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# INTERNATIONAL SPORTS LAW PERSPECTIVE

## CITIUS, ALTIUS, FORTIUS? A STUDY OF CRIMINAL VIOLENCE IN SPORT

JACK ANDERSON\*

*"Nothing should be punished by the law that does not lie beyond the limits of toleration."*

—Devlin, *The Enforcement of Morals*

### I. INTRODUCTION

This article intends to examine what role, if any, the criminal law should have in regulating and sanctioning violent behaviour "beyond the touchline."<sup>1</sup> The principal focus will be on the crime of assault. Generally, that which is done by consent is no assault at all, though this is not a license to inflict serious harm. However, what role does consent play in modern contact sports where physical aggression of a kind that would otherwise be deemed illegal, is permitted? In short, contact sports, or what were once called "manly diversions," have long received an exemption from the lower thresholds of consent. Accordingly, this article will address three broad issues; the origins of this "sporting" exemption, its justification under criminal legal theory and its actual application. In discussing these objectives, focus will be on the Anglo-Irish experience of this area of the law. Ultimately, conclusions will be drawn as to the relationship between violence, sport and the criminal law not only as to the effects of criminal violence in sport but also as to its causes.

### II. MANLY DIVERSION: *R. v. CONEY*

It is suggested that an ideal starting point in contemporary legal attitudes to violence in sport is provided by the infamous prize-fighting case of *R. v. Coney*.<sup>2</sup> The judgments in this case contain many insights into

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1. The English barrister Edward Grayson, now President of the British Association of Sport and the Law, first used the phrase.

2. *The Queen v. Coney*, 8 Q.B. 534 (1882).

the birth of modern criminal law's approach to sporting violence. In brief, the judgments suggest that even sporting activities as manifestly violent as gloved boxing, may be permitted as "manly diversions," so long as public order and safety is not threatened.<sup>3</sup> These policy considerations apart, *Coney* is also an enlightening initial reference on the controversial question of so-called "sporting consent." The judgments in *Coney* may provide an answer as to why levels of force that would normally be criminal assaults are deemed lawful once inflicted in the course of a game.

The facts of the case are straightforward. On June 16, 1881, at the close of the Ascot races, two men, Mitchell and Burke, were seen fighting each other in a ring, formed by ropes surrounded by posts, in the presence of a large crowd.<sup>4</sup> The combatants were assisted by their "seconds" Parker and Symonds.<sup>5</sup> In addition, three named prisoners, Coney, Gilliam and Tully and five other persons were seen amongst the crowd.<sup>6</sup> They were also charged in an indictment containing a number of counts for unlawful assaults, riot and rout.<sup>7</sup> At trial, all counts except the seventh and eighth were given up by the prosecution.<sup>8</sup> The seventh count charged all prisoners, except Burke, with a common assault upon him.<sup>9</sup> The eighth count charged all prisoners, except Mitchell, with a common assault upon him.<sup>10</sup>

In defence of Coney and the other spectators, two principal arguments were forwarded. Firstly, that it was questionable whether the combatants were guilty of assaults upon each other and secondly, that it was incorrect to state that the defendants were aiding and abetting the fight given that they took no active part in the fight or its management.<sup>11</sup> The initial argument centred on the proposition that the offence of aiding and abetting could only have been committed where it was a criminal activity that was being encouraged by the party charged.<sup>12</sup> It followed that in order for an assault to have been committed, it was necessary that the act had been executed without the consent of the alleged victim.<sup>13</sup>

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3. *Id.* at 539-40.

4. *Id.* at 535.

5. *Id.*

6. *Id.*

7. *Coney*, 8 Q.B. at 534-35.

8. *Id.*

9. *Id.* at 536.

10. *Id.*

11. *Id.* at 539-40.

12. *Coney*, 8 Q.B. at 539.

13. *Id.*

Thus, counsel for the defendants argued that since Burke and Mitchell consented to their fight, an assault could not have occurred.<sup>14</sup>

As regards the second defence, witnesses supplied evidence that the named prisoners did not participate in any way in the fight, its organisation or in any of the betting activity that surrounded the occasion.<sup>15</sup> In fact, one witness said that the crowd was so tightly packed that it would not have been possible for Coney to push his way out!<sup>16</sup> It was claimed that the prisoners' attendance at the fight was merely passive in nature.<sup>17</sup>

At trial, the chairman directed the jury that prizefights are illegal and all persons who go to such an event to see the combatants strike each other, and who are present when they do so, are guilty in law of an assault on the grounds of aiding and abetting.<sup>18</sup> In this, the chairman added the words of Justice Littledale in *R. v. Murphy* to his direction "[i]f they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything."<sup>19</sup>

The jury found that Burke and Mitchell were clearly guilty of assault on each other as combatants, as were Parker and Symonds, who directly aided the management of the fight.<sup>20</sup> The jury also found that Coney, Gilliam and Tully were guilty of assault, but only in consequence of the chairman's direction of law.<sup>21</sup> The jury could not hold, as a matter of fact, that Coney and the others were aiding and abetting.<sup>22</sup>

The chairman asked the opinion of the Court of Criminal Appeal as to whether his direction to the jury on this matter was correct.<sup>23</sup> Eleven judgments were handed down and on a clear eight to three majority the conviction of the spectators was quashed.<sup>24</sup> The Court was of the opinion that mere voluntary presence at such an event could not be translated into aiding and abetting a criminal activity.<sup>25</sup> Nevertheless, in this instance, it is not so much the debate on active, as opposed to passive presence, at a criminal event that is important. It is the nature of this particular criminal event that interests us, *i.e.*, the sport of prize fighting.

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14. *Id.* at 538-39.

15. *Id.* at 539.

16. *Id.* at 535.

17. *Coney*, 8 Q.B. at 535.

18. *Id.* at 537-38.

19. *Id.* at 537 (citing *R. v. Murphy*, 172 Eng. Rep. 1164, 1165 (1833)).

20. *Id.* at 536 (holding all duly sentenced to six weeks imprisonment with hard labour).

21. *Id.*

22. *Coney*, 8 Q.B. at 536.

23. *Id.*

24. *Id.*

25. *Id.* at 534.

To this end, it is well to note the reasons why the court was unanimous in holding that prize fighting was illegal and what these, essentially policy, concerns can contribute to the modern judicial view of aggressive sporting activities.

Justice Cave, after reviewing relevant authorities such as *Matthew v. Ollerton*,<sup>26</sup> *R. v. Perkins*<sup>27</sup> and *R. v. Lewis*<sup>28</sup> was of the opinion that in agreeing to fight in the fashion that they did, Burke and Mitchell were clearly guilty of assault.<sup>29</sup> He continued,

The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct a blow struck in a prize-fight is clearly an assault; but playing with single-sticks or wrestling do not involve and assault; nor does boxing with gloves in the ordinary way.. . .<sup>30</sup>

What Justice Cave meant by boxing in the "ordinary" way is open to question, though presumably he intended it to encapsulate sparring as regulated by the Queensbury rules. In addition to this brief review of "sporting consent," Justice Cave also dismissed the trial judge's direction to the jury with alacrity, observing, "[w]here presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is prima facie not accidental it is evidence, but no more than evidence, for the jury."<sup>31</sup> In affirmation, Justice Cave referred to authority such as *R. v. Atkinson*,<sup>32</sup> *R. v. Borthwick*,<sup>33</sup> and *R. v. Perkins*<sup>34</sup> where similar issues were considered and in particular to two "duelling" cases of *R. v. Young*<sup>35</sup> and *R. v. Cuddy*.<sup>36</sup>

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26. 90 Eng. Rep. 438 (1724).

27. 172 Eng. Rep. 814 (1831).

28. 174 Eng. Rep. 874 (1844).

29. *Coney*, 8 Q.B. at 539.

30. *Id.*

31. *Id.* at 540.

32. 11 Cox C.C. 330, 333 (1869) (indicting persons for serious rioting; held that mere presence among the rioters did not render the person liable).

33. 99 Eng. Rep. 136 (1779).

34. 172 Eng. Rep. 814 (1831) (finding Perkins guilty of assault as a combatant in a prize-fight, as were certain spectators directly involved in the management of the fight, one who acted as Perkins' second, one who collected the money *i.e.*, a bookmaker, and one who kept the ring clear).

35. 10 Cox C.C. 371 (1871).

36. 174 Eng. Rep. 779 (1843).

In the particular "duelling" cases referred to above, *Young* concerned the indictment of the prisoners for the murder of Mr. Mirifin, who was killed in a duel by a Mr. Elliot.<sup>37</sup> *Young* assisted in the preparation of the duel and was deemed a principal of the second degree.<sup>38</sup> In *Cuddy*, the prisoner was charged with aiding and abetting a Mr. Munro in the murder of a Colonel Fawcett, whom Munro had shot in a duel.<sup>39</sup> Williams, in directing the jury stated "[w]hen two persons go out to fight a deliberate duel, and death ensues, all persons who are present on that occasion, encouraging or promoting that death, will be guilty of abetting the principal offender."<sup>40</sup> Applying this "active participation" test, Cave distinguished *Murphy* and held that the present conviction ought not to stand.<sup>41</sup>

Stephen, Lopes, North, Huddleston, and Denam, agreed with Cave that the trial judge's reliance on *Murphy* was incorrect and that mere presence at a prize fight did not automatically sustain a charge of aiding and abetting.<sup>42</sup> Similar to Cave, they distinguished between deliberate presence at the event and mere casual attendance.<sup>43</sup> However, unlike Cave, these judgments did not consider, at any great length, the issue of the combatant's consent to the fight. On the majority side, this issue seems to have been left to Cave and Hawkins.

Hawkins eloquently reviewed the status of consent in criminal assault [a]s a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of consent is an essential element in every assault, and that which is done by consent is no assault at all. . . .<sup>44</sup>

Hawkins continued with reference to *R. v. Guthrie*<sup>45</sup> and *R. v. Billingham*<sup>46</sup> that "it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution."<sup>47</sup>

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37. *Coney*, 8 Q.B. at 541.

38. *Id.*

39. *Id.* at 542.

40. *Id.*

41. *Id.* at 543.

42. *Coney*, 8 Q.B. at 549-50, 552, 557-58, 561, 567.

43. *Id.*

44. *Id.* at 553.

45. 11 Cox C.C. 522 (1870).

46. 172 Eng. Rep. 106 (1825).

47. *Coney*, 8 Q.B. at 553.

Again, applying the "moralistic" test that a man may compromise his own civil rights but not the public interest, Hawkins was clear:

that every fight in which the object and intent of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such fight be a hostile fight begun and continued in anger, or a prize-fight for money or other advantage.<sup>48</sup>

At first instance, it would seem to supporters of the sports of boxing and martial arts that such a holding renders their sports illegal. Indeed, this feeling is exacerbated by Hawkins's immediate reference to *R. v. Ward*<sup>49</sup> as support for his proposition that every fight containing an element of a violent trade of blows is illegal.<sup>50</sup> In the stated case, "the prisoner was tried for the slaughter of a man whom he had killed in a fight to which he had been challenged by the deceased for a public trial of skill in boxing. No unfairness was suggested, and yet it was held that the prisoner was properly convicted."<sup>51</sup>

Hawkins did admit however, "[t]he cases in which it has been held that persons may lawfully engage in friendly encounters not calculated to produce real injury or to rouse angry passions in either, do not in the least militate against the view I have expressed."<sup>52</sup> Thus, it would seem that boxing as practiced under the Queensbury rules, martial arts, and indeed contact sports in general, were exceptions to this rule on the grounds that they are neither breaches of the peace, nor are they calculated to be productive thereof. In short, such sports can be deemed socially acceptable on the grounds that they are not designed to produce mischief.

Nevertheless, even under the colour of a friendly encounter, where the parties really have as their object the intention to beat each other until one of them is exhausted or subdued by that force, and so engage in a conflict likely to end in breach of the peace, each is liable to be prosecuted for assault.<sup>53</sup> According to Hawkins, it is a matter of fact for the jury to decide whether the circumstances of the fight are socially acceptable or not.<sup>54</sup>

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48. *Id.* at 553.

49. 12 Cox C.C. 123 (1872).

50. *Coney*, 8 Q.B. at 554.

51. *Id.*

52. *Id.*

53. *R. v. Orton* 14 Cox C.C. 226, 227 (1878) (holding that it appeared to be an organised boxing match, but the severity and intensity of the punishment inflicted was such as to go beyond that which would be expected in a gloved boxing match of fixed duration).

54. *Coney*, 8 Q.B. at 558.

On this dubious thread of policy does the legality of boxing hang. The legality of this sport is defined in entirely negative terms, i.e., it is not prize fighting which is illegal because it disturbs the peace and may incite rioting and social disorder. As Papworth argues:

it does not seem possible to distinguish [as Hawkins attempted to do] between those fights which are assaults and thus deserving of the sanction of the criminal law and those which are not assaults on the basis of the intention of the parties, when in truth, both prize fighters and boxers seek the same end; '*to hurt the opponent more than he is hurt himself*.'<sup>55</sup>

Papworth is forced to conclude that "the apparent immunity of boxing from the sanction of the law defies rational explanation,"<sup>56</sup> and that all one can surmise is that boxing remains "*outside the ordinary law of violence because society chooses to tolerate it*."<sup>57</sup>

In conclusion in *Coney* the dissenting judgments, agreed with the view that in no way could one consent to that which is clearly an illegal act and contributes to a disturbance of the peace, thereby threatening public order and safety.<sup>58</sup> As Matthew stated simply on the matter, "[t]here is, however, abundant authority for saying that no consent can render that innocent which is in fact dangerous."<sup>59</sup> Moreover, it is precisely on these grounds of public protection that Chief Justice Lord Coleridge, Pollock, and Mathew took a firmer line on the prisoners' attendance at the fight. The learned judges took the view that the best way to rid society of this vicious practice was to punish those who sustain it with their support.<sup>60</sup> As Chief Justice Lord Coleridge remarked:

[i]n such a case as this the spectators really make the fight; without them, and in the absence of any one to look on and encourage, no two men, having no cause of personal quarrel, would meet together in solitude to knock one another about for an hour

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55. Neil Papworth, *Boxing and Prize Fighting: The Indistinguishable Distinguished?*, 2 SPORT & L. J. 5, 8 (1994) (citing *R. v. Brown*, 2 WKLY. L. REP. 556, 592 (1993)).

56. *Id.*

57. *Id.* (citing *Brown*, 2 WKLY. L. REP. at 592). For a select bibliography on the legality of boxing see: Edward Grayson, *Boxing Clever*, 142 N.L.J. 48 (1992); Steve Greenfield & Guy Osborn, *A Gauntlet for the Glove: The Challenge to English Boxing Contracts*, 6 MARQ. SPORTS L.J. 153 (1995); Kelly Howard, *Regulating the Sport of Boxing - Congress Throws the First Punch*, 7 SETON HALL J. SPORT L. 103 (1997); Neil Papworth, *Parliament and the Boxing Bill*, 4 SPORT & L.J. 24 (1996); Mike Seabrooke, *Going to Hell in Your Own Way*, 142 N.L.J. 438 (1992).

58. *Coney*, 8 Q.B. at 534.

59. *Id.* at 547.

60. *Id.* at 534.



or two. The brutalizing effects of prize-fights are chiefly due to the crowd who resort to them. . .<sup>61</sup>

To this end, fellow dissenter, Mathew, noted:

a prize-fight, which is an assault, and therefore contrary to the law, takes place in public, in order that it may be witnessed by spectators. The spectators by their presence lend themselves to the purpose of the combatants, and countenance and encourage them in a violation of the law. They therefore aid and abet.<sup>62</sup>

It must be noted, though, that Manisty representing the majority took great care to dismiss this view:

[i]t is said that if the ruling of the chairman is not upheld a great impetus will be given to prize fighting. I do not share in that apprehension. It is well settled law that every person who by his presence or otherwise encourages a fight, be it prize or an ordinary fight, is guilty of a criminal offence, that is to say, of an assault or manslaughter, as the case may be, but it is for the jury in each particular case to say as a matter of fact whether the accused did by his presence or otherwise encourage the combatants to fight . . . Suppose that the fight in question had resulted in the death of one of the combatants, then, if the direction given to the jury was right, every person who was in the crowd was in point of law guilty of manslaughter . . . I cannot believe such is the law of England.<sup>63</sup>

The question that now needs to be addressed is whether or not that proposition and the principles underlying it, namely that there is recognition of a limited level of sporting consent, is the current law of England.

### III. THE PROBLEM OF "SPORTING" CONSENT

The essence of *Coney* is succinctly stated by McCutcheon "[a]pplications 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."<sup>64</sup> To this effect, *Coney* reaffirmed earlier decisions such as *R. v. Bradshaw*<sup>65</sup> and *R. v. Moore*<sup>66</sup> as regards the legal limits to which sports participants can consent to bodily harm within the course of

61. *Id.* at 569.

62. *Id.* at 548.

63. *Coney*, 8 Q.B. at 562-63.

64. Paul McCutcheon, *Sports Violence, Consent and the Criminal Law*, 45 N. IR. LEGAL Q. 267, 267 (1994).

65. 14 Cox C.C. 83 (1878).

66. 14 T.L.R. 229 (1898).

their sport. (In fact, it could be argued that Coney extended the principle first enunciated in these cases by including non-fatal violence.) In the former case, the accused during a football game struck an opponent in the stomach with his knee, resulting in the eventual death of the opponent.<sup>67</sup> Bramwell's seminal direction to the jury is well-held as the source of criminal law's involvement in sport, much of which merits lengthy quotation:

[I]f 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 and reckless as to whether he would produce serious injury or not, then the act would be unlawful. In either case he would be guilty of a criminal act and you must find him guilty; if you are of a contrary opinion you will acquit him.<sup>68</sup>

Given the evidence, the jury acquitted the footballer on the manslaughter charge, after representation had been given by an umpire that no unfair play had occurred.<sup>69</sup> Twenty years later, in *Moore*, a similar factual scenario led to a guilty verdict.<sup>70</sup> Resonant of Bramwell, Hawkins directed the jury that "[n]o one had a right to use force which was likely to injure another, and if he did use such force and death resulted, the crime of manslaughter had been committed."<sup>71</sup>

In the above cases, Bramwell and Hawkins were faced with three questions.<sup>72</sup> Firstly, did the victim consent to the act?<sup>73</sup> Secondly, was the act of a nature that the victim could effectively consent to it?<sup>74</sup> And thirdly, what threshold of consent should apply herein?<sup>75</sup> Both lordships were of the view that, in sport, the victim would have consented to whatever the rules permitted and that it was reasonable to suggest, given

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67. *Bradshaw*, 14 Cox C.C. at 84.

68. *Id.* at 85.

69. *Id.* at 84.

70. *Moore*, 14 T.L.R. at 230.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Moore*, 14 T.L.R. at 229.

the formulated rules of the recognised sport of football, that these rules were of a nature that they could be effectively consented to.<sup>76</sup>

Thirdly, while evidence that the accused was acting within the rules would be of obvious benefit to the accused,<sup>77</sup> it was clear from the judgments, Bramwell in particular, that it was immaterial whether the accused broke the rules or not if the accused "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 and reckless as to whether he would produce serious injury or not,"<sup>78</sup> or, as Hawkins suggested, "[n]o one had a right to use force which was likely to injure another."<sup>79</sup>

Therefore, it is submitted that the above cases imply that the criminal law's intrusion into the sporting sphere is founded on the basis that deliberate and/or reckless tackling causing injury, particularly in breach of the playing laws of that particular game, creates a *prima facie* offence. It seems, from the above, that the threshold of "sporting consent" in assault is breached where intention or knowledge that the act was likely to cause serious injury is proven.

This basic proposition has been implicitly reaffirmed in more recent cases, beginning with the Court of Appeal decision of *R. v. Donovan*,<sup>80</sup> where it was stated firmly, "[i]f an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime."<sup>81</sup> This view was reiterated in the *Attorney General's Reference (No. 6 of 1980)*.<sup>82</sup> In this case, two youths of 18 and 17 decided to settle an argument by a fistfight.<sup>83</sup> One of them sustained a bleeding nose and bruises to his face and it was held that the other was guilty of assault occasioning bodily harm as:

it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason

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76. It follows that, in the unlikely instance of a recognized game having rules that permitted an unacceptably dangerous act, a court could hold that the act was unlawful, notwithstanding the victim's consent. See generally JOHN SMITH, SMITH AND HOGAN'S CRIMINAL LAW, 410-11 (9th ed., 1999).

77. In later judgments, it is also acknowledged that players consent to actions, and can be reasonably held to act, outside the rules of the game but within the "spirit" of the game. The spirit of the game is taken to include the incidental norms of play *i.e.*, incidents though strictly prohibited by the rules, regularly occur in the ordinary course of play.

78. *Bradshaw*, 14 Cox C.C. at 85.

79. *Moore*, 14 T.L.R. at 230.

80. 2 K.B. 498 (C.A., 1934).

81. *Id.* at 507.

82. 2 All E.R. 1057 (1981).

83. *Id.* at 1058

... [I]t is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.<sup>84</sup>

In this, the court added the reminder, "nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports," (this being justified in the public interest).<sup>85</sup>

This exception is not confined to organised games. There is also what one could call a "horseplay" exception, in that consent by boys to such activities may be a defence to a charge of inflicting serious bodily harm if there is no intention to cause injury, as *per R. v. Jones*.<sup>86</sup> It is suggested that there is an element of recognition in this case that schoolboys have always behaved in such fashion and probably always will.<sup>87</sup> In fact, a genuine belief of consent in these circumstances, even if unreasonably held, may negative recklessness, as *per R. v. Aitken*.<sup>88</sup> In this case, members of the RAF set fire to each other's clothes as part of over-exuberant celebrations.<sup>89</sup> The injuring parties, who were initially court-martialed, were held to have genuinely believed that the victim, who suffered severe burns, had consented to the acts.<sup>90</sup> Presumably, similar reasoning would apply to unorganised games such as "tackle."

#### IV. NO LICENSE FOR THUGGERY: RECENT ENGLISH CASE LAW

In any event, contemporary English case law is no less insistent that the inherent violence of sport cannot go unhindered. Chief Justice Lord Lane observed in *R. v. Lloyd*, that while "forceful contact was allowed by the rules [of rugby union and *semble* the Law] ... [t]he game was not,

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84. *Id.* at 1059. SMITH, *supra* note 76, at 410 (questioning this definition and, in particular, they have difficulty with the use of "or should cause" and "and/or." They suggest that these words imply that the act done to the other with consent is an assault, though it is not intended to cause harm, if in fact it does. Smith and Hogan refer to *Case and Comment: Manslaughter*, 42 CRIM. L. REV. 570, 571 (1995) where both the defendant and the plaintiff engaged in vigorous sexual activity. The victim consented and did so lawfully. During the activity, a ring that the accused was wearing injured the victim and resulted in her death. The defendant was charged with manslaughter by an unlawful and dangerous act. Judge J was of the opinion that it would be incorrect to treat as criminal, activity which would otherwise amount to an assault merely because an injury was caused).

85. *Id.*

86. *Case and Comment: Inflicting Grievous Bodily Harm*, 34 CRIM. L. REV. 513 (1987).

87. *Id.*

88. 1 WKLY. L. REP. 1006 (1992).

89. *Id.*

90. *Id.* at 1018.

however, a licence for thuggery.”<sup>91</sup> Admittedly, the consistent sentiment expressed by Lord Lane markedly contrasts to the more sporadic precedents of the earlier criminal courts. Indeed, it wasn't until the late 1970s that a burgeoning of this type of prosecution was witnessed on these islands.

In fact, *R. v. Billingham*<sup>92</sup> was the first successful prosecution of a rugby footballer for assault occasioning actual bodily harm for incidents occurring on the field of play.<sup>93</sup> This case centred on an amateur rugby game in South Wales where, during the course of a rather rugged encounter, the accused broke his opponent's leg.<sup>94</sup> The victim was a prison officer whose principals were not content to lose his services in such a manner without an attempt to let similar offenders realise the potential consequences of such behaviour.<sup>95</sup> Therefore, by the time David Bishop, a Welsh international player, punched an opponent on the ground, away from the ball, during a club rugby match in South Wales in 1986, an incident which, because of the intensity of the violence therein attracted a considerable amount of publicity, neither he nor his club could claim that they were unaware of the legal consequences.<sup>96</sup> In the case itself, Mr. Bishop pleaded guilty to common assault for the “off the ball” incident and was duly convicted and sentenced to one month imprisonment, varied to one of twelve months suspended by the Court of Appeal.<sup>97</sup>

Despite the notoriety of the above case involving an internationally renowned player, this ignorance of the penal repercussions of the criminal law remained and a litany of sports prosecutions arising from on-field violence littered the jurisdiction in the 1980s. Rugby Union, in particular, contributed to this increase and included *R. v. Gingell*, where a conviction for inflicting grievous bodily harm was successful, leading to a sentence of six months, which was overturned and reduced to two months imprisonment.<sup>98</sup> Furthermore, in 1986, in *R. v. Johnson*, the accused bit the ear off of an opponent in a police rugby union match and was, quite rightly, charged with the infliction of grievous bodily harm with intent contrary to §18 of the Offences Against the Person Act,

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91. *Case and Comment: Violence*, 36 CRIM. L. REV. 513, 514 (1989).

92. *Case and Comment: Assault*, 22 CRIM. L. REV. 553 (1978).

93. *Id.* at 553.

94. *Id.*

95. *Id.*

96. *Id.*

97. John Goodbody, *Rugby International Jailed for Punch*, TIMES (London), Sep. 2, 1986.

98. *Case and Comment: Sentence*, 25 CRIM. L. REV. 661 (1980).

1861.<sup>99</sup> Johnson was subsequently convicted and sentenced to six months custodial imprisonment, confirmed on appeal.<sup>100</sup>

These prosecutions were not confined to the rugby field, and in 1988, in Swindon Magistrates' Court the accused, Chris Kamara, a professional soccer player, broke the jaw of a fellow professional soccer player after a match. Subsequently, in *R. v. Kamara*,<sup>101</sup> Mr. Kamara pleaded guilty to inflicting grievous bodily harm contrary to §20 of the Offences Against the Person Act, 1861, and was fined a total of £1500, including compensation and costs.<sup>102</sup> It is interesting to note that on February 6, 1997, the *Irish Times* reported that Bradford had decided to initiate legal action against Huddersfield defender Kevin Gray, following his potentially career ending tackle on Bradford's record signing of the time, Gordon Watson.<sup>103</sup> The criminal proceedings against Gray were instigated after a meeting, on that date, between Bradford chairman Geoffrey Richmond, club directors and manager Chris Kamara, whose familiarity with the criminal courts was no doubt invaluable in the circumstances.<sup>104</sup>

1988 had also seen, in Wood Green Crown Court, the case of *R. v. Birkin*.<sup>105</sup> In this instance, the accused had run after and struck an opponent who had 'late' tackled him.<sup>106</sup> The accused duly pleaded guilty to assault occasioning actual bodily harm and was sentenced to eight months imprisonment, reduced on appeal to six months.<sup>107</sup> Similar prosecutions for what could be dubbed 'assault in retaliation' can be found in *R. v. Davies*,<sup>108</sup> though there seems to be a thin line between such a conviction and an acquittal based on the loosely defined defence of 'accident', successfully pleaded in *R. v. Rees*.<sup>109</sup> It is interesting to note that in the later cases the resulting injury had tragic, fatal consequences.

Arguably however, the most specific and significant contribution to the position of sport *viz* the criminal law, in recent times, can be found in

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99. *PC Who Bit Player Loses Appeal*, TIMES (London), Oct. 15, 1986.

100. *Id.*

101. John Goodbody, *Kamara Fined £ 1200 in Pitch Assault Test Case*, TIMES (London), Apr. 15, 1988.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Case and Comment: Assault Occasioning Actual Bodily Harm*, 35 CRIM L. REV. 854 (1988).

106. *Id.*

107. *Id.* at 855.

108. *Case and Comment: Assault*, 38 CRIM L. REV. 70 (1991).

109. Edward Grayson, *Sport and the Law*, in ALL E.R. ANN. REV. 362, 365 (1992).

*R. v. Brown*.<sup>110</sup> In *Brown*, where the law on consent was fully reviewed, the House of Lords confirmed that the existing law on the area indicated that, whereas consent negatives liability for minor harm, the victim's consent does not provide a defence where actual bodily harm is intentionally or recklessly caused, unless the case falls within a range of special "socially acceptable" categories, including lawful sports and games.<sup>111</sup> In the latter context, Lord Mustill's dissenting speech is most authoritative and well worth citing at length, his Lordship taking the view that:

Some sports, such as the various codes of football, have deliberate bodily contact as an essential element. They lie at a 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 the contact sports each player knows and by taking part agrees that an opponent may from time to time inflict upon his body (for example by a rugby tackle) what would otherwise be a painful battery. By taking part he also assumes the risk that the deliberate contact may have unintended effects, conceivably of sufficient severity to amount to grievous bodily harm. But he does not agree that this more serious kind of injury may be inflicted deliberately.<sup>112</sup>

The present law of England, as stated by Lord Mustill in *Brown*, is that no one can consent to serious bodily harm and the participant cannot, therefore, consent to the fact that he might be seriously injured.<sup>113</sup> It suffices to say that, from a practical point of view, this view of "sporting consent" has been strongly questioned regarding its functional applicability to the nature of sport. Indeed, in 1994, the UK Central Council of Physical Recreation ("CCPR") similarly queried the above principle, and their response is worth citing at length:

This raises a crucial question for sport. Does a player who walks on to a pitch be it cricket, football or rugby, for example, consent to the fact that he may be injured but *not* to the fact that he might be seriously injured? Is it right that no one can consent to the risk

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110. 2 WKLY. L. REP. 556 (1993).

111. *Id.* at 592-93.

112. *Id.*

113. Additionally, see the support this approach has received in the UK Law Commission's Consultation Paper dealing, *infra*, with violence in sport entitled: "Consent and Offences Against the Person, Consultation Paper No. 134." This report was published on February 23rd, 1994, and is reviewed in detail by Alexander Radley, *A Study of Consent to Violence in Sport with Particular Reference to the Law Commission Paper No. 134*, 3 SPORT & L. J. 47 (1995).

of serious injury? If a rugby tackle is made within the rules of the game (*i.e.*, not too high and not too late) but nevertheless is an extremely hard tackle and the opponent sustains a *serious* injury as a result of the tackle, the question has to be, did the opponent consent to that tackle? Hard tackles in rugby are not only encouraged but applauded. Any player must, we submit, therefore consent to being tackled hard by walking onto the pitch. If we assume that the tackler did not intend to injure his opponent but did intend to tackle him as hard as he possibly could and if a court held that he applied more force than was strictly necessary and was therefore reckless as to whether his opponent was injured, (notwithstanding the fact that the rules not only permit hard tackling [but] actively encourage it) the tackler would not perhaps be able to rely on the defence of consent.<sup>114</sup>

To this end, the CCPR argues that the line of lawful consent in sport should be drawn on the grounds of what they term the “lawfulness” of the activity in question *i.e.*, that a player consents to the risk of injury, perhaps even serious injury, provided the rules of the sport in question are adhered to.<sup>115</sup> This, the CCPR suggests, addresses the problem that arises in many sports where a particular skill of that game carries an almost unavoidable sense of risk, for example, fast bowling in cricket.<sup>116</sup> As the law stands, a bowler who continues to bowl in this fashion and injures the batsman would risk criminal liability, given that the consent threshold is one of injury and not serious injury.<sup>117</sup> However, if the line was drawn at “lawfulness,” the batsmen would be seen to have consented to the risk of injury, even serious injury, provided the bowler was bowling within the rules and, also, what one could term the “spirit” or “culture” of the game *i.e.*, what was an accepted and expected part of the game.<sup>118</sup>

The CCPR’s argument is that the criminal law should be wary, if not reluctant, to interfere “beyond the touchline” and, when it does so, as it clearly must from time to time, it should do so from the proper perspective *i.e.*, the norms and values of that sport.<sup>119</sup> The CCPR submits that the essential (and practical) problem for the law as it now stands is, that

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114. Central Council of Physical Recreation, *The Law Commission: Consultation Paper No. 134 Criminal Law - Consent and Offences against the Person; A Response on the Issues for Sports and Games*, 3 SPORT & L. J. 4 (1995).

115. *Id.* at 5.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*



in assessing whether the player's conduct is criminal, conformity to the rules of the game is merely persuasive in nature.<sup>120</sup> Unsurprisingly, the CCPR is of the opinion that this is clearly wrong and to be avoided for it may result in an undesirably interfering role for the criminal law in sport, paradoxically threatening the spontaneity, the athleticism and genuine competitiveness that it seeks to protect.<sup>121</sup> As the CCPR put it simply and conclusively in its reply to the UK Law Commission report of 1994,

If the courts are to decide whether an activity is lawful by means of objective criteria and not by means of the rules of a particular game, then there is also a danger that the offending player would not be tried by reference to what was acceptable to his sport but by reference to the opinions on the sport in question by a judge and jury who may never have played his sport.<sup>122</sup>

#### V. IRISH CASE LAW

Ireland has seen some development in this area of the law, particularly as regards the sport of Gaelic football.<sup>123</sup> The most serious incident to date occurred in April, 1999, when a Galway footballer was jailed for nine months.<sup>124</sup> McCutcheon points out, between 1987 and 1992 four other similarly-based cases were referred to the Director of Public Prosecutions.<sup>125</sup> More recently, a number of prosecutions have been noted and on February 19, 1998, the *Irish Times* reported that a player had pleaded guilty to assault occasioning actual bodily harm to an opponent during a North Dublin, Gaelic football, under-21 final in 1995.<sup>126</sup> The Dublin Circuit Criminal Court heard that the incident which led to latter's jaw being broken occurred near the end of a game played amid intense hostility between the rival supporters and that there had been frequent crowd incursions onto the playing field and that this atmosphere had ultimately contributed to blows being struck between the players.<sup>127</sup>

In addition to criminal cases, more and more civil actions are being initiated for football assaults, although the old "omerta" tradition of

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120. *Id.*

121. *Id.*

122. *Id.*

123. Jack Anderson, *Violence, Sport and the Law: An Application to Gaelic Games*, 7 SPORT & L. J. 51 (1999).

124. *Footballer Gets 9 Months for Injuring Player in Junior Match*, IRISH TIMES, Apr. 9, 1999, at 6.

125. McCutcheon, *supra* note 64, at 271.

126. *Sentence on GAA Player Adjourned*, Irish Times, Feb. 19, 1998, at 4.

127. *Id.*

"tell 'em nothing" still pervades and there is a certain social reluctance among those involved in sport to invoke or at least co-operate with the legal process. The law is not seen as a credible sanction for such assaults and it is interesting to note that in two recent assault cases taken in Ireland for violence in sport, both were unsuccessful on the grounds of mistaken identity, both judges expressing their exasperation at the uncooperative attitude of the parties involved including the refereeing officials. One notes a case taken by an aggrieved footballer in the Navan District Court in June, 1997 where the defendant was cleared of assault occasioning actual bodily harm in a Meath senior Gaelic football match in October, 1996 on the grounds of mistaken identity.<sup>128</sup> Similar grounds of mistaken identity led to the dismissal of a claim in damages brought by Donegal Gaelic footballer against an opponent who it was alleged broke the victim's jaw in the match in question.<sup>129</sup>

Given these developments, it is argued that the games organising body, the Gaelic Athletic Association (GAA) will have to reflect on a number of issues, notably, the provision of a comprehensive insurance/compensation scheme for injured players, a reorganisation of the current disciplinary structures and possibly a consideration of the continuing sustainability of the amateur status of the GAA at all levels. In fact, in many of the recent cases mentioned above, reference was made to the inadequacy of the GAA's current compensation scheme for injured players. This insurance-based injury scheme allows for payment of up to £25,000 once medical evidence of injury is submitted but it is a notoriously dilatory system. Apparently, it is extremely difficult to secure compensation from the fund for the player as aggravated by the fact that the amounts paid may not suffice the payment of all medical bills, particularly in the case of serious injury. In addition, there is no compensation outside of medical expenses, therefore time off work is at the players' own expense, and it is regularly the case that players depend on the fund-raising of team-mates to get by. Surely this is not acceptable and it may be time for the GAA to introduce a comprehensive, "no-fault" scheme of compensation as operated by an independent body. As one leading hurler who himself suffered a serious injury has remarked, if the GAA does not act soon they may end up facing a nightmarishly enormous compensation bill such as given in the Ian Knight case.<sup>130</sup>

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128. *GAA Referee and Linesman Criticism in Assault Case*, IRISH TIMES, Jun. 26, 1997, at 9.

129. *GAA Footballer Loses for Damages Against Garda*, IRISH TIMES, Nov. 14, 1997, at 7.

130. Philip Reid, *Absence Makes Dunne's Heart Grow Stronger*, IRISH TIMES, May 17, 1999, at 55. The Knight case refers to English soccer and ex-footballer Ian Knight's claim for

## VI. RECENT IRISH DEVELOPMENTS

In the early 1990s, the Law Reform Commission (LRC) undertook a review of the law on offences against the person. Many of its recommendations were adopted in the Non-Fatal Offences Against the Person Act, 1997.<sup>131</sup> The provision significantly overhauled this area of the law. In particular, it abolished the common law offences of assault and battery and repealed the relevant provisions of the Offences Against the Person Act, 1861.<sup>132</sup>

The LRC Report on Non-Fatal Offences Against the Person devoted a brief section to the issues of sports violence and it presents a useful summary as to the issues involved in this area of the criminal law.<sup>133</sup> Generally, as regards violence in sport, the Irish LRC was of no doubt that criminal liability should continue to attach to acts of violence committed in the course of sporting activities.<sup>134</sup> The LRC was not minded to recommend the extension of a general exemption to persons engaged in contact sports.<sup>135</sup> Nevertheless, the LRC was of the opinion that the criminal law should be viewed as the "policeman of last resort" in these circumstances.<sup>136</sup> Borrowing heavily from a similar review by the Canadian Law Reform Commission, the Irish LRC was of the opinion that the curbing of sporting violence in the long term is better served by administrative and educational measures from the sporting bodies themselves.<sup>137</sup>

The LRC's report also specifically reviewed the question of "sporting" consent. The LRC's brief analysis of this area of the law was quite similar to that which has been enunciated in the English courts. According to the Commission, a participant in a sport may be regarded as consenting to any contact in accordance with the rules of the game, and/or any contact of an accidental nature, arising incidentally in the course of

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£1.5 million in the Sheffield High Court in the UK for an "over the top" tackle during an FA Cup match in 1987. At the time, the claim was the largest made for alleged recklessness on the pitch; it was settled after a day of trial for an estimated £500,000. (reported as *Ex-football Star Claims £1.5m Over Tackle That Ended Career*, IRISH INDEP., Oct. 14, 1997.)

131. LAW REFORM COMMISSION, REPORT ON NON-FATAL OFFENCES AGAINST THE PERSON, 1994, Cmnd. 45, at 272. (*hereinafter* LRC).

132. A brief background to the 1997 Act is given in an Explanatory Memorandum that accompanied its publication. *Non-Fatal Offences Against the Person Act, 1997* (Explanatory Memorandum issued by the Department of Justice, February, 1997).

133. *Id.* at 272-75.

134. *Id.* at 274-75.

135. *Id.* at 275.

136. *Id.*

137. *Id.* at 272-73.

it.<sup>138</sup> In short, if the requisite intent or recklessness is absent and the contact is within the rules and the spirit of the game, the fact that the force used is likely to cause injury will be irrelevant.<sup>139</sup>

In an overall sense, the LRC justified this somewhat laissez-faire attitude to violence in sport on two grounds. Firstly, on the grounds of public policy, where the justification of the self-regulation of sport is tolerated, as “[p]articipation in sports promotes fitness and good health, discipline, teamwork and self-control.”<sup>140</sup> Secondly, the Law Reform Commission quite rightly alluded to the fact that the criminal law is a rather blunt instrument when it comes to regulating violence in sport.<sup>141</sup> If a person suffers a severe injury as a result of taking part in a contact sport, the Law Reform Commission was of the opinion that as the victim undertook that risk of injury as part of a lawful sporting activity, it would then be unjust to prosecute the injuring partner.<sup>142</sup> The LRC felt that the individual concerned would, in effect, be a ‘scapegoat’ for the sport as a whole and unjustly targeted.<sup>143</sup> The LRC stated that it would be far better if, on seeing that there was no possibility of prosecution, public debate would be generated as to whether or not the sporting activity in question, which frequently resulted in serious harm, should be proscribed.<sup>144</sup>

## VII. CONCLUSION

It is submitted that the approach of the Irish LRC towards the issue of violence in sport is quite reasonable. Contact sports are exempted from the usual scope of consent to assault not only on the public policy grounds that they are good for the health of society, but also, because their methods of self-regulation are for the main part satisfactorily drawn. This exemption is not however a license for thuggery, and where

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138. *Id.* at 273.

139. *Id.*

140. *Id.* at 274.

141. *Id.* at 275.

142. *Id.*

143. A similar view is taken in the United States, *see generally* Don Eugene-Nolan Gibson, Comment, *Violence in Professional Sports: A Proposal for Self-Regulation*, 3 L. REFORM COMMISSION OF CAN. 425, 439-440 (1981); RICHARD B. HORROW, *SPORTS VIOLENCE: THE INTERACTION BETWEEN PRIVATE LAW MAKING AND THE CRIMINAL LAW* (1980); GOVERNMENT AND SPORT: THE PUBLIC POLICY ISSUES (Arthur T. Johnson & James H. Frey eds., 1985); and Karen Melnik, *Giving Violence a Sporting chance: A Review of Measures Used to Curb Excessive Violence in Professional Sports*, 17 J. LEGIS. 123 (1990).

144. LRC at 274-75. (With similar reasoning the LRC rejected that idea that boxing should be singled out in specific legislation.)

the inflicted injury is clearly intentional and reckless to the extent that it is beyond the rules and norms of the game in question, the criminal law's threshold of toleration will be breached. This seems to be the accepted position both in the English and Irish courts. It is also the well-established view in many other parts of the common law world, notably Canada.<sup>145</sup>

Finally, and as stated earlier, the history of contact sports is rooted in injury, violence and mishap. Indeed, it is submitted that contact sports provide an outlet for physical contact of a kind not normally tolerated by society is, to a large extent, the *raison d'être* of these sport's popularity. The criminal law has given the public reasonable scope to pursue these activities and only when this exemption is abused to the extent that it threatens general public behavioural standards, will the courts act. Sporting bodies should be careful not to abuse this privilege. They should ensure that they have a strict, consistent and transparent disciplinary code. And to borrow a phrase from one of the most popular contact sports on these islands, rugby union, if sports authorities do not properly use their power of self-regulation to combat excessive violence in their sports, they may lose it, to the criminal courts.

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145. R. v. Green, 16 D.L.R. 137 (1970); R. v. Maki 14 D.L.R. 164 (1970); R. v. Cey 48 C.C.C. 480 (1989).