be in.

Consent applies to the majority of contacts seen as an integral part of the game, but there has never been judgement passed on how the defence of consent should be specifically applied to sport. The general rule is that nobody can consent to actual bodily harm or greater offences (s47, s20, s18, manslaughter or murder). *R v Brown*¹⁴ is the leading case in this area. In Lord Mustill's dissenting judgement he says –

“Some sports ... have deliberate bodily contact as an essential element. They lie at the mid-point between fighting, where the participant knows that his opponent will try to harm him and the milder sports where there is at most an acknowledgement that someone may be accidentally hurt. In contact sports, each player knows and by taking apart agrees that an opponent may ... inflict upon his body ... what would be ... a painful battery. ... But he does not agree that [a more serious form of injury resulting from an unintended effect of deliberate contact] be inflicted deliberately. ... What we need to know is whether, notwithstanding the recipient's implied consent, there comes a point at which it becomes too severe for the law to tolerate”.

Lord Mustill then refers to *Bradshaw* as a starting point to adduce where the line is drawn between violence that can be consented to and violence not in the public interest at any level, saying that the act would be unlawful if intended to cause serious hurt. It is this question about the scope of consent that is the most contested point regarding this defence, and the judgement in *Brown* conflicts with previous judgements on this issue.

There have been several notable attempts to answer this question. In *Attorney General's Reference (No6 of 1980)*¹⁵, sports and games were held to be exceptions to the rule that it is immaterial whether or not a person causes bodily harm to another in public or private if intended and / or caused. *Per* Lord Lane –

“These ... exceptions can be justified as ... needed in the public interest”¹⁶.

This case barely touches the surface of the problem. It gives no mention to the upper limit of harm a participator can consent to or the acts to which consent applies, just that consent is a defence to participator violence.

*R v Billingham*¹⁷ made the first attempt at limiting the scope of consent when it was held that a player only consents to force that he could reasonably expect to happen during a game. This decision shows that there is no

¹⁴ [1993] 2 WLR 556

¹⁵ [1981] QB 715

¹⁶ [1981] QB 715 at 719

¹⁷ [1978] Crim LR 553

unlimited license to violence on the sportsfield, a point the majority of society will think is obvious. Yet there is still no mention of what is reasonable.

The Law Commission, in its Paper No 134, stated –

“In the latter case [regarding sadomasochistic encounters] the victim has consented to a ... code of conduct designed to produce physical contact or even injury. ... In most sports and games, however, the most that the victim has consented to is the risk of incurring a particular type of injury during the course of the game”.

The Law Commission continued that the general rules for sports and games are that the intentional infliction of injury enjoys no immunity, a decision as to whether a reckless infliction of injury is criminal will be strongly influenced by whether the incident occurred on-the-ball or off it, and that unreasonable risk taking by an individual is also criminal.

As with all the previous discussions of consent, this one is also problematic. Participants in contact sports do impliedly consent to physical contact (such as a tackle in rugby or football) and they also consent to specific acts, not the risk of them. “If those contacts cause injury, that too is consented to”¹⁸. Yet again, what is a reasonable risk, and therefore what specific actions are consented to, are not explained.

The difficulty in explaining the scope of consent is because one general rule cannot apply to all sports. This can be best highlighted by comparing a sport such as basketball to one such as boxing. A boxer consents to being punched and even knocked out by his opponent. In a game of basketball, this would be unreasonable. This is because the rules and / or practice, or “playing culture”, of boxing allow this action to happen, but punching is not a practice in basketball. It is the concept of a playing culture that would provide clarity in defining the scope of reasonable conduct in sport.

The concept of playing culture is not yet fully accepted by the courts – at best a passing comment may be made as to its existence. This neglect is naïve, as a definition of playing culture would help to define consent more precisely by taking into account the way the game is played. Any sceptic would say that it is for this reason that Law has not grasped onto playing culture with both hands. By adding the luxury of precision to the previously blurred area of consent, the Law, although being clarified, could be pushed away from the sportsfield with more responsibility being given to governing bodies.

It is ultimately up to the governing bodies to define what the playing culture is of their particular sport. They are simply better placed than the Law to identify what is a part of the game. It is generally accepted that playing culture goes beyond the rules and into the game’s “practices”¹⁹. Playing culture also extends into the more

¹⁸ *Sports Law*, 2nd edition, Simon Gardiner et al, page 666

¹⁹ Per Bramwell LJ in *R v Bradshaw* (1878) 14 Cox CC 83

contentious area of commonly occurring incidents of foul play as addressed in *Billingham* where the judge suggested that consent could only extend to force “which could reasonably be expected to happen during the a game”.

With no statutory definition of playing culture in English Law, can it truly be said that such a notion exists? To define playing culture, it is required to move away from these shores to Canada, Australia and America. Although the American idea of playing culture has its roots in Tort Law, it can be applied to criminal cases if required:

“Participating in ... a game does not manifest consent to contacts which are prohibited by the rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill”.²⁰

The use of criminal law to control participator violence has been most prominent in Canada’s ice hockey leagues. In *R v Key*²¹, *Wakeling JA* and *Gerwing JA* held that consent could extend further than the rules of the game to contacts and resultant injuries arising from breaches of the rules that fall within the accepted standards by which the game is played. It was also held that consent should be implied and determined objectively as every participator would have his own consent and therefore there would be no uniformity.

Gerwing JA also presented some pointers for determining whether a participant could consent to the act, i.e. whether the act was within the playing culture. These included “The conditions under which the game ... is played, the nature of the act [forming] the charge, the extent of the force employed, the degree of risk of injury, and the probabilities of serious harm”²².

This objective test was followed in a not much later Canadian case, *R v Ciccarelli*²³. In this case the scope of the objective test was extended to include:

- “(a) the nature of the game played; whether amateur or professional league and so on;
- (b) nature of the particular act or acts and their surrounding circumstances;
- (c) the degree of force employed;
- (d) the degree of risk of injury; and
- (e) the state of mind of the accused”²⁴.

²⁰ *American Restatement of Torts*, (1965), 2nd edition, paragraph 86

²¹ (1989) 48 CCC (3d) 480

²² *Ibid*, page 490

²³ (1989) 54 CCC (3d) 121

²⁴ Per Corbett DCJ, page 216

In this case, the defendant hit the victim over the head with a hockey stick three times in retaliation. There was no injury caused but criminal liability was imposed because hitting an opponent with a hockey stick is a potentially dangerous act and as such should have been outside the playing culture.

A similar approach was adopted in Australian Tort, but when there was a case before the criminal court, there was no hesitation to use it. In *McNamara v Duncan*²⁵ – a case concerning an off-the-ball elbowing incident – the court held that:

“One who enters into a sport, game or contest may be taken to consent to physical contacts consistent with the understood rules of the game”²⁶.

It continues that sensible hurt produced as a result of intentional acts inherent with the game accompanies the playing of the game. The rules and code of conduct of the game, however, do not justify any act done with the principle intention of causing injury or serious harm. In *Guimelli v Johnston*²⁷, the respondent said that consent to the application of physical force extends to physical force which involves some infringement of the rules of the game.

With these definitions in mind, the next question to be asked is whether playing culture has a place in English Law, seeing as it obviously has found its feet in other jurisdictions. There are two arguments here. The first is that anything outside the rules of the game is not a part of the game and therefore should amount to criminal liability as it cannot be consented to. The reverse argument is that minor breaches of the rules are an inherent part of the game whether intended or not, and therefore should be encompassed in the game.

Edward Grayson, a firm believer in fair play, believes that all harm caused by a breach of the rules should be criminal and cannot be consented to:

“If a person intentionally or recklessly causes harm to another in order to prevent them from reaching a ball or for reason of sheer thuggery, then these actions are in breach of the criminal law. ... the administrators of sport have failed to control this evil.”²⁸

In *Sports Law*²⁹, Mark James attempts to back up Grayson’s obvious discomfort with contact sports with reference to FIFA’s Fair Play Charter. I suggest that it is impossible to find a sports fan and / or participator who does not believe in fair play, but would also suggest the great difficulty required to find one who agrees that (with reference to the first line of Grayson’s quote) a simple obstruction (worthy of a free-kick at most) in

²⁵ [1971] 26 ALR 584

²⁶ *Ibid*, p589

²⁷ (1991) ATR 81

²⁸ *Making Foul Play a Crime* (1999), Edward Grayson

football could amount to a criminal offence. I would venture that Grayson is very much misled if he believes that this is the way contact sports such as football are played in the modern era, and doubt that the governing body of the most popular sport in the world would also accept such a dramatic point of view.

Simon Gardiner offers a more sensible opinion:

“... many participants in sports will see physical contact and resulting harm as consensual which are within the normal course of events. So the commission of fouls in football due to illegal tackles and the consequential injury are likely to be seen as consensual. They have inevitability ... and ... come inside the working culture of the game.

“Only where clear acts of force are used off-the-ball ... should the criminal law intervene if the internal measures are seen as ineffectual against persistent offenders”.³⁰

Conclusions

I believe that Gardiner has summed up the position that should be taken by the Law when considering participator violence. There is no doubt that there are incidents on the sportsfield that should amount to criminal offences. I accept that these incidents do take place when submitting my conclusions. However, these offences are normally (although not always) off-the-ball, where the primary intention of the defendant is to harm his victim.

To impose criminal liability on a participant who commits a simple foul, as suggested by Grayson, is ridiculous. If this was the case, rules of a game should be made the laws of the land, referees should be replaced with policeman and governing bodies with the CPS and the Courts. You only have to look as far as the aims and the essence of sport, and playing culture, to realise that this is the case.

In FIFA's Code of Conduct for Football³¹, the first of the “Golden Rules” is to “Play to Win”. If criminal liability is imposed every time a foul is committed in a contact sport, participants will not play to win – they will play not to end up in court. The stemming of the determination of participants to win by the Law if this were the case would be catastrophic to the world of sport.

Players accept fouls as part of the playing culture. So do spectators. Taking football as an example, you only have to listen to the cheers when a sliding tackle is made to realise that this is the case, so it could hardly be said

²⁹ *Sports Law*, 2nd edition, Simon Gardiner et al, page 669

³⁰ *Not playing the game: is it a crime?* (1993), Simon Gardiner, *Solicitors Journal* 628, at page 629

³¹ <http://www.fifa2.com/scripts/runisa.dll?M2:gp::67173+article+37246+E>

that criminal liability for a foul is in the entire public interest. Even if this does not make the challenge legal, it at least makes it tolerable. Also, without strong evidence that the act was outside the playing culture, any charge is likely to fail because of the difficulty in proving the defendant's mens rea.

Therefore, I believe the Law should interfere with the world of "participator violence" in sport only when it is needed where a "foul" or incident occurs outside the participant's consent and the playing culture. The notion of playing culture should be incorporated into English Law, but should be given the flexibility to evolve with the game. A definition or benchmark for playing culture should be provided by an expert within the game³², such as its governing body – not the Law. Not to consider the playing culture of any game by the Law when considering violence would be to undermine the essence of participating in sport as a whole.

³² *R v Blissett*, unreported, 3rd December 1992. Here, the Chief Executive of the Football Association gave expert evidence saying that the type of challenge concerned would happen many times during the course of a football match. The defendant was cleared.