

Ultra-Violence on the Pitch: Establishing a Threshold for the Intervention of Criminal Law in English Football

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Abstract

Despite a steadily growing list of cases, there has been little guidance and clarity as to when it is appropriate to pursue criminal charges in cases of on-field participant violence in English football. While the *Barnes* Court of Appeal ruling in 2004 gave some lawyers, legal scholars, and sport administrators hope that a threshold of criminality had been established, more recent cases such as *Ward* in 2009 and *Chapman* in 2010 have cast doubt on the authority of *Barnes*. In so doing, doubt has been cast on where a threshold of criminality might lie in cases of on-field participant violence in England. This article critically examines potential test criteria that could be used in determining an appropriate threshold for the intervention of criminal law in English football.

Keywords: English Football; Violence; Criminal Law

Playing at Hand-Sworn, Bucklers, Football, Wrestling, and the like, whereby one of them receiveth a hurt, and dieth thereof within a year and a day; in these cases, some are of the opinion, that this is a Felony of Death: some others are of opinion, that this is no Felony of Death, but that they shall have their pardon, of course, as for misadventure, for that such their play was by consent, and again, there was no former intent to do hurt, or any former malice, but done only for disport, and traill of Manhood.

- Michael Dalton, 17th Century Legal Scholar

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Introduction

Determining the threshold by which sports violence becomes criminal violence has been a long-standing endeavour, as 17th Century legal scholar Michael Dalton (1618) reveals. However, this threshold remains unclear despite a growing body of cases appearing in criminal courts resulting from violent conduct on fields of play. The cases continue to be filled with contestations and seeming contradictions. In this paper, three important questions will be explored. First, what can be considered violence in the context of English football? Second, to what extent has the criminal law been involved in on-field violence in English football? And third, where and how should the threshold be placed for the criminal justice system's involvement with on-field participant violence?

The use of the courts and criminal law for on-field violence is relatively rare, considering that "each year, millions of people are injured whilst playing sport" (Fafinski, 255, p. 414). Violence is an integral part of many sports, and many sports could not continue without it. This point is reaffirmed in *R v Henderson* (1976 at 127) where it was stated that, "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."

Smith (1987) contends that beyond maintaining the integrity of certain sports, there are several other reasons for why the criminal courts have given the arena of sport relative immunity. First, he suggests that the police and courts have other priorities to focus on. Second, sports leagues have internal player control mechanisms that could be potentially more effective in dealing with such matters. Third, civil law proceedings have been well established as an option for injured players to proceed with their grievances. Fourth, it could be perceived as unfair to criminalise the individual player while ignoring those who have guided or coached players into violent acts, such as the team captain or coach. Fifth, it would be unfair to criminalise a player when the law has been so unclear about what is and is not seen to be reasonable on-field violence. Sixth, it is very difficult to reach a guilty verdict in cases involving on-field violence. Seventh, prosecuting athletes does very little to address and solve the problem of sports violence and the injuries that result.

One aspect that Smith does not mention is that sportspersons appear unlikely to come forward to police with criminal complaints for injuries they have sustained during play, also making investigations and subsequent prosecutions unlikely.

On rare occasions, cases of on-field violence do cross over an undefined threshold of criminality and are deemed to be criminal violence. Many legal scholars have argued that this is problematic and that the courts should restrain from getting involved in cases of on-field violence (Gardiner, 1994; Gardiner & Felix, 1995; Gardiner & James, 1997; Standen, 2009). Summarising this position, Gardiner and Felix (1995, p. 213) state "better a man with a whistle regulating the game than a man with a wig!" Others argue that the criminal law must have a central role in cases of on-field violence to curb increasing occurrences of injurious violence, protect players, avoid bringing sports into disrepute, and to have an educating effect on sports participants to fully know and understand the limits of acceptable body contact (Blackshaw, 2008; Grayson, 1971, 1988, 1990, 1994, 1999; Grayson & Bond, 1993). A point often missed is that on-field violence effects more than the victim and also might incite off-field violence such as hooliganism, rioting, and domestic violence. My argument is that a middle ground must be established whereby better and more transparent self-regulation is encouraged alongside a more clearly defined threshold for the intervention of criminal law.

Labeling Physical Contact in Sport

The term violence does not exist in English law. Yet, it remains the colloquial term for referring to a range of possible criminal charges related to potentially unreasonable physical contact occurring on fields of play. Possible charges that athletes can face for physical contact on the field in England include: assault, assault occasioning actual bodily harm, unlawfully wounding or inflicting grievous bodily harm, wounding or causing grievous bodily harm with intent, manslaughter, or murder. To my knowledge, no athlete in English football has ever been convicted of murder for on-field physical contact, but it is possible that it could occur.

My research on Canadian football players' perspectives on violence in their sport revealed that players themselves typically do not define physical contact in sport to be violence (Fogel, 2013a).

According to many of the 59 players interviewed in the study, "violence" on the field only takes place when it is outside the rules of play, after a play has been whistled down, with intent to injure, or well away from the action of the game.

Out of this study, three distinct types of violence emerged from players' descriptions of the body contact in Canadian football: a) routine contact, b) immoderate violence, and c) ultra-violence. Routine contact is authorised by the rules of sport, common, deemed consensual by the majority of athletes, and causes minimal or no injury e.g. a routine tackle. Immoderate violence is unauthorised in the rules of sport, non-consensual yet relatively common, and not so extreme that legal officials become involved, e.g. pushing a player from behind. Ultra-violence is an extreme form of violence that is unauthorised, non-consensual, committed with recklessness or intent to harm, and causes severe injury, e.g. a player using his cleats to stomp on the head of an opposing player.

This typology illustrates that although players did not report to consent to physical contact that is outside the rules of the sport, they did not believe that such non-consensual acts should be deemed criminal unless severe injury was caused intentionally or recklessly. As such, players themselves seem to reject any notion that consent should be a determining factor in establishing a threshold for criminality of on-field violence. Instead, they outline a straightforward threshold for when the criminal law should intervene: if conduct is outside the safety rules and playing culture of the sport, committed recklessly or with intent, where serious long-term bodily harm results. It is my opinion that this is the criminality threshold test that the courts should adopt. Ultra-violence in sport should be treated as criminal violence.

Prosecuting Ultra-Violence in English Soccer

Prosecution of on-field violence is a relatively rare occurrence. In rugby there are numerous cases of punches to the face causing fractured bones, kicks to the head with cleats, and headfirst pile drives into the ground causing death (see *Bradshaw* 1878, *Billinghamurst* 1978, *Gingell* 1980, *Johnson* 1986, *Lloyd* 1989, *Goodwin* 1995, *Calton* 1999, *Moss* 2000, *Evans* 2010). In Canadian ice hockey, players have been prosecuted for striking opposing players in the head with their sticks, punching opposing players in the back of the head, and driving opponent's faces into the ice (See *Maki* 1970, *Green* 1971, *Watson* 1975, *Henderson* 1976, *Cey* 1989, *Ciccarelli* 1989, *McSorley* 2000, *Bertuzzi* 2004). While rugby and ice hockey may have more apparent violence, it cannot be said that English football is a sport without ultra-violence and that grave injuries do not result.

In 2008, FIFA President Sepp Blatter stated "Dangerous tackling is one of the most important issues in football... attacking someone is criminal... whether it happens on the football pitch or elsewhere... it is criminal and should be treated as such" (Syed, 2008). Pre and post-dating Sepp's claim, many cases of ultra-violence in English football have given rise to the intervention of the criminal courts.

Chart 1: Criminal Cases of Participant Violence in English Football

Name	Year	Level	Play	Charge	Outcome
Moore	1898	Amateur	On	Manslaughter	Guilty
Birkin	1988	Amateur	Off	Assault- actual bodily harm	Guilty
Kamara	1988	Professional	On	Grievous bodily harm	Plead Guilty
Chapman	1989	Amateur	Off	Grievous bodily harm	Plead Guilty
Shervill	1989	Amateur	Off	Grievous bodily harm	Plead Guilty
Lincoln	1990	Amateur	Off	Assault- actual bodily harm	Guilty
Davies	1991	Amateur	Off	Assault- actual bodily harm	Guilty
Blissett	1992	Professional	On	Assault- actual bodily harm	Acquitted
Ferguson	1994	Professional	Off	Assault- actual bodily harm	Guilty
Cantona	1995	Professional	Off	Assault	Guilty
Barnes	2004	Amateur	On	Grievous bodily harm	Acquitted
Cotteril	2007	Amateur	Off	Grievous bodily harm	Plead Guilty
Barton	2008	Professional	Off	Assault- actual bodily harm	Guilty
Forwood	2009	Amateur	Off	Manslaughter	Plead Guilty
Ward	2009	Amateur	On	Assault- actual bodily harm	Guilty
Chapman	2010	Amateur	On	Grievous bodily harm	Plead Guilty
Chester	2010	Amateur	On	Grievous bodily harm	Acquitted

This chart makes clear that criminal courts can and do intervene and successfully prosecute athletes for on-field violence in English football. Only seven of these cases are, however, related to on-ball actions that could potentially be considered part of active play. The other ten cases involve acts that were away from active play, e.g. Cantona jumped into the stands and kicked a spectator. Interestingly, in all ten of the off-ball cases the defendant either entered a guilty plea or was found guilty. In on-ball cases, the results are significantly more mixed with three acquittals each in cases where serious bodily harm resulted.

Despite a growing list of cases, there has been little guidance as to when it is appropriate to pursue criminal charges in cases of on-field violence in sport. However, the Court of Appeal in *Barnes* has provided some clarification. In the case, the defendant inflicted a serious leg injury on the victim resulting from a two-footed sliding tackle during an amateur football match. Barnes was originally convicted on the charge of unlawfully and maliciously inflicting grievous bodily harm, but the conviction was overturned on appeal.

The outcome of *Barnes* seemed to signal the end of cases brought before the courts for on-ball violence. The Court of Appeal judge stated: "In making a judgment 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" (at Para 15). The ruling did not establish a precise threshold of criminality, but it did highlight that one does exist and gave non-interventionist legal scholars something to hope for.

The authority of *Barnes* might be seen as a significant part of the explanation for why several cases of ultra-violence in English football have been investigated by police but have not resulted in charges. Manchester City player Ben Thatcher hit an opponent Pedro Mendes in the face knocking him unconscious. The Greater Manchester Police launched an investigation into the incident but he was never charged or prosecuted after the FA gave him a fine and suspension. In a separate incident, Liverpool player Luis Suarez bit an opposing player on the arm during a match between Liverpool and Chelsea in 2013. Biting is not part of the game of football, is not within the rules, and has obvious intent to cause harm. Yet, Suarez was not convicted or even prosecuted. Cases such as these suggest a reluctance to prosecute ultra-violence on the pitch in the post-*Barnes* era.

However, as Adam Pendlebury (2012) has aptly revealed, the authority of *Barnes* has not been absolute and has not done away with all confusion surrounding the criminality threshold in English football. Pendlebury explores the case of *Chapman* at length, which has clear similarities to *Barnes* in that it was an on-ball play that caused a significant leg injury to an opposing player, it was at the amateur level, both received similar league discipline, and the same criminal charges resulted.

Comparing the cases, the *Barnes* tackle could be seen as having more intent to harm as it has been alleged to have been performed in retaliation, while in *Chapman* it was the first incident between the two players. Despite the similarities, *Barnes* was acquitted while *Chapman* was sentenced to six months imprisonment.

An issue with comparing these cases is that *Chapman* entered a guilty plea. Had he not, it seems very possible that he would have been found not guilty based on the authority of the *Barnes* acquittal. A more interesting comparison is to *R v Ward*(2009). In this case, amateur football player Mark Ward was found guilty of assault following a two-footed “hard and late” tackle and was sentenced to four months imprisonment. The judge stated, “A prison sentence must be passed. Not only to stop you in your tracks, but also as a clear deterrent to others. This kind of behaviour on the pitch is intolerable.”

The relatively recent cases of *Chapman* and *Ward* make it clear that even acts associated with playing the game can result in criminality. While some may have assumed that *Barnes* created an exemption of criminal law for acts of on-field violence, it remains unclear as to exactly how far that exemption can and should extend.

Establishing a Threshold Test

To consider where this threshold can and should exist, I will consider the efficacy of different possible threshold tests that have been proposed and/or used. I argue for a multi-faceted approach, with test criteria that are actually testable and useful.

Possibly the most comprehensive and detailed threshold test for prosecutorial discretion for sports violence has been developed by the Crown Prosecution Service (CPS; in Gardiner, 2007). Their list of criteria is as follows:

1. What was nature of the conduct in the context of the sport under consideration?
2. What was the degree of pre-meditation?
3. Did the offender seek to ensure that match officials were unsuspected when the offence was committed?
4. Who was the conduct directed at, e.g. other participants, match officials, spectators?
5. 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?
6. Were there any previous incidents of a similar nature?
7. What actions have been taken by the match officials or the governing bodies in relation to the incident?

While these questions may inform context, they appear to do little in establishing a clear threshold. It is unclear how these questions would need to be answered for a prosecution to commence.

Though it has already been established that *Barnes* is not a definitive authority on sports violence in England, it is an interesting and important case as the Court of Appeal made the effort to openly consider different criteria. Specifically, the presiding judge considered factors related to: i) the *Cey* criteria, ii) consent, iii) the rules and practice of the game, iv) the presence of disciplinary review within the sport, and v) the gravity of the injury. Each of these criteria will be explored further as possible criteria for determining an appropriate threshold for identifying on-field violence as potentially criminal.

i) The *Cey* Criteria

A key statement in *Barnes* on the threshold of criminality was “[t]hat the level is an objective one and does not depend on the views of individual players. The type of sport, the level at which it is played, the nature of the act, the degree of force used, the extent of the risk of injury, the state of mind of the defendant are all likely to be relevant in determining whether the defendant’s actions go beyond the threshold” (at para 15). While it was not stated as such, this list of criteria appears to be derived from similar criteria stated and used in the Canadian ice hockey case of *R v Cey* (1989). Both the criteria in *Cey*, and the adoption in *Barnes*, are stated as tests to determine the appropriateness of criminal law intervention into sport.

It is my view that exploring these outlined aspects is a useful endeavour to reveal the full context of the incident. These tests do not, however, form a clear and coherent threshold test and are plagued with simply being exploratory in nature, much like the CPS criteria previously discussed. The Cey criteria could be a preliminary step in investigating violence in sport, but they do not establish a threshold.

ii) Consent

In Canadian sport, it has long been held that the key aspect of sport's relative immunity from prosecution in the criminal courts is the notion of *volenti non fit injuria*, or "to a willing person, injury is not done" (Corbet, Findlay, & Lech, 2008, p. 28). That is, there is a basic understanding that if an act of violence in sport is consented to, that no crime has occurred. It has been held that players knowingly understand the risks of the game and thus, by stepping on they field they are consenting to these risks. Without such an understanding, violent contact sports like Canadian ice hockey would cease to exist. In *R. v. Green*(1971) the judge stated:

"I think within our experience we can come to the conclusion that this is an extremely ordinary happening in a hockey game and the players really think nothing of it. If you go behind the net of a defenseman, particularly one who is trying to defend his zone, and you are struck in the face by that player's glove, a penalty might be called against him, but you do not really think anything of it; it is one of the types of risk one assumes."

Likewise, in *R. v. Cey* (1989), the judge stated:

"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 therefrom. 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."

In England, the belief in consent to the risks of the sport has not created an exemption from criminal law. It has, instead, led to debates on the extent to which physical harm can be consented to and to what extent players do in fact consent to the harm on the field.

In *Barnes*, authority on the viability of a consent defence is given to *R v Brown*(1993). The circumstances in *Brown* were of an entirely different nature involving homosexual sadomasochism and the limits of consenting to one's own harm, but some definitive statements on sport were made in the rule.

Specifically, it was stated (at 592) that some sports, such as the various codes of football, have deliberate bodily contact as an essential element. They lie at a mid-point between fighting, where the participant knows that his opponent will try to harm him, and the milder sports where there is at most an acknowledgement that someone may be accidentally hurt. In the contact sports each player knows and by taking part agrees that an opponent may from time to time inflict upon his body what would otherwise be a painful battery. By taking part he also assumes the risk that the deliberate contact may have unintended effects, conceivably of sufficient severity to amount to grievous bodily harm.

As such, sport is provided with specific exemptions that allow for some consent to harm. In *Barnes*, this exemption is accepted as it is pointed out that just as "a patient can lawfully consent to having an operation performed upon him by a surgeon, even though he will inevitably suffer bodily harm while the operation is performed" then so to is "physical injury in the course of contact sports such as football and boxing" permitted some exemption. This exemption is further reinforced in Law Commission Consultation Paper No. 134, which states, "In a sport in which bodily contact is a commonplace part of the game, the players consent to such contact even if, through unfortunate accident, injury, perhaps of a serious nature, may result."

The importance of consent in cases of sports violence might in fact be overstated. My previous research on Canadian football players illustrated that players themselves do not consent to much of what the Canadian courts have deemed consensual on their behalf. For example, a professional athlete does not show up to work thinking that he could be tackled from behind leaving his leg broken and his career finished any more than any other worker, like a teacher or lawyer, might consent to having this happen in their workplace. Despite this, the 59 interviewed football players did not think that just because they did not consent to an act that the act should invariably be considered criminal.

As such, the consent defence remains an oddity in criminal sports law, whereby players do not agree to it in principle but appear to accept it as the outcome of non-interference from the courts is favourable to them. Therefore, it is clear that consent is not a useful threshold of criminality.

iii) The Rules and Practice of the Game

Alexandru-Virgil Voicu (2005) suggests that any behaviour that extends beyond the rules of the game should be open to criminal or civil liability. On its own without other threshold criteria, this is a problematic stance. There are the formal rules that are often laid out in a clear fashion in the rulebook of a given sport; there are also informal rules that govern any given sport. For example, in basketball the rules state that a foul has been committed when a player on defence strikes a player on offence while the offensive player is in the act of shooting. This is the formal rule. The informal rule, or playing culture, is that if a player fouls another in the act of shooting, the foul should be hard enough to prevent the player from getting the shot up, thus avoiding a potential three-point play. Suggesting that this aspect of the playing culture of the sport should be considered criminal neglects an understanding of the sport.

Barnes draws reference to the term "legitimate sport," which arose during the first ruling without clear definition. Though it remains largely undefined, the accepted meaning appears to be the playing culture or the larger rules and customs that govern a sport. It is my view that playing culture should be a significant consideration in determining the threshold of criminality. Subsumed in this term should also be that plays both on and off the ball can be part of a playing culture and therefore that often debated, but not altogether useful, distinction can be put to rest. According to Pendlebury (2006), a problem with playing culture criteria is that it is difficult to determine. Likewise, Proctor (2012) suggests the problem with a playing culture test is the boundaries are not clear and a judge would need to have played the sport or been a significant fan to understand the culture. My perspective is that playing cultures are not overly difficult to understand, and can be quite easily understood through fairly basic qualitative studies of different sports. Furthermore, any confusion could be clarified with players' testimony on the playing culture of their sport. My research on Canadian football has revealed that shared understandings exist in relation to how much violence is perceived as part of a playing culture (Fogel, 2013a).

iv) The Presence of Disciplinary Review

A common argument for establishing a near impossibly high threshold for attaching criminal liability for acts of on-field violence is that internal disciplinary review mechanisms might be better suited to the task.

A self-governing body can ensure that punishment is swift and certain, and there is little doubt that the playing culture of the game would be understood. Furthermore, the punishment that a governing body can give out can supersede that which the courts are capable of in some instances. For example, Jeffrey Standen (2008) claims that the largest penalty ever given for assault in recent United States history was the suspension given to professional basketball player Latrell Sprewell after he choked his coach. Sprewell lost over 25 million dollars as a result of the suspension.

Holding a similar view, the appeal judge in *Barnes* (at para 5) stated, "The starting point is the fact that most organised sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct" and later "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."

In contrast to this view, it can be argued that self-governance leads to special treatment and the concealing of truth (see *McSorley* 2000). Internal disciplinary reviews also lead to inconsistencies between sports and playing levels that seem unfair. It is more likely that professional sports will have elaborate disciplinary mechanisms and governance models in place, while amateur levels will not. As such, professional athletes are granted special leniencies that amateur athletes do not. This is a backwards approach - the harm caused by violence in professional sport is often more significant as it can strip an athlete of his or her livelihood via injury, and can [mis]educate young spectators on how to play the game.

I am not proposing that self-governance should not be permitted within reason. The on-field contact that I have labeled "immoderate violence" is particularly well suited to being handled through governing bodies of sport.

That said, such governing bodies should be present at all levels of different sports; should enforce penalties when necessary; and, at the professional levels, should be formed somewhat independently from the owners and managers who have a vested interest in profits that creates a conflict of interest in their handling of disciplinary matters. Overall, better, more transparent self-governance is needed. However, whether or not a disciplinary body exists should not be the threshold for determining an appropriate threshold for prosecuting sports violence.

v) The Gravity of the Injury

A significant question left after the *Barnes* ruling is to what extent harm and injury resulting from on-field violence can pass the threshold of criminality. It was stated (para 5) that, "A criminal prosecution should be reserved for those situations in where the conduct is sufficiently grave to be properly categorised as criminal." Injury alone does not seem to be a determining threshold for criminality, nor should it be. In *Bradshaw*(at para 84), a case involving acquittal on charges of manslaughter in 1878, it was stated, "If a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will likely to be productive of death or injury." In contrast to a recent Canadian rugby case, *R v C.C.*, the defendant was convicted of manslaughter after driving an opposing player headfirst into the ground causing fatal injuries. In this case, a degree of recklessness could be shown that driving someone headfirst into the ground would cause serious injuries and that such an act would likely cause grave injuries. Injury alone, without recklessness and violation of playing culture, should not be sufficient grounds for crossing the threshold of criminality. For example, in the sport of baseball players hit a ball that is flying at over 90mph with a wooden bat. While players have limited control, the ball coming off the wooden bat can fly straight at the head of the pitcher who has thrown the ball causing a potentially serious brain injury. The batter should not be held criminally responsible for such an injury. In contrast, if he stormed the pitcher with his bat and swung it at him directly causing a brain injury, outside the playing culture of the sport, then criminal liability should be attached to such behaviour.

Conclusion

It is not in the public interest or good for the courts to be filled with cases of on-field violence, as this would burden the courts and undermine the integrity and sustainability of many sports. Likewise, it is not in the public interest or good to allow sport to exist in a state of exemption from criminal law whereby playing sport becomes a “licence for thuggary” and incidents of sport-related serious injuries and deaths begin to rise (from *Lloyd* 1989). A balance must be struck.

This balance appears quite simple: acts shall be deemed criminal if conduct is outside the safety rules and playing culture of the sport, committed recklessly or with intent, where serious long-term bodily harm results. All three aspects of the test must be violated for the criminal law to intervene. This simple, multi-faceted threshold is consistent with the approach used in *Barnes*, and minimises the grey area that has long characterised sports violence and criminal law in England and internationally. It also removes confusing debates and considerations that need not weigh into the decision to prosecute. Such a straightforward test should be established to remove the inconsistency and uncertainty of the involvement of criminal law in contact sports, allowing the police and courts to act swiftly and certainty when the occasion arises.

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