

**WHAT HAPPENS ON THE FIELD STAYS ON THE FIELD:
WHEN SHOULD THE CRIMINAL LAW BE EMPLOYED
FOR ASSAULTS DURING SPORT?**

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**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE DEGREE OF
BACHELOR OF LAWS (WITH HONOURS)
AT THE UNIVERSITY OF OTAGO, DUNEDIN, NEW ZEALAND**

OCTOBER 2012

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Introduction

As the Ontario Court of Appeal said in *R v Cey*¹:

But for the element of consent, [sport] involves a continuous series of assaults. Obviously, most of the body contact is consented to merely by the decision to participate in the sport. To determine at what point this consent disappears is not an easy task, but it must be identified in order to determine when a player moves from conduct calling for the imposition of a penalty into conduct which involves a criminal assault calling for a criminal conviction and sentence.

Whenever a person steps onto a sports field, there are certain things that they implicitly consent to: a rugby player consents to physical contact in a tackle; boxers consent to punches being thrown by their opponent; football players consent to tough but fair tackles. But what of conduct outside the rules of the game which results in injury? For example, in 2005 Tana Umaga and Keven Mealamu spear tackled Brian O'Driscoll whilst playing for the All Blacks against the British and Irish Lions.² This action was outside the rules of rugby, and resulted in a serious injury to O'Driscoll. However, no action was taken against Umaga or Mealamu through either the criminal law or rugby's judicial body.³ Further, with the exception of a handful of sparring sports, fighting is outside the rules of nearly every game. Nevertheless, fighting still occurs regularly in both rugby league and rugby union, often going unpunished, or resulting in minor suspensions.⁴ If a fight or spear tackle were to happen on the street the Police and Crown Prosecutors would certainly investigate, if not lay charges, but when these incidents happen during sport they are regularly ignored by these agencies, even when televised to hundreds of thousands of homes in New Zealand. This dissertation aims to determine why sports players in New Zealand are not being charged for actions outside of the rules of the sports they play. Are there legal reasons for this: can there be a defence of consent? Or are there public policy reasons why charges are not being laid: would it be detrimental to the public good to lay these charges?

¹ *R v Cey* [1989] 5 WWR 169; (1989) 48 CCC (3d) 480 (SKCA) at [32].

² For a video of this see RTE Television "Brian O'Driscoll Spear Tackle Lions Vs New Zealand" (1 November 2007) YouTube <www.youtube.com>.

³ Mark Orlovac and Jim Stokes "No action on new O'Driscoll video" (25 October 2005) BBC Sport <www.news.bbc.co.uk>.

⁴ For an example of limited punishments for fighting in rugby league see Paul Crawley "Ten Toyota Cup players facing 13 weeks in suspensions for two separate brawls" *Herald Sun* (online ed, Australia, 24 April 2012).

Conduct on a sports field could lead to actions under the sports code's disciplinary systems, the civil law, the criminal law, or any combination of the three. In New Zealand the Accident Compensation Act 2001 limits the applicability of civil law actions, as no person may bring proceedings outside of the Act for damages arising directly or indirectly out of personal injury covered by the Act.⁵ Although some actions on sports fields may result in actionable civil lawsuits not prohibited by the Accident Compensation Act, such as for exemplary damages,⁶ the majority of injuries arising in sports games will be covered by the Act. Therefore this dissertation will focus only on punishment through the criminal law and the disciplinary body of the sport. There is a limited body of case law on criminal convictions for violence in sport in New Zealand, so a range of other jurisdictions will be considered, in particular the United Kingdom, Canada and Australia.

Assault is defined under s 2 of the Crimes Act 1961 to include 'the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly'. Common assault prohibits the assaulting of any person and is punishable by a maximum of one year of imprisonment.⁷ This is the lowest of the range of relevant crimes against the person in Part 8 of the Crimes Act 1961 in New Zealand.⁸ To be guilty of any of the offences against the person other than common assault, there must be at least intent to injure⁹ or

⁵ Accident Compensation Act 2001, s 317.

⁶ Section 319, and see *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA).

⁷ Crimes Act 1961, s 196.

⁸ The other relevant crimes against the person, in order of severity, are: assault with intent to injure (s 193, punishable by a maximum of three years imprisonment); disabling (s 197, which prohibits wilfully stupefying or rendering unconscious any other person without lawful excuse, punishable by a maximum of five years imprisonment); assault with a weapon (s 202C, punishable by a maximum of five years imprisonment); injuring with intent (s 189, which prohibits injuring any person with intent to injure or reckless disregard for the safety of others, punishable by a maximum of five years imprisonment; and injuring any person with intent to cause grievous bodily harm, punishable by a maximum of ten years imprisonment); wounding with intent (s 188, which prohibits wounding, maiming, disfiguring or causing grievous bodily harm to any person with intent to injure or reckless disregard for the safety of others, punishable by a maximum of seven years imprisonment; and wounding, maiming, disfiguring or causing grievous bodily harm to any person with intent to cause grievous bodily harm, punishable by a maximum of fourteen years imprisonment); manslaughter (ss 171 and 177, punishable by a maximum of imprisonment for life); and murder (ss 167 and 172, punishable by a maximum of imprisonment for life).

⁹ That is to cause actually bodily harm: Crimes Act 1961, s 2.

other aggravating circumstances.¹⁰ The main focus of this piece will be on common assault, as where more serious charges are available it is highly likely that a prosecution would be laid. It is also possible to be charged with common assault under s 9 of the Summary Offences Act 1981.¹¹ The definition of assault is identical to that of the Crimes Act 1961.¹²

A person cannot sue or recover damages under the civil law for an injury to which they consented (the doctrine of *volenti non fit injuria*). Under the Crimes Act 1961, consent, including an honest belief in consent, is preserved as a defence to assault by s 20(1).¹³ The law on consent in New Zealand is spelt out in *R v Lee*, and is considered in detail in Chapter 1.

The basic position on consent in the criminal law in New Zealand is that 'if injury is not intended and there is no reckless disregard for the safety of others, then consent is a complete defence to any charge of assault, provided what occurred comes within the scope of the consent.'¹⁴ Further, 'where injury was intended or where the perpetrator was reckless, consent is still a complete defence, provided what occurred comes within the scope of the consent',¹⁵ although there are some exceptions, notably in relation to fighting.

It is possible for consent to be implied, as is the case in sports encounters.¹⁶ What is difficult to determine is exactly what a player impliedly consents to when stepping onto the field. Some actions clearly go beyond what is consented to, but just how far do actions need to go to become criminal? One divisive line that has frequently appeared is that between conduct within the written and unwritten rules of the sport and conduct outside the written and unwritten rules of the sport.¹⁷ Another distinction often cited is that between conduct

¹⁰ *R v Lee* at [159].

¹¹ Punishable by a maximum of six months imprisonment or a fine not exceeding \$4,000.

¹² Summary Offences Act 1981, s 2(1).

¹³ *R v Lee* [2006] 3 NZLR 42 (CA) at [160] and [311], and *R v Nazif* [1987] 2 NZLR 122 (CA) at p 128.

¹⁴ *R v Lee* at [313].

¹⁵ *Ibid* at [314].

¹⁶ *Ibid* at [308], considering the judgment of Lord Mustill in *R v Brown* [1994] AC 212 (HL) at 258-259.

¹⁷ See *Police v Jones* DC Pukekohe CRN-5057-006-082, 24 April 1996 at 7.

occurring on the ball and conduct occurring off the ball. However, for a range of reasons, these are not always clear tests. This will be considered further in Chapter 2.

Often actions on the sports field will clearly fit within the definition of common assault or even one of the more serious charges. However, the limited number of prosecutions shows that charges are not being laid. There can be two reasons why this is the case: either the actions are viewed as lawful, as consent is seen as a defence, or there are seen to be public policy reasons for Crown Prosecutors and the Police choosing not to bring any charges (where the case is brought to their attention). Both of these possibilities will be examined during the course of this dissertation.

Chapter 1: The New Zealand position on consent as a defence

1.1. The law on consent in New Zealand

The Court of Appeal in *Lee* carefully considered the law of consent in New Zealand in a judgment given by Glazebrook J. The results of the Court's findings are summarised at [313] to [318] of Glazebrook J's judgment:¹⁸

[313] The test in New Zealand at common law is not a results-based test. If injury is not intended and there is no reckless disregard for the safety of others, then consent is a complete defence to any charge of assault, provided what occurred comes within the scope of the consent.

[314] Where injury was intended or where the perpetrator was reckless, consent is still a complete defence, provided what occurred comes within the scope of the consent, except in the situations set out below.

[315] Apart from sparring matches or play-fights and organised matches conducted with a referee and according to established rules, consent is not a defence in relation to fighting. Those involved in sparring matches and play-fights must not be acting in reckless disregard for the safety of others and must not intend to cause bodily injury for consent to be operative.

[316] Where grievous bodily harm is intended, public policy factors may require the Judge to withdraw the defence of consent from the jury. The same applies where a perpetrator acts in reckless disregard for the safety of others. When deciding whether consent should be withdrawn as a defence on public policy grounds in such situations the Judge should take into account the right to personal autonomy, the social utility (or otherwise) of the activity, the level of seriousness of the injury intended or risked, the level of risk of such injury, the rationality of any consent or belief in consent, and any other relevant factors in the particular case.

[317] Under these principles, consent must be left to the jury if there is an evidential basis for it, except where s 63 applies, in cases of fighting, and in cases where grievous bodily harm is intended or where the perpetrator acts in reckless disregard for the safety of others and the Judge withdraws the defence on public policy grounds. Any withdrawal of the defence will usually be a conditional withdrawal as it will be for the jury to decide whether the Crown has proved intent to inflict grievous bodily harm or that the perpetrator has acted in reckless disregard for the safety of others. In any particular case, there may also be other factual pre-requisites to the withdrawal of consent as a defence which may need to be decided by the jury.

[318] Where consent is left to the jury, it will be for the jury to decide whether the Crown has proved both lack of consent (either explicit or implied) and lack of honest belief in consent or whether the Crown has proved that what happened does not come within the scope of any consent and that the perpetrator did not honestly believe that it did.

¹⁸ *R v Lee* at [313]–[318].

While grievous bodily harm will rarely be intended during a sports match, there may be a range of circumstances where players act in reckless disregard for the safety of others. In these circumstances consent may be removed as a defence by the Judge. In other situations, consent can be a defence where there is actual consent or an honest belief in consent, express or implied. Where the defence is an honest belief in consent, there is no requirement of reasonableness, although reasonableness will be material to the question of whether that belief was honestly held.¹⁹

The ruling in *Lee* means that legitimate tackles and actions, provided they fall within the implied consent of the sport, will be allowed the defence of consent. Consent is expressly stated to not be a defence to fighting, apart from sparring, play-fights and organised matches conducted with a referee and according to established rules. This means that consent cannot be a defence to fights occurring on sports fields outside of these narrow constraints. Therefore an assault charge for a fight in a rugby match cannot be defended by a claim it was consented to. Whether there is some other lawful excuse for fighting in a sports match will be examined in Chapter 3. Whether consent will be a defence for actions that break the rules of the sport will depend on whether there is implied consent to the actions or the defendant had an honest belief that the victim impliedly consented. This is more difficult and will be considered in Chapter 2.

1.2. The law on consent in other jurisdictions

The law on consent in other jurisdictions is also summarised in *Lee*, including the United Kingdom,²⁰ Canada,²¹ and Australia.²² In Canada²³ and some states of Australia²⁴ lack of

¹⁹ *Ibid* at [273] and see *R v Nazif*. This position differs from the historical law on consent. Before the Criminal Code Act 1893 came into force (the precursor to the Crimes Act 1961), the common law prevented a person from consenting to be maimed (*R v Lee* at [178] and [180] and see James Fitzjames Stephen *A digest of the criminal law (crimes and punishments)* (5th ed, Macmillan, London, 1894) at 164–165). It was also not possible to consent to anything that amounted to a breach of the peace (*R v Lee* at [178] and see Stephen at 166 and Courtney Stanhope Kenny *Outlines of criminal law: based on lectures delivered in the University of Cambridge* (7th ed, University Press, Cambridge, 1915) at 156–157), or to use the defence of consent for fighting except in organised sport or general sparring (Stephen at 156). The exception for maiming has now been removed, but importantly the exception for fighting has been maintained by the Court of Appeal in *Lee*.

²⁰ *R v Lee* at [182]–[232].

consent is a statutory element of the offence of assault. This is different from New Zealand and the United Kingdom²⁵ where consent is a defence to a charge of assault. However, this distinction has no material effect on the focus of this dissertation, only on who must prove consent or a lack thereof.

In the United Kingdom, the law on consent is that stated by the majority of the House of Lords in *R v Brown*. There, consent is a defence to simple assault, but not to assault that occasions actual bodily harm, except in recognised categories of cases, including lawful sports, surgery, tattooing and body piercing.²⁶ In Canada, although the lack of consent is a statutory element of the crime of assault, it has been held that consent to assault is irrelevant in certain circumstances, where exceptions are required for public policy reasons.²⁷ However, this was not seen to impact on the ability to consent in sporting activities. In Australia, consent is a defence to assault, except to the infliction of actual or grievous bodily harm. However, there are exceptions to this qualification, including lawful sporting events and surgical procedures.²⁸

Although the general New Zealand position is somewhat different from these other jurisdictions, and allows for the possibility of consent to grievous bodily harm, this difference is of minimal consequence, because there are exceptions to the limited availability of consent as a defence for organised lawful sport in these jurisdictions.²⁹ This means that cases from other jurisdictions can be considered in relation to incidents on the sports field in New Zealand.

²¹ *Ibid* at [233]–[248].

²² *Ibid* at [254]–[260].

²³ Criminal Code of Canada 1985, s 265.

²⁴ Queensland (Queensland Criminal Code Act 1899, s 245), Northern Territories (Northern Territory Criminal Code Act, s 187) and Western Australia (Western Australia Criminal Code Act Compilation Act 1913, s 222).

²⁵ Assault is a common law offence in the United Kingdom, therefore see, for example, *R v Brown*.

²⁶ For a summary of *R v Brown* see *R v Lee* at [219].

²⁷ *R v Jobidon* [1991] 2 SCR 714.

²⁸ Mirko Bagaric and Kenneth J Arenson *Criminal Laws in Australia: Cases and Materials* (Oxford University Press, USA, 2004) at 269; David Lanham and others *Criminal Laws in Australia* (The Federation Press, Sydney, 2006) at 251; *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331 (SC).

²⁹ See *R v Brown* in the United Kingdom, *R v Jobidon* in Canada and *Pallante v Stadiums Pty Ltd (No 1)* in Australia.

1.3. Scope of consent

A final point on consent is that it will only be a defence where the actions come within the scope of the activity consented to.³⁰ As was said by Glazebrook J in *Lee*:³¹

Consent to the intentional infliction of harm (and especially grievous bodily harm) is likely, however, to be relatively rare. It will be much more common for people to consent to activities carrying the risk of harm. The risk can be relatively low, such as in a social game of badminton doubles, or of a higher order, such as in professional ice hockey or contact sports such as rugby.

...

This will, in most cases, limit the ambit of the defence to minor harm and reasonable risks as people are unlikely to consent to the infliction of serious harm or to unreasonable risks.

This means that it is crucial to identify either the exact level of injury consented to, or, more commonly, the level of risk of injury consented to.³² As Lord Mustill discussed in *Brown*, there are many different forms of consent:³³

It is too simple to speak only of consent, for it comes in various sorts. Of these, four spring immediately to mind. First, there is an express agreement to the infliction of the injury which was in the event inflicted. Next, there is express agreement to the infliction of some harm, but not to that harm which in the event was actually caused. These two categories are matched by two more, in which the recipient expressly consents not to the infliction of harm, but to engagement in an activity which creates a risk of harm; again, either the harm which actually results, or to something less. These examples do not exhaust the categories, for corresponding with each are situations of frequent occurrence in practice where the consent is not expressed but implied.

In many cases there is no express consent to a level of risk.³⁴ In these situations consent must be implied from the undertaking of the activity itself,³⁵ which will be considered further during Chapter 2.

³⁰ *R v Lee* at [308].

³¹ *Ibid* at [304] and [308].

³² *Ibid* at [308].

³³ *R v Brown* at 103.

³⁴ The judgment of Lord Mustill in *R v Brown* at 103.

³⁵ *R v Lee* at [308].

Chapter 2: What does implied consent cover on a sports field?

In sporting situations, consent will most frequently be an implied consent to the reasonable risk of injury associated with playing that sport. However, it is not always clear exactly what is impliedly consented to. The general rule established in *Lee* is that the scope of any implied consent will be determined by reference to largely objective criteria.³⁶ This point was obiter in the case, and referred to the Canadian judgments of *Cey* and *R v Leclerc*.³⁷

2.1. The key Canadian cases

Cey is a Saskatchewan Court of Appeal case dealing with a charge of assault causing actual bodily harm. This arose when an ice hockey player checked an opponent in the neck with his stick, causing concussion and injuries to the mouth and nose. The victim, despite saying he had never been hit so severely before, accepted the risk of those injuries.³⁸ The action was outside the rules of the game being played, resulting in a five minute penalty against the accused.³⁹ The only active issue for the Court was whether there had been consent to the injury. As the Court stated:⁴⁰

It is clear that in agreeing to play the game a hockey player consents to some forms of intentional bodily contact and to the risk of injury there from. Those forms sanctioned by the rules are the clearest example. Other forms, denounced by the rules but falling within the accepted standards by which the game is played, may also come within the scope of the consent.

It is equally clear that there are some actions which can take place in the course of a sporting conflict that are so violent it would be perverse to find that anyone taking part in a sporting activity had impliedly consented to subject himself to them.

The Court found that there must be only one standard of implied consent in each game, which requires reference to objective criteria.⁴¹ The Court then gave a number of objective criteria for the determination of implied consent: the conditions under which the game at

³⁶ *Ibid* at [308].

³⁷ *R v Leclerc* (1991) 67 CCC (3d) 563; (1991) 4 OR (3d) 788 (ONCA).

³⁸ *R v Cey* at [4].

³⁹ *Ibid* at [8].

⁴⁰ *Ibid* at [15]–[16].

⁴¹ *Ibid* at [19]. Interestingly, the Court also qualified that statement, saying that in a fight between two players, there may be additional, more specific consents, before leaving the qualification unqualified.

issue is played;⁴² the nature of the act at issue;⁴³ the degree of force employed;⁴⁴ the degree of risk of injury;⁴⁵ and the probability of serious harm.⁴⁶ In considering these criteria, the state of mind of the accused will not be especially significant, except so far as to determine whether the accused intentionally applied force to the body of the victim.⁴⁷ The test then is to weigh these criteria to determine whether the action was so violent and inherently dangerous to have been excluded from the implied consent.⁴⁸

In *Leclerc* the Ontario Court of Appeal built on the test from *Cey*. This case involved an ice hockey match where the rules did not permit bodily contact. However, the accused hit the victim in the back with his stick, which was outside the rules of the game, and the referee awarded a five minute 'match penalty' against the accused for a deliberate attempt to injure.⁴⁹ The actions resulted in the victim suffering a dislocation of his spine, and becoming permanently paralysed from the waist down.⁵⁰ At trial, the judge found that the accused pushed the victim in the back, but that it was not deliberate and vicious, finding that even in a non-contact league, all players expected and accepted the risks of contact inherent and reasonably incidental in the spirited play of hockey at this level, which the Court of Appeal confirmed.⁵¹ On appeal, the Court said that the objective criteria from *Cey* need not be rigidly applied.⁵² In its view, regard should be had to the whole of the conditions under which the game is played.⁵³ The Ontario Court of Appeal added a further objective criteria to consider: whether the rules of the game contemplate contact.⁵⁴ It was found that:⁵⁵

The weight of judicial authority appears to be that a player, by participating in a sport such as hockey, impliedly consents to some bodily contact necessarily incidental to the game, but

⁴² Ibid at [20].

⁴³ Ibid at [21].

⁴⁴ Ibid at [21].

⁴⁵ Ibid at [22].

⁴⁶ Ibid at [22].

⁴⁷ Ibid at [24].

⁴⁸ Ibid at [26].

⁴⁹ *R v Leclerc* at 790.

⁵⁰ Ibid at 790.

⁵¹ Ibid at 791.

⁵² Ibid at 795.

⁵³ Ibid at 795.

⁵⁴ Ibid at 796.

⁵⁵ Ibid at 797.

not to overly violent attacks, all of which should be determined according to objective criteria.

The Court held that 'conduct which evinces a deliberate purpose to inflict injury will generally be held to be outside of the immunity provided by the scope of implied consent in a sports arena'.⁵⁶ The ultimate test was whether the conduct of the accused 'was so inherently dangerous as to be excluded from implied consent'.⁵⁷

2.2. Problems with these decisions

There are a number of problems with these tests outlined. Firstly, the tests from *Cey* and *Leclerc* take a focus only on violent and dangerous sports. If the same test of considering whether conduct was so violent and inherently dangerous to be excluded from consent were to be applied in non contact sports such as netball or cricket, there would be an anomaly. A player tackling another player to the ground in these sports is acting completely outside the rules, and the tackle would not be impliedly consented to. Despite this, using the *Cey* test, this conduct is not sufficiently violent or inherently dangerous to be excluded from implied consent. The problem is not with the six objective criteria outlined in the two cases, but with the ultimate test they outline.

Secondly, the use of the six objective criteria from *Cey* and *Leclerc* does not make the law any clearer. It merely outlines a list of criteria that need to be considered in each case, which generally would be considered even without the test. There is no clear indication in each case for individuals to determine what conduct will and will not be seen as criminal. This decision would turn on a judge balancing the factors in each set of circumstances.

Thirdly, the test outlined makes no attempt to define what conduct will and will not be characterised as criminal, or outside the possible realms of implied consent. There will be some things which will always be within implied consent, and some things which will never fall within implied consent, and these are considered at [2.4]. Although there will be a grey area where implied consent will be determined in the particular circumstances, attempts should be made to limit this area.

⁵⁶ Ibid at 797.

⁵⁷ Ibid at 797.

There are also further problems with considering this Canadian test as the law in New Zealand. In both *Cey* and *Leclerc*, the Court considered only actual implied consent.⁵⁸ Although it is possible in Canada for an honest belief in implied consent to be a defence,⁵⁹ in both cases this was not considered, as the defence in each case was that there was actual implied consent.⁶⁰ This leaves an area of the law unconsidered, where the accused has an honest belief in consent on the part of the victim.⁶¹

Finally, the use of the *Cey* and *Leclerc* tests in *Lee* was only an obiter statement by the Court of Appeal. This means the use is not binding on future courts, and the correct test is yet to be finally determined in our Courts. However, it does stand in good stead, and lower courts would be unlikely to directly oppose this position. A number of other tests have been proposed in other case law and academic writing, so I will consider these to try and determine the appropriate test in New Zealand. However, elucidating a clear test for all situations would be close to impossible, because the same action could be acceptable in some circumstances, but not acceptable in others. There needs to be some ambiguity left in the test for the fact that this is a very fact based area of the law.

2.3. Other proposed tests

Although there are some actions which clearly are consented to, and others that clearly go beyond the scope of consent in any sport, there is a difficult area between these two extremes.⁶² Other tests have been discussed which seek to limit the grey area between these two extremes. A range of these tests are considered below.

⁵⁸ Under s 244(1) of the Criminal Code of Canada 1970, now s 265(1) of the Criminal Code of Canada 1985.

⁵⁹ Under s 244(4) of the Criminal Code of Canada 1970, now s 265(4) of the Criminal Code of Canada 1985.

⁶⁰ *R v Cey* at [24]; *R v Leclerc* at 791.

⁶¹ *R v Nazif*.

⁶² See *R v Cey* at [18] where it was said that 'Between, on the one hand, those forms of intentional bodily contact sanctioned by the rules and thus ordinarily included within the scope of the implied consent and, on the other, those forms which are beyond the rules and so violent as to be obviously excluded from consent, lie a host of others, many of which will present uncertainty. Since this is a matter of degree, the question becomes what, in general, is it that serves to distinguish those which exceed the ambit of the implied consent from those which do not.'

2.3.1. On the ball vs. off the ball conduct

Under this test, conduct on the ball or reasonably incidental to the play is seen to be consented to, whereas conduct that occurs off the ball or after play has finished is viewed as criminal. This test has been described a number of different ways. In *Criminal Laws of Australia*, the following test is outlined:⁶³

The use of force, whatever its degree, must be reasonably incidental to the game. Where the force used is outside the course of play it will not be covered by consent.

In *R v Leyte*,⁶⁴ the court found that there is consent so long as reactions are 'instinctive and closely related to the play', whether or not a foul is being committed.⁶⁵ This was elaborated on:⁶⁶

Where there is a significant time interval between the termination of play and the blows struck, and where the players by their conduct have after the stoppage of play ceased to be aggressive so that their subsequent actions should no longer be instinctive, then the players cannot be deemed to consent to assaults at that stage.

There are problems with this decision in *Leyte*. Simply because actions are instinctive does not mean they cannot be criminal. Further, there is no need for the play to have finished for actions to be criminal. The result in the case was also dubious. In the case, a handball player (a reasonably low contact sport) was found to consent to being punched in the face, resulting in a broken nose, because the incident occurred instinctively. Ignoring the fact that fighting could not be consented to in New Zealand, this should have been found outside the implied consent.

The general test distinguishing between conduct on the ball and off the ball has been proven to be inadequate. In *Cey*, the Saskatchewan Court of Appeal discussed the distinction between conduct on the ball and off the ball; however it found that conduct on the ball could still be criminal.⁶⁷ For example, if a rugby player, instead of tackling his opponent who had the ball, punched him to stop his momentum, that conduct would be on

⁶³ Lanham and others, above n 28 at 253.

⁶⁴ *R v Leyte* (1973) 13 CCC (2d) 458 (ONCC).

⁶⁵ *Ibid* at 458.

⁶⁶ *Ibid* at 458.

⁶⁷ *R v Cey* at [14].

the ball, yet clearly not within the implied consent. In *Crichton v Police*,⁶⁸ the defendant was found guilty of assault for grabbing the testicles of another player during the course of a tackle in a game of rugby league, despite this conduct occurring on the ball. In *R v Barnes*,⁶⁹ where off the ball conduct was seen as criminal, the English Court of Appeal found that some conduct on the ball, amounting to an unreasonable risk of injury, would also be criminal.

Simon Gardiner⁷⁰ explains that whilst convictions for conduct on the ball are rare, they are not unheard of. He says that 'the law of assaults has been deployed mainly for off the ball incidents, which are less controversial and can be more easily constructed as criminal acts'⁷¹ than on the ball assaults. Although 'there have been far fewer prosecutions for violent on the ball incidents during play'⁷² the author finds that they are possible.

Therefore the principle from this test might be best stated that conduct occurring off the ball or after play has ceased should not be seen to be consented to. However, this may prove to be problematic in games such as ice hockey and Australian Rules football where part of the game is played off the ball. The test could be modified to consent being removed after the whistle has been blown, but that is unnecessarily limited. Instead, the test could be couched in terms of within play or outside play of the game.

2.3.2. Conduct within the written and unwritten rules and spirit/norms of the game vs. outside the written and unwritten rules and spirit/norms of the game

This is one of the most commonly cited distinctions, although the test is often worded slightly differently. Under this test, conduct that falls within the written rules of the game, or the unwritten rules and spirit or norms (sometimes referred to as playing culture) of the game will be consented to, and therefore not criminal. Actions falling outside of this will lack

⁶⁸ *Crichton v Police* HC Christchurch AP382/92, 17 December 1992.

⁶⁹ *R v Barnes* [2004] EWCA Crim 3246.

⁷⁰ Simon Gardiner "Should more matches end in court?" (2005) 155 NLJ 998.

⁷¹ *Ibid* at 999.

⁷² *Ibid* at 998.

consent, and therefore be criminal. Hazel Hartley defined this test as between sanctioned and unsanctioned violence.⁷³

In *Cey* the court held that conduct outside of the rules, but within accepted standards under which the game is played, will not be criminal.⁷⁴ In *R v Jobidon*, consent was seen as a defence to conduct within the customary norms and rules of the game.⁷⁵ In *R v Chu*,⁷⁶ conduct within the rules, including the unwritten rules, was not seen as criminal, whereas conduct outside this was deemed to be criminal. In *Police v Jones*, foul play and actions outside the rules or spirit of the sport were seen as potentially attracting criminal liability.⁷⁷ However, general terms such as 'foul play' do not assist in determining whether a particular act is criminal or not, as there can be many different views on what these terms entail.

An interesting point raised in some Canadian cases was that what falls within the unwritten rules will vary from game to game. In *R v McSorely*,⁷⁸ the court found that the unwritten rules must be determined in the particular game, as referees exercise considerable discretion in awarding penalties.⁷⁹ Where the referee allowed rougher play and more breaches of the rules without penalisation, the actions falling within the unwritten rules were much wider. The same test was applied in *R v TNB*.⁸⁰ This finding that the rules are indefinite⁸¹ is problematic, as it imports further uncertainty into the situation.

However, the universal effectiveness of this test has been questioned. In *Barnes*, the English Court of Appeal found that not all conduct outside the rules of the game would be criminal:⁸²

The fact that the play is within the rules and practice of the game and does not go beyond them, will be a firm indication that what has happened is not criminal. In making a judgment

⁷³ Hazel J Hartley *Sport, Physical Recreation and the Law* (Routledge, Oxon, 2009) at 95.

⁷⁴ *R v Cey* at [15].

⁷⁵ *R v Jobidon* at [128].

⁷⁶ *R v Chu* [2006] BCPC 587.

⁷⁷ *Police v Jones* at 7.

⁷⁸ *R v McSorely* [2000] BCPC 116.

⁷⁹ *Ibid* at [22].

⁸⁰ *R v TNB* [2009] BCPC 117 at [93].

⁸¹ *R v McSorely (Sentencing)* [2000] BCPC 117 at [2].

⁸² *R v Barnes* at [15].

as to whether conduct is criminal or not, it has to be borne in mind that, in highly competitive sports, conduct outside the rules can be expected to occur in the heat of the moment, and even if the conduct justifies not only being penalised but also a warning or even a sending off, it still may not reach the threshold level required for it to be criminal.

It is difficult to reconcile this statement with the preceding three paragraphs. It could possibly be combined with the other tests if this statement was seen to only cover written rules of the sport. Unwritten rules would then determine whether conduct was considered or not. However, the statement refers to the 'rules and practice' of the game, which would also include the unwritten rules.

As is stated in *Criminal Laws in Australia*:⁸³

It would be tempting to hold that participants do not consent to conduct in breach of the internal rules of the game. But breaches of the rules occur frequently and to hold that every breach destroys consent would effectively destroy the game itself.

This means that the unwritten rules of the game need to be couched very widely, so as to prevent every breach of the rules from being criminal. For this test to be workable would require the unwritten rules and norms to provide that breaches of the written rules are possible, as is seen in *Cey* and *McSorely* where the unwritten code of conduct was seen to be superimposed on the written rules.⁸⁴ However, having to determine whether something is within the unwritten rules of the game simply creates more vagueness in the test.

A further problem with this test is that it could lead to normalisation of dangerous and unacceptable practices, such as fighting in rugby and rugby league through the unwritten rules and norms of the sport.

A possible modification to this test could be that conduct within the written rules and the unwritten rules and norms of the game will be consented to, and therefore not criminal, unless there are public policy reasons to negate this. Conduct outside the written rules and unwritten rules and norms of the game will be an indication that conduct is not consented to, and therefore criminal, however this will not necessarily apply in all situations.

⁸³ Lanham and others, above n 28 at 253.

⁸⁴ *R v McSorely* at [18].

2.3.3. Do generally tolerated breaches of the rules fall within implied consent?

It has been argued that rule-breaking conduct that leads to bodily injury can still be lawful, if it is within the 'playing cultures' or 'norms' of the sport.⁸⁵ However, other cases and authors have viewed the topic differently. As the Court said in *Cey*:⁸⁶

The mere fact that a type of assault occurs with some frequency does not necessarily mean that it is not of such a severe nature that consent thereto is precluded.

It is difficult to reconcile these two positions: on the one side, that frequent breaches of a rule may cause that breach to become an unwritten rule; and on the other, the fact that frequent breaches may still be criminal.

Glanville Williams wrote that players are deemed to consent to breaches of the rules, 'if it is the sort of thing that may be expected to happen during the game'.⁸⁷ However, *R v Ciccarelli*⁸⁸ considered this statement, and found it inappropriate, saying that such an approach 'panders to a public appetite for violence as entertainment ... Violence in sports is father to violence in everyday life.'⁸⁹ The Court held that there is no doubt that actions meeting the test for assault happen in sport regularly, but that does not mean they are not assaults. 'That assaultive incidents happen does not mean they are accepted by the players.'⁹⁰

Allowing frequent breaches of the rules to become a part of the unwritten rules can create unsatisfactory results. In *TNB*, Frame J said 'I cannot find that this punch was unlike any other thrown in this game or any other game'.⁹¹ Just because fighting is commonplace in some sports should not cause it to lose its status as criminal. The result in this case was

⁸⁵ Gardiner "Should more matches end in court?", above n 70 at 999.

⁸⁶ At [28].

⁸⁷ Glanville Williams "Consent and Public Policy" [1962] Crim LR 74 at 81.

⁸⁸ *R v Ciccarelli* (1989) 54 CCC (3d) 121 (ONDC).

⁸⁹ *Ibid* at [21].

⁹⁰ *Ibid* at [34].

⁹¹ *R v TNB* at [100].

concerning, because it was held that fighting, head butting and eye gouging were within the generally accepted unwritten rules of the game.⁹²

Again, this cannot be a clear dividing line to apply in all cases. However, it may be relevant for the judge to consider in each case whether the actions amounted to a common breach of the rules, or whether they were unusual.

2.3.4. Breaches of rules for the safety of the players vs. rules for enhancing the playing of the game

In Criminal Laws of Australia, a distinction between different types of breaches of the rules of the game was considered.⁹³ Breaches of rules which are merely designed to enhance the game are seen as consented to, and therefore not criminal. However, breaches of rules which were designed for the safety of players are viewed as lacking consent and therefore criminal. Examples of these safety rules would be those preventing spear tackles in rugby, or kicking of the ball out of the goalkeeper's hands in football. This approach was applied in *Nabozny v Barnhill*⁹⁴ in the United States of America and *Re Lenfield*⁹⁵ in Australia.

Although this could be a useful distinction to draw, not all breaches of rules for the safety of players could be considered criminal. High tackles are outlawed by the rules of rugby and rugby league for the safety of players, however not every high tackle could be considered criminal. Players may slip, resulting in a high tackle, or slight mistiming could result in the same. Neither of these situations would deserve criminal punishment. Although this lack of criminality can be seen as due to the absence of intent, rather than the absence of consent, there is still intent to apply force to another person, despite the resulting force differing from that intended. It may also be difficult to determine whether a particular rule is for safety or for the playing of the game. For instance, early and late tackles in rugby and rugby league are prohibited, partly so that the game can be played without interruption, but also for the safety of players involved. Nevertheless, this could be an objective criterion to add to the list of considerations from *Cey*, to be considered by the judge in any case.

⁹² Ibid at [31], [50] and [88].

⁹³ Lanham and others, above n 28 at 254.

⁹⁴ *Nabozny v Barnhill* (1975) 31 Ill App (3d) 212.

⁹⁵ *Re Lenfield* (1993) 114 FLR 195.

2.3.5. Clear intention to cause injury negates consent

This is the position in Canada and England. In Canada, a defendant cannot claim consent where there was an intention to cause serious hurt or non-trivial bodily harm.⁹⁶ In other words, a clear intention to cause injury negates consent.⁹⁷ In England, consent is no defence where bodily harm is intended and/or caused.⁹⁸ *Barnes* confirms that ‘the intentional infliction of injury enjoys no immunity.’⁹⁹ As Bastin J stated in *Agar v Canning*:¹⁰⁰

Injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of the implied consent.

Lee provides that in New Zealand the test is not a results based test,¹⁰¹ therefore that part of the English position cannot apply. *Lee* also provides that consent is still a defence to the intention to cause injury, unless public policy dictates otherwise.¹⁰² It may be possible to create a new exception in New Zealand, denying consent as a defence when there is deliberate intent to cause injury during sport. However, the Court of Appeal in *Lee* stressed that exceptions to the general rule would be rare.¹⁰³ An exception here would run contrary to the general test in New Zealand, and is unlikely to be implemented.

However, it may be possible to find that clear intention to cause injury would negative implied consent in New Zealand. This would not run counter to the general rules stated in *Lee*. Further, if there was actual consent to the injury, then that would still stand as a defence. As the Court of Appeal said in *Lee*, it would be unusual for a person to consent to actual injury; instead implied consent will generally be to the risk of injury.¹⁰⁴ Where a

⁹⁶ *R v Jobidon* at [127].

⁹⁷ *R v Leclerc* at 788.

⁹⁸ *Attorney General's Reference (No. 6 of 1980)* [1981] 2 All ER 1057 (CA) at 1059.

⁹⁹ *R v Barnes* at [14].

¹⁰⁰ *Agar v Canning* (1965) 54 WWR 302 (MBQB) at 304, affirmed in *Agar v Canning* (1966) 55 WWR 384 (MBCA).

¹⁰¹ *R v Lee* at [313].

¹⁰² *Ibid* at [315].

¹⁰³ *Ibid* at [296].

¹⁰⁴ *Ibid* at [304].

person intentionally injures another player on a sports field, that would fall outside of the implied consent.

2.3.6. Other distinctions

Other distinctions have also been raised, however they do little to bring clarity to the situation. For example, Hazel Hartley distinguished between four types of violence, seemingly building on the work of Michael Smith.¹⁰⁵ However, this distinction does not help to distinguish between what conduct will be legitimate and what will be criminal.

Conduct outside the contemplation of the game

TNB is another case where conduct within the rules, including unwritten rules, was deemed not to be criminal. Interestingly, in this case the court found that conduct is contemplated if it is punishable by penalties for being a breach of the rules of the game.¹⁰⁶ Where conduct was contemplated by the rules of the game, it was seen to be consented to, and therefore could not be criminal. However, this test would create anomalies across sports. In sports where there is a rule penalising very violent conduct, that would be seen as within the contemplation of the rules. Violent conduct should not be treated differently because it is within the contemplation of the rules. A more comprehensive rulebook would result in less conduct being viewed as criminal.

Iowa Code definition of assault

The Iowa Code takes another approach to criminal assaults in sport. In it, there is a defence to assault where the defendant and the victim are voluntary participants in a sport activity that is not criminal, where such an act is a reasonably foreseeable incident of that sport and does not create an unreasonable risk of serious injury or breach of the peace.¹⁰⁷

¹⁰⁵ Michael Smith *Violence and Sport* (Butterworths, London, 1983). These types of violence were: legitimised violence (within the rules of the game), borderline violence (strictly prohibited, but generally accepted as legitimate), quasi-criminal violence (prohibited by rules and also the norms of player conduct), and criminal violence (Hartley, above n 73 at 94–95).

¹⁰⁶ *R v TNB* at [29].

¹⁰⁷ Iowa Code s 708(1).

However, this test could prove problematic. It allows for sports to become more violent, and those actions will be seen to be 'reasonably foreseeable'. As argued at [2.3.3], simply because an action is frequent does not mean that it is not criminal.¹⁰⁸

2.4. Proposed position in New Zealand

From this analysis it can be seen that there is not one clear statement of the law which encompasses all situations. It is not always clear what will be impliedly consented to in each sport. However, a range of situations which will and will not be criminal can be established. As was said in *Barnes*, beyond these areas there will be uncertainty, which will need to be decided on the particular facts in each case. Nevertheless, there are objective criteria that should be considered in each case where there is uncertainty, which will be indicators of whether the actions are criminal or not.

2.4.1. Clear cases which will be criminal

It is often clear that conduct is criminal and has gone well beyond what can be consented to. Most of the reported cases fall within this category. In *R v Tevaga*,¹⁰⁹ a rugby player ran for 25 metres to join a fight, breaking a player's jaw with a single punch. In *Vaeno v Police*,¹¹⁰ during a scrum in a rugby game the defendant bit the right ear of the victim tearing a 4 cm piece off his ear. In *R v Billinghamurst*,¹¹¹ a rugby player punched another player, breaking his jaw during an off the ball incident. In *R v Lloyd*,¹¹² a player kicked an innocent victim in the head with great force whilst he was lying on the ground in an off the ball incident. All of these cases were correctly seen as criminal, and well beyond what could possibly be consented to.

However, an attempt must be made to categorise actions which will be lacking consent, and therefore are criminal. From the earlier analysis, the following principles should be used in New Zealand: where conduct is outside the course of play, or after play has finished it will be criminal; deliberate or reckless breaches of rules which exist for the safety of players will

¹⁰⁸ *R v Cey* at [28].

¹⁰⁹ *R v Tevaga* [1991] 1 NZLR 296 (CA).

¹¹⁰ *Vaeno v Police* HC Auckland A266/87, 18 February 1988.

¹¹¹ *R v Billinghamurst* [1978] Crim LR 553.

¹¹² *R v Lloyd* (1989) 11 Cr App R (S) 36.

be criminal; and a clear intention to cause injury would go beyond implied consent, and therefore be criminal (unless it was expressly consented to). As was stated in *Lee*, fighting should also not be permitted.

2.4.2. Clear cases which will not be criminal

Most actions occurring on the sports field will be legal, as they fall within implied consent. From the earlier analysis the following principles should form the law in New Zealand: conduct within the written rules of the game will not be criminal; conduct within the unwritten rules and norms of the game will be consented to, and therefore not criminal, unless there are public policy reasons to negate this, such as if fighting is within the unwritten rules or norms of the sport; and breaches of rules that exist purely for the playing of the sport will not be criminal.

2.4.3. Objective criteria to consider in cases within the grey area

The tests outlined for what will and will not be criminal are not comprehensive. Where a case falls within the grey area between the two tests, whether actions are criminal will depend on the facts in the case at hand, and whether there was implied consent to the actions. As was found in *Cey*, there can only be one level of implied consent in each game.¹¹³ A range of factors should be considered where it is not clear from the earlier tests whether conduct is impliedly consented to or not.

Where conduct is within the course of play, reasonably incidental to the play, or on the ball it will be a strong indication that it is not criminal, though this will not be a comprehensive factor.

Conduct outside the unwritten rules and norms of the game will be an indication that conduct is not consented to, and therefore criminal. However, conduct which only falls outside of the written rules of the game, but within the unwritten rules and norms, will generally be consented to, where breaches of the rules are commonplace, otherwise there

¹¹³ *R v Cey* at [19].

would be no penalties awarded.¹¹⁴ Unwritten rules must be objectively determined at the level of sport being played, rather than the particular game at issue.

Where the actions amount to a breach of a rule which is infrequently breached, that will be an indication that they are criminal. Where actions amount to a frequent breach then it is an indication that they are not criminal, however limited weight should be placed on this factor.

Given that this is a very fact based area, further to the three factors outlined above, the circumstances in each case should be considered. The objective criteria listed in *Cey* are useful for this, supplemented by other criteria. Objective criteria that should be considered when determining whether there was consent include: the conditions under which the game at issue is played;¹¹⁵ the nature of the actions at issue and their surrounding circumstances;¹¹⁶ the degree of force employed;¹¹⁷ the degree of risk of injury;¹¹⁸ the probability of serious harm;¹¹⁹ whether the rules of the game contemplate contact;¹²⁰ the nature of the sport;¹²¹ the level at which the sport is played;¹²² the state of mind of the accused;¹²³ and whether the actions could be regarded as an instinctive reaction, error or misjudgement in the heat of the game.¹²⁴

¹¹⁴ For example, where two players in a football match are running for the football it is permitted to push shoulder to shoulder, however it is not permitted to use your hands to push. This rule is outside the rules of the game and is frequently breached, however it falls within the unwritten norms of the game and is consented to. Another example could be in Australian Rules football, where coming into contact with a players head and shoulder area is outside the rules of the game, however frequently occurs through the game. This conduct is necessary for the game to be contested, and falls within the unwritten norms.

¹¹⁵ *R v Cey* at [20].

¹¹⁶ *R v Ciccarelli*.

¹¹⁷ *R v Cey* at [21].

¹¹⁸ *Ibid* at [22].

¹¹⁹ *Ibid* at [22].

¹²⁰ *R v Leclerc* at 796.

¹²¹ *R v Ciccarelli*.

¹²² *R v Barnes* at [15].

¹²³ *R v Ciccarelli*.

¹²⁴ *R v Barnes* at [16].

2.5. Honest belief in implied consent

Making the law more difficult in this area is that an accused need only have an honest belief in implied consent on the part of the victim.¹²⁵ Whether or not that belief was reasonable is only relevant in determining whether that belief was honestly held.¹²⁶ This means that where there is a defence of honest belief of implied consent, the court must take a two step test. First, it must determine what was impliedly consented to. Then it must compare that level of implied consent to what the defendant claims they honestly believed to be the case.

This could create problems. A more violent player may honestly believe that more violent acts are impliedly consented to than actually are. If, as was found in *Cey*, there can only be one level of implied consent on each sports field, then it seems to run counter to the principle that there can be different levels of honest belief in implied consent.¹²⁷

Honest belief in consent has been used regularly in sexual offence cases, however in sports cases it has rarely been mentioned. Instead, the focus in sports cases has been on actual implied consent. Most sports cases do not even mention that there could be an honest belief in consent, and those that do simply skip over it, focusing instead on actual implied consent.¹²⁸ In *Ciccarelli*, the defence of honest belief in consent was pleaded, however, as there was no evidence of belief in consent the defence failed.

Although infrequently used, the defence of honest belief in implied consent would be available on the sports field, where the actions go further than is actually impliedly consented to.

2.6. Are there certain actions which cannot be impliedly consented to in any sport?

It was held in *TNB* that head butts, eye gouges, punches, and other conduct was impliedly consented to in a game of rugby.¹²⁹ Although this Canadian decision arguably would be overturned in New Zealand, it raises the question of whether there should be other broad

¹²⁵ *R v Nazif*.

¹²⁶ *R v Lee* at [273] and see *R v Nazif*.

¹²⁷ *R v Cey* at [19].

¹²⁸ See, for example *R v TNB*.

¹²⁹ *R v TNB* at [31], [50] and [88].

exceptions as to what cannot be impliedly consented to in sport. These practices add nothing to the playing of the game of rugby, and are simply acts of violence, although not all players would agree with this. However, as raised at [2.3.3], simply because breaches of the rules are frequent and generally accepted does not mean they should not be viewed as criminal.

However, with the exception of fighting, to find that any of these actions could not be impliedly consented to would require the rewriting of the decision in *Lee*. This is because unless the intention was to cause grievous bodily harm or there was reckless disregard for safety and there were sufficient reasons to remove the defence of consent, under *Lee* the defence of consent must be left to the jury. In *Lee* the court said that any further exceptions 'would be rare and Judges should be very wary of creating exceptions based on their own personal views of acceptable behaviour.'¹³⁰

It is unlikely that any court would hold that new exceptions to consent should be made for certain actions within sports games. However, it is also unlikely to be found that there is implied consent to being eye gouged in any sport.

It should be noted that there may, in some cases (such as mixed martial arts), be a basis for finding that actions within the rules of a sport cannot be consented to. This would be where actions amount to grievous bodily harm and there are good public policy reasons for removing consent.

2.7. Why are so few cases brought before the courts for assaults during sport?

From the earlier analysis it is clear that there are situations in sports matches which will amount to criminal assaults. However, relatively few cases on the matter have found their way before the courts in New Zealand. Why are these cases not being brought before the court system if consent is not a defence to the actions? The next two chapters consider two alternatives for this: firstly, whether there are good public policy reasons for charges not

¹³⁰ *R v Lee* at [296].

being laid; and secondly, whether sports disciplinary tribunals are better placed to deal with these cases than the court system.

Chapter 3: Are there good public policy reasons for charges not being laid?

In cases such as *Tevaga*, our Courts have indicated that fighting during a rugby game can amount to an assault, and that this should not go unpunished. In *Tevaga* our Court of Appeal said:¹³¹

It is necessary to emphasise, however, that assaults in the course of sporting contests, such as the various codes of football, cannot be tolerated by the community or the Courts. Whatever tacit acquiescence may be said to have prevailed in the past in relation to the kind of almost barbaric behaviour exemplified by this case is no longer acceptable by current standards.

Despite this statement from the Court of Appeal over 20 years ago, there remain few cases where assaults on sports fields have been prosecuted in this country. When cases have found themselves before the courts, convictions have frequently been entered,¹³² and statements made that sport is not exempt from criminal prosecution.¹³³ Simon Gardiner describes the problem behind the limited number of prosecutions as twofold:¹³⁴

There are two major concerns. First, there is confusion surrounding the substantive law, especially the law of assault and consent; second, there is the exercise of prosecutorial discretion-where is the line to be drawn as to the type of conduct that will be prosecuted?

The difficulty around the law of assault and consent has been considered in the preceding chapters. I now turn to the question of what conduct will be prosecuted.

3.1. Prosecution guidelines

New Zealand has a set of prosecution guidelines, last updated in January 2010,¹³⁵ as do England, Scotland, Australia and Canada. These guidelines outline tests for what conduct should properly be prosecuted.

¹³¹ *R v Tevaga* at 297.

¹³² Examples including *Crichton v Police*; *R v Tevaga* and *Vaeno v Police*.

¹³³ *R v Tevaga* at 297; *R v Maki* [1970] 3 OR 780 (ONPC) at 272.

¹³⁴ Gardiner "Should more matches end in court?", above n 70 at 999.

¹³⁵ Crown Law *Prosecution Guidelines* (1 January 2010).

3.1.1. New Zealand

In New Zealand, any person may lay a criminal charge, however in practice the New Zealand Police initiate most criminal proceedings.¹³⁶ Approximately 200,000 prosecutions are taken annually by the police.¹³⁷ Prosecutions brought by private persons are rare, with only around 100 prosecutions brought in this method each year.¹³⁸ An example of this was Mark Henaghan laying a charge against Richard Loe for eye gouging Greg Cooper during a rugby match, because the Police failed to lay any charges.¹³⁹

There is no centralised decision maker in New Zealand in relation to prosecution decisions.¹⁴⁰ Crown Solicitors undertake prosecution of indictable offences, whilst other agencies such as the New Zealand Police undertake prosecution of summary offences in the District Court.¹⁴¹ When deciding whether to prosecute, the Police and Crown Solicitors must consider the prosecution guidelines.

The prosecution guidelines provide that prosecutions ought to be initiated only where the prosecutor is satisfied that the test for prosecution is met. This test is met if: the evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction (the evidential test); and prosecution is required in the public interest (the public interest test).¹⁴² The evidential test and public interest test are further outlined.¹⁴³

A reasonable prospect of conviction exists if, in relation to an identifiable individual, there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.

...

¹³⁶ Cabinet Domestic Policy Committee *Review of Public Prosecution Services* (Ministry of Justice, March 2011) at [9].

¹³⁷ *Ibid* at [9].

¹³⁸ *Ibid* at [12].

¹³⁹ This did not eventuate in any criminal proceedings against Loe, although he was banned from the game for nine months following the incident. See Steve Bale "Rugby Union: Loe banned for gouging" *The Independent* (online ed, United Kingdom, 9 October 1992).

¹⁴⁰ Prosecution Guidelines, above n 135 at [1.1].

¹⁴¹ *Ibid* at [1.1].

¹⁴² *Ibid* at [6.1].

¹⁴³ *Ibid* at [6.3], [6.5] and [6.7].

Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, the next consideration is whether the public interest requires a prosecution. It is not the rule that all offences for which there are sufficient evidence must be prosecuted. Prosecutors must exercise their discretion as to whether a prosecution is required in the public interest.

...

Broadly, the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law. This presumption provides the starting point for consideration of each individual case. In some instances the serious nature of the case will make the presumption a very strong one. However, there will be circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, the offence is not serious and prosecution is not required in the public interest. Prosecutors for instance should positively consider the appropriateness of any diversionary option (particularly if the defendant is a youth).

Sixteen public interest considerations indicating that prosecution is required are outlined at [6.8]. These are not a conclusive list.¹⁴⁴ For the current purposes, the relevant considerations include:¹⁴⁵

The predominant consideration is the seriousness of the offence. Where a conviction is likely to result in a significant penalty including any confiscation order or disqualification, then there is a strong public interest for a prosecution; and

Where the offence is prevalent.

Thirteen public interest considerations against prosecution which may be relevant are also listed, with the most relevant including: where the Court is likely to impose a very small or nominal penalty;¹⁴⁶ where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgement or a genuine mistake;¹⁴⁷ and where any proper alternatives to prosecution are available.¹⁴⁸

Since these prosecution guidelines were released, a review of the prosecution services has been conducted. One of the major focuses of the review was to ensure that legal services

¹⁴⁴ Ibid at [6.8].

¹⁴⁵ Ibid at [6.8.1] and [6.8.8].

¹⁴⁶ Ibid at [6.9.1].

¹⁴⁷ Ibid at [6.9.2].

¹⁴⁸ Ibid at [6.9.13].

are delivered in a way that is cost effective.¹⁴⁹ One of the suggestions raised by the review is the need to clarify that costs should be a factor in decision-making at all points in investigation and prosecution processes.¹⁵⁰ In his review, John Spencer found that the system is generally sound and no major changes are needed.¹⁵¹ However, he found that:¹⁵²

Unlike in most jurisdictions throughout the Commonwealth, our Prosecution Guidelines do not expressly recognise that cost is a relevant factor in determining whether a prosecution is in the public interest.

It is interesting to note this difference to other jurisdictions, especially given that there was an opportunity to add this to the guidelines as recently as 2010.

3.1.2. England

In England, two documents govern the decision to prosecute.¹⁵³ The test in England is the same as that in New Zealand: whether there is enough evidence against the defendant, and whether it is in the public interest to bring the case to court.¹⁵⁴ As in New Zealand, a number of common public interest factors tending in favour of prosecution and against prosecution are outlined.¹⁵⁵ These are similar to those outlined in New Zealand, and do not amount to a comprehensive list.

Hazel Hartley detailed that in June 2005 the Crown Prosecution Service of England and Wales ran a conference on 'Crime in Sport', reporting that it was reviewing policy concerning when and where criminal prosecutions should be brought for on-field violence. This was in part due to concerns over the ad hoc approach of existing policy, which lacked clarity and provided little guidance for police.¹⁵⁶ However, no direct modifications to the guidelines appear to have resulted from this review.

¹⁴⁹ Ministry of Justice "Review of Public Policy Services" <www.justice.govt.nz>.

¹⁵⁰ Ibid.

¹⁵¹ John Spencer *Review of Public Prosecution Services* (Ministry of Justice, September 2011).

¹⁵² Ibid at [260.3].

¹⁵³ Crown Prosecution Service *The Code for Crown Prosecutors* (February 2010) and Crown Prosecution Service *Prosecutions: The decision to prosecute* (2010).

¹⁵⁴ Ibid at [4].

¹⁵⁵ Ibid at [4.16] and [4.17].

¹⁵⁶ Hartley, above n 73 at 93.

A review of the Crown Prosecution Service in England and Wales was undertaken in 2009.¹⁵⁷ One of the major findings of this review was that more consistency was required in the decision to prosecute, which may result in changes to the prosecution guidelines.¹⁵⁸

3.1.3. Scotland

Of the other jurisdictions considered, Scotland is the only one to make any specific reference to sport in its prosecution guidelines. Again, the test for prosecution is similar, requiring sufficient evidence and public interest in the prosecution.¹⁵⁹ However, additional to the Prosecution Code, the Lord Advocate issues guidelines for specific circumstances. One of these circumstances is for incidents during sporting events. These guidelines for sport were first established in 2005 and have been affirmed as recently as March 2011. These guidelines provide that:¹⁶⁰

All those involved in the administration, refereeing and playing of sports have the initial and the major responsibilities to avoid and in any event to deal with excessive violence or serious disorderly conduct on the part of players, coaches and managers. ... However, even if those involved seek to discharge their responsibilities to the best of their abilities, sportsmen cannot be regarded as exempt from compliance with the criminal law.

The guidelines provide that only 'where the violence used goes well beyond what can be regarded as normal physical contact for the sport concerned' will it be appropriate to investigate and prosecute.¹⁶¹

Simon Gardiner analysed why these sporting guidelines came about. He found that *Ferguson v Normand*,¹⁶² where a Scottish Premier League football player was convicted and imprisoned for an off the ball head butt:¹⁶³

¹⁵⁷ House of Commons Justice Committee *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (House of Commons, 15 July 2009).

¹⁵⁸ *Ibid* at 44–47.

¹⁵⁹ Crown Office and Procurator Fiscal Service *Prosecution Code* (Crown Office, May 2001).

¹⁶⁰ Lord Advocate *Lord Advocate's Guidelines to Chief Constables: Incidents During Sporting Events* (Crown Office and Procurator Fiscal Service, 14 March 2011) at [2].

¹⁶¹ *Ibid* at [3].

¹⁶² *Ferguson v Normand* [1995] SCCR 770 (HCJ).

¹⁶³ Gardiner "Should more matches end in court?", above n 70 at 999.

coincided with an increased propensity of the Glasgow region Procurator Fiscal to embark on sports participation criminal prosecutions, which led to the Lord Advocate drawing up guidelines for bringing such prosecutions in Scotland.

These guidelines for sport give a very limited scope for prosecution, leaving most conduct to be dealt with by the sport itself. Whether this is the correct position is considered at [3.4]. The Scottish position should be considered cautiously in New Zealand, because of the history of sectarian violence in Scotland, especially related to sport, which casts a different view over the appropriateness of violence in sport.

3.1.4. Australia and Canada

Australia and Canada both have a slightly different prosecution system, because of their self governing states and territories.¹⁶⁴ However, each of these countries has prosecution guidelines for their nationwide services, which are very similar to the guidelines in place in New Zealand.

In Canada, the Federal Prosecution Service Deskbook contains the prosecution guidelines.¹⁶⁵ The test in this mirrors the two part test in New Zealand: whether there is sufficient evidence and a public interest in prosecuting.¹⁶⁶ Public interest criteria are outlined which are very similar to those in New Zealand.¹⁶⁷ Interestingly, Part IV of the Deskbook outlines policy in certain types of litigation, including parental child abduction¹⁶⁸ and spousal violence,¹⁶⁹ but no policy is outlined for sport.

In Australia, the Prosecution Policy of the Commonwealth contains the prosecution guidelines.¹⁷⁰ Again this has a two part test for the decision to prosecute mirroring that in

¹⁶⁴ Ministry of Justice *Examining the Prosecution Systems of England and Wales, Canada, Australia and Scotland: A background document to the Review of Public Prosecution Services in New Zealand* (September 2011) at 15 and 38.

¹⁶⁵ Federal Prosecution Service *The Federal Prosecution Service Deskbook* (Department of Justice Canada, October 2005).

¹⁶⁶ *Ibid* at [15].

¹⁶⁷ *Ibid* at [15.3.2].

¹⁶⁸ *Ibid* at [30].

¹⁶⁹ *Ibid* at [28].

¹⁷⁰ Commonwealth Director of Public Prosecutions *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process* (November 2008).

New Zealand,¹⁷¹ with similar public interest factors outlined (although a more comprehensive list is detailed).¹⁷²

3.2. Arguments supporting a failure to prosecute

There are a number of possible reasons why few decisions are made to prosecute for actions on sports fields. It could be seen that either the evidential test or the public interest test is not met. It may be seen that the cost of any prosecution is not worthwhile given the relatively low sentences imposed.

It is also possible that many of the actions are not being reported to the Police. This consideration of the societal attitude is outside the scope of this piece. However, professional games of sport generally have police at the ground, so no report should need to be made.

3.2.1. Difficulty in meeting the evidential test

As outlined above, the evidential test requires there to be credible evidence which can satisfy beyond reasonable doubt that the accused has committed a criminal offence.¹⁷³ The difficulty in sporting situations will be establishing the facts in any particular situation. As Simon Gardiner said:¹⁷⁴

adequate evidence can often be a problem with a specific playing culture that means injured parties are unlikely to make a complaint and other participants are unlikely to give incriminating evidence as witnesses. Although most professional sport is now videoed, this can often provide a two-dimensional image that is far from conclusive.

Even where witnesses do come forward it can be very difficult to establish the facts in any given case. *TNB* and *Police v Jones* are examples of how hard it can be to determine the facts in a case. Witnesses all viewed the actions slightly differently, which made it difficult

¹⁷¹ Ibid at [2].

¹⁷² Ibid at [2.10].

¹⁷³ Prosecution Guidelines, above n 135 at [6.3].

¹⁷⁴ Gardiner "Should more matches end in court?", above n 70 at 998. This ethos of sport, in being reluctant to give evidence in criminal investigations is discussed in Jack Anderson "No licence for thuggery: violence, sport and the criminal law" [2008] 10 Crim LR 751 at 761 and Adam Pendlebury "Perception of Playing Culture in Sport: The Problem of Diverse Opinion in the Light of Barnes" (2006) 4 ESJL 1 at [16]–[30].

for the judge to determine exactly what occurred. However, this difficulty in establishing facts is no different to any other assault charge, so should not be a consideration against prosecution.

3.2.2. Difficulty in meeting the public interest test

Even when there is sufficient evidence to prosecute, there is a discretion as to whether prosecuting is in the public interest.¹⁷⁵ The general presumption is that the public interest requires prosecution where there has been a breach of the criminal law; however this is not a conclusive presumption.¹⁷⁶

A number of public interest considerations for and against prosecution are detailed in the Prosecution Guidelines.¹⁷⁷ Of these, only a handful will be particularly relevant for incidents during sport. As is outlined, 'the predominant consideration is the seriousness of the offence. Where a conviction is likely to result in a significant penalty ... there is a strong public interest for a prosecution.'¹⁷⁸ Convictions for common assault often result in minor penalties. However, the maximum sentence possible for common assault is one year of imprisonment.¹⁷⁹ Additionally, the line between common assault and injuring with intent is not particularly significant where an intention to injure is established.

Another factor calling for prosecution is where the offence is prevalent.¹⁸⁰ In Canada between 1970 and 1985, there were more than 100 criminal convictions for violent conduct in ice hockey during the course of the game.¹⁸¹ Violent conduct is widespread in both rugby league and union, especially fighting off the ball.

Factors pointing away from prosecution include where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of

¹⁷⁵ Prosecution Guidelines, above n 135 at [6.5].

¹⁷⁶ Ibid at [6.7].

¹⁷⁷ Ibid at [6.8] and [6.9].

¹⁷⁸ Ibid at [6.8.1].

¹⁷⁹ Crimes Act 1961, s 196.

¹⁸⁰ Prosecution Guidelines, above n 135 at [6.8.8].

¹⁸¹ Anderson, above n 174 at 756.

judgement or a genuine mistake,¹⁸² and where any proper alternatives to prosecution are available.¹⁸³ Alternatives to prosecution will be considered in depth in chapter 4.

Many actions during sport that technically would amount to common assault result in minor harm to other players. Simon Gardiner describes many actions as 'little more than a scuffle or, using the vernacular, 'handbags', with none or only minor resulting harm.'¹⁸⁴ This is likely to be the reason why most cases making it before New Zealand courts are those where significant harm to the victim has resulted.¹⁸⁵ However, again this should not be viewed as a conclusive factor, and where actions go beyond the level of consent it is possible for prosecutions to be brought.

3.2.3. Cost benefit analysis

The cost of a trial, mainly because of the difficulty in determining facts, could be a deterrent when bringing charges, especially where the sentences imposed are often relatively minor. However, as outlined at [3.1.1], cost is not expressly listed as a consideration when deciding whether to prosecute. John Spencer suggests that this should be changed; however, given that New Zealand is the only country of those considered that makes no express reference to cost, it may be seen to be a deliberate choice.

3.2.4. Detriment to sporting contests

The public interest considerations outlined at [6.8] and [6.9] of the Prosecution Guidelines are not intended to be a comprehensive list.¹⁸⁶ Another relevant consideration is the public benefit gained from sport, and any detriment to that from prosecutions.

Overseas, and before the decision in *Lee* in New Zealand, sport has been allowed an exemption from the general inability to consent to more than trivial bodily harm based on the public interest seen in sport as a whole.¹⁸⁷ This public interest in sport is largely based

¹⁸² Prosecution Guidelines, above n 135 at [6.9.2].

¹⁸³ Ibid at [6.9.13].

¹⁸⁴ Gardiner "Should more matches end in court?", above n 70 at 998.

¹⁸⁵ See, for example *R v Tevaga* and *Vaeno v Police*.

¹⁸⁶ Prosecution Guidelines, above n 135 at [6.8].

¹⁸⁷ *Attorney General's Reference (No. 6 of 1980)* at 1059.

on the societal and health benefits of participation in sport.¹⁸⁸ Courts have tried to avoid discouraging the free participation in sport.¹⁸⁹

With this in mind, academics have been cautious on the position of the criminal law in sport. It has been argued that more prosecutions would remove the contest in sport. Any regulation must be careful not to undermine the unrestrained quality and sheer physicality which provide the appeal in contact sports.¹⁹⁰

Nevertheless, there are two sides to this debate: that 'the law does not stop at the touchline', and the view that the intervention of the law is highly problematic.¹⁹¹ 'However, this does not mean that sport should be sanitised and overtly controlled with respect to its physicality. Physical endeavour and vigour are essential elements of most sports.'¹⁹²

It is clear that the physical contest in sport needs to be preserved. However, where violence is completely unrelated to the game, there is a deliberate intention to injure, or reckless disregard for another player's safety, the criminal law should rightfully be permitted step in. This would not detrimentally affect the physical contest of sport, merely the unnecessary violence within it.

3.2.5. Does a single punch amount to fighting?

As was seen at [1.1], it can never be a defence to claim consent for fighting.¹⁹³ So why are criminal charges not laid for fighting on sports fields? Laying aside public policy considerations, is it possible that a single punch is not seen to amount to fighting?

¹⁸⁸ Anderson, above n 174 at 753, referring to *R v Brown* and *R v Lee*. The public interest in sport has been discussed in other cases such as *Attorney General's Reference (No. 6 of 1980)* where the law was seen to operate to protect those playing sport from prosecution because participation in sport is seen as being in the public interest for promoting health, discipline and competition.

¹⁸⁹ *Nabozny v Barnhill* at 214.

¹⁹⁰ Simon Gardiner "The Law and the Sportsfield" [1994] Crim LR 513.

¹⁹¹ Simon Gardiner and others *Sports Law* (4th ed, Routledge, Oxon, 2012) at 499, and Simon Gardiner "Tackling from Behind: Interventions on the Playing Field" in Steve Greenfield and Guy Osborn (ed) *Law and sport in contemporary society* (Frank Cass Publishers, London, 2000).

¹⁹² Gardiner and others *Sports Law* (4th ed), above n 191 at 499.

¹⁹³ *R v Lee* at [315].

In *R v Coney*,¹⁹⁴ one of the founding cases of the rule against fighting, two reasons were given for holding that prize fights are illegal. Firstly, they were seen as likely to lead to serious injuries, and secondly, they were likely to cause a breach of the peace through brawls among spectators. The breach of the peace ground was later rejected.¹⁹⁵ This is a difficult area of law and the exception for fighting has generally been simply carried on by the courts.¹⁹⁶ *Jobidon* discusses the social uselessness of fist fights, seeing precious little utility in them.¹⁹⁷ It is enough for current purposes to acknowledge that the fighting exception exists. However, there is a limit to this exception: where the fight was only a minor struggle.¹⁹⁸

There is argument that much of the fighting that occurs on sports fields amounts to only minor struggles, or as Simon Gardiner would put it, 'handbags'.¹⁹⁹ This raises two questions: whether a single punch thrown in sport would fall within the fighting exception, and also where the line is drawn as to what constitutes a minor struggle.

A single punch has been held in a number of cases to be outside the scope of consent.²⁰⁰ However, these cases resulted in serious injuries to the victims. It could be argued that a single punch is in fact worse than a fight, because there is at least some form of consent between fighters.²⁰¹ There seems to be no authority for one punch not amounting to a fight, however, whether it only amounted to a minor struggle will be a relevant question.

Whether actions amount to only a minor struggle imports more uncertainty. However, this is a necessary exception, as many of the fights occurring during rugby clearly do not reach a level serious enough to be criminal. The mere pulling of shirts during a rugby match should

¹⁹⁴ *R v Coney* (1882) 8 QBD 534.

¹⁹⁵ *Attorney General's Reference (No. 6 of 1980)* at 1059.

¹⁹⁶ For an analysis of the law see Ambi Sithamparanathan "Noble art of self defence or unlawful barbarism?" (2002) 13(8) Ent LR 183; Gardiner and others *Sports Law* (4th ed), above n 191; and Edward Grayson *Sport and the Law* (Butterworths, London, 2000).

¹⁹⁷ *R v Jobidon* at [112].

¹⁹⁸ *R v Lee* at [183], referring to *Attorney General's Reference (No. 6 of 1980)* at 1059.

¹⁹⁹ Gardiner "Should more matches end in court?", above n 70 at 998.

²⁰⁰ Such as *R v Tevaga* and *R v Birkin* [1988] Crim LR 854 where a single punch in each case resulted in a broken jaw.

²⁰¹ Although this consent is not a defence, it can be seen that there is a form of consent to the actions.

not amount to a crime. There is some authority for what may amount to a minor struggle. In *R v Jones*,²⁰² the defence was allowed for 'rough and undisciplined play' and 'play fighting'. However, the limit to this is where there is no anger and no intention to cause bodily harm.²⁰³ This will remove the defence in a large number of fights in sporting situations.

3.3. Arguments calling for prosecution

Whilst there are some strong arguments for avoiding prosecution in sport, there are also strong arguments that criminal convictions are required in sport. As Simon Gardiner said, this point of view is:²⁰⁴

predicated on the belief that there needs to be firmer action concerning violent and abusive behaviour on the sports field, with public concerns that players escape public prosecution for their actions.

3.3.1. Public interest in convictions

Sport should not be a licence for thuggery.²⁰⁵ Violence on the sports field may inspire violence among spectators, and lead to imitation by young players.²⁰⁶ Violence and fighting within sport is prevalent, one of the public interest factors calling for prosecution.²⁰⁷ As was said in *R v Henderson*:²⁰⁸

I fully realize that if too many legal restrictions are placed upon those who participate in sports where the very nature of the game precipitates bodily contact, the game will soon lose not only players but also spectators. It certainly is not my plan in any way to inhibit the interaction between players, but what is society to do when those interactions between participants lead to conduct which, if it were anywhere but in the arena or on a playing field, would attract criminal sanctions without any delay on the part of the authorities? Surely the authorities are not to turn a blind eye while the law of the jungle prevails. Quite the contrary, where there are obvious infractions of the criminal law, the authorities are duty-bound to take whatever action is necessary to prevent a repetition of such conduct.

²⁰² *R v Jones* (1986) 83 Cr App R 375 (CA).

²⁰³ *R v Jones* at 278 and *R v Donovan* [1934] 2 KB 498 (CA) at 508.

²⁰⁴ Gardiner "Should more matches end in court?", above n 70 at 998.

²⁰⁵ *R v Lloyd*, a phrase which has been picked up in a number of different articles and cases.

²⁰⁶ Bradley C Nielson "Controlling Sports Violence: Too Late for the Carrots - Bring on the Big Stick" (1989) 74 Iowa LR 681 at 687.

²⁰⁷ Prosecution Guidelines, above n 135 at [6.8.8].

²⁰⁸ *R v Henderson* [1976] 4 WWR 119 at 127.

Where the incident occurs during professional sport, there has been seen to be an increased public interest in conviction. In *McSorely*, in relation to public policy reasons why charges were being laid, the prosecutors submitted:²⁰⁹

It is particularly significant when that act is carried out ... at the highest level of the game in circumstances that are watched by millions of people for whom the game is important, many of whom play that game at a whole variety of levels.

And in *Ferguson v Normand*, when referring to professional games of sport, the court held that:²¹⁰

These are fixtures which set the standard of conduct throughout the country and any sentence for an assault committed in these circumstances must reflect the need to deter others from engaging in similar acts of criminal violence.

3.3.2. Sport cannot be exempt from the criminal law

It has been said that 'there is increasingly a view that the law should be involved more prominently in the regulation of sport.'²¹¹ A number of cases have raised the point that sport cannot be an area that is free from the reach of the criminal law.²¹² As was said in *R v Watson*,²¹³ it is:

patent, however, that to engage in [sport] is not to enter a forum to which the criminal law does not extend. To hold otherwise would be to create in the [sport] arena a sanctuary for unbridled violence to which the law ... could not apply.

In *Ferguson v Normand* it was held that the fact that an offence is committed in public, before a large number of spectators, might be an indication that it is a more serious offence.²¹⁴

²⁰⁹ *R v McSorely* at [9].

²¹⁰ *Ferguson v Normand* at 775.

²¹¹ Simon Gardiner and Alexandra Felix "Juridification of the Football Field: Strategies for Giving Law the Elbow" (1995) 5 Marq Sports LJ 189 at 189.

²¹² See, for example, *R v Maki*; *R v Lloyd*; and *R v McSorely*.

²¹³ *R v Watson* (1975) 26 CCC (2d) 150 at 156.

²¹⁴ *Ferguson v Normand* at 775, where the court said 'A footballer who assaults another player on the football field is not entitled to expect leniency from the court just because the incident occurred in the course of a football match ... On the contrary, one of the factors which may indicate the gravity of the offence is the fact that the assault has been committed in public before so many spectators.

No part of life can be free from the criminal law, and sport is no exception to that. In an American study, it was found that three-quarters of judges were of the opinion that incidents of 'excessive sports violence' should be handled in the criminal courts.²¹⁵

3.3.3. Lowered tolerance of violence and fighting in society

'The issue of determining liability in sports participation ... reflects changing values concerning the degree of physical interaction between participants and what behaviour might be construed as "violence"'.²¹⁶ It has been argued that we now have a lower tolerance of violence within society than we did in the past. The Court of Appeal in *Lee* stated that:²¹⁷

In our view, if anything, contemporary social conditions in New Zealand mean that there is less tolerance of fighting and therefore a strengthened justification for fights being an exception to the rule that consent is a defence where no more than mere bodily injury is intended and caused.

Sepp Blatter, the President of FIFA, recently called for criminal prosecutions to be brought against those who commit dangerous tackles.²¹⁸ Edward Grayson details a significant shift in the attitude of society towards violence and its acceptance on the sports field.²¹⁹ He believes that violence is on the increase, and more intervention of the criminal law is now needed.²²⁰ However there is limited evidence for this claim that violence is increasing, and a range of other authors dispute this fact.²²¹

This lowered tolerance of violence needs to be examined against a sporting context. Fighting during rugby league engenders much support from the crowd at the match. A search of 'sports fights' on YouTube brings up nearly 80,000 results, many of which have

²¹⁵ M Barry, R Fox and C Jones "Judicial Opinion on the Criminality of Sports Violence in the United States" (2005) 15 *Seton Hall Journal of Sports and Entertainment Law* 1, as cited in Anderson, above n 174 at 755, n 26.

²¹⁶ Gardiner and others *Sports Law* (4th ed), above n 191 at 500.

²¹⁷ *R v Lee* at [296].

²¹⁸ Ian Blackshaw "Jail players who commit dangerous tackles" (2008) 1 *ISLJ* 106.

²¹⁹ Grayson, above n 196 in Chapter 6.

²²⁰ *Ibid* at 290.

²²¹ This is a recurring argument that Simon Gardiner raises through his many texts and articles on the topic.

over one million views. Does this mean we see sports fights as exempt from that lowered tolerance of violence?

3.3.4. Breaches of the peace: violence inciting rioting

A final reason calling for prosecutions is that violence on the sports field can incite violence and rioting among fans viewing the game. This is more relevant at higher levels of the game, however it can still be seen at lower levels of the game. It is not possible to use consent as a defence to a breach of the peace, which has been used in Scotland in *Butcher v Jessop*.²²² In that case, the violence among players led the police to a fear that an invasion of the pitch would occur, or violence within the stands would result. Penalties for a breach of the peace are small, and the use of it in *Butcher v Jessop* has been criticised, and not repeated in Scotland.

3.4. **Should New Zealand develop new prosecution guidelines for sport?**

New Zealand is not alone in having neither guidelines for prosecution of incidents during sport, nor any specific mention of sport in the prosecution guidelines. The Scottish Guidelines for prosecution during sport were drafted in response to a perception of too many cases coming before court,²²³ so do not provide good guidance for what is needed in a New Zealand situation. However, if any guidelines were implemented they would need to be very carefully developed, so as to still promote the free participation in sport.

The Scottish Guidelines have been criticised because they 'simply remind the police of their powers rather than defining how and when those powers should be used'²²⁴ and also that they leave the threshold for criminal law intervention too high, which would result in a lack of cases.²²⁵

²²² *Butcher v Jessop* (1989) SC(JC) 55.

²²³ Gardiner "Should more matches end in court?", above n 70 at 999.

²²⁴ Mark James and Simon Gardiner "Touchlines and Guidelines: The Lord Advocate's Response to Sportfield Violence" [1997] Crim LR 41.

²²⁵ Because the Guidelines require conduct that is 'well beyond the normal' before prosecutions should be laid; S Miller "Criminal Law and Sport in Scotland" (1996) 4(2) SATLJ 40.

More relevantly, as a result of the Crown Prosecution Service conference 'Crime in Sport', draft guidelines were produced for prosecuting crime in sport. These have not been formalised in terms of a specific policy, however they establish a useful test. In the draft, whether to prosecute still involves a two part test. The public interest test then looks at a range of objective criteria:²²⁶

- The nature of the conduct in the context of the sport under consideration.
- What was the degree of pre-meditation?
- Did the offender seek to ensure that match officials were unsuspected when the offence was committed?
- Who the conduct was directed at, e.g. other participants, match officials, spectators?
- What was the impact on those other people and their subsequent behaviour, e.g. did the incident lead to further violence or disorder on the field of play or by spectators?
- Previous incidents of a similar nature.
- Any action taken by the match officials or the governing bodies in relation to the incident.

These criteria are extremely useful, however one minor change should be made. The consideration of 'previous incidents of a similar nature' needs to be narrowed to 'previous incidents of a similar nature by the offender'. Without this change there is a danger of holding one person responsible for the earlier conduct of others, and also a possible incentive for opposing players and fans to engage in criminal conduct.

Given the fact specific nature of sport, there is clearly discretion needed in the decision of whether to prosecute or not. However, the guidelines currently do not contain enough public interest factors relevant to sport. A suggested new public interest factor to include would be if the offence is committed in front of many people then it is an indication that a prosecution should be brought.²²⁷ On top of this, the proposed test in England, with the

²²⁶ Gardiner and others *Sports Law* (4th ed), above n 191 at 521–522.

²²⁷ 'The fact the [actions occur] before [thousands of] spectators and subsequently millions on TV may provide support for making an example of the perpetrator.' Gardiner and others *Sports Law* (4th ed), above n 191 at 522.

modification outlined, should be introduced as a set of criteria for prosecutors to consider in every circumstance.

Chapter 4: Should the criminal law be seen as a 'last resort'?

One of the most commonly used arguments against bringing more prosecutions for actions on sports fields is that sports have their own disciplinary tribunals, or judiciary systems, and these amount to a sufficient punishment. The English Court of Appeal put it this way in *Barnes*:²²⁸

In determining what the approach of the courts should be, the starting point is the fact that most organised sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct. As a result, in the majority of situations there is not only no need for criminal proceedings, it is undesirable that there should be any criminal proceedings. Further, in addition to a criminal prosecution, there is the possibility of an injured player obtaining damages in a civil action from another player, if that other player caused him injuries through negligence or an assault. The circumstances in which criminal and civil remedies are available can and do overlap. However, a criminal prosecution should be reserved for those situations where the conduct is sufficiently grave to be properly categorised as criminal.

However, the relevance of this statement in New Zealand could be limited. Part of the reasoning for the undesirability of prosecutions in England is that there is the possibility of obtaining damages in a civil action.²²⁹ In New Zealand this is not possible, due to the Accident Compensation Act 2001.²³⁰ This means that there can be no punishment through civil actions in New Zealand, and the potential for double punishment is reduced. Gardiner also sees criminal law as a last resort and one that should consistently defer to robust internal disciplinary sporting punishments.²³¹ Nevertheless, this cannot lead to exempting sporting activities from complying with the criminal law.²³²

4.1. What types of punishments are available to tribunals?

One argument against criminalising violence in sport is that sport is subject to complex regulation beyond the criminal law, 'by a network of normative rules including playing rules,

²²⁸ At [5].

²²⁹ In England, 'civil liability is the branch of the law that has become most used concerning on-field injuries.' Gardiner and others *Sports Law* (4th ed), above n 191 at 500.

²³⁰ Section 317.

²³¹ Gardiner "Should more matches end in court?", above n 70 at 1000.

²³² *R v Maki* at 272.

disciplinary rules and codes of conduct.²³³ However, this view has some shortcomings. People in professions, such as accountants, lawyers and doctors, are subject to many rules through their employers and national regulatory bodies, however they are all still subject to criminal actions where appropriate.²³⁴ This view also focuses more on professional sport than where the action occurs in amateur sport, raising the question: why should amateur players be treated any differently?

Sports bodies have become more severe with their punishment of violent conduct. An example of this is *McSorely*, where Marty McSorely argued that he could produce evidence of past attacks that were more brutal than his but resulted in less severe sanctions. This was rejected as the sport had changed and the NHL was merely fulfilling its commitment to penalise more stringently irresponsible blows to the head.

However, it has been noted that 'compared to criminal punishments, the judgments of a tribunal can seem somewhat trivial.'²³⁵ For example, violent conduct during an amateur football game in New Zealand results in a minimum of a two game suspension, and a \$100 fine.²³⁶ No upper limit is stipulated on punishments for conduct, and an indefinite suspension is possible.²³⁷ A range of other punishments are possible, including a ban on taking part in any football related activity.²³⁸

A much more rigid set of guidelines is provided for players playing rugby league in the National Rugby League competition in New Zealand and Australia. In an attempt to 'ensure

²³³ Gardiner and others *Sports Law* (4th ed), above n 191 at 524.

²³⁴ Simon Gardiner and others *Sports Law* (3rd ed, Routledge-Cavendish, Oxon, 2006).

²³⁵ Ibid at 659. Take for example the case of Daniel Maroko in the Toyota Cup (the under 20 version of the National Rugby League competition). He bit another player during a game and received only a one match ban (Chris Barclay "Under-20 Sharks biter gets one-match ban" *Stuff.co.nz* (online ed, New Zealand, 20 June 2012)). The longest suspension in NRL history is Danny Williams' 18 match ban for a king hit on Mark O'Neill which left him hospitalised (Russell Jackson "Matt Prior to face the music over Thurston hit" *Stuff.co.nz* (online ed, New Zealand, 7 May 2012)).

²³⁶ New Zealand Football *Regulation 7: Penalties for misconduct* (2009) at [8(d)]. Each week a player is suspended results in a \$50 fine to the player's club under [8(d)(iv)].

²³⁷ New Zealand Football *New Zealand Football Incorporated Rules* (9 June 2010) at [33]. However, where there is an indefinite suspension, the fine issued along with that suspension is limited (New Zealand Football *Regulation 7: Penalties for misconduct* at [8]).

²³⁸ New Zealand Football *New Zealand Football Incorporated Rules* at [33.3.2(f)].

consistency and fairness in penalties awarded by the NRL Judiciary, penalties are awarded according to a pre-determined points system.²³⁹ A range of different offences are graded on seriousness from one to five, and a point value allocated to each of these. There are some modifications to this value, including discounts for being seven years incident free and making an early guilty plea, and increases for prior convictions for similar or other offences.²⁴⁰ Each 100 points a player receives results in a one match ban. The most serious offences are grade five intentional high tackles and dangerous throws, both resulting in a base penalty of a nine match ban. Comparatively, grade five kicking and striking charges only have a base penalty of six and five match bans respectively.

There are a wide range of examples of these rules being implemented in sport.²⁴¹

4.1.1. The divide between professional and amateur sport

Additional to suspensions, professional players can face significant fines for inappropriate conduct on the field. These fines can go well beyond those that could be imposed by the criminal courts,²⁴² although given the high wages of many professional sports players, they may not amount to an actual deterrent.²⁴³ In many circumstances, suspension results in a large monetary loss to players. However, this is not true in amateur grades.

²³⁹ NRL "NRL Judiciary" <www.nrl.com>.

²⁴⁰ Ibid.

²⁴¹ For example, a football player was recently banned from the sport indefinitely for breaking a referee's jaw (Jessica Tasman-Jones and Steve Hopkins "Footballer banned from game indefinitely" *Stuff.co.nz* (online ed, New Zealand, 3 May 2012)). In another example, both Adam Blair and Glenn Stewart were each banned for three matches for an ugly fight in the NRL last season ("Three-match ban for Manly's Glenn Stewart" *Stuff.co.nz* (online ed, New Zealand, 1 September 2011); Ian McCulloch and Steve Jancetic "Three-match NRL ban for Adam Blair" *Stuff.co.nz* (online ed, New Zealand, 31 August 2011)).

²⁴² Gardiner and others *Sports Law* (3rd ed), above n 234 at 658. For example, following a seven second skirmish in the English Premier League between two Newcastle United football players, Lee Bowyer and Kieran Dyer, which resulted in no harm to either player, Bowyer was banned for seven matches and fined £30,000 by the FA, in addition to the club fine of around £200,000 (Gardiner "Should more matches end in court?", above n 70 at 1000).

²⁴³ For example, John Terry was recently found guilty by the English Football Association of racially abusing Anton Ferdinand and was subsequently banned for four matches and handed a £220,000 fine. However, this amounted to only one weeks wages for Terry (Dan Roan "John Terry banned and fined by FA over Anton Ferdinand incident" (27 September 2012) BBC Sport <www.bbc.co.uk>).

Another distinction with professional sport is that where players are contracted they may have clauses in their contracts allowing for punishment where they bring the sport into disrepute.²⁴⁴

Whilst disciplinary tribunals may be effective at the professional level, 'the internal sporting disciplinary procedures at regional level are not enforced as effectively.'²⁴⁵ This may well be the reason that the majority of prosecutions have occurred at an amateur level, where players therefore are more likely to report actions to the police.²⁴⁶ This disconnection between professional and amateur sport raises significant problems. The ability to pay a fine should not render criminal conduct non-criminal, as that discriminates between classes. Furthermore, professional players should be seen to be setting the standards for all other players of the sport, and therefore should be treated the same.

4.2. The effect of disciplinary punishments as a mitigating factor in sentencing

The fact that proper alternatives to prosecution are available is a factor pointing away from prosecution.²⁴⁷ Disciplinary proceedings could, where punishment is sufficient, be seen as a proper alternative to prosecution.

This does not impact on the ability to charge criminally. Nevertheless, when prosecution does result, the fact that incidents occur in sport have been seen as a mitigating factor.²⁴⁸ *Ferguson v Normand* took a different view, in that if offences happened in front of a large crowd then it was in fact an indication that a larger sentence was required. However, the large majority of cases show that courts have been more lenient on sentencing violence

²⁴⁴ Examples of these clauses can be found in Gardiner and others *Sports Law* (4th ed), above n 191 at 403. For a comprehensive analysis of these clauses see Patrick George "Sport in Disrepute" (2009) 4(1) Australian and New Zealand Sports Law Journal 24 and James J Paterson "Disciplining Athletes for Off-field Indiscretions: A Comparative Review of the Australian Football League and the National Football League's Personal Conduct Policies" (2009) 4(1) Australian and New Zealand Sports Law Journal 105.

²⁴⁵ Gardiner and others *Sports Law* (4th ed), above n 191 at 517.

²⁴⁶ Gardiner "Should more matches end in court?", above n 70 at 999 and Gardiner and others *Sports Law* (4th ed), above n 191 at 517.

²⁴⁷ Prosecution Guidelines, above n 135 at [6.9.13].

²⁴⁸ For example, see *R v Birkin*; *R v Lincoln* (1990) 12 Cr App R (S) 250; and *R v Rogers* (1993) 15 Cr App R (S) 393, however in all of these cases the violence was seen as somewhat linked to the course of play, rather than outside it.

within sport, using terms such as ‘in the heat of the moment’,²⁴⁹ which could also be applied in almost all non-sports cases. This trend may change along with the changing views of society on violence generally.

A final point to raise is that being banned from a sport for a period of time arguably should not be a mitigating factor in sentencing imprisonment: the two punishments would run concurrently. A sentence of imprisonment would effectively encompass a ban from playing sport.

4.3. Are tribunals better placed than the courts to deal with this conduct?

For the purposes of this piece, I am ignoring any arguments around judicial process that may come out of these proceedings.²⁵⁰ The view that tribunals are better placed to deal with this conduct is based partly in the fact that tribunal members have much more experience in the pressures of the game. This also falls in line with the current trend towards an increasing number of specialist tribunals in New Zealand.

There are a number of perceived benefits of disciplinary tribunals over the criminal law. It has been argued that:²⁵¹

Punishments imposed from a governing body are potentially the more effective method for controlling sports violence. It is the most immediate and direct form of punishment and contains the required effective symbolism. Players know that it will be imposed and to a greater or lesser extent it is imposed with a degree of consistency and certainty.

...

Where a disciplinary tribunal is operated efficiently, delays between the act and the punishment can be kept to a minimum, maximising its symbolic impact unlike the lengthy pre-trial wait should the law become involved. For example, the Rugby Football League holds all tribunals before the next round of matches are played, whilst the Football Association will generally hold its hearings within a month of the incident.

²⁴⁹ *R v Lincoln; R v Rogers*.

²⁵⁰ For example, in any case of misconduct heard before a New Zealand Football committee, ‘the Referee’s Report shall be taken as fact except where there has been a case of mistaken identity.’ (New Zealand Football *Regulation 7: Penalties for misconduct* at [1(d)].)

²⁵¹ Gardiner and others *Sports Law* (3rd ed), above n 234 at 659.

A number of academics have criticised the hearing of sport cases in court, viewing the objective application of rules as 'ill-suited to assessing the spontaneous and occasionally heated "playing culture" of the sports arena'.²⁵² However, it has also been seen in cases such as *Leclerc* and *Chu* that some judges do show a clear understanding of sport.²⁵³ Nevertheless this is unlikely in most circumstances.

An argument against disciplinary tribunals dealing with all cases was detailed clearly in *McSorely*:²⁵⁴

There are many groups that claim authority to discipline their members. Some are statutory, such as law societies and judicial councils, and some exist by virtue of private contractual arrangements such as in the case of the National Hockey League. Even where the disciplinary body is statutory, its status is often very controversial. There have been many cases before police discipline tribunals and medical licensing authorities where the public has been suspicious of the process, fearing that those involved are getting special treatment or that the truth is being concealed. In my view, there should be a heavy onus on those purporting to pre-empt the normal criminal process, particularly where it is a private organization such as a group of hockey owners. Statutory bodies must act in the public interest; businessmen have no such obligation.

Where violence is not serious, disciplinary tribunals will be better placed to deal with it. Costs will be decreased, timeliness increased, and individuals will receive punishment for their misconduct. However, where violence is serious, the criminal law must become involved. Jack Anderson makes this clear, although I believe to leave the criminal law as a 'last resort' is a step too far:²⁵⁵

The criminal law should remain a last resort in matters of sporting violence. It is preferable that the lead on eliminating inherently excessive violence in a sport comes from within the expertise of the sport itself. The criminal law can be a rather blunt instrument in such circumstances, and can lead to an individual participant becoming the "scapegoat" for the unsafe practices of their chosen sport.

²⁵² Stefan Fafinski "Consent and the Rules of the Game: The Interplay of Civil and Criminal Liability for Sporting Injuries" (2005) 69 JCL 414, and also see James and Gardiner, above n 224.

²⁵³ Anderson, above n 174 at 759.

²⁵⁴ At [12].

²⁵⁵ Anderson, above n 174 at 763, a view which is supported in Jeffrey Standen "The manly sports: The problematic use of criminal law to regulate sports violence" (2009) 99(3) J Crim L & Criminology 619.

4.4. Is punishment through disciplinary tribunals alone sufficient?

A major problem with punishment through disciplinary tribunals is the differences in punishments between amateurs and professionals, raised at [4.1.1].²⁵⁶ Another problem is the inconsistency in punishments between sports. Fighting in rugby league carries lesser sentences than in football. There is also a large difference between penalties handed out by these tribunals and the criminal court.²⁵⁷

As is well established, 'no sports league, no matter how well organised or self-policed it may be, should thereby render players in that league immune from criminal prosecution.'²⁵⁸ Whether punishment through disciplinary tribunals alone is viewed as sufficient will depend on personal views as to necessary punishments. In more serious cases it will be difficult to see punishments from disciplinary tribunals as sufficient.

As a Crown Prosecutor in England said, 'arguably what matters is that inappropriate behaviour is dealt with robustly and appropriately', rather than whether it is through the criminal court or a sports tribunal.²⁵⁹ Lord Denning put it this way:²⁶⁰

Justice can often be done in [internal tribunals] better by a good layman than by a bad lawyer. This is especially so in activities like football and other sports where no points of law are likely to arise and it is all part of the proper regulation of the game.

Much conduct can appropriately be left to the sport's own disciplinary system to be dealt with. However, this does not mean that sport is exempt from criminal law. Further, where disciplinary tribunals are awarding insufficient penalties, the criminal law will need to step in to show that the conduct is inappropriate. Where conduct meets the tests for criminality

²⁵⁶ A good example of the lack of cases involving professional players can be seen in John C Bridges *Making Violence Part of the Game: The Socio-Legal History of Violence in American Sport* (Kroshka Books, New York, 1999) at 178. This was found to be mostly due to efforts by sporting bodies to keep disciplinary procedures 'in the family' and out of the courts (at 178).

²⁵⁷ For example, Keven Mealamu was suspended for only two games for a head butt on an opposing player, whereas in the criminal court significant periods of imprisonment have been handed down (see "New Zealand's Keven Mealamu describes headbutt ban as toughest period of career" *The Telegraph* (online ed, United Kingdom, 22 November 2010) and *Ferguson v Normand*).

²⁵⁸ *R v Maki* at 272, and also see *R v Watson* at 156.

²⁵⁹ Nick Hawkins "Crossing the line - When sport becomes a crime" (28 March 2012) The Crown Prosecution Service <www.cps.gov.uk>.

²⁶⁰ *Enderby Town FC v Football Association* [1971] 1 Ch 591 at 605.

outlined earlier, it should be dealt with by the criminal courts, rather than disciplinary tribunals.

Conclusion

This topic remains unsettled in New Zealand. *Lee* has clarified the position on consent in New Zealand further than other jurisdictions, however it is still not clear what is impliedly consented to during sport. An attempt has been made in this piece to draw two clear lines where conduct will and will not be criminal, and a range of objective criteria established for cases falling within the grey area between these two lines.

Although there are some public policy reasons pointing both for and against the prosecuting of actions on sports fields, sport certainly should not be exempt from the criminal law. The current prosecution guidelines in New Zealand should be amended, with a specific mention of sport made. A draft range of criteria, using the Crown Prosecution Service draft, has been established.

Sports disciplinary tribunals do have a role to play in eradicating unnecessary violent conduct within sport. However, serious cases do need to be dealt with by the courts. It is more important that inappropriate behaviour is dealt with robustly and appropriately than that criminal punishments are brought about.

One final point to add is that the analysis of sentences in sports violence cases shows a worrying trend towards lower sentences in sport than other situations.²⁶¹ In many cases, sentences are reduced simply because the actions occur on a sports field, with judges seeing the fact that actions occurred in the heat of the moment as a mitigating factor, despite these not being a formally acknowledged mitigating factor in sentencing.²⁶²

To conclude, as David Gendall said:²⁶³

²⁶¹ Gardiner and others *Sports Law* (3rd ed), above n 234 at 617–619.

²⁶² For examples of this see *R v Birkin*; *R v Lincoln*; and *R v Goodwin* (1995) 16 Cr App R (S) 885. This 'tender' approach to sentencing can also be seen in the Canadian courts, which dilutes the deterrent and denunciation value of convictions (Anderson, above n 174 at 758).

²⁶³ David Gendall "The sport of boxing: Freedom versus social constraint" [1997] Wai L Rev 5 at 10.

As the views of a community move over time, as the generally accepted ideas of what should be tolerated and what constrained gradually change, the community's legal principles are called upon to reflect those wider changes.

The law around sports violence is no exception to this, and as the general tolerance of violence changes, so will the law around assault on the sports field.²⁶⁴ Perhaps it is just that sports have not kept pace with the changing views of society, in finding violence is unacceptable, and a more rapid change is required to reflect this.

²⁶⁴ In his recently published book, 'The Better Angels of Our Nature', Steven Pinker has claimed to provide evidence that our societies are becoming less violent and less tolerant of violence (Steven Pinker *The Better Angels of Our Nature: Why Violence Has Declined* (Viking, London, 2011)).

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