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CARDIFF METROPOLITAN UNIVERSITY
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**VIOLENCE IN SPORT AND THE ROLE OF THE
CRIMINAL LAW**

**Dissertation submitted under the discipline of
SOCIO-CULTURAL**

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TABLE OF CONTENTS

	PAGE
ACKNOWLEDGEMENTS	(i)
ABSTRACT	(ii)
CHAPTER ONE: INTRODUCTION	
1.0 Introduction	2
CHAPTER TWO: REVIEW OF LITERATURE	
2.0 Introduction to Literature Review	5
2.1 History and the Development of Sport and the Law	5
2.2 Nature of the Sport	6
2.3 Violence	8
2.4 Negligence	9
2.5 Defining moment over Negligence in Sport	10
2.6 Tort Law	11
2.7 The Issue of Inconsistency Surrounding the Law	12
2.8 Volenti Principal	13
2.9 Consent	13
CHAPTER THREE: RESULTS	
3.1 Case Study One: Carrol v Grivil	16
3.11 The facts	16
3.12 Employment	17
3.13 Application to the facts	17
3.14 Conclusion	18
3.2 Case Study Two: Tuilagi v Aston	19
3.21 The Facts	19
3.22 Application to the facts	20
3.23 Conclusion	20

PAGE

CHAPTER FOUR: DISCUSSION

4.0 Themes from Comparing the Case Studies	22
4.1 Compare and Contrast of the Level of Punishment Given to Sports Participants	24
4.2 The Role of the Media and its Effects	25
4.3 The Issue of Paternalism with Comparison to Boxing	26

CHAPTER FIVE: CONCLUSION

5.0 Conclusion	29
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REFERENCE LIST	31
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APPENDICES

Appendix A Ethics Form	A2
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ABSTRACT

The aim of this study will critically evaluate where and when the criminal law should be used to regulate conduct between sports participants on the sports ground. In more recent years a quantifiable concern has arisen over the level and volume of violent incidents between participants taking part in Rugby Union.

In this study there are five chapters, the first contains an introduction about what this study is about and what its main focus is to be. Second, will be a review of the literature surrounding these issues, together with a historical look at sport with insight into the change of amateur to professionalism followed by a look into the concept of the history of sport law and the nature of sport itself. The broader concepts of violence and negligence will then be reviewed, and then contracting this chapter will be a further review of the literature surrounding more specific elements that are significant to the findings of this study. Chapter three will examine two recent examples of case law involving cases of similar melees on the sports field. The discussion will involve extracting identifiable themes from these two case studies with specific look at the need for justice and the punishments sanctioned. The role and effect of the media and, without great exploration, the moral standards and concern that is generated when examining such a subject will be included in the fourth chapter, before concluding the study in the final chapter.

This study involves an underlying notion of how sports-related violence should be understood by both the players involved and society. The findings reveal that specifically to sport, understanding the problematic concept of consent within the law will be of considerable influence when determining the punishments required and whether prosecutions should be initiated.

CHAPTER 1

INTRODUCTION

1.0 Introduction

Sport over the years has become of increasing importance within peoples' lives and plays a major role in society today, whether it is played at a recreational, amateur or professional level. Sport itself instils a variety of essential ingredients into individuals who take part in it both mentally, socially and physically.

The definition surrounding that of sport brings with it a level of uncertainty; it in some ways defies definition. However according to Coakley (2001; 20) 'Sports are institutionalized competitive activities that involve rigorous physical exertion or the use of relatively complex physical skills by participants motivated by personal enjoyment and external rewards.' Comparable to this definition, Singer (1976; 33) understands sport as 'a human activity that involves specific administrative organisations and historical background rule which define objective and limit pattern of human behaviour.' Although lacking in distinctiveness it is clear there are some common themes behind the definition of sport itself, for example the existence of rules and the use physical exertion. These two common themes mentioned make it clearer to see that through participation in sport the element of risk of injury is also involved. Injury can of course be attributed down to a variety of causes most of which could be deemed an accident, for example tearing a muscle simply from running or suffering a wound from a tackle. However injury can also arise from negligent behaviour performed on the sports field. The journal *negligent liability in sport* elaborates on this and states that 'where there is negligence there is scope in the sporting arena for those harmed to take legal action' (Schot 2005; 1).

In the journal *Liability for Professional Athletes' Injuries: a comparative analysis of where the risk lies* James (2006; 15) states 'In the space of little more than 20 years, sport has moved from a position where it operated almost unhindered by legal regulation to a situation where almost any decision of a governing body, or any action of a player, can result in the threat of, if not actual, litigation.' And so for that reason, there is an issue of when is it appropriate for criminal proceedings to intervene when an incidents results in injury on the sports field as a result of one players negligence towards another's. There is obvious need to regulate conduct between sports participants and this has emerged as an increasing concern over recent years. This is not to say that criminal prosecutions have increased, they are still very much an infrequent occurrence, however in light of the recent case of *R v Barnes* and a recent restatement of prosecution by the Crown Prosecution

Service (CPS) there have been questions to arise over the clarity and involvement of the criminal law in the context of negligence in sport.

The commercialisation and commodification surrounding sport is forever increasing, so the need to distinguish where the line between violent conduct in sport should involve the criminal laws' intervention and when it should not is becoming all the more important, as sport could potentially run the risk of portraying negligence and violent behaviour as somewhat acceptable. These concerns only highlight further problems over the clarity and consistency around just how much involvement there currently is, or should be from the law.

Since the first case of an injury caused through the negligent actions between sport participants to come before the courts, the law has had a need to develop rapidly. Liability for an incident must be held accountable for. If there were to be an infliction such as a punch or kick to the head in a public area, it goes without question that there will be some form of intervention involved from the law. If this is compared to a similar incident in a sporting context the application of the principals of the law plays a different and somewhat immoral part. The current defence for this level of discrepancy depends on that of the considered circumstances in which the situation arose and the defence of consent.

The purpose of this study is to investigate the relationship between sports participation and criminal liability. It will evaluate the debate around when it is appropriate for the criminal law to intervene in order to regulate violence in sport today. There is a law established for violent conduct in sport. However as it stands there is a level of inconsistency concerned with its application. The study will focus more specifically on violence in Rugby Union and will take a look at two case studies involving negligent behaviour in the selected sport, which will both be compared in order to highlight key themes and identify problems arising from how they were dealt with reference to the law.

CHAPTER 2

REVIEW OF LITERATURE

2.0 Introduction to Literature Review

The following review of literature will explore themes most relevant to this study. The first two concepts of the history and development of sport and the law and the nature of the sport represent a preface into the topic area of this study. The literature on the broader aspects of the study, violence and negligence will then be reviewed to gain an extensive understanding of the general focus of the study. Subsequent to these broader concepts, the more specific and refined issues will be explored and these will divide into four different categories.

2.1 History and the Development of Sport and the Law

To know when sport initially originated is unclear and 'some analysts have argued that sport as we understand it has its root not in prehistory but in England around the time of industrialisation' (Scambler (2005; 8). Even when dated back so far there is evidence 'to suggest that they were commonly and competitively practised' (Scambler 2005; 9). This competitive nature that is coupled with sport leaves indication to believe that aggression (and then subsequently violence) is likely to occur.

A sub discipline to consider with that of the history of sport is that of the change from amateurism to professionalism. With specific reference to that of Rugby Union amateurism came about through the intention of involving the working class in the game. Rugby Union unlike the Football Association did not make the change from amateurism to professionalism until 'the decision of the International Rugby Board (IB) in August 1995' decided (Smith 2000; 146). A study by Macleod et al focused on the *Impact of professionalism on injuries in rugby union* whose investigation and results concluded that 'the introduction of professionalism in rugby union has coincided with an increase in injuries' (2000; 346). Could the results of an increase in injury then lead on to suggest that the shift from amateurism to professionalism has caused the game to become more violent and forceful in its nature? Supporting this idea Macloed et al writes 'professionalism has resulted in more emphasis being placed on strength, speed, and stamina in all players' (2000; 351). It has been argued by Collins that 'professionalism would inevitably mean the

subordination of the middle-class amateur to the working-class professional' (2009; 27). Which then led a future RFU president to comment over professionalism calling for a 'no mercy, but iron rigor' interpretation (Collins 2009; 27).

The history of sport law vague in its premise, the first issue arises over whether the appropriate term for law in sport should be identified as sport law or whether it would be more accurate to refer to the relationship as sport and the law. When considering the first legal subject, Grayson (1999; 37) connotes that 'no subject exist which jurisprudentially can be called sports law'. This view is supported by in the journal by Woodhouse (1996; 3) when he writes 'there is no such thing as sports law. Instead it is the application to sport situations of disciplines such as contract law (and) disciplinary procedures'. It could be said that such an outlook on the debate is somewhat narrow in its approach. The latter however conceives a wider and more reasoned analysis between the two subjects. For Opie (1996; 74) suggests sports law as 'one of those fields of law which is applied law as opposed to pure or theoretical law, rather than being a discipline with a common legal theme running through it such as criminal law'. Law as a subject is on some level associated with that of the matter of sport, which is where the understanding of incorporating the label of 'law' itself into the subject title initiates. Opie (1996; 79) then later goes on to include the issue of sport and the law has not long being established. He denotes that 'it is something which has occurred only during the last 15 years.' And that it is somewhat 'customary for them to undergo debate until they have been around long enough to establish themselves'.

Law plays an increasingly important role in regulating sport. 'That rule of law, on and off the playing field, is essential for the future of sport in society, whatever sport may mean, as it is for society in general. For without the rule of law in society, anarchy reigns. Without the rule of law in sport chaos exists' (Grayson in Greenfield and Osborn, 2000; 11). The need to implement law into the sporting society stems from the idea that 'law was important in the pre-modern world as a form of control' (Gardiner et al, 2006; 86). In other words the law is in some way a more complex form of regulation. Sport can be seen as a culture that undeniably requires the use of disciplinary intervention based upon Cashmore (2000; 225) view that sport is considered to 'be morally reprehensible and a threat to social order.'

2.2 Nature of the Sport

A common arising challenge associated with the implementation of law in sport is that the perpetrator will often claim that the form of accused battery was unintentional and not simply a result from an act that is part of the game. The difficulties of this challenge according to Gardiner et al (2006; 629) is 'in proving the mental element or trespass has ensured that negligence has established itself as the preferred cause of action for the recovery of damages for sports injuries'.

To say that sport does not provoke aggression would be wrong. When considering specific contact sports such as rugby union, most players would agree that aggression is not only needed but is also important to the game of rugby. In the heat of the game the misconduct of a person can very much be instinctive and unplanned. This could be viewed as a basis as to why such transgression should not be judged by the standards which are applicable to that of social conduct.

Timmer (2002; 205) writes 'attempting to draw a clear line between legitimate and illegitimate conduct during a sports contest is often difficult'. An apparent subject area contributing to this difficulty is that need to consider the nature of the sport. The playing culture of the sport in recent years has become a focal point when establishing whether the defendant acted in an unconnected way to the nature and rules of the game, or whether the act could be considered an integral part of the game and can be expected given the inherent risk towards the participants in the playing of the sport itself.

This having said, such a basis should not act as a justification towards liability for negligence in that of a sporting context. Seeking to win and a mere act of impulsive misconduct should not be recognised as an invite for violence in sport. However it could be argued that 'a player who directs his or her aggression against another in a wild and reckless way is doing so out of desire to win rather than malice' (Cashmore 2010; 316). Reckless disregard in such a circumstance ought to act as more of a fundamental basis for defence, for it takes into account the circumstances of the situation within the game without any form of degree of immunity from tortious liability. Reckless disregard is essentially an alternative theory to that of negligence. The journal 'The standard of care in sport' (Felix 1996; 32) contributes to this by summarising that 'reckless disregard is a more appropriate standard for sport field violence'.

Gardiner et al (1998; 472) endorses the importance for the need to consider the nature of the game for he states that 'it extends not only to play which is within the rules of the game

but to minor infractions to the rules which are accepted as being part of the playing of the game'. Such an act is known as borderline violence. However alongside this, violence brought about through actions committed during the course of the game rarely holds intention to injure. The intent is primarily to gain an advantage or to win. This is an essential ingredient to sport. So instead of deliberating whether the topic of nature of the sport holds enough reasonable ground to be used as a justification for the use of violent conduct on the sports field, would the decision to allow for sports participants to simply adhere to a lower standard of care hold a more rational and reasoning view over this subject area.

The pressure amounting towards the players is inevitably going to be on the increase wherever criminal liability could occur. So with the introduction of reckless disregard offering an alternative justification for violence in sport, the pressure for players to alter their style of play ought to decrease as the threat of civil action could potentially not be the only inevitable outcome. Arguably to this, reckless disregard should not pave the way for such behaviour in sport, but merely allow for more leeway to be given, but punishing negligence in the higher degree.

2.3 Violence

Coakley and Pike (2009; 228) define violence as 'the use of excessive physical force, which causes or has the potential to cause harm or destruction'. Understanding violence plays an important part when considering the application of law into sport. Being able to interpret the form of player violence correctly will have huge influence over the final outcome of a negligence case of an incident. Young (2012; 40) considers the idea that 'pain and injury are viewed as ordinary and acceptable dimensions of sport' both of which can be caused intentionally or unintentional and also be a result of an act of violence. This view then runs in contrast to that of Coakley and Pike (2009; 228) who writes that 'Violence in sports is not new. However this does not mean that it is a natural or inevitable part of sports'.

When considering the subject area of violence in sport there are four categories in which violence can be broken down into. The most useful framework for understanding player violence on the sports field was developed by Smith (1983). Cited in the article by McGraw-Hill, Smith (1983) begins by classifying violence into four categories, the first two are 'relatively legitimate' followed by the last two being 'relatively illegitimate'.

Brutal body contact according to Smith (with relation to Rugby Union) includes tackles, blocks, collisions and hits. All of which are acts found within the rules of the game and are consented to by the players.

Borderline Violence is described as an act that is prohibited by the rules of the games however due to its routine occurrence; overtime is becoming more accepted by players and officials. An example relating to rugby union here would be a scrum punch in rugby.

Quasi-criminal Violence refers to a clear violation of the rules of the game and also a violation of the law itself to some significant degree, for example cheap shots and late hits, some of which can result in severe injury. Punishment towards this category of violence will usual be in the form of fines or suspensions given to the player or players involved in the act of violence.

Criminal Violence is unlawful acts of violence that are clearly outside the law, for example assaults that appear to be premeditated and or deliberate. Although these acts are considered rare, in that the frequency in which they occur in comparison to the other types of violence is low, there is 'growing support that criminal charges ought to be filed when they occur' (Coakley and Pike 2009; 228). Contrasting again to the views of Coakley and Pike, Young (2012; 40) argues that there is a 'commonly held view that courts are in the wrong place to deliberate over player violence'.

In sport, violence can often be associated aggression. However there have been a number of distinctions made in contrast to this association. Fromm (1973;51) states that 'the fact is that competitive sports stimulate a great deal of aggression'. Further to this Scambler (2005; 115) write that 'aggression in sport is a metaphor for commitment.' So the need to distinguish the two subject matters becomes vital when referring to the level of acceptability involved. Scambler (2005; 115) then supports this further by endorsing that 'violence in sport is an intended action to injure the opponent.'

2.4 Negligence

Rogers (1989; 175) in his literature defines negligence as "the breach of a legal duty to take care which results in damage undesired by the defendant to the plaintiff'. Whereas the journal *Sport, Physical Activity, and the law* writes simply that negligence 'is

essentially either failing to do something that a reasonable, prudent person would have done under the same or similar circumstances or doing something that a reasonable, prudent and up-to-date person would not have done' (Dougherty et al 2002; 177). The theory behind negligence runs comparable to that of tort law for it recognises the need to compensate the said persons harmed through the recklessness and carelessness of others. In order for negligence to be established there has to have been an act of conduct that falls below the appropriate standard of duty of care between persons. Contracts are an essential part of the business of sport. 'The fundamental elements of any contract must include an offer and acceptance of the offer and consideration' (Epstein 2013; 107). The contract of a contact sports participant involves keeping a high level of conduct. Reckless behaviour on or off the field will jeopardise the integrity and public confidence in the game. With specific reference to Rugby Union, the Contract of Employment clearly states that the player will 'observe the highest standards in his conduct both on and off the field; and not do or omit to do anything which is likely to damage Rugby or bring it into disrepute.' (RFU 2013, online). Contract law expresses that players must adhere to the terms of employment in which they are hired. If this standard is not met and damage or injury is caused then the act is liable to be considered as negligence and in order to establish an appropriate standard of care, there must be a way to measure how an 'ordinary, reasonable person would act under like circumstance' (Steven 1999; 269). The importance of a contract with particular mention towards violence and negligence in this case could be said to be in place to enforce the prevention of violence in sport.

Negligence can be all too easily satisfied, especially where contact sports are concerned. In reality the line between reckless disregard and negligence is often dismissed unlike in sport, for the consideration of styles of play and playing culture are all of relevance to the circumstances under consideration. 'The difficulty emerges in attempting to define how poor a player's standard of play must be before it is considered to be negligent' (James and McArdle 2005; 3). Sport inherently contains a high element of risk involved and therefore the likelihood of injury is more likely to occur. An act or omission which violates a legal duty will create an element of unreasonable risk and harm between participants. It is defining what the legal standard of negligence is that becomes imperative in order to develop that all important factor of consistency.

2.5 Defining moment over negligence in sport

The case of *Condon v Basi* in sport has been a key defining moment which has influenced

the concerns around negligence in sport. This specific case has been said to be, “the most influential precedent in the area of negligence in sport’ (Charish 2004; 292). The historical background around negligence in sport could be described as imprecise however since this particular case the law ‘has seen a massive growth in recourse to the law and in jurisprudential development in the 20 years since’ (James and McArdle 2005; 3). In 1985, the year of the case, it was decided that if an incident were to occur even in a sporting situation where physical contact is not only inevitable but a requirement, there is an obligation for persons to owe a duty of care towards each other. The case dealt with a reckless tackle resulting in an injury. The claim of negligence succeeded for the decision was made that the standard of care fell far below that expected. The main questions to arise and that which were pivotal to this case was whether the appropriate standard of care was met and whether the act complained was the cause of the injury sustained. Could the ‘negligent’ act be assessed as merely a lapse in skill or an error of judgement? How far does conduct need to be breached in order to be considered as an act of negligence? For, Mcardle and James (2005; 4) respond to this by stating’ while breaching the rules of the sport may be indicative of negligence, it is not the only factor to consider, the playing culture of the game is also relevant.’

This delineating moment established that if injury were to occur as a result of a negligent act or challenge than a sports participant could be liable in tort to another participant. This case identified the need for establishing a specific standard where there previously was none.

2.6 Tort Law

According to the literature *Sport and Physical Education; The Key Concepts* ‘There is no such phenomenon as sport law recognised by the legal system. What exist are branches of law which can be applied to sporting institutions and unsporting situations’ (Chandler et al 2002; 121). Tort law plays an important part in sport today, it is concerned with establishing who should bear the loss and how much should be paid in damages either physically or financially. There are a number of areas that are involved in tort law. The English law states that every person’s body is inviolate, meaning that any touching of another person no matter the degree of injury can be considered as battery. However the criminal law takes into consideration the normal contacts of everyday life, this is where tort law differs. Tort law does not distinguish between the level of battery or injury. It follows the principal that an injury is an injury no matter what the scale of the damage. The effect

of this according to Gardiner et al (1998; 473) is that 'everybody is protected not only against physical injury but against any form of physical molestation.' The role of tort law in sport is to act as a control over the players' violence on the sports field. Anderson (2010; 67) similar to Smith (1983) divides violence into two distinctions 'Legitimate violence, for example is, the violence that is necessary to collide with a catcher in baseball, so that a runner might score a run. Illegitimate violence occurs in purposeful fouls against an opponent: committing and act prohibited by the rules of the sport.' As mentioned, tort is concerned with the compensation of an injured player, both in terms of physical damage and or loss of income that the injured player might have suffered, so by ensuring the perpetrator is punished in a financial way (via compensation pay out) is put in place to act as a deterrent to prevent the use of violence in sport.

2.7 Issue of Inconsistency Surrounding the Law

The inconsistency surrounding the criminal law falls under three areas. The attitude to on and off the ball cases; the similarity between different cases performed in different sporting situations and the lack of consistency between non-sporting and sporting cases. Because of the level of uncertainty surrounding such a topic, it becomes harder for both the participants and the prosecutors to distinguish whether a particular incident will or will not lead to the trial and prosecution of a player. On the ball incidents as said by Gardiner et al (1998; 473) 'are virtually never prosecuted, despite the gravity of injury that can be inflicted.' Gardiner et al (1998; 474) then later goes on the state that 'most reported cases which have involved sport, are centred around an off the ball incident such as a fight'. With regards to similar incidents occurring in different sports there is an obvious high level of inconsistency. Some sports such as rugby have a higher incident and conviction rate, the article *Epidemiology of injuries in English professional rugby union: part 1 match injuries* written by Brooks et al (2005; 757) supports this claim when he writes 'Rugby union is one of the most popular professional team sports in the world, but it also has one of the highest reported incidences of injury'. However in other sports such as boxing it allows for participants to inflict injury with exemption, the fundamental problem surrounding the inconsistency here arises because of different sports being permitted a different level of contact. 'The basis for boxing's immunity from the law is thoroughly confused' (Gardiner et al 2006; 630). A rational justification for this would be to consider the concept of reasonableness playing an important part alongside the consideration of the specific sporting circumstances. The third area is a focal point to this study, Griffith-Jones (1997; 3) states that 'a blow inflicted by a punch or kick may be different where the blow is landed in

the context of some sporting conflict, in comparison with an identical blow inflicted on another occasion, such as in a public house'. So why is it that sport is allowed to act as a mitigating circumstance, especially when considering the that the consequences of violent incidences off the sports field impede remarkably on a persons' life.

It could be said that with the level of inconsistency associated with the criminal law, its level of effectiveness in deterrence towards acts of negligence from the players on the sports field is inadequate. For to Gardiner et al (2006; 630) states that 'proving the intention to commit a trespass is problematic unless the incident takes place off-the-ball or is otherwise unconnected with the play', however criminal law 'must take place on some level if the law is going to retain any semblance of authority over sport' (Gardiner et al 1998; 474). In support of this, the journal *Liability for Professional Athletes' Injuries: a comparative analysis of where the risk lies* (James 2006;16) it is written that 'problems continue with the definition of the applicable standard of care and the amount of evidence required to prove fault in cases of sports negligence'. Young (2012; 40) supports this view when he writes in the literature *Sport, Violence and Society* that when considering 'player violence criminalisation, the authorities remain uncertain as to how to act and how to act consistently.'

2.8 Volenti Principal

An area for consideration related to negligence is the Volenti Principal. 'Volenti non fit injuria' translates from Latin into 'to a willing person, no injury is done.' The connection to negligence is made for the principal holds the meaning that if a person is willing and knowingly putting themselves into a risky and dangerous situation where injury is likely to occur, then the said person holds little ground to litigate. However this principal 'will not come to the aid of a negligent defendant simply because the incident occurred in the course of sport' (James and McArdle 2005; 5). This on some level may be unexpected, for the volenti principal will not simply cover or protect the actions of a sports participant who may have acted negligently even when there is often scope for redress in negligence for persons who are injured in the course of sport.

Establishing where the fault and the blame lies when considering negligence is significant factor. Determining these two factors will play an important role in deciding whether or not the act can be deemed negligent or liable to compensate. For Greenfield and Osborn (2003, online) state in their literature that 'Pure accidents, without any fault, are not any

different on the sports field as they are in the home or the workplace, and are not of themselves something that provides a means of compensation unless there is an element of fault that can be allocated'. The law although somewhat stable in its principle continues to be inapplicable when considering the amount of evidence required to prove fault.

2.9 Consent

An important element surrounding that of criminal liability in sports participation is that of consent. There are various literatures surrounding the topic of consent. The general consensus when considering consent in sport is different to that of the public interest. When a player or participant steps onto the playing field it is presumed that they have consented to the inherent risk of a particular type of injury that is likely to occur in the game. So in other words participants are consenting to unintended injury and deliberate contact that may result due to the degree of risk that the sport involves.

The level of risk naturally alters depending on the sport being played. For example in contact sports such as rugby, taking part will involve forms of battery such as a rugby tackle. Scambler writes that 'the risk of injury has been exacerbated by processes of professionalization and commodification, which have transformed players' physical bulk, prowess, intensity and mental edge' (2005; 96). So does this principal hold concern over the level of consent that is presumed from simply being on the pitch. If these factors are increasing and becoming more apparent the question can be asked does the correlation between consent and risk need to develop simultaneously.

CHAPTER 3

RESULTS

3.0 Introduction to the Case Studies

The following section is going to specifically identify two cases of violence in sport. The two case studies run comparatively along the same lines in terms of the melee involved. The case studies will provide an analysis of the facts and application to the facts, finishing off with a conclusion detailing the decision and actions that were sanctioned. Case study one will also include a section on employment which will cover the issue of a breach in contract.

Following this, at the end of this chapter a comparison will be made between the two case studies establishing what has been developed within these studies. Three identifiable problems from the case studies will be raised with connection to the themes presented in the review of literature.

3.1 Case Study One: Carrol v Grivil

This study will evaluate the case between Carroll and Grivil. This cases' issue was to determine whether the first defendant (Carroll) should be held accountable for punching the claimant (Grivil) during a semi-professional division 2 rugby union match on the 29th October 2005. This relevant case law will be examined against the problematic concept of the law of assault. Looking specifically at whether an apparent demarcation between lawful and unlawful conduct took place. A discussion and analysis of the facts and the application

of the fact will be summarised, concluding with the sanctions given and a look at whether the law was used appropriately to the situation in question.

3.11 The Facts

The standard of the game being at a semi-professional level meant that the incident was caught on camera. The incident under scrutiny is not whether the attack took place for that is evident from the DVD footage and during the disciplinary hearing the first defendant admitted to deliberate assault, but as to whether the attack was deliberate or premeditated. The case resulted in the first defendant being liable for off-the-ball assault committed during the game. The assault took place following a scrum when the first defendant threw a punch which consequently struck the opponent causing him to suffer a blow-out fracture to the right side of his face. The force of the punch resulted in the claimant needing reconstructive surgery to the right orbit of his face.

In rugby it is not uncommon for there to be commotion or encounters between players after the whistle has been blown. The punch was thrown and the referee awarded a yellow card to the first defendant. However at close of play the claimants team alleged that the incident had happened contrary to the IRB Law 10.4 Foul play, Dangerous play and misconduct (a) which states 'Punching or striking. A player must not strike an opponent with the fist or arm, including the elbow, shoulder, head or knee(s).' and that the incident has been provoked (IRB 2014, online)

3.12 Employment

As part of the contract of employment it section 3 states that 'at all times, the player will observe the highest standards in his conduct both on and off the field.' And more specifically 'the player shall not physically assault or abuse match officials, opponents, spectators or colleagues' (Gravil v Carroll & Anor, 2008 online.) So not only has the first defendant become liable for assault he is also in breach of his contract. And the club in which the employment is given could be held accountable for vicarious liability. There is a long established rule which states that an employer is vicariously liable for the actions of their employees if the said action occurred during the course of employment. However the problem to arise from this case is that the employer (the first defendants' rugby club) contends that the tort occurred outside the course of employment because the whistle had already gone.

Being able to distinguish between where the employer is and is not vicariously liable to the acts of an employee is difficult. For determining whether the incident occurred in the course of employment but outside the scope of employment is hard to identify.

The matter under question is whether the tort is so closely connected with the breach of employment that a fair outcome would be to hold the vicarious liability in the hands of the employer.

3.13 Application to the facts

Although it is considered somewhat frequent and ordinary though still undesirable for melees to occur in contact sports especially during that of a rugby match, defining the circumstances around the contract of employment becomes problematic.

The DVD evidence led the court to conclude that the act of tort was part of the game and not independent of it. The court decided that there was in fact a close relationship between the punch and the employment of the first defendant and the punch was thus a breach of the contract. The complication comes from the opportunity in which the situation arose. The claimant did not give the opportunity to be punched the act was merely done in the course of the game (otherwise known as the course of that employment). The non-verbal consent is given by both parties simply by stepping foot onto the sports field, by this they are consenting to a certain level of physical force through the nature of the game. The theory of consent comes with a level of complexity when the tort of negligence is applied to the sports environment. Subsequently there should be no mistaking the opportunity given with that of consent to be punched.

Further to establishing this, the court must deem whether there are grounds to and whether it is fair to hold the club (the employer) liable for the tort. It is important that clubs are not seen to be endorsing the use of violence in sport. Because of its importance the court in this case held the club vicariously liable, in order to be seen to be taking proactive in ensuring the line between fair play and unfair play is endorsed.

3.14 Conclusion

The relevance of this case lies in whether the court decision and actions taken by the law fall at an appropriate level. The tort which occurred resulted in severe damage to the victim and the special damages claimed amounted to over £4,000.

The maintenance of keeping sport safe is challenging given the inherent dangerous activity involved. So the threat of legal liability emphasises to the players the need to play the game in an ethical and disciplined manner.

As mentioned, the court decided that the tort occurred in the course of the game, however the question must arise that why is it that because of the circumstances in which the tort of negligence occurred it was viewed in one respect as acceptable. If such an incident had occurred between spectators on that day, the punishment determined would most likely be incomparable, to that of a match ban and a fine that was imposed upon the defendant. Should criminal prosecutions be greater in sporting context to act as a further deterrent towards violence in sport? Should off-the-ball incidents be treated without consideration to circumstance?

3.2 Case Study Two: Ashton v Tuilagi

This study will evaluate the case between Tuilagi and Ashton. The cases' issue dealt with incident to which Tuilagi pleaded guilty to punching Chris Ashton during a semi-final Aviva premiership match between Leicester and Northampton on the 14th May 2011. This case deals with an assessment of the seriousness of the players' misconduct. With specific look at the punishment and consequences that were decided and whether the consistency between 'crime' and penalty was appropriate.

3.21 The Facts

Similar to the other case study, the level of play meant that the incident was caught on camera. The evidence from the DVD footage showed the citing complaint to be described as follows. The Claimant (Ashton) was initially taken out by an off-the-ball high tackle from the First defendant (Tuilagi). The illegal challenge by Tuilagi resulted in both players being forced to the ground. Ashton subsequently struck Tuilagi with his knee to the upper back and lower neck region, finishing by pushing the opponent with both hands around his

shoulders, all whilst the player was still grounded. The actions taken were as a result in objection to the illegal tackle made by Tuilagi. However this is not the issue in question. The first defendant then almost instantly retaliates to this by assaulting the claimant with two left handed punches and one right handed punch all to the face. The footage shows Ashton to try to yield off the punches in a self-defending manner.

The referee confirmed that he had missed the incident occurring first hand; however after consultation with the assistant referee the decision was made to give both players a yellow card. In the disciplinary hearing held by Blackett, he adds 'from the video evidence available I consider the match officials have responded incorrectly to the facts' (2011, online). This element here once again highlights the area of inconsistency surrounding that of the level of violence to the level of punishment. For both players received the same enforcement when one was unmistakably worse and more negligent. Blackett then supports to this notion by concluding that 'the overtly violent reaction of Manu Tuilagi causing injury to the face of an opponent entirely warranted a Red Card' (2011, online).

3.22 Application to the Facts

The incident started because of an illegal tackle made by the first defendant, the reaction from Ashton although not acceptable is often looked over by officials due to the nature of the game and the frequency of such occurrences. This leads question as to why the force and intent to injure behind the response by Tuilagi was so violent and physical in its nature. There lays little room for provocation holding a rational basis for reason.

The level of entry point of the seriousness of the player's conduct constituted at the top end range meaning the punishment given is anything from an 8-52 week ban. The panel determined a 10 week ban to be appropriate. However with the youth, remorse and inexperience of the player being considered, the panel further reduced the sentence to that of a mere five week ban.

3.23 Conclusion

Similar to the other case study, it is the decisions and actions of the governing bodies and law intervention that needs to be focused on. From the facts it is clear that the first defendant intended to strike the claimant and with significant force. To say he was provoked can almost only be considered a matter of opinion of the panel, who then later sanctioned that the incident 'was not premeditated and the player acted instinctively' (Blackett et al 2011; online). The punishment has to be consistent with a heavy deterrent for that of a wrongful and somewhat criminal act. Tuilagi escaping with a moderate five week ban once again draws attention to the inequality of the relationship between the an act of violence and punishment. Rugby is considered an exciting game and its hard physical contact nature is definitely an element which leads people to this consideration. If this were to be restrained to a certain extent there runs risk of the sport becoming ruined if it were to be softened up. This being said conduct that displays deliberate purpose to injure should theoretically be held accountable outside the immunity of the consent in a sporting environment.

CHAPTER 4

DISCUSSION

4.0 Identified Themes from Comparing the Case Studies

From an analysis of these relevant case studies the apparent identifiable problems to be raised can be divided into three categories.

- 1- Punishment
- 2- Justice
- 3- Moral Concern

First, punishment, it is somewhat fair to say that acts of violence require with it some form of reprimand. There is a need for discretion to be exercised when deciding whether to prosecute incidents of violence in sport. Incidents off the sports field often involve a complaint which then leads to a police investigation, such a process is often not the case for sports incidents. It could be said they uphold some form of code of silence in where

neither party is likely to complain or give incriminating evidence. Both case studies because of the level in which they are played, as stated, were recorded. So pictorial evidence is invariably available for the off the ball incidents, does this not then lead question as to the need for a complaint when such an incident takes place, for the evidence is readily available to provide a grounds for a conviction. The Crown Prosecution Service (CPS) guidelines highlight where there may be a need for punishment on the level of prosecution; however could it be fair to conclude that these guidelines should follow more of a criterion in order for all parties (e.g. participants, match officials and society) to know when the line has been crossed. For Gardiner writes 'The Crown Prosecution Service has recognised its existing policy towards violence on the pitch is ad hoc and there is no clarity or consistency' (2011; 25). Another problem to be identified within that of punishment that can be looked into is that of inconsistency of the level of punishments given to the participants. For example both cases result in the defendant being given a match ban and in the case of the first case study a fine was also given to compensate for the special damages claim by the claimant. Again the issue can be raised as to whether a fine should be an automatic inclusion with a punishment and not only be incorporated when there is a need to pay out for damages. This refers back to the need for a stronger deterrent. Suggestion is orientating towards that of a prosecution after such incidents take place because it would seem the obvious way to level out that division of punishment between on the field and off the field. A match ban is a deterrent in itself, but is also on no similar scale to prosecution. This once again draws back on that issue of inconsistency.

Justice is the second issue to arise from the case studies and links closely to the previous theme raised. The nature of the conduct and in the context of sport is taken under consideration in both case studies, but violence inherently involves a level of social interaction between one person and another. So the need for control, power and more importantly result is increasing. The law and justice run associated. Kent writes that 'Justice means giving to everyone his due' (1903; 334). Within the context of this study this simply signifies that punishment is due unto those who deserve it. Cited in the Book Review: Sports Justice: The Law and Business of Sports by Harris, Abrams defines sports justice as 'the product of the authoritative procedures used in the business of sports to resolve disputes and controversies' (2010; 309). Here Abrams has referred to this issue with the business of sports. Which gives reason to suggest that such matters involving justice are once again divorcing into their own subject areas and in this case, the subject area of sport. Equating onto the assumption that sport in a sense follows its own justice system. Noting this, the presumption has been made that an appropriate way to achieve

justice is within the internal rules of the sport itself, for as this study has shown, the legal system is proving insufficient to achieve such result that society deem fair and just. Surely sport should hold no exception when considering a subject as extensive as justice.

When drawing on this issue with reference to the case studies, justice has in one outlook been given, for both case studies result in actions being taken, but for justice to be labelled and identified as a match ban and or a fine (in the case of the first case study) holds little rationalisation.

The last identified problem, falls under that of moral standard and concern. Sports have a profound effect on society, for example victories impact not only in the economic sense but also in a community sense. The point being made here is that society reflects. The disciplinary rules of the game provide a basic architecture over what is deemed acceptable in order to produce a game of fair play. If not only these laws but also the laws of society are broken in the process, for example the issues arisen in the case studies, then the need for both punishment and justice in a moral consensus need to be upheld. 'In the heat of a sport contest, tempers often flair and reaction may become as prominent as action' (McNamee and Jones, 2003;43) and 'Commitment to doing the moral thing is infinitely more difficult than instinctively responding to poor play, poor officiating and inappropriate actions and undesirable outcomes' (Aicinena 2007;1). The moral concern once again returns to this interest of reflection.

4.1 Compare and Contrast of the Level of Punishment given to Sports Participants

This investigation is going to consider the level of consequences between offences given in the same circumstance as opposed to circumstances outside the environment of sport. Although somewhat of a digression from the main focus of the study, this case study aims to highlight further the area of inconsistency surrounding punishment and criminal intervention in a sporting situation. The detail per case will not be of great detail for it is the comparison between punishments given where the attention and focus are going to lie. Although it could be said that there is much to admire about the attitude of participants in rugby in both relation to the relationship between coaches and players but also that of the respect given to towards officials with regards to their need to discipline. In an article by Carpenter (2013, online) it states that 'decisions by disciplinary panels in sport appear not to reflect the gravity of offences and their real life potential or actual consequences.'

The first incident being explored is that of Cian Healy during a six nations rugby match in 2013. The incident includes the issue of foul play. The first defendant stamped on an opposition's leg when he was laid on the wrong side of a ruck. This is an obvious violation to the rules and breach of duty of care towards the other player involved. Although the foul play was not seen by a referee a complaint was made after the game by the citing commissioner. The decision was made by the disciplinary committee to give Healy a three week ban. Due to the player schedule, this then resulted in the defendant consequently only being banned for one game.

The second case under consideration involves Sergio Parisse of Italy. The defendant was punished for insulting the referee. The disciplinary committee decided that a 30 day ban would be of suitable punishment. The encounter here involved no violent behaviour or conduct yet the punishment sanctioned was greater than that of a more obvious violation to the rules.

The third, alike the first, was an illegal tackle committed by Scotland's' Nick De Luca. However he was handed a 13 week ban, which equates to more than five times longer than that of Cian Healy's punishment for foul play.

The first issue to comment on is the application of the regulations. Why is it the two similar cases listed above are not the two similar cases that receive the similar punishment. Two cases of foul play should surely fall under the same category within the regulations of the game.

The second issue to arise, without suggesting or implying that verbal abuse should be tolerated more leniently, but is as to whether it warrants the same level punishment as that of a obvious violation of the rules that is clearly outside the realms of the legitimate violence that players accept. Morally and ethically and in terms of sportsmanship it could also be disputed that match officials warrant a higher level of respect so in this case it is important to recognise the difference between inconsistencies and differences that rugby examples. The inconsistencies are hard to measure. It could be attributed towards 'A combination of flawed judgement and flawed laws' (Paul 2013, online)

4.2 The Role of the Media and its Effects

An important area to draw on is that of the role of the media towards violence in sport. This study has spoken often about the need for deterrent to play an important role in the regulation and prevention of violent conduct in a sporting situation. The impact of the media is constantly influencing the view and beliefs of spectators and followers of sport. Their impact is only ever going to be increasing as a result of the wide variety of ways in which the media has developed over the years. Sport in the mind of the public has a high profile. And with professional sport having more media coverage not only of the game but incidents of alleged violence constantly extracted and replayed, this it only adds to the reasons as to why violence in sport needs to be treated appropriately, consistently and suitably across the board. The indirect impact that violence has on the public has every potential to result in a developing relationship between media coverage and real life violence. Young and Smith support this when they write 'the problem of media coverage of sports violence and sports violence in general needs to be redressed' (1998; 229). The messages accompanying violence in sport are often seen to condoning and in some light tolerate. The media plays an active role in the depiction and interpretation of violence in sport. When asked about the aspects of sport in which journalist deem most worthy of making the news, the response was 'what can only be described as pro-violent attitudes' (Young 2012; 147). This endorsed by the opinion of Coakley and Donnelly for in their literature they state 'the media present stories stating that violence is rampant in sports and in society, and then they run multiple replays or photos of violent acts, knowing that this will increase their ratings or sales' (2009; 199). As result of such response from the media, there lies extra emphasis on the correlation between sport and violence to be detached, for again Coakely and Donnelly advance this concept by stating "media coverage makes these sports and the violence they contain more visible than ever before' (2009; 201).

Through high levels of publicity it only emphasises the need for violent conduct to be addressed and punished correctly in sport. If sport is seen to condone violent behaviour the additional implications on society and well as the value of sport itself show huge potential. For example with reference to Coakely and Donnelly 'Children watch this coverage and may imitate violent athletes when they play informal games' (2009; 201).

4.3 The Issue of Paternalism with Comparison to Boxing

An obvious area of contrast to this study lies in that of the sport of boxing. Boxing is an obvious area which involves much confusion over its moral and legislative issues. Many

see boxing to encourage and in some way promote such a level of violent behaviour which inevitably can be seen to instrument general social violence. However to compare the sport of boxing to that of unruliness behaviour would be unfair for the strict discipline and sanctions put into place with boxing are there to prevent this. Herrera (2002; 169) claims that boxing is not under question about its morality because it involves participants trying to hurt each other but more to 'the fact that the infliction of this hurt is through the deliberate use of the fists' a concept of which contradicts what is deemed acceptable in society.

For a law to be constituted because something is immoral holds basis for justification. With this being said boxing links highly with immorality, which then leads to difficulty when arguing that it is acceptable to partake without the risk of legal intervention. Davis (1995; 48) accompanies this idea when he states that 'Legal arguments must suppose a moral background; we do not want the law to countenance immorality. But moral arguments generally do not presuppose a legal background.'

Without exploring this issue too in-depth it is hard to avoid the issue of paternalism with regards to boxing because of the recognised and obvious health risks and inflicted injuries involved in the nature and aim of the sport. Paternalism according to Morgan, W 'refers to interference with the liberty of agents for what is believed to be their own good' (2007; 380). More simply paternalism occurs when 'one person makes a decision on behalf of or speaks for another according to what he or she believes is the other person's best interest' (Morgan et al 2007; 207). The interjection of paternalism in boxing brings about the subject argument of autonomy, which can be connected back to this issue of consent. It could be said that it is within the participants' knowledge, understanding and acceptance that participation involves harm. For Dixon (2001; 48) says that 'we should respect the right of autonomous adults to exercise their ability to rationally guide their behavior by their own freely chosen values.' To interfere with an adults' decision to partake in boxing is wrong for it does not treat them as autonomous. So to use paternalism as a basis for restriction within the sport holds little sophistication for an argument.

Jones (2001; 65) convincingly writes in his journal that 'boxing is a sport that involves risk to health. Therefore: Boxing is immoral. Therefore: It should be banned.' He later justifies this view giving the argument formal expression with 'Intentionally harming another is morally wrong. The aim of boxing (uniquely) is intentionally to harm another. Therefore:

Boxing is morally wrong.' Although sense can be drawn from this idea, it at the same time constructs uncertainty over the intention of boxing all together.

From the strong opinions gathered from the literature it is apparent that the need for the law to be upheld on a moral basis is becoming all the more imperative. The law should not be seen to give legal right to injure. Yet the underlying theme running parallel throughout consideration relays back to the issue of consent.

CHAPTER 5

CONCLUSION

5.0 Conclusion

Sport plays a significant role in many peoples' lives and for professionals this is undoubtedly so. Sport displays and encompasses with it a moral virtue. The nature and design of sport for both individuals and society provides an important moral function, it acts as a vehicle for participants to display a means of both self-expression and development.

Rawls, J (1971; 523) denotes this further when he addresses sport in the term of a 'social union' as being 'a community of people with shared ends and common activities valued for themselves, enjoying one another's excellences and individuality as they participate in the activities.'

Sport on some level provides an outlet for violence in sport, but from doing so it runs a high risk of jeopardizing the nature and integrity of the sport. Surely sport should be admired for its respectable traits and not let the violence which occurs on occasion arbitrate this. Sport contains rules; these rules are in some sense set up on the basis of decency, safety and fair play. Rules containing a basis of decency reflect its foundation of the moral standard both involved and required.

Understanding the fundamentals of criminal law can help justify and rationalise why violent behaviour is perceived differently when violence occurs in a sporting situation. This study looked into the harm caused through violence between sports participants, who by entering into the sporting situation assume and understand the risks that the game may produce. In other words it has not considered subjecting the public, spectators or the match officials to any form of negligent act. By segregating the study in this way, this ultimately could be an underlying justification as to why governing bodies, the legal system and society treats violence on the sports field different to that on the streets. This is not to say that this is a rationale for acceptance of violence in sport, for this approach runs its risk of ruining society's moral opinions behind violence both on and off the sports field. Morally, incidents of such nature require an acceptable punishment that should be exacted. If an unacceptable level of conduct on the sports field is treated with immunity from the legal system, the threat to affecting and influencing society's concept of good and bad worsens, 'Particularly in a time seemingly of rising crime rates, and genuine community concern about senseless violence' (Kell 1994; 135).

Sports on the whole should be careful not to abuse what some may deem a privilege. This can be done in way by ensuring that there is strict and all the more important consistent disciplinary code upheld.

A principal concern of this study was to consider where and when the criminal law should intervene in order to regulate acts of violence on the sports field. From the research gathered and explored throughout this study a reasonable conclusion can be drawn that there is reasonable scope to exempt violent acts on the sports field within reason. However if this exemption is seen to be abused, so much so that it threatens both the

moral standard and behavioural standard of the public, then there is and should be a requirement for the legal system to impose a necessary punishment. Endorsing this further, Anderson comments specifically on rugby union by stating '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' (2000; 108).

The issue of consent has been referred back to often throughout this study and it would be fair to conclude that with a more coherent jurisprudential development of the issue of consent the intervention of the criminal law would possess with it that all important matter of consistency. However until this distinction about the law on consent to harmful conduct can be made the position at which the law should and does intervene will always be somewhat unsatisfactory. For athletes are often dismissed from criminal prosecution through the defence of that of consent. This only further reiterates the need for a comprehensible understanding about the definition of that of consent.

A criminal prosecution holds with it not only a deterrent for violent acts but also has a place in regulating contests of violence on the sports field. Should the decision be as simple and in some sense as broad as to only convict what is thought to be far outside relevant rules of the game? The concept of consent has reoccurred and run continuous throughout this study. The applicability of the defence of consent towards violence acts in sport must govern with it a well-defined rules set if prosecutions for battery are to prosper. Criminal prosecutions can be an effective method of portraying to society that unnecessary violence is not tolerated in sport. However in critique of this 'criminal sanctions for sports violence will bring about the downfall of sports, as participants will feel constrained from playing with vigour due to the threat of prosecution'(Binder 1975; 244). Sport violence holds with it a threat to society and in particular to youths. Consequently responsibility needs to be taken in order to abate the unnecessary violence appearing on the sports field correlating over to that in society. When the internal rules and regulations cease to amend and control such an ongoing problem, additional methods of deterrent are essential in order to attain successful balance.

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APPENDIX

A

Date: 20/03/14

To : Rowena Johnson

Project reference number: st20004945

Your project was recommended for approval by myself as supervisor and formally approved at the Cardiff School of Sport Research Ethics Committee meeting of [include the one that applies 29th May 2013, 26th June 2013, 24th July 2013, 16th October 2013, 27th November 2013].

Yours sincerely



Supervisor