Prosecuting Sportsfield Violence: A British Perspective

Introduction

The control of incidents of violence between participants in contact sports has long been considered to be within the jurisdiction of the national governing bodies of sports. The criminal courts have only rarely been resorted to. On both sides of the Atlantic, it appeared that as sport was only a game, it was immune from the law, despite the sometimes horrific injuries that could be inflicted.

In Britain, this view is changing. Short suspensions, or small fines for what, if committed anywhere but the field of play, would be criminal assaults, are no longer seen as adequate sanctions. This has resulted in a steady increase in the number of sports participants who are being prosecuted for acts of during the game violence. This is most visible in soccer and rugby, where several professional players have been the subject of criminal prosecutions. Yet these actions are just the tip of the iceberg, as every month, there are further instances of players of all levels being convicted for assaults on their fellows. However, for each case that comes before the criminal courts, many more escape prosecution altogether. This paper will address the problems associated with prosecuting participator violence, a potential solution and the lessons to be learnt from the British experience.

The Law

In England, the criminal law had been only sleeping. The law governing sports violence can be traced to the 1878 case of *R v Bradshaw.*[1] The defendant was charged with manslaughter, having charged the opposing goalkeeper with his knees, knocking him to the ground, during a soccer match. The victim later died from internal injuries. In directing the jury, Bramwell LJ said that,

"No rules or practice of any game whatever can make lawful that which is unlawful by the law of the land."[2]

Although the defendant was acquitted, his defence of accident succeeding, this case set the precedent that sporting contests are not above the law.

Since then, a number of both sporting and non-sporting cases have helped to shape the law in this area. *R v Venna*[3] states that subjective recklessness, or conscious risk taking, as later defined in *R v Cunningham,*[4] is an adequate alternative mens rea for assaults. Most recently, in *R v Brown*[5] it was held that,

"[A player]... assumes the risk that 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."[6]

The recent Law Commission Consultation Paper No. 134, 'Consent and Offences Against the Person' has reiterated the point that participator violence is not above the law.

In 1995, Duncan Ferguson became the first International representative, professional soccer player to be sent to prison for an on-field assault. The judge made the observation that headbutting another player was a serious offence and totally unacceptable behaviour for an athlete and role model for the young. Ferguson was jailed for three months.[7]

In the various codes of football and other contact sports such as hockey, not all impacts between participants are criminal. Many such impacts are not only within the rules of the game, but are a necessary part of it and as such are consented to by the participants. The problem for the law is how to define the circumstances and scope of that consent. Three alternative standards could be argued for:

A participant can only consent to force being applied to him which is within the rules of a particular sport. This would appear to be a

simple test to apply to control participator violence. However, it has three drawbacks. Firstly, it is contrary to the law as stated in *Bradshaw*.[8] Secondly, it would make many technical, non-injurious incidents of foul play crimes. Thirdly, it will not catch a player who deliberately injures an opponent with a hit which is within the rules.[9]

A participant can consent to force being applied to him which is within the playing culture of a particular sport.[10] This test allows participants to consent to contacts which are reasonably foreseeable as part of the game and includes contacts both within the rules and those resulting from commonly occurring, foreseeable breaches of the rules.[11] This test appears to be more workable than the previous one, though still has problems. Again, it does not cover some deliberately inflicted injuries. More significantly, perhaps, is the question of who is to decide the limits of the playing culture. If it is the governing bodies, are they to be able, in effect, to opt out of legal control? If it is the courts, are they to rewrite the rules of sport?

A participant can consent only to the risk of injury, not to that which is criminally inflicted. This is test laid down in *Brown*[12] and is used in the rest of the criminal law. Criminally inflicted injury includes injuries which are deliberately or recklessly inflicted and interfere with the health and welfare of the victim. This test would see the law ignore almost all incidentally inflicted injury. Further, it would mean that sports violence would rarely come to court because of the evidential difficulties in proving a case without a defendant's confession. All defendants would simply claim that it was an accident and part of the game.

As a result of these jurisprudential problems, between *Bradshaw* and *Ferguson*, very few sports violence cases have reached the criminal courts. The majority of actions which do are usually the result of fights in minor league soccer and rugby matches. Very few of the reported cases have involved on-the-ball assaults, which are normally dealt with by the referee. However, with the increased media interest in the punishment of participator violence and the detailed analysis of slow motion replays, the available evidence for use in prosecutions is growing.

Although the injuries received are usually quite minor, it is not uncommon for players to require major surgery. If these injuries occurred anywhere but on the field of play, the perpetrator would find himself the subject of a lengthy custodial sentence. However, in a sporting context, the cases rarely get to court, and when they do, much lower sentences are handed down. This cannot be logically explained, when for over 125 years, the courts have held that assaults on the sports field should be treated the same as assaults committed anywhere else. The law is well placed to deal with on field violence. Why is it then, that prosecutions are so few and far between?

The Role of the Crown Prosecution Service

The Crown Prosecution Service (CPS) is the state prosecutor in England. The first difficulty that it must overcome when trying to formulate policy in relation to participator violence, is the lack of cases that reach it. It is hard to produce coherent prosecution guidelines when so few cases are ever investigated. This problem originates with the lack of complaints that the police receive. The police consider crowd control, not player safety, to be of paramount importance. Participants usually prefer their governing body, as opposed to the police, to deal with on-field incidents. Players are often reluctant to be seen to want to take the matter further than their governing body, especially where fellow professionals are involved. This is well demonstrated by professional soccer player Gary Mabbutt's refusal to take any action following his clash with John Fashanu, which left the former with a titanium plate in his eye socket.[13] The recent increase in the number of cases reaching the courts may possibly be explained by different reasons depending on whether the game is at the elite or non-elite level.

At the elite level, many games are now videoed. This has lead to a whole new type of evidence which is, generally, both reliable and impartial. This allows the incidents to be reviewed at different speeds and where more than one camera is present, from different angles. At

the non-elite level, instead of the video cameras, the police are often present in a non-professional capacity, either as player, spectator or referee. They are thus able to give on the spot advice to all parties involved in an offence which occurs on the field of play.

However, where on-field violence is involved, the police will usually follow the example of a Chief Superintendent of Fife Police, Richard Borrer. Following a fight between two professional soccer players, which left one of them with a broken nose, Borrer felt able to confirm immediately that no police action would be taken, despite the high public profile of the players involved.[14]

Many theories can be postulated as to why so few incidents of on-field violence result in prosecution. These include the lack of severity of most of the injuries, that prosecution is felt to be inappropriate by the players themselves and a general feeling amongst those involved in sport that a certain level of violence is an inherent part of the game. At present, none of these theories can be conclusively proved or disproved, but what cannot be denied is that only a tiny proportion of the technically actionable on-field assaults committed ever reach the CPS.

When a case does reach the CPS, the Code for Crown Prosecutors[15] makes no specific provision for sport. Sports assaults must satisfy the usual two stage test for deciding whether a prosecution should be proceeded with. The two tests are:

The Evidential Test: Is there enough evidence to provide a realistic prospect of conviction?[16]

The Public Interest Test: Is it in the public interest to proceed with the prosecution?[17]

The first test is objective and means that the court, if properly directed, would, on the balance of probabilities, convict. If the CPS do not have this degree of evidence, they do not proceed.

There are always many evidential problems associated with a case of sports violence. Firstly, that the witness statements are usually split along team lines. In only a tiny minority of cases will a player or supporter give evidence that goes against the player from his favoured team. The natural bias of witnesses makes them feel that their player's actions were justified, whilst the opponent is the villain, whether in the normal course of the game or in relation to the assault. This team loyalty distorts a witness's evidence, making it less than objective in the circumstances.

Secondly, many players are reluctant to testify at all against another player. Gary Mabbutt did not want to take John Fashanu to court, despite his anger at Fashanu being cleared by the FA. In the Ferguson trial, the victim, Paul McStay, was so reluctant to give evidence of the headbutt, claiming that it was only a clash of heads, that the Judge asked him, "Do you understand the meaning of perjury? It is lying under oath. It is a serious offence."[18] Thus, many sports assaults cases fail the first test.

Thirdly, is the issue of consent. According to *R v Brown*,[19] it is no longer legally possible to consent to the deliberate infliction of actual bodily harm or more serious harm. Players are only allowed to consent to the risk that serious injury may be incidentally inflicted on them as part of the game that they are playing. But in the course of sport, you are allowed to consent to much more contact than you would in everyday life, which makes comparisons of between sports assaults and non-sports assaults all the more difficult.

Following from this, is the problem of on-the-ball assaults, or those which appear to be a part of the game, such as 'professional fouls'. The evidence in these cases will be much more contentious, with argument centring on whether an incident was intentional, reckless or accidental. The evidence is more a matter of opinion than fact, with 'experts' being called to give evidence as to their interpretation of the incident, as in *R v Blissett*.[20] Only the aggressor himself can ever really know what he intended. Once into this grey area, a conviction becomes almost impossible.

Those that do pass, then have to negotiate the 'public interest test'. In general, it can be said that where an assault is involved, there can be little doubt that it is in the public interest to prosecute. But is the prosecution of sports assaults necessarily in the public interest? Obvi-

ously where serious injury is deliberately inflicted, there can be no doubt that it is. Can the same be said of minor injuries and reckless assaults? Can these be said to be so widespread and such a threat to society that they warrant prosecution to stop sport from getting out of control? Or are they better described as being a natural part of contact sports?

The CPS must balance the public interest of interfering with sport on the one hand and prosecuting crime on the other. It is in the public interest both to allow sport to flourish and to prosecute violent offenders. In high profile cases, they will often hope to make an example of a player to show that he is not above the law (e.g. where elite level players are involved), or will try to show that justice is being done where a serious injury is involved. These prosecutions show that on-field violence will be treated as seriously as any other crime whilst trying to set a good example to everybody involved with the game. It is also hoped that in the long term, these prosecutions will have an effect on all players' attitudes to serious foul play. The players involved in the high-profile cases are often role models for the next generation of players. It is hoped that these younger players will be discouraged from violent play by the threat of following their heroes into the dock.

However, it must be questioned whether the profile of the offender and/or the severity of the injury are the correct factors to use. It could be argued that this would be a sensible way to filter the cases, but this is clearly treating sport as a special case. If the use of an elbow or a headbutt on the street would lead to prosecution, so should it also when it occurs on the pitch. However, to prosecute participants for all breaches of the rules of a game which are technically assaults would be absurd. If every trip or push or over-enthusiastic challenge was prosecuted, sport would cease to exist in any recognisable form.

Further, it is not in the public interest to overburden the courts with a large number of petty offences, especially when there is, at least potentially, an effective alternative system in place which is run by the sports' governing bodies. These internal disciplinary mechanisms are trying to achieve the same ends as the criminal law, namely punishment and deterrence. Although sport cannot opt out of the criminal law, it must surely be in everyone's best interests for the governing bodies and CPS to co-operate on these issues. This would leave the courts to deal with only the more serious matters, but on a more formal footing than at present.

There is also much concern that a participant runs the risk of multiple jeopardy if prosecuted. In most incidents of sports violence, the referee, and later the governing body, will take some action, either by cautioning or sending the player off, and banning or fining him later. In some cases the player's club will also take some action against him, again usually in the form of a fine or a ban. The CPS consider that this is punishment enough for on-field assaults, which are usually committed in the heat of the moment. It saves the time and expense of a protracted trial, which is in any event only likely to result in a fine substantially less than that handed down by the governing body.

Treating instances of sports violence as just another crime is a seemingly impossible task. Usually, there will be severe evidential problems in securing a conviction. However, the problem that is becoming more acute, is whether these prosecutions are in the public interest. In England, there is no cohesive policy and no guidelines to establish which incidents ought to be prosecuted. However, early last Summer in Scotland, the Lord Advocate, Scotland's chief legal officer, issued a series of guidelines to senior police officers setting out the circumstances in which prosecutions ought to be brought.[21] It is yet to be seen how effective these are, but any guidance in this complex and controversial field is a step forward. It is to be hoped that guidelines such as these remove some of the problems relating to sports violence, so that the players know where they stand in relation to the threat of prosecution.

The Future

Resort to the criminal law can be seen as a draconian and inconvenient measure for controlling incidents of on-field violence. Its use has several major drawbacks. Its effectiveness

as a deterrent is unproved, inasmuch as it cannot be said to have reduced player violence in any way. It is inconsistently and relatively rarely used, leading to claims that a player is open to multiple jeopardy for one act.[22] Others argue that it will simply ruin contact sports as we know them and that the criminal justice system is too cumbersome leaving too long between offence and punishment.[23] In its favour is that it brings attention to on-field violence to a very wide audience and creates consistency with the 'real world'.[24]

Although there is a claim by the prosecuting authorities that sports assaults will receive the same treatment as any other type of assault, the courts have not followed this lead. In general, a player convicted of an on-field assault will receive a much lower sentence than somebody convicted of an ordinary assault. More often than not, the perpetrator will receive only a fine and perhaps be ordered to pay a relatively small sum in compensation. There is surely little use in resorting to the criminal law if it is not going to be used to its full effect. Where assaults are concerned, sports prosecutions are not treated as ordinary crimes. For the criminal law to maintain its authority, it must not only act consistently and fairly, but be seen to do so.

Therefore the question must be asked: How should prosecutors approach the problem of sports assaults?

If they prosecute, the CPS is accused of overreacting. If they do not, they are charged with treating athletes differently. By treating sports violence as any other crime, no account is taken of the alternative punishments to which a player may be subjected. By treating them differently, sport is allowed to opt out of the law.

What the prosecutors must do is decide why they are prosecuting players. Is it as a deterrent through punishment? If so, the same results could be achieved by using the governing bodies' internal disciplinary mechanisms more effectively. Is it to protect society? If so, a ban from the game would achieve the same effect, both setting an example to youth and protecting the class of society at risk. Prosecutors must then balance whether the court system is undermined and trivialised by prosecuting sports participants so inconsistently and for a large number of minor assaults, against whether it is brought into disrepute by failing to prosecute clear cases of on-field assaults. What is required is consistency. The Code for Crown Prosecutors lists which factors should be taken into account when deciding whether to prosecute.[25] It would not be hard to do the same for sports assaults

To achieve consistency, a policy on legal involvement must be introduced so that prosecutors know the circumstances in which their discretion ought to be exercised for or against prosecution. Not all sports assaults are worthy of prosecution, whilst others are far too serious to be punished by a sport's governing body alone. For many offences, the police have the ability to caution or bind over, rather than prosecute. There are Home Office guidelines for these situations, just as the CPS has guidelines for deciding which assault offence should be charged in a given set of circumstances. Consistency will only be achieved when the prosecutors have formal guidelines to aid them in the exercise of their discretion in a difficult area.

Although the sports of the UK and the US differ, the philosophies behind their disciplinary systems are the same. They aim to protect the integrity of the game and the players involved. Whatever the arguments against legal involvement controlling sports violence, the reality in the UK is that the use of the criminal law is a growing phenomenon. If governing bodies cannot, or will not, control sports violence, the courts will. This pro-active approach is highly controversial. In some sports, such as rugby, it has lead to longer bans being imposed, which in turn is leading to a decrease in participator violence. Other sports continue to ignore the warning signs and their star players are finding themselves the subject of criminal prosecutions.

US sport is at the stage where action can be taken to prevent the criminal law taking a foothold in sport. In the UK it is already too late. The worst that could foreseeably happen, would be that the courts gain the ability to review the rules and policies of sports and games to ensure they are not too violent. Although that situation is unlikely, it is likely that in the UK, prosecutions for sports violence will continue

to rise for the foreseeable future.

US leagues already have in place tough sanctions for off-field criminal behaviour and the use of performance enhancing drugs. Sports violence can be treated in the same way as these issues, both as a crime and as cheating. If the sports internal punishments do not reflect this, conviction rates may begin to do so.

If US governing bodies act now to punish violence adequately and control foul play through internal disciplinary sanctions, the criminal law will have no role to play. But if they delay too long, they may find that like their British counterparts, leading players end up in prison, instead of in the penalty box.

[1] (1878) 14 Cox CC 83.
[2] Ibid. at 84.
[3][1076] 1 QB 42.
[4] [1957] 2 QB 396.
[5] [1993] 2 WLR 556.
[6] Ibid. at 593.
[7] *The Times* 26-5-95.
[8] Above.
[9] For example, Jack Tatum's hit on Darrly Stingley, which he later admitted in his autobiography, 'They Call Me Assassin' was calculated to injure his victim.
[10] For a more detailed explanation of the 'playing culture' theory see S. Gardiner, 'The Law and the Sportsfield' [1994] Crim.L.R. 513 and G. Williams, 'Consent and Public Policy' [1962] Crim.L.R. 74.
[11] This test was recently accepted as part of English tort law in the unreported case *Elliott v Saunders.*
[12] Above.
[13] *The Times* 27-11-93.
[14] *The Times* 14-8-94.
[15] June 1994 edition. The Code gives basic, general guidance on the conduct of criminal cases.
[16] Ibid. para.5.
[17] Ibid. para.6.
[18] *The Times* 26-5-95.
[19] Supra.
[20] *The Independent* 4-12-92.
[21] For further discussion of the Instructions see, S. Miller, 'Criminal Law and Sport in Scotland' Sport and the Law Journal Vol. 4(2) 40 and M. James & S. Gardiner, 'Touchlines and Guidelines' [1997] Crim.L.R. 39.
[22] See the comments by the Everton management team on Ferguson's release, *The Times* 25-11-95.
[23] S. Gardiner and A. Felix, "Juridification of the football field: Strategies for giving law the elbow." (1995) Vol. 5 No. 2 at 189, Marquette Sports Law Journal.
[24] E. Grayson and C. Bond, "Making foul play a crime." (1993) Sol J at 693.
[25] Code paras. 6.4 and 6.5.

Waivers & Releases for the Health & Fitness Club Industry

by
Doyice J. Cotten

Contact: Doyice Cotten
US Price: $14.95
Canadian Price: $22.95
Binding: Paper
Pages: 82

NEW BOOK HELPS HEALTH AND FITNESS CLUB OWNERS AND MANAGERS BETTER UNDERSTAND WAIVERS AND THEIR USES

Statesboro, GA — The first comprehensive primer describing what waivers are and how they should be used in the health and fitness industry. The book covers the following: (1) introduction to waivers, (2) limitations of waivers, (3) effectiveness of waivers in each state, (4) writing a waiver, (5) administering a waiver, and (6) what to do about minors.

This book will be essential for (1) club owners, (2) club managers, and (3) independent contractors, such as aerobic dance instructors, massage therapists, personal trainers, and sport instructors.

Sport Risk Consulting • 402 Brannen Drive • Statesboro, IL 30458