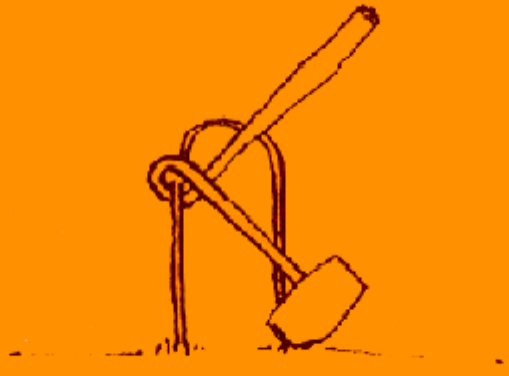
Games, Rules and the Law



A.S.S.H. STUDIES IN SPORTS HISTORY: NO.4

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CONTENTS

PREFACE

The three papers in this fourth publication in the A.S.S.H. series *Studies in Sport* were presented at the Sporting Traditions V Conference in Melbourne in 1987.

The first paper provides an overview of the attempts to clarify the ways in which rules are involved in the conduct of sport. Broadly speaking, rules are considered to be relevant to the identity of particular sports, a matter which might be of concern to historians interested in the early days of sport, and to the wider significance of sport by virtue of the seeming moral significance of cheating and other undesirable breaking of rules.

With the growth of the commercial significance of sport, such matters have come to have more intense formal significance involving, thereby, the law. The second and third papers discuss a number of features of this development.

The second paper focusses on the legal attempts to control participants' violence. For this purpose, the precise significance of the rules and their application is central in the necessary determination of such matters as intentionality and responsibility. Opie provides an overview of the changes in the focus of attention of the law since the seventeenth century. This account provides insight into the changing social significance of sport, as well as providing the basis for appreciating the application of the law. He shows that the interest of the law in the conduct of sportsmen did not begin with modern professional sport, although in modern times the problems have changed. New difficulties have arisen because of the possible "vested commercial interest in maintaining some degree of vigorous, if not violent, conduct in sport" and because of the impossibility of "a duty of care", given the nature and rationale of modern contact sport, particularly at the highest levels.

In the third paper Neville Turner raises fascinating questions with regard to the moral responsibilities of sporting heroes and heroines who have become public figures capable of setting standards and influencing conduct, particularly of the young. He suggests that sportsmanship is not only, for such figures, a moral duty but, increasingly, a legal duty because of certain requirements stated in players' contracts. These

trends raise intriguing questions, many of which are yet to be tested in the courts. It is hoped that such questions will stimulate our readers to further contemplation of the world of sport, and to a closer observation of that world.

RULES AND GAMES

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It is a common enough view among those who play games that those who win by cheating do not really win, even though they may be awarded the prize. Some recent writers have presented this view, or some close variant of it, in the following ways:

> The end in poker is not to gain money, nor in golf simply to get a ball into a hole, but to do these things in prescribed (or, perhaps more accurately, not to do them in proscribed) ways: that is, to do them only in accordance with rules. Rules in games thus seem to be in some sense inseparable from ends for to break a game rule is to render impossible the attainment of an end . . . since one cannot (really) win the game unless he plays it, and one cannot really play the game unless he obeys the rules of the game.[1]

> . . . games are paradigmatically practices, and a necessary condition for cheating is the violation of the rules of the game. But if one cannot be engaged in a practice unless one is following the rules of the practice (and hence not violating them) then one who is ostensibly playing but cheating is not actually playing the game.[2]

> Competing, winning and losing in athletics are intelligible only within the framework of rules which define a specific competitive sport. A person may cheat at a game or compete at it but it is logically impossible for him to do both. To cheat is to cease to compete.[3]

> . . . The rules of a game are the definition of that game. If this is the case a player who deliberately breaks the rules of that game is deliberately no longer playing that game.[4]

This view, or family of views, which has been called 'formalism'[5] or the 'logical incompatibility thesis'[6] to mark the two central claims, namely that games are defined by their rules (are rule-constituted), and that breaking the rules of a game is logically incompatible with playing that game, has not gone unchallenged. The arguments which have been offered against formalism are intended to establish that players who break the rules of a game may still be playing that game because games are not constituted merely by their rules.

It is this dispute which is the focus of this paper. It will be necessary, in the process of trying to understand the dispute, to clarify the relationship between games and their rules.

Before considering the dispute in detail it may be worth indicating the wider significance of such a study of games and their rules. It is possible to do this only in general terms in this paper.

There is a long tradition of thought which attaches to the proper conduct of games some value in the process of moral education. Obviously the proper conduct of games involves the appropriate recognition of rules and their sovereignty in the face of severe pressure to break, if not abandon, them. As the Olympic philosophy proclaims, it is in sporting competition, games, where life is made simple and intense, that the young may learn valuable moral lessons, in preparation for the greater complexity of life beyond the playing field. As McCarthy's physical education teacher says :

> If he were God, McCarthy, man would make sense out of life. There'd be goals you could see, a beginning and an end with time for oranges in the middle. With rules
>
> "And if you broke them God would blow a whistle?" . . . .
>
> . . . But life - God's smarter than man, he made it shapeless, any number to a team, and no club colours.[7]

Not many observers of the world of sport today would attach much validity to the efficacy of games as an agent of moral education. Though the rhetoric lives on when the value of competitive sport is discussed, it is difficult to ignore the practical world of sport, particularly that at the highest levels. That world presents an overwhelming rejection of the claim that sport has any positive moral significance. In much sport the prevailing attitudes to the rules are the same as those which prevail in society at large: obedience is entirely pragmatic and covert rule-breaking is raised to an art form. Players appeal for everything in their favour regardless of the rights, deliberately break rules when it is strategically beneficial, and exploit any weakness detected in the officials. None of this behaviour is consistent with claims that the rules of games are constitutive. The rules seem to be an obstacle to be overcome. Perhaps the extent of the decline in the sovereignty of rules was best illustrated when the world's greatest footballer in the ultimate football competition not only allowed himself to be the scorer of a goal by breaking the rules, but appeared to regard it without shame afterwards. A system which accepts, as its greatest exponent, one who places the prize above the art at which he excels, can surely have little claim to the lofty vocation of moral exemplar.

In the world outside the arena it is regarded as stupid and naive to limit one's benefits by following rules if the rules can be broken without fear of detection: so tax evasion is a thriving business and drivers speed when there are no police in sight. To go even further, drivers warn other drivers of the presence of radar, and there are available, on the open market, devices to detect police radar so that the driver has an improved chance to break, without penalty, laws designed for his own benefit. At the same time the same drivers lament the road toll. Examples could be multiplied at length.

So while it may be true, as Keenan says, "that sport mirrors the corruptions of society generally, and of unjust men more specifically"[8], and that sport may never be worthy of the lofty tasks set for it by de Coubertin, it seems clear that much of sport's value if it has any, other than passing entertainment, is related to the nature of, and significance accorded to, the rules of the game. This paper is intended as a small contribution in the development of understanding of how rules in games are best described.

Objections to the thesis that games are defined by their rules have, for the most part, focussed on the implications of it rather than on the meaning of the thesis itself. In other words it has been argued that, if the rules are constitutive, then certain propositions follow. If these propositions are found to be unacceptable in some sense, then games are not constituted by their rules.

This approach increases the chances of confusion, because it is difficult to know what follows from the statement that games are constituted by their rules if the meaning of that statement is not clear. Opportunities for different interpretations are further increased because there is no standard version of the formalist account of games, and accordingly critics have had to base their objections on what are often merely passing comments of authors writing about other features of games. In many of these references to the idea, it is merely taken for granted, so that there is little supporting analysis or argument to make clear what is meant.

Thus there is a range of interpretations which I shall illustrate in order to see what has to be resolved before we can make a decision about the dispute.

The fact that a game is defined, or constituted, by its rules is fairly generally taken to imply that the activity of playing the game is

constituted by action in accordance with the rules, and that therefore a person who breaks the rules is not playing the game, and therefore cannot win the game. Among critics and supporters of formalism however we can find different interpretations at four points in this chain of reasoning.

Schwyzer[9] argues that although chess is defined by its rules, it does not follow that the activity of playing chess is constituted by activity in accordance with the rules. The rules of chess distinguish chess from other games, but do not distinguish playing chess from other kinds of rule governed activities. What makes playing chess the kind of activity it is, that is, what constitutes the activity of playing chess, is not determined by the rules, but by what Wittgenstein calls "the grammar of chess". In short, this is the social context in which chess exists. This is indicated by the kinds of things it is appropriate to say about chess: who the winner was, what moves were bad, who the champion is, and so on. He illustrates his argument by describing Chess in Ruritania, where it is constituted by the same rules, but engaged in as a religious ceremony once a year by two priests to forecast the coming season. It is not played *as a game.* Playing a game then involves more than acting in accordance with the rules of the game. Exploring the nature of this addition would be interesting, but is beyond the scope of this paper. It might be noted, though, that the rules of many games do not mention anything about trying to win, and some do it only indirectly by stating that the rules are the rules of a game. For anyone who did not know what a game was, the rules would be of little use.

A second site of different interpretations is the relationship of the players to the rules. Using the terminology developed by Ganz,[10] persons in their actions may *fulfil a* rule, or may *act in accordance with* a *rule,* or may *be following* a rule. If you follow a rule you satisfy the rule, know the rule, and see to it that you satisfy it. Rule following is a deliberate, reasoning, process. To act in accordance with a rule is to satisfy the rule, and to know it, (in the sense that, if questioned, you could formulate it in some way) but not to have deliberately seen to it that you satisfied it on the occasion in question. Acting in accordance with a rule is habitual rule following. Finally, a rule is fulfilled by some action if the action satisfies the rule but the agent does not know the rule at all (and could not, therefore, have used it in any practical reasoning).

Now, depending on whether games being defined by their rules means that to play a game is to *follow* the rules, or whether it means to *act in accordance* with the rules, or merely to *fulfil* the rules, we are faced with a range of cases which are problematic for the formalist thesis. Clearly requiring rule-following as a condition for game playing is unrealistic. Much game playing involves nothing which could be called 'seeing to it'. Indeed much of learning to play a game has as its goal that actions become automatic. Seeing to it that you obeyed the rules would be regarded as an impairment to playing the game well. Then, too, it is easy to imagine someone becoming a player by a process of imitation, repetition, reaction and habit, without knowing the rules, and even accomplished players in some games are found not to know certain rules. So to require knowledge of the rules (and certainly therefore to require heeding the rules) seems too stringent a condition for playing a game. We are left then, out of the three possibilities, with the requirement that playing a game requires merely fulfilling the rule (as a necessary, but not sufficient condition, if Schwyzer is right). In other words the rules must not be broken. Perhaps the best way to increase your chances of fulfilling the rules is to know them, and to train yourself to advance from a process of seeing to it that you fulfil them, (following them) to a process of acting in accordance with them, automatically.

On this matter of the interpretation to be given to the relation between the rules and the activity of playing the game, two other possibilities (against formalism) are worth mentioning. D'Agostino suggests that 'X is playing G' is to be taken as meaning "X is willing to submit to authoritative decisions invoking the rules of G"[11]. This condition means that rule breaking and lack of knowledge of the rules can be accommodated in the notion of playing a game.

Secondly, as opposed to a formalist interpretation of 'playing a game' as 'fulfilling the rules of the game', it might be worth considering *'trying to* fulfil the rules of the game'. This would have consequences similar to those of previous suggestions and would be consistent with the peculiar relation between ends and means in games, where difficulty is deliberately created. It would also make games practices of a kind different from other rule-constituted practices. This would be a departure from the traditional view that games are *paradigmatically practices*[12].

The third point of interpretation of the implications of games being rule-constituted, and perhaps the most common, is the matter of breaking the rules. There are two sources of variety: Different kinds of infringements, and different consequences of infringements.

The rather brief statements of the formalist thesis are either incomplete or vague in their specification of rule breaking. Some mention only cheating, ignoring the fact that not all rule breaking is cheating. Others consider only rule-breaking, making no distinction between accidental and deliberate, or covert and open, or rule-breaking by players and by officials. It is by no means clear that all these cases bear in the same way upon the thesis that games are rule constituted, particularly when it is remembered that the rules of games, (most, if not all) which are said to constitute the game, include rules the sole purpose of which is to deal with breakages accidental and deliberate, of other rules. In other words the definition of a game usually includes the procedure to be followed when some rules are broken, and this rule-governed procedure is part of the game. So it is odd to call breaches of those rules which are qualified further by other rules, not part of the game.

Further it might be noted that if playing the game involves only fulfilling the rules (that is satisfying them without the requirement of knowing them) then cheating is impossible, if by 'cheating' is meant 'deliberate covert rule-breaking'. It is not possible to break rules deliberately if one does not know the rules. However if *trying* to fulfil the rules is the necessary condition for playing the game, deliberate rule breaking would not be playing the game but accidental breaking would be, provided it was duly penalized.

D'Agostino discusses another interesting kind of rule-breaking or, rather, a convention of ignoring certain of the rules. He uses basketball as an example. In particular, he claims, the non-contact rule is ignored, not arbitrarily, but consistently, in certain conditions, with certain purposes in mind. "The unofficial, implicit, empirically determinable conventions which govern official interpretations of the formal rules" he calls the ethos of the game[13]. This account raises interesting questions about the nature of rules and how their meaning might be determined, and to these matters I will return briefly later. The point of including it here is to provide an example of another kind of rule-breaking which is likely to have quite different implications for the formalist thesis. There is also a whole range of related

infringements by officials, (rather than by players) to complicate the issue further. Here it suffices to conclude that 'breaking the rules' is not without some ambiguity.

To return to the second group of different interpretations in connection with rule breaking, namely the consequences of infringements in games which are defined by their rules, we can identify four. Lehman argues that if cheating is logically incompatible with competing, then, when someone cheats in a game, no game ever occurred[14]. This conclusion however seems to be based on an extremely unsympathetic interpretation of 'competing'. Competing in a game involves a number of actions subject to different rules. If one action, throwing a spitball, breaks one rule, then to take that as nullifying all the other actions performed in accordance with the rules seems unjustified.

A second interpretation is that a game in which rules are broken is a defective game[15]. This, according to D'Agostino, indicates that formalism leads to a kind of Platonism about games, according to which all actual games (which of course involve breaking of rules) are imperfect actualizations of the ideal game. According to formalism, any game in which a rule of the game is violated is not really an instance of the game. If this were correct, he argues, we might well expect that, as players become more skilful, actual games would become more like ideal games because rule infringements would become fewer. Although he allows that more skilful players may commit fewer unintentional fouls he suggests that "they may intentionally engage in rule-violating behaviour *more* frequently than less skilful players (depending on the ethos)". Therefore actual games do not tend to become nearer the ideal as the standard improves.

It is difficult to see the force of this as an objection to the formalist position. I see no reason either to object to Platonism, nor to assume that games might not approach the ideal type as both intentional and unintentional fouls are diminished through changes in skill and *attitude.* Remembering too that game-rules accommodate both kinds of fouls, the sense given to 'ideal type' is not straightforward.

The third interpretation is that a player who breaks a rule in a game is not playing the game. This is the most common interpretation, and is indeed the one made by those who are called formalists by their critics. This is seen to have two unfortunate consequences in that it destroys the

distinction between 'not playing at all' and 'not playing fairly', and it causes difficulties for the explanation of the notion of a penalty. In brief, why give a penalty to someone who is not playing? The spectators are not playing either [16].

The relationship between 'not playing' and 'not playing fairly' is interesting and not at all straightforward. In some contexts there would be no meaningful difference: playing *is* playing fairly, and 'fairly' would add nothing to the account. In other contexts, a distinction could be made and it would probably be informative to consider some cases, but there is not the space here to do so.

The second point is not unrelated. The strangeness in the notion of giving a penalty to someone who is not playing, arises because it suggests that a penalty is being given to someone who is not playing in the sense that the spectators are not playing. The important distinction however is between a 'player who is not playing' and a spectator who is not playing. It is the combination of being a player and not playing which justifies the penalty. Here the definition of 'player' is critical, because the term often incorporates a version of the action-custom ambiguity. In most actual games, certainly important ones, a person becomes a player by having his name on a team list, by wearing a uniform, being assigned a position, and so on. His being a player does not directly depend, merely, at least initially, on his performing certain actions (which fulfil the rules), although it may be reasonable to have some expectation about his intentions. On the other hand, in other contexts, there is the sense in which a person is a player by virtue of actions in accordance with the rules, and solely by virtue of that. In that sense, the action sense, a person ceases to be a player when he ceases to be playing (as when I cease to be a player when I cease playing with my children). But the duly appointed player has to be duly dismissed in order to cease having the responsibility to play. So when, by breaking the rules, he stops playing he is penalized because he is a player who is not playing.

In different contexts, the defining characteristics of a player will be different. A person walking along the beach may become a player merely by catching a ball hit towards him from a nearby cricket match, but a spectator at a Test Match who catches the ball near the boundary does not produce a dismissal. Consideration of what conditions must be met by a player, apart from acting to fulfil the rules, merits more consideration

than can be given here. Suits's notions of the cheat, trifler and the spoilsport suggest that more than obedience to rules is necessary[17]. It is possible that some notion of commitment is not only required but is perhaps a source of some parts of the notion of fair play.

The final interpretation of implications of the claim that games are defined by their rules is not that there is no game, nor that the game is defective, nor that the player is not playing the game, but merely that the action which broke the rules is not part of the game. Accordingly, such action cannot advance the course of the game, and usually it results in the game being stopped and restarted with some remedial change in the conditions to restore the game to its state before the infringement, or to some state which is regarded as equivalent in respect to the interests of the players who suffered or benefited from the infringing act[18]. Probably in practice this remedial action is only imperfectly achieved and a consideration of cases would be informative. The strategic foul depends for its efficacy on a particular sort of balance of this kind.

It should be obvious by now that the so-called formalist thesis has been taken to mean many things. Consequently, any discussion of the dispute tends to degenerate into an exchange of sentences beginning with "Well it depends on what you mean by X" where X might be 'playing a game' or 'following a rule' or 'cheating' or 'breaking a rule' or 'being a player'. It is difficult to make progress in such a jungle. Perhaps it may be possible though to indicate a way through the problems by responding first to the claim that games are constituted by their rules by asking 'Which games?' and 'Which rules?'.

It is not difficult to establish that the phrase 'the game of Australian Rules Football' can mean quite different things in different contexts, and hence what it might mean when we say "The game of Australian Rules Football is defined by the rules of Australian Rules Football" is by no means to be taken for granted. So we might well ask "Which game of Australian Rules Football is defined by its rules?" Consider some possible candidates, suggested by putting them in different contexts.

(1) The game of football played at the firm's picnic last Saturday was a riot.

(2) The game of football developed rapidly under the new administration.

(3) The game of football played in the 1980's in the V.F.L. is a different game from that played in the 1920's.

(4) It's false that the game of football was invented by a South Australian 10 years before it was first played, and that it was stolen by a Victorian.

Which if any of these different games of Australian Rules football is constituted by its rules? If any, are the defining sets of rules the same? If the rules have changed over the years, and the rules define the game, is it the same game? If the V.F.L. decided that, as from next Saturday, in deference to the Federal Government's multicultural policy (or instead as a bicentennial project), Australian Rules Football would be played with a round ball, would it still be Australian Rules Football. If not, why not? Of course, questions such as these, focussing on the identity of game can be raised about all games; they have been a feature of cricket discussions in recent years ("one-day cricket is not really cricket"). As well as providing entertainment, such questions raise doubts about the extent to which games are defined by their rules. One might expect that a rule constituted activity would have its identity easily established, but for some reason it does not seem to be easy to establish criteria, although it is perhaps easier for some senses of 'game' than for others[19].

To understand better the different senses suggested above for the term 'game' it may help to see how rules are relevant to the various senses. This will also provide us with a basis for considering the question 'Which Rules?'

It is a fundamental feature of a game that it does not merely consist of actions involving physical objects, but that these actions are, or are not, part of the game by virtue of some special game interpretation[20]. So objects become bats, people become players, actions become stumping and bowling and scoring a run, and so on. These game terms, as we may call them, have special meanings and these meanings are dual, and determined by two sets of rules. Using the game term 'bat' as an example, part of its meaning is due to its relationship to other game terms, and the rules which specify these relationships determine what can and cannot be done with the bat in the game. It can be used to hit the ball but not to trip players, for example. So there is a set of syntactical rules linking all the game terms, and providing part of their meaning by fitting them into a self-contained system of terms. The meaning of game terms specified in this way has been called the import of the terms[21].

The second component of their meaning is the connotation, and this consists of the particular physical characteristics of the objects or events or actions to which they are applied. The rules which specify those characteristics give a particular physical interpretation to the abstract system of game terms. This dual meaning of the game terms, that is the relating of the connotation and the import, specifies the action which constitutes the game. It is the rules which link connotation and import of game terms which can be called constitutive rules by virtue of their making actions possible which were not possible in the absence of the rules[22].

Now it is possible that a game, so constituted, and this is the minimal sense of 'game', might never be played, perhaps lying idle in some dusty drawer. (See 4 above). It is clear that such a game is constituted by its rules but it makes no sense to speak of anyone breaking the rules because it has not been played.

Once the game has been played, there is another sense of 'game' created, to refer to the physical game at a particular time and place. For most games (perhaps all other than chess), the physical occurrence (actions and objects) will, in addition to fulfilling the conditions specified in the connotation of game terms, more or less loosely, ("This will do as a bat", and "We'll use that bin for a wicket") have other incidental features not required by the rules. These will give the game a particular quality, only contingently related to the rules, and may provide the basis for a change in the identity of the game.

The playing of a game may become a social practice and may, despite minor differences in equipment and interpretations of game terms, be referred to as 'the game X'. The identity conditions of this social game may include those of all the played games, but what is constant and what varies will depend on local circumstances.

If, as has usually happened, the social practice, being widespread, becomes codified and institutionalized, it is quite likely that some informal features, incidental but current in the social practice will be seen as requiring regulation, in order to be able to compare games, tally results and perform other functions undertaken by sporting associations. So new rules might be added to fulfil new purposes.

Although in this account, the identity conditions are presented as accumulating from one sense to the next, it may not be so simple because bureaucratic consideration may over-ride or modify rules of the played game[23].

Consider for example D'Agostino's explanation of the ignoring of the rule about bodily contact in basketball[24].

From this brief sketch it should be clear that any discussion of whether rules define games is likely to founder unless there is considerably more precision in the use of both terms 'games' and 'rules'. Even in the simplest sense of 'game', rules could be seen to serve two functions. More complicated senses of 'game' involved further functions for rules, or perhaps for other regulating mechanisms.

In the face of such vagueness it may be a natural inclination to attach some special significance to the *written* rules as definitive. But if Baker and Hacker are right, determining what the written rules mean will be a pointless quest. The rules of games (along with other kinds of rules) they say,

> exist in so far as they are generally invoked by members of a social group, directly or indirectly in guiding, justifying, explaining, identifying and teaching the behaviour to which they are relevant[25].

It does not make a lot of sense, then, to draw a distinction between what the rule about body contact means and how the officials habitually interpret it. How it is used in the official situation *is* what it means. And if players do not regard any game rules as constitutive, but see them as merely regulative: of their attempts to be a winner, then the rules are not constitutive. For sport, as one kind of game, that would seem to be a sad development. Much more analysis is necessary before we can claim to understand how rules work in games, even though games are usually regarded as involving rules in the most straightforward way.

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CHANGING CONCERNS IN THE LEGAL CONTROL OF PARTICIPANT VIOLENCE IN SPORT

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PRELIMINARY MATTERS

(a) Introduction

Sport has a special capacity for inflaming the passions of both participants and spectators so as to produce violent conduct. With the possible exception of boxing, this capacity achieves its greatest dimensions on the field of play in the fast action team sports which involve Physical contact.

The causes, occurrence and consequences of violent conduct in the context of sport have been fertile fields of study for a wide range of academic disciplines; criminology, history, medicine, political science and sociology being some of the more important. Not unexpectedly, the law has exhibited a keen interest in the control of such violent conduct. The motivation for this interest and the manner in which it has been exhibited have varied over the past 400 to 500 years. This paper seeks to survey various aspects of the changing concerns in the legal control of violent conduct in sport.

The conduct which will be considered is that of participants in sport. Indeed, from the lawyer's viewpoint, this is the most interesting field as it has produced discrete legal doctrine. This paper will not consider violent conduct by spectators or the legal responsibility of facility operators and event organizers for injury sustained by participants or spectators.

Also, it is intended to exclude the legal rules which govern the conduct of internal disciplinary proceedings of sports bodies. Essentially these are private proceedings, the outcome of which does not concern the legal system except to the extent that those proceedings must follow certain basic principles of justice.

The legal controls which will be considered are criminal prosecution and civil action seeking compensation for injury. The focus of this paper is not confined merely to violence in the sense of fighting or other overt acts of aggression but extends to include injuries sustained in the course of play.

The basic source material for this paper consists of reported decisions of courts in Australia and England (with some reference to Canadian and United States decisions) and the writings of learned commentators.

(b) The Legal Controls

The two forms of legal controls to be considered are criminal prosecution and civil action for compensation.

Criminal prosecution is usually undertaken by the State and will involve the police or some other prosecutorial authority. Obviously, this entails the sport participant being charged with a criminal offence. Usually that offence will be one of the various kinds of assault; graver forms of injury will mean a more serious charge of assault. Occasionally, the death of a participant will result in a charge of manslaughter.

A civil action for compensation will involve commencing an action under the law of torts. Here the injured individual will seek to obtain monetary compensation (damages) in respect of a physical injury which has been sustained. Compensation can be awarded to meet expenses such as hospital and medical accounts, loss of income if absence from employment has occurred and loss of earning capacity if the participant has been disabled so as to reduce his or her ability to earn an income in the future. There are other grounds for awarding damages and these include pain and suffering and loss of enjoyment of life.

The law of torts recognizes two forms of legal action which may be of relevance to the injured sportsman. First, there is the tort of *battery* which grants a right of compensation to those injured by intentionally delivered physical contacts occurring without consent. Battery is the modern form of the old tort of trespass to the person. Secondly, there is

the immensely important and pervasive tort of *negligence.* It imposes a legal duty to exercise reasonable care not to injure others whom it can reasonably be foreseen will be injured if such care is not taken. The tort of negligence is concerned with unintentional physical contacts.

Where a person is engaged in an activity such as sport which entails intentional physical contacts or abnormal (when compared to everyday life) risk of unintentional contacts, due allowance is made so as not to impose legal liability. It is necessary to briefly consider how this allowance is made.

(c) Consent to Physical Contact in Sport

Physical contact which occurs in sport would often have criminal and civil law implications but for the fact that it occurs in sport. If a person is pushed over, grabbed, punched or hit on the head with a ball while walking down a public street, a variety of criminal offences might be committed as well as the torts of battery and negligence. Yet the same acts on the sports field frequently do not have these consequences.

The reasons for this state of affairs have long been a subject of considerable interest to legal scholars. It is now generally accepted that the person playing, say, football agrees *by virtue of participation in the game* to be tackled within certain limits. This approach is rooted in the Latin maxim *volenti non fit injuria* [1]. The modern terminology is to refer to the contact occurring with the participant's *consent* (criminal law and the tort of battery) or *at the participant's risk* (the tort of negligence). For convenience, consent will be used to cover both terms.

The practical significance of the rule is that a participant who sustains an injury by virtue of physical contact to which he or she has consented will bear the loss caused by the injury rather than be entitled to shift it (by means of a successful compensation claim) to the person who delivered the contact (as might be the case otherwise). Similarly, contacts which might otherwise be criminal are rendered innocent.

Notwithstanding that participation in contact sports in particular can be attended by broken limbs and even death, the law usually recognizes the validity of the consent. In the criminal law context this non-interference

has been justified on the basis

> . . . that the participants consent to the contest in a form controlled by rules, that the rules are such that the risk of serious injury is slight and is counter-balanced and outweighed by the gratifying aspects of diversion, recreation and promotion of health.[2]

Similar justifications have been advanced for not imposing civil responsibility.

The consent to receive physical contact may be given by the sports participant either expressly or impliedly. An express consent can be oral or written but in sport (especially contact sport) it is rare. An example of express consent in another setting is when a patient signs a form authorizing a doctor to perform an operation. An implied consent may be found in a participant's conduct or in the surrounding circumstances. The essence of the consent in sport is to be found in the fact of participation.

The crucial issue which has most often concerned the courts is the extent of the consent. To which contacts does a person consent by virtue of participation? Are they those permitted by the rules of the sport? Alternatively is the test one of ascertaining those contacts which are common or foreseeable, even if outside the rules? Are any of these factors determinitative? For instance even if contact is within a sport's rules, is there consent if it occurs carelessly, maliciously or in an unsporting manner?

Answers to these questions are uncertain. Some questions have not been addressed squarely in the courts and others are unresolved due to apparent inconsistencies between the decided cases.

These are some of the modern issues in the legal control of sport. It is not possible to address them without knowledge of the history of changing concerns in the legal control of violent conduct by participants. This is especially so as many of the statements of principle which are referred to in order to decide cases today have originated from times when conditions in sport and society were quite different.

From the 17th to the 19th centuries debate in legal circles focussed upon the inherent lawfulness of those sports and pastimes involving physical contact or risk of serious injury. It is to this debate which attention will now be directed.

EARLY DEBATE OVER THE LAWFULNESS OF PHYSICAL CONTACT SPORT

Writing in the mid 17th century Hale made the following observation:

> And therefore I have known it ruled, that if two men are playing at cudgels together, or wrestling by consent, if one with a blow or fall kill the other, it is manslaughter . . .[3]

In support of his observation Hale referred to two decisions involving friendly sword-play[4]. The first concerned the manslaughter conviction of a man who accidentally killed his friend while "playing at foils at a fencing school" but little is known about this case[5]. The other, decided in the 17th century, was *Sir John Chichester's Case*[6]. In that case according to Hale[7] Sir John and his servant were engaged in their usual sporting practice, Sir John armed with his rapier housed in its scabbard and the servant with a bedstaff. Sir John thrust at his servant who endeavoured to parry but succeeded only in knocking off the chape of the scabbard (the metal covering cap at its end) exposing the rapier which continued on its course with fatal consequences. Although there was probably no intention to even prick the servant, Sir John was found guilty of manslaughter.

The implication of Hale's observation was clear: the deceased's consent in regard to the risks of these sporting or practice occasions mentioned by Hale did not afford protection from criminal responsibility.

Not surprisingly this restrictive view did not remain long without criticism[8]. In 1762, Foster[9] stated that Hale had misapplied the principles of law relating to manslaughter in these circumstances. After recognizing that if a person struck another with the intention (derived from anger or preconceived malice) of doing bodily harm manslaughter would be appropriate if death ensued, he proceeded to make what has been called by Williams[10] "the classic statement of the law", namely:

> But is this the case of persons who in perfect friendship engage by mutual consent in any of these recreations for a trial of skill or manhood, or for improvement in the use of their weapons? Here is indeed the appearance of a combat, but it is in reality no more than a friendly exertion of strength and dexterity for the purposes I have mentioned . . . bodily harm was not the motive on either side. I therefore cannot call these exercises unlawful; they are manly diversions, they tend to give strength, skill and activity, and may fit people for defence, public as well as personal in time of need[11].

Unlike Hale's approach, there is in this statement a recognition that the participants' consent to body contact and the resultant risk of injury would be upheld by the law and that this can be justified by the advantages to be gained from engaging in contact sport activity.

However, Foster was careful to set limits. Instances where the motive was bodily harm have been mentioned. Next he excluded prize-fights and then he went on to support the decision *in Sir John Chichester's Case in* terms which would be recognized today as manslaughter by criminal negligence:

> Sir John ought not to have used a deadly weapon with so little caution. The chape was likely enough to be beaten off in the violence of play, and if that should happen, death, or some great bodily harm must ensue. He did not use that degree of circumspection which common prudence would have suggested. And therefore the fact so circumstanced might well amount to manslaughter, *though the exercise itself with proper weapons might have been otherwise lawful.* [Emphasis added.][12]

In 1803, East concluded that Foster's views as to the legitimacy of consent in sport represented the better opinion[13]. Referring to sports such as cudgels, foils and wrestling which he called "lawful" East added

> . . . the weapons ordinarily made use of upon such occasions are not deadly in their nature, unless urged by a malicious and vindictive spirit.
>
> Upon this distinction, as to the nature of the weapon, *Sir John Chichester's Case* seems to have turned ...[14]

Thus, by the beginning of the 19th century the following propositions could be made about contact sports:

1. Subject to the following proposition, the consent of a person engaged in a contact sport was sufficient to relieve another participant of criminal liability for serious injury or death.

2. That consent was vitiated if given in connection with prize-fights and certain other pastimes, or in a sport in which great bodily harm was likely to occur (albeit unintentionally) *or* in circumstances where one or more participants were motivated to cause bodily harm out of anger or malice.

The next section will consider the first of the three exceptional circumstances referred to in proposition 2. Also attention will be given to the growth of organized team sports in the 19th century played under standardized

rules with safety and order considerations in mind. That development had a significant impact on the jurisprudence of the period and in large measure dispensed with all practical concern over the second and third exceptional circumstances.

PRIZE-FIGHTS AND CERTAIN OTHER PASTIMES

Mention has already been made of Foster's exclusion of prize-fights from the consent rule. He put it in these terms:

> I would not be understood to speak here of prize-fighting and public boxing matches, or any other exertions of courage, strength and activity of the kind which are exhibited for lucre, and can serve no valuable purpose; but on the contrary encourage a spirit of idleness and debauchery. For these disorders will I conceive, fall under a quite different consideration.[15]

Today, the lawyer's perception of a prize-fight is dominated by the famous case of *R. v. Coney* [16] decided in 1882. It is the vision of two bare-fisted pugilists engaged in a largely unregulated (by today's standards) fight to the finish for a purse[17] before an unruly crowd of gamblers. Pollock has suggested that in Hale's time a prize-fight would have had another meaning.

> The prize-fight of those days was a fight with swords, the weapon being the single-edged cutting 'backsword', not the small-sword carried by gentlemen, though it seems gentlemen occasionally played at backswords for their own amusement. In other respects the diversion had much the same incidents as the pugilism of the later eighteenth and early nineteenth centuries[18].

This view might gain some inferential support from Foster's distinction between prize-fights and public boxing matches *supra.* Even so, this question is of little relevance today for virtually throughout the 19th and 20th centuries the perception of the prize-fight has been of the kind considered in *R. v. Coney* and it is this perception which will be used for present purposes. What is of some importance is that Foster impugned a range of activities in addition to prize-fighting, be it of the Pollock or *R. v. Coney* version. "Cock-throwing at Shrovetide"[19], public jousts and tournaments[20], duelling[21] and the Oxford and Cambridge University football matches of the 16th century[22] were other activities which have been treated on a par with prize-fighting.

The common thread of objection to these activities (with the exception of duelling) was that they were occasions for riotous behaviour with attendant risks of injury to life, limb and property[23]. These were times when courts were much concerned with public order. In addition, when a prize was offered to a winner of the contest the commentators could see no useful purpose in the activity; it was quite unlike those friendly encounters intended to improve health, strength and fitness for defence[24]. There are also suggestions of judicial concern over the gambling[25] and even the political plotting[26] that these occasions engendered.

Prize-fighting in the 18th century has been described by McIntosh as follows:

> Pugilism, the antecedent of modern boxing . . . was patronised by the nobility; it was organised under rules; the contests in the prize rings drew vast crowds, and at the same time they were illegal. The rules were drawn up in 1743 by Jack Broughton, who opened a training school and amphitheatre in Totterham Court Road and was patronised by the Duke of Cumberland. Fights were bare-fisted, and continued until one of the contestants was unable to 'come up to scratch', that was the middle of the ring, when called by the referee for the beginning of a new round. Certain practices such as kicking, hitting below the belt, hitting a man when he was down and going down to avoid punishment were specifically forbidden, but there was still plenty of scope for doing things which an opponent had not anticipated, as when in 1795 John Jackson held Daniel Mendoza down by his hair while he hit him. The referee allowed it, so thereafter fighters cropped their heads. As prize fights were against the law they were not publicly advertised and a venue had to be chosen which was either secret, changed at the last moment, or in an area where magistrates and constables were known to be sympathetic or timid[27].

Through the 19th century there was waged in the courts what can be described as a campaign[28] against prize-fighting. Notwithstanding McIntosh's reference to the existence of some rules, as the century progressed an argument raised against prize-fighting with increasing forcefulness was the danger to the participants deriving from the activity's violent and unregulated nature. The campaign culminated not with *R. v. Coney* but the unreported 1901 decision of *R. v. Roberts*[29] in which the legality of boxing under the rules originally drawn up by the Marquis of Queensberry in 1865 and standardized and adopted in at least the United Kingdom and the United States by 1889[30] appears to have been recognized[31].

The willingness to accept boxing as a lawful activity was a reflection of various changes that had occurred in sport and society over the century.

The general movement toward organized sport and the initial introduction of rules for sparring in 1865 contributed to boxing being conducted in a manner much less likely to cause serious bodily harm to participants as well as riotous crowd behaviour. Furthermore, civil disorder had become much less of a concern[32]. The other objection taken to prize-fights, that they were contests for lucre, was overcome by the emergence of professional sports and in *R. v. Coney* it seemed not to matter that there was no evidence that the participants were fighting for a purse[33].

The correct view would now seem to be that notwithstanding the comments to be found in these older cases, the mere fact that a sporting contest is engaged in for a prize or there is disorder among the spectators should not affect the criminal or civil liability of participants for physical contact[34]. Nevertheless, some instances have arisen in recent times in which these propositions have been questioned[35] and, therefore, it is important to be careful to avoid situations where these old and now irrelevant issues cloud matters of criminal liability and compensation for athletes injured in contact sports.

CONSENT AND THE RULES OF THE SPORT

(a) The Rules

The two immediately preceding sections have demonstrated that the first concern which the courts displayed in regard to sporting activities was that of lawfulness. Furthermore, over time, this concern had found root in a variety of beliefs and social conditions. With the lawfulness of contact sports established, there still remained concern over isolated instances of violent conduct occurring within the context of a sporting contest. For example, the especially violent foul tackle or a brawl in a football match. To assess the lawfulness of such conduct the courts needed to determine the relationship between the law and the rules of the sport. This section will consider how that relationship was developed.

The fact that a person impliedly consents to certain physical contact by virtue of participation in a contact sport has been demonstrated *supra.* An issue there left for resolution was the definition of a test for identifying those contacts to which consent is given.

One test that is often advanced in the modern authorities is that the participant consents to contacts which are permitted by the rules and customs (or usages) of the sport[36].

In the older English authorities there is very little express reference to the role of the rules of the game. Perhaps two reasons for this can be advanced. It was only in the 19th century (and often toward its end) that many sports began to develop reasonably comprehensive and uniform rules of play. Given this void the judges had little option other than to resort to tests connected with the overall dangerousness of the sport and the spirit (friendly or otherwise) with which it was played. Secondly, almost all of the reported cases from this period concern situations in which a participant had died, usually in a boxing contest. As the accepted view was that a person could not consent to receiving blows likely to cause his or her own death[37], courts tended to put to one side those rules that did exist (or at least treat them as inconclusive) and examined the sport from a perspective of whether it was inherently dangerous to life.

Even so, the early authorities did inferentially acknowledge a role for the rules. For example, Foster's approval of wrestling as a trial of skill and manhood rests implicitly upon the existence of an understanding or agreement between the participants that deadly force would not be used. Again, in *R. v. Young*[38] Bramwell B. recognized that sparring with gloves not involving a fight to the finish was not dangerous and therefore could not be classified as a prize-fight. Hence, a participant who killed another in such a contest was acquitted of manslaughter. Williams attributes this decision to the introduction of rules for boxing contests in the previous year[39]. In fact, it is implicit in the decision that the deceased boxer had consented to contacts (and the attendant risk of injury) within the rules of the sport.

The rules of Association Football (soccer) and their relationship to consent were considered in *R. v. Bradshaw*[40] and *R. v. Moore*[41]. In both cases the defendant was charged with the manslaughter of a fellow participant. The view put forward by each judge was that criminal responsibility was not determined merely by reference to whether the defendant's conduct was within the rules of the game. In *R. v. Bradshaw* Bramwell L. J. said:

> No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land; and the law of the land says you sha11 not do that which is likely to cause the death of another[42].

Also, the report of *R. v. Moore* reads in part as follows:

> The learned judge, in summing up, said that the rules of the game were quite immaterial, and it did not matter whether the prisoner broke the rules or not[43].

However, *Bramwell, L.J.* added the following rider:

> But, on the other hand, 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 knows will be likely to be productive of death or injury[44].

Commentators have interpreted these statements as meaning that the rules of the game are admissible in evidence in favour of the defence[45] but inadmissible in favour of the prosecution[46].

Three helpful propositions can be derived from these judgement extracts and comments.

1. Behaviour outside the rules does not prove criminal (or civil) liability. For instance, contact in these circumstances may be accidental and innocent. On the other hand, the commentators perhaps go too far in maintaining that the rules are "inadmissible" in favour of the prosecution. Surely a breach of the rules could be adduced as some evidence (although not conclusive) that a player had intended to injure or that his victim did not consent to the contact?[47]

2. Behaviour within the rules is evidence that the player's intentions were lawful but, again, not conclusive evidence.

3. Most importantly for the conditions of the time, the courts were prepared to recognize that participants in contact sports could consent to contacts and the resultant risk of injury and thereby preclude criminal (or civil) liability. However, the courts chose to retain for themselves a power to render consent nugatory (at least for criminal law purposes) in the event that the sport was considered unacceptably dangerous or the motive of the participants was to inflict harm. In many instances these two eventualities were closely intertwined.

It is interesting to note that in *R. v. Bradshaw* where the accused was acquitted there was conflicting evidence as to whether the rules had been broken. One umpire testified that nothing unfair had occurred. By contrast, in *R. v. Moore* evidence of a deliberate, foul charge was clear and the accused was convicted.

To review, the courts by the beginning of the 20th century were starting to pay increasing (if only inferential) attention to the rules of a sport for the purpose of determining criminal liability[48]. This is reflected in the following comment by Manson:

> The reasonable view is that the combatants consent to take the ordinary risks of the sport in which they engage [footnote omitted], the risks of being struck, kicked, or cuffed, as the case may be, and the pain resulting therefrom; but only while the play is fair, and according to the rules, and the blows as given in sport and not maliciously [footnote omitted][49].

However, the factors to which the courts were preferring to give express attention were the dangerousness of the sport and the state of mind of the participants. The reasons for this emphasis were largely historical but, as well, represented in part the desire of the courts to reserve to themselves final authority over determination of lawful conduct. Delegation of that power to the makers and interpreters of the rules of play was not preferred. To examine these concepts of dangerousness and state of mind, it is necessary to return to legal history briefly.

(b) Dangerousness

From an early stage, the courts classified some very dangerous sporting activities as "unlawful"[50]. If a participant (or bystander[51]) was unintentionally killed in the course of such an unlawful sporting activity the participant who caused the death committed manslaughter. East, for example, referred to public jousts and tournaments as being illegal "... however devoid of *malice,* in the popular sense of the word, the contest might be"[52]. Indeed, he recorded that in the reign of Henry II it was necessary that a statute be passed providing that it was not a felony to kill another in a friendly joust carried on at the King's command.

Aside from reasons of public order, East considered that jousting was unlawful "... because the parties made use of deadly weapons from whence it was most probable that mischief might ensue . . ."[53] Foster considered

that it was manslaughter to kill a person in the course of sport if it was likely from the nature of the sport that "... death, or some great bodily harm must ensue"[54]. In *R. v. Young* Bramwell B. considered that a sport was unlawful if it was "... a thing likely to kill"[55]. In what has become a very widely quoted statement Stephen J. in *R. v. Coney* echoed these earlier authorities when he said:

> [T]he injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the *lives and health of the combatants should be endangered* by blows, and because prize-fights are disorderly exhibitions, mischievious on many obvious grounds. Therefore the consent of the parties to the blows which they mutually receive does no prevent those blows from being assaults. [Emphasis added.][56]

In the same case Mathew J. was of a similar view:

> The fists of trained pugilists are dangerous weapons which they are not at liberty to use against each other.[57]

In substance these authorities decided that a sporting activity was unlawful if it was likely to result in participants being killed or seriously injured. In this respect the courts were directing themselves to the dangerousness of a sport as a whole and it is easy to understand how this merged with the public order considerations discussed *supra.*

Yet with the emergence on a large scale of a wide variety of sports played according to rules designed to ensure orderly and relatively safe conduct, cases involving sports unlawful on the ground of dangerousness rarely came before the courts[58]. Indeed, perhaps such activities cannot really be described as sport.

The centre of attention shifted to determining which acts or conduct attracted criminal consequences in what were otherwise lawful sports. Foster had foreshadowed this when he stated that friendly sword-play was lawful but its manner of conduct *in Sir John Chichester's Case* justified the conviction. So *in R. v. Bradshaw* Bramwell L. J. accepted that soccer was a lawful albeit rough game and then examined the defendant's particular conduct. In conformity with the "dangerous sport" authorities he held that the defendant's conduct had to be likely to produce death or serious injury[59]. This approach was followed in *R. v. Moore*[60] which involved another soccer fatality. In all of these situations it was clear that it was an ineffective defence to maintain that the

victim had consented to receiving the blow which caused his death (even if the consent could be viewed as having been given).

Even so, the rules and practices of sport have become progressively more refined so as to promote considerations of safety such that today it is inappropriate to view dangerousness in isolation as a criterion of criminal or civil liability. Rather, the better approach in virtually all instances is to enquire whether the participants were endeavouring to play the game according to its rules (see *infra).*

(c) State of Mind - Anger, Hostility, Intention to Harm, Malice[61]

Running parallel with the courts' refusal to recognize consent as a defence in unacceptably dangerous sporting activity has been a similar refusal where a participant's state of mind was considered inappropriate. Foster contrasted situations where a blow was struck "in anger or from preconceived malice" with blows exchanged in "perfect friendship"[62]. Of course, the former were criminal and the latter innocent except if the dangerousness consideration was contravened as *in Sir John Chichester's Case.* East said that criminal consequences attached if the "motive was improper"[63].

Rather than assert that dangerousness and state of mind ran parallel, it is probably more accurate to maintain that they were intertwined. The temptation is to view state of mind as part of the larger concept of dangerousness for the reason that blows struck in anger are likely to be dangerous. East identified this nicely. When approving Foster's views on the playing at cudgels, foils or wrestling in a friendly spirit he said:

> To which may be added, that the weapons ordinarily made use of upon such occasions are not deadly in their nature, unless urged by a malicious and vindictive spirit[64].

An illuminating example of this intertwining can be found in the report of *R. v. Orton* which involved a prize-fight[65].

> It was found that each combatant was severely punished, and one of them had his ear bitten through. They were highly exasperated with each other, each calling the other a coward, and taunting each other with unfair fighting so much that, even after they were arrested and in the custody of the police, they were with difficulty prevented from closing with each other and renewing the fight.

Notwithstanding this temptation to merge the two concepts, there is some authority for maintaining that a participant's state of mind can be an independent ground for disallowing consent as a defence to a criminal prosecution. In addition to Foster's opinion *supra,* Cave J. in *R. v. Coney* said:

> The true view is, I think, that a blow struck in anger, or which is likely or intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely or intended to cause bodily harm, is not an assault.[66]

Two states of mind are identified in this passage: anger (or hostility) and an intention to inflict a specific degree of harm; both of which negate consent. Frequently they are indistinguishable but in regard to some sports there are suggestions that a distinction does exist[67]. This is so mainly with contact sports of the combat variety, principally boxing. In boxing there is undoubtedly an intent to inflict some harm but no anger if the parties are "sparring", or so the judgements in *R. v. Coney* would have us believe. This perception has been criticized as unrealistic[68] and is inconsistent with the modern experience in the highly competitive professional contact sports. However, the statement of Cave J. as well as similar statements by Hawkins J. in *R. v. Coney*[69] and by Manson[70] were made at a time when good sportsmanship and "gentlemanly" behaviour[71] were, perhaps, stronger ideals than they are today. It was after all the age of the restoration of the Olympics.

What then of a situation where physical contact occurs within the rules but is motivated by anger or an intention to inflict bodily harm? Obviously, short of an admission of such a state of mind by the participant making contact, the practical problems of proof will be virtually insurmountable. Yet, the theoretical possibility of liability in those circumstances remains. Recently, when speaking of boxing (to which special considerations might apply in regard to distinguishing anger and an intention to injure) McInerney J. of the Supreme Court of Victoria said in *Pallante v. Stadiums Pty. Ltd. (No.l),* "[i]t may be an assault, at all events, from the time when the element of hostility becomes the *predominant* motive"[72]. Interestingly, this implies that hostility and consent can exist side by side so long as hostility is not predominant.

REVIEW

The authorities just considered exhibit a recognition that body contact in sport and the resultant risk of injury did not as a general matter attract criminal or civil liability. The legal basis for this was the player's consent to such contact and risk by virtue of participation in the sport. The social justification was that the benefits of sport outweighed the costs of injuries sustained.

However, not everything done in the name of sport received this immunity. The courts retained an ultimate authority to impose criminal responsibility notwithstanding consent to contact. This authority could be invoked if the sport was too dangerous in terms of the likelihood of really serious bodily harm or if the participant's state of mind was one of intent to injure or of hostility.

With the growth of organized sport there was a further recognition that acts done within the rules of the sport would be much less likely to warrant a court invoking its ultimate authority. Even so, the rules were not conclusive determinants.

THE PERIOD OF QUIET GESTATION

From the early part of the 20th century until the mid 1960s there are very few reported cases of criminal or civil proceedings before the courts in regard to violent conduct in sport. Perhaps it was a situation where the courts had established the basic ground rules and, therefore, could leave the sports bodies to handle their affairs internally. Occasionally, there were criminal prosecutions for violent conduct which was clearly outside the scope of the sport. For instance, fighting behind the play in football. These cases came before local magistrates but, more often, a sport's own disciplinary tribunal was considered the best way in which to deal with such incidents. Undoubtedly this was a recognition that in the overall scheme of criminal activity, an exchange of punches by participants whose emotions were inflamed in the course of otherwise healthy sporting

activity was not a matter of sufficient importance to absorb the time of police and courts.

An important development during this period was the *emergence of civil actions seeking compensation for injuries sustained in non-contact sports.* In 1927, a golfer was held liable in *negligence* for having unintentionally struck her caddy with a golf club while practising her swing? Another example of the application of negligence principles to non-contact sport occurred in 1967 when the High Court of Australia held the driver of a waterski tow-boat liable to a skier for having failed to point out the presence on a river of a stationary boat. The waterskier was performing complex manoeuvres in conjunction with other skiers, became blinded by spray and collided with the stationary boat[74].

In summary, the position which has been reached in Australia (at least) in regard to civil liability in negligence is that people engaged in non-contact sports (being those where physical contact between participants is not to be expected in the normal course of events) owe their fellow participants a legal duty to exercise reasonable care for their safety while engaged in the sporting activity. There is no such rule that a person accepts the risk of being injured while engaged in sport. That is far too broad a proposition. Any element of risk is taken into account by enquiring what care a reasonable participant would take for the safety of others while engaged in the sport. In open, non-contact sports such as tennis, golf, lawn bowls, swimming and yachting the requisite standard of care for safety will be very much like that which may be expected in the conduct of many other everyday activities including work.

Of course, this does not mean that each time a participant is injured in non-contact sport the person who caused the injury will be criminally or civilly responsible. It may be assumed that in virtually every case any such injury will be unintentional and, therefore, will not attract criminal liability[75]. Furthermore, even where the injury is unintentional it will need to be established by the injured participant that the person who caused the injury had not exercised reasonable care before civil liability can arise.

It is very likely that more civil claims for compensation will come before the oourts in the years to come. As a general matter, the public

has a much heightened awareness of its legal rights and, especially with the availability of legal aid, is much less reluctant than in the past to seek to enforce those rights. Also, with the growing emphasis on safety in many areas of life and with the expectation which that emphasis produces of being able to pursue one's activities in as risk-free an environment as possible, the chances of injured participants accepting with good grace the severe injuries which can be sustained even in non-contact sports is likely to be something of the past.

These comments serve to introduce the modern era which is now upon us in regard to contact sports.

THE MODERN ERA FOR CONTACT SPORTS

(a) Sport, Violence and the Media

Sport is widely regarded as an immensely significant medium for conveying messages and shaping attitudes. It has been used to promote desirable lifestyles, foster nationalism, sell commercial products and promote international understanding. Sometimes this role is for the good and other times for the bad. That is a separate debate.

With the advent of mass television and broadcasting, it did not take very long for the media and advertisers to recognize that certain classes of audience were attracted to vigorous, fast action team sports involving degrees of physical contact. No doubt a significant portion of the appeal of Australian rules football in the North American television reception market can be attributed to its physical contact characteristics. Perhaps it is not unfair to suggest that those who are responsible for physical contact sports having mass media coverage possess something of a vested commercial interest in maintaining some degree of vigorous if not violent conduct in the sport. For instance, in professional ice hockey in North America, it is strongly arguable that there is an unusually high degree of tolerance of fighting between players.

Against this commercial interest, other elements in the community (including the sports community) see a need to discourage such behaviour appearing on the mass media as it sets an inappropriate standard of conduct

for others who play the sport and also tends to tarnish many of the good images which are portrayed about sport in general.

As previously mentioned, the law has tended to leave punitive action against sportspeople to the disciplinary processes of sport itself. However, this tolerance can vanish in the face of certain factors which appear to be virtually universal in application to Australia and North America at least. The combined presence of a serious fight or blow, significant injury, television coverage and a perceived failure by the sports body to act positively in regard to the conduct have prompted into action the otherwise reluctant criminal justice authorities of the State. The incident in 1985 involving the Hawthorn Australian rules footballer Matthews and the Green[76] and Maki[77] ice hockey cases from Canada in 1970 are examples.

Such incidents can produce a range of reaction. At one extreme there may be calls for government intervention or even the banning of such sports or aspects of them. At the other extreme there is the image of the booming sports administrator telling the courts to stay out of sport. The firmer ground lies somewhere between these two extremes. Sport does receive tolerant treatment from the criminal justice authorities and in that sense the courts do stay out of sport. However, the tolerance exhibited lasts only while sport is prepared to effectively take action to keep excesses under control.

(b) Contact Sports and Negligence

The second important modern development lies in the way in which the law deals with claims for compensation arising out of injuries sustained in contact sports. There is very little doubt that intentionally landed contacts made in intentional breach of rules designed to preserve player safety or restrict physical contact will give rise to both criminal and civil liability. A punch thrown in a rugby scrum and an elbow blow delivered to the side of a player's head in Australian rules football are unlawful if intentionally delivered. The argument that such blows are merely part of the game, are to be expected and, therefore, consented to, even though in breach of the rules, has been universally rejected in Australia[78], Canada[79], England[80] and the United States[81]. In these circumstances the injured participant may bring an action for battery and the player who caused the injury cannot maintain there was consent to the blow. The courts have held that any such consent is not to be implied by mere participation in the game.

However, what is to be the situation if either the contact is unintentional or the breach of the safety rule is unintentional? In the former case there is no intentional contact and, therefore, no battery. In the latter case, while contact is intentional, the courts have accepted that participation in a game implies consent to contacts which occur in the unintentional infringement of the rules. Obviously, this is a sensible approach.

Nevertheless can there be negligence in the playing of contact sports? Some recent cases in England and the United States suggest that negligence does have a role even though battery would not occur[82]. In Canada[83], the courts have been able to satisfactorily resolve cases without reference to negligence as has been the position in Australia[84]. It is submitted that the imposition of negligence liability in regard to the playing of fast action contact sports is much to be feared because negligence imposes a detached, objective but, nevertheless, value-laden standard of care. The duty of care required by negligence and the very nature of contact sports are incompatible. The problem has been put in these terms.

> In all sports and at all levels participants will be competing at or close to the limits of their respective abilities. This develops special significance given the normality of physical contact (often of a very forceful kind) in contact sports. Individuals and teams will be aiming to maximize their command of the skills of the sport and at the same time exercise mastery over the opposition. That mastery can be achieved in many ways. For example, an opponent may be defeated because he is not as fit or strong and therefore becomes tired more quickly and might be out-performed. Also, all manner of pressure (including physical buffeting - if permitted - and psychologically demoralizing propaganda) may be directed at the opponent to force playing errors and mis-judgements: to put the opponent 'off his game'. These tactics are recognized as perfectly legitimate and constitute part of the challenge and enjoyment of many sports. Indeed, they are part of the honing of the mental and physical skills that sport seeks to achieve. Furthermore, play may of ten become 'desperate'. Players may operate at the very limits of their physical and mental abilities in order to succeed or to prevent others from doing so. Decisions are made without time for reflection and often under great pressure. Moves may be attempted which have little chance of success.
>
> It is submitted that these circumstances make the playing of contact sports an inappropriate subject for the application of the tort of negligence. How can a participant expect from another the exercise of reasonable care for his safety in the

> playing of a game when he is doing his very best to try to induce that other participant to make as many errors of judgement as possible? The response to this might be to say that the reasonable [person] in the circumstances formula . . . can easily account for the characteristics of modern contact sports just outlined and that it will be only the extreme and relatively rare instances of foolhardiness that will give rise to liability. Yet herein lies the dilemma because it is these rare cases which most markedly illustrate the problem. What is to be said to the soccer player who makes a genuine attempt to perform a match saving tackle on an attacker about to shoot for goal but in circumstances where there is only a small chance of not fouling the attacker? Is it fair that he will be a hero if he deprives the attacker of possession without fouling him but liable in negligence for any injury if he fails? The answer is that it is not fair expecially given the instinctive or reflex nature of contact sports. A duty of *care* should not be imposed because of the inconsistent nature of the concepts behind the tort of negligence and the playing of contact sports.
>
> Advocating that negligence has no role in the playing of contact sports is not to say that there should be no legal control. Battery is still available and it is far more likely that sportspeople will readily understand and agree with the imposition of liability on the participant who makes intentional contact in deliberate breach of safety rules while all other participants are left free to get on with the game. While it is conceded that the application of battery in this way may present problems of proof of intention, these may be no more onerous than establishing what was reasonable care in the circumstances and, more importantly, it is submitted that most sportspeople can distinguish genuine attempts to play the game from professional fouls and thuggery. Such legal doctrine would be readily comprehended by the ordinary sportsperson while the imposition of negligence principles with their nebulous concept of careful judgement may only serve to fundamentally alter the nature of contact sports and perhaps deprive them of their rationale.[85]

NOTES :

1. "To a willing person no injury is done", Burke J., *Jowitt's Dictionary of English Law* (2nd ed. 1977) vol.2 1870; "that to which a man consents cannot be considered an injury", Bird R., *Osborn's Concise Law Dictionary* (7th ed. 1983) 331.

2. Hughes G., "Two Views on Consent in the Criminal Law" (1963) 26 *Modern Law Review* 233, 244.

3. Hale M., *The History of the Pleas of the Crown* (1736) vol.1 472. (All future references to "Hale" will be to this work.) Although Hale died in 1676 this work was not published until well after his death. *See also,* Hale M., *Pleas of the Crown. A Methodical Summary* (1678) 57.

4. Hale, *op. cit.,472.*

5. *id.*

6. Aleyn, 11; 82 E.R. 888.

7. The present discussion is based upon Hale's recitation of the facts which is more substantial than Aleyn's report.

8. Indeed, even before Hale expressed his view Dalton had noted a conflict of opinion.

> Playing at hand-sword, bucklers, foot-ball, wrestling, and the like, whereby one of them receiveth a hurt, and dieth thereof within the year and day; in these cases, some are of opinion, that this is 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, nor any former malice, but done only for disport, and trial of manhood.

Dalton M., *The Countrey Justice* (1619) 225.

9. Foster, M., *Crown Law* (1762) 259.

10. Williams G., "Consent and Public Policy" [1962] *Criminal Law Review* 74, 80.

11. Foster, *op. cit.* 259-60.

12. *ibid.,* 260.

13. East E. H., *Pleas of the Crown* (1803) 268.

14. *id.*

15. Foster, *op. cit.* 260.

16. (1882) 8 Q.B.D. 534 (Eng. Crt. Crown Cases Res'd).

17. Strictly, there was no evidence in this case of the participants competing for a purse. However, purses were the order of the day.

18. Pollock F., "Note" (1912) 28 *Modern Law Review* 125.

19. Foster, *op. cit.* 261; East, *op. cit.* 270-1.

20. East, *op. cit.* 270.

21. *R. v. Coney* (1882) Q.B.D. 534, 547; Williams, *op. cit.* 77-8.

22. McIntosh P., *Fair Play. Ethics in Sport and Education* (1980) 20.

23. Hence, there has never been any common law offence of "prize-fighting" as such. *Pallante v. Stadiums Pty. Ltd. (No. 1)* [1976] V.R. 331, 337 (Vic. Sup. Crt.).

24. East, *loc. cit.;* Foster, *loc. cit.*

25. Le Marchant Minty L., "Unlawful Wounding; Will Consent Make It Legal?" (1956) 24 *Medio-Legal Journal* 54, 56 notes "that serious riots not infrequently took place when the onlookers, to save their bets, cut the ropes and forcibly put an end to the [prize-fight]".

26. McIntosh, *op. cit.* 21 records that supporters of Cromwell were suspicious of football matches and cudgel playing as occasions for meetings of disaffected people.

27. *ibid.*, 22. For an even more colourful description see, Le Marchant Minty, *op. cit.* 55-7.

28. One of the earliest cases is *Ward's* case (1789) which is mentioned at East, *op. cit.* 270. There a participant in a public boxing match was held guilty of the manslaughter of his opponent. *See also, Hunt v. Bell* (1822) 1 Bing 1; 130 E.R. 1 (an action for defaming the plaintiff in connection with his vocation of promoting sparring exhibitions failed as this activity was considered unlawful as it tended to encourage or prepare people for prize-fighting); *R. v. Billingham, Savage and Skinner* (1825) 2 Car. & P. 234; 172 E.R. 106 (spectators at a prize-fight convicted for rioting when a magistrate tried to prevent the fight taking place); *R. v. Hargrave* (1831) 5 Car. & P. 169; 172 E.R. 925 (spectator at a prize-fight after which a participant died from blows received was convicted of manslaughter as principal in second degree for having aided and abetted the killer); *R. v. Perkins* (1831) 4 Car. & P. 536; 172 E.R. 814 (spectators at prize-fight guilty of breach of the peace); *R. v. Murphy* (1833) 6 Car. & P. 102; 172 E.R. 1164 (spectators aiding and abetting prize-fight convicted of manslaughter); *R. v. Brown* (1841) 1 Car & M. 314; 174 E.R. 522 (person in vicinity of prize-fight convicted of having refused to aid a constable in quelling a riot); *R. v. Hunt* (1845) 1 Cox C.C. 177 (participants and spectators at prize-fight not guilty of rioting as police arrived after conclusion of fight and no resistance offered); *R. v. Orton* (1878) 39 L.T. 293 (participants and spectators guilty of unlawful assembly); *R.* v. *Coney* (1882) *8* Q.B.D. 534 (prize-fights held to be illegal but insufficient evidence of certain spectators having aided and abetted to sustain conviction against them for assault).

29. Grayson E., *Sport and the Law* (1978) 32; Le Marchant Minty, *op. cit.* 57; Samuels A., "Sport Injury and the Law" (1984) 24 *Medicine, Science and the Law* 254, 260.

30. Harris W. H. and Levy J. S., *The New Columbia Encyclopedia* (1975) 2257.

31. Two subsequent English cases have proceeded on the assumption that boxing in this form is legal without deciding the point. *See, Boyle v. White City Stadium Ltd.* [1935] 1 K.B. 110 (Eng. C.A.) and *Serville v. Constance* [1954] 1 W.L.R. 487 (Eng. Ch.D.).

32. The establishment of regular police forces was a major factor in this change. *See, Attorney-General's Reference (No.6 of 1980)* [1981] Q.B. 715, 719 (Eng. C.A.).

33. However, this was not completely determinative of the issue as in that case prize-fights were able to be held illegal on public order and safety grounds. For another statement paying little attention to the presence of a purse see, *R. v. Young* (1866) 10 Cox C.C. 371, 373.

34. Williams, *op. cit.* 78. Also, sports such as soccer which have been plagued by repeated, violent crowd behaviour are not considered illegal.

35. *In Pallante v. Stadium Pty. Ltd. (No. 1)* [1976] V.R. 331 a civil action by a boxer against the organizers of a bout was resisted in part on the basis that the boxing match was a prize-fight, and therefore illegal, because it was conducted for reward. This argument failed. Also, one Irish commentator has considered the position of boxing to be sufficiently doubtful to suggest the Parliament of Eire enact legislation expressly declaring the sport to be legal: "Boxing and the Law" (1954) 88 *Irish Law Times* 231, 234. However, recent controversy over the safety of boxing even under the Queensberry rules (e.g. in 1984 the American Medical Association passed a resolution calling for the elimination of amateur and professional boxing) may mean that its legality will yet again be called into question, although not for reasons of lucre or public order. For a discussion of recent medical evidence concerning the safety of boxing see, Ontario, *For Amateur Boxing: the Report of the Amateur Boxing Review Committee* (1983) 34-46.

36. This is not to suggest that the test is exhaustive. For instance, some contacts ostensibly within the rules may not receive consent (e.g. where the motive is to injure) while on the other hand some contacts outside the rules are accepted (e.g. an unskilful attempt at permissible "boarding" in ice hockey which results in the boarded player being struck in the face with a hockey stick unintentionally but nevertheless in breach of the rules).

37. E.g., *R. v. Coney* (1882) 8 Q.B.D. 534, 549 *per* Stephen J.

38. (1886) 10 cox C.C. 371.

39. Williams, *op. cit.* 80.

40. (1878) 14 Cox C.C. 83.

41. (1898) 14 T.L.R. 229.

42. (1878) 14 Cox C.C. 83, 84.

43. (1898) 14 T.L.R. 229, 229-30.

44. (1878) 14 Cox C.C. 83, 85.

45. *R. v. Billinghurst* [1978] *Criminal Law Review* 553, 554

46. *id.;* Williams, *op. cit.* 81.

47. *See,* Smith J.C. and Hogan B., *Criminal Law* (5th ed. 1983) 359.

48. *R. v. Roberts* (1901, unreported) is a further example. *See,* Grayson, *op.cit.* 32; Le Marchant Minty, *op. cit. 57;* Samuels, *op. cit.* 260.

49. Manson E., "Note" (1890) *Law Quarterly Review* 110, 111.

50. Foster, *op. cit.* 260.

51. *ibid.,* 261.

52. East, *op. cit.* 270.

53. *id.*

54. Foster, *op. cit.* 260.

55. (1866) 10 Cox C.C. 371, 373.

56. (1882) 8 Q.B.D. 534, 549.

57. (1882) 8 Q.B.D. 534.

58. Two interesting cases which did come before the courts receive mention in the literature. Manson, *op. cit.* 111, n.1 refers to a case decided probably in 1889 where a "police magistrate refused on moral and medical grounds (under the Act for the Protection of Children, 1889) to allow boy boxers to exhibit at the Aquarium." Le Marchant Minty, op. *cit.* 57 refers to the Reverend F.B. Meyer in 1911 successfully having two boxers bound over "to keep the peace and give recognisances for their future behaviour in regard to each other" in respect of an advertised fight. Evidence adduced indicated that the gloves likely to be used would be unsafe and that the fight, between men of different races, could cause the crowd to riot if the white man appeared likely to lose.

59. (1878) 14 Cox C.C. 83, 85.

60. (1898) 14 T.L.R. 229.

61. All of these terms have been used from time to time to describe the state of mind under consideration. They should be distinguished from a simple intention to make contact for the purpose of playing the sport.

62. Foster, *op. cit.* 259.

63. East, *op. cit.* 271.

64. *ibid.,* 268.

65. (1878) 39 L.T. 293, 294.

66. (1882) 8 Q.B.D. 534, 539.

67. *E.g., Pallante v. Stadiums Pty. Ltd. (No. 1)* [1976] V.R. 331, 343.

68. Hughes, *op. cit.* 243.

69. (1882) 8 Q.B.D. 534, 553-4.

70. Manson, *op. cit.* 111-2.

71. E.g., McIntosh, *op. cit.* 33 recounts that the introduction of the penalty kick for an intentional foul in front of the goal in soccer aroused moral indignation among many players. "Such a rule, they claimed, cast aspersions on their integrity. No gentleman would intentionally foul another gentleman."

72. [1976] V.R. 331, 343.

73. *Cleghorn v. Oldham* (1927) 43 T.L.R. 465.

74. *Rootes v. Shelton* (1957) 116 C.L.R. 383.

75. In some extreme circumstances there may be criminal liability for unintentionally inflicted injuries but these circumstances are confined to situations where the injury is severe (e.g. death or grievous bodily harm) and the participant has exhibited a gross degree of carelessness.

76. *R. v. Green* (1970) 16 D.L.R. (3d) 137.

77. *R. v. Maki* (1970) 14 D.L.R. (3d) 164.

78. *McNamara v. Duncan* (1971) 26 A.L.R. 584 (A.C.T. Sup. Crt.).

79. *Agar v. Canning* (1965) 54 W.W.R. 302 (Can. *Man.* Q.B.); *aff'd* (1966) 55 W.W.R. 384 (Can. Man. C.A.).

80. *R. v. Billinghurst* [1978] *Crim. L.R. 553* (Eng. Cr. Crt.).

81. *American Restatement of the Law of Torts* 2nd ed. (1965) 86.

82. *Condon v. Basi* [1985] 1 W.L.R. 866 (Eng. C.A.); *Hackbart v. Cincinnati Bengals, Inc.* (1977) 435 F. Supp. 352 (U.S. Dist. Crt.), *rev'd* (1979) 601 F.2d 516 (U.S. Crt. Apps. 10th Cir.), *cert. denied* (1979) 100 S.Ct. 275 (U.S. S.C.)

83. *Aqar v. Canning* (note 79 *supra.)* is the leading authority.

84. *McNamara v. Duncan* (note 78 *supra.).*

85. (1986) 15 *M.U.L.R.* 756, 761.

THE MORAL AND LEGAL RESPONSIBILITIES OF SPORTSMEN AND WOMEN

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In March last year, in Newcastle-under-Lyme, England, my closest childhood friend threw himself off a high-rise car park.

I received the devastating news by means of an early morning telephone call from England. I could not attend his funeral, but, on my way back to Australia from Mexico in August, I stayed a few weeks in England. And I visited his widow and three sons.

His beautiful and brave wife was coping wonderfully. But the boys had been shattered by the gruesome death of their father.

The two younger ones, however, both keen soccer lovers aged 13 and 11, were fascinated by my account of the World Cup.

They excitedly told me that, one Saturday afternoon in April, they had been taken to see Everton, the top First Division soccer team, play against Chelsea, and there they had been introduced to the Everton players.

“What were they like?” I asked.

"Well," said the 11 year old, “Some of them were a bit grumpy, but Gary Lineker talked to me. He was really friendly! "

Now it turned out that a friend of their mother had some connections with the Everton Club. He must have made a special effort to arrange this meeting, to alleviate the boys' distress.

Gary Lineker, who scored the most number of goals in the World Cup, was transferred at the end of 1985-6 to a Spanish Club, Barcelona, for over 3 million pounds, of which he will receive a substantial percentage.

In my view, he has earned every penny of what he receives, simply for having restored hope and excitement into the lives of those two boys.

Many people believe that top sportsmen earn far greater sums than they deserve. It is certain that there is much envy in this. Why should someone be paid millions of dollars for doing something he enjoys?

The justification, to me, lies not so much in the proper appreciation of genius or talent, but in the recognition that sportsmen have the highest responsibility to young people. Keith Dunstan has pointed out that sporting talent is valued above all other activity in Australia, where it would be inconceivable, for instance, for a literary figure, such as the Mexican Carlos Fuentes, or the Frenchman Andre Malraux, to become a diplomat or statesman.

Thus sportsmen are *exemplars,* having a unique ability to influence the young. Adults often forget the adulation that they felt for sporting heroes of their day. But every parent knows the feeling that advice which he may have given and was disregarded, when it comes from a sporting hero, will classify as an infallible pronouncement.

It is disappointing that certain sportsmen abuse their responsibilities.

Three seemingly unconnected instances will illustrate what I mean.

Last year, three highly paid male tennis players were reported as becoming fathers of children outside marriage. One of them married the mother, thus legitimating the child. The other two, so far as I am aware, have not done so. Thus the children remain ex-nuptial.

The sentimental and fawning way in which these events were reported may be indicative of a changing attitude to so-called *de facto* relationships. The impression was given that fatherhood had somehow matured the players, and that everyone, including their girl-friends, the grandparents, the nurses, the doctors, Uncle Tom Cobley and all, was delighted.

Today, 16% of all births in Australia are ex-nuptial, but a child born ex-nuptially is still subject to many legal and social disabilities. It is an act of selfishness *deliberately* to bring into the world a child outside marriage. With contraception freely available, it is highly irresponsible to do so negligently. For three of the highest-paid professional tennis players to give their imprimatur to this anti-social behaviour was a betrayal of their responsibilities to young people.

The second example concerns the infamous first goal that Maradona scored against England in the World Cup. I was at the other end of the

Aztec Stadium, and could not therefore see whether it was fair or not. But it struck me as odd that a striker as slight as Maradona could have out-jumped the tall and brilliant English goalkeeper, Peter Shilton. And Shilton is an excellent sportsman, who would not normally protest without cause.

When I saw the replay on Mexican T.V., it was obvious that Maradona must have handled the ball. The Mexican commentators were all agreed on that.

Reactions to this goal, however, were intriguing. The Mexican experts blamed the referee, but regarded Maradona's deceit with some amusement and indeed admiration. Maradona, who appeared on T.V. that night stated that the goal was scored with the hand of God *(con la mano de Dios).* He was alluding to the fact that the Argentinian team had visited the shrine of the Virgin of Guadalupe the previous night, to pray for her assistance. This, as a Mexican friend in Mexico pointed out, is not uncommon; it is apparently Mexican thieves who are said to pray for God's assistance in locating victims and relieving them of their belongings.

The fact that an act of blatant cheating could be practised in front of 110,000 people and an uncountable number of television viewers, with impunity and without shame, surely testifies to a false sense of values. Is it right that sportsmen should encourage children that cheating is in order, provided that the referee does not see it? And the so-called **professional foul", which was very common in Mexico, to my mind, is nothing short of *an abnegation* of professional responsibility - totally unprofessional.

Finally, I was intrigued by the problems posed by that "anti-establishment" figure, Ian Botham. He is surely the finest all-rounder England (and possibly the world) has ever produced. The only comparable Englishman would, to my mind, be Frank Woolley, who is regarded by most Australians as simply a batsman, but who took more than 2,000 wickets in first class cricket and is the only cricketer to have taken 1,000 catches. If I had access to a Time-Machine, my first trip backwards would be to the Canterbury Festival of, say, 1928, to see Woolley.

No two cricketers could be more different in style, but this Woolley and Botham have in common. They were both difficult characters, although

for different reasons. Woolley was acetic and unapproachable; Botham is gregarious and perhaps too easily led. Botham, however, has caused his employers and the governing body of cricket moral dilemmas of great complexity. What should be the attitude of a sport towards drugs?

When the Brownlow medal gala was shown last September, the joint winners were featured sharing a beer. The winners of the Benson and Hedges competitions occasionally, and possibly by design, are seen smoking cigarettes.

Now I have friends, especially among students, who regard the distinctions made by the law between marijuana on the one hand and alcohol and tobacco on the other as absurd. They no doubt would applaud Botham for being honest about his "pot-smoking" and regard the sentence of two months' suspension from first-class cricket as unjust and hypocritical.

But I think the judgement of the tribunal that passed sentence on Botham (which included a current county cricketer, the Surrey offspinner, Pat Pocock) was right. It was not so much the smoking of marijuana, as the implicit encouragement of it, that was the gravamen of the offence. And although Botham may be such a great performer that drug-taking might not have impaired his performance, I do not think that it can be seriously disputed that habitual drug-taking is likely to mar the sporting ability of the average boy or girl. Botham was rightly punished for setting a dubious example to children.

And it is significant that recently it was announced that the French government had called on Michel Platini, the soccer star, to launch an anti-drug campaign.

Now one could go on with many more examples of *dubious morality* exhibited by sportspersons - accepting bribes for going to or not going to South Africa - Alan Border's recent statement that he would go for $50,000, Dirk Wellham's swinging a bat at a picket at St Kilda Oval - and several very audible use of expletives.

Some of you might be thinking that this paper, addressing nebulous moral imperatives, is simply no more than the musings of a pharisaical prig, and that this speech would have been more fitting in the pulpit of St Paul's Cathedral than in this cathedral of sport?

The question is, however, whether there is more than a mere moral obligation to behave in a sportsmanlike manner, and it is clear that in many sports, *moral* duties have been translated into legal duties.

A good example is contained in the current contract between The Australian Cricket Board and certain contracted players. It contains a host of clauses concerning *duties* and obligations placed on players, including:

(1) a clause that the player will participate in promotional activities.

(2) a clause that the player will perform his services diligently and faithfully and keep himself fit.

(3) a clause that the player warrants his fitness and undertakes to notify the Board of any illness, injury or ailment.

(4) an undertaking to complete a fitness programme.

(5) an undertaking not to commit any act or be guilty of any act or conduct calculated to render him unfit.
(A couple of seasons ago, at a McDonald's Cup Final, when rain had stopped play, I saw two Australian International players on the field indulge in horseplay, by throwing sawdust at each other. The very same players were involved in another incident at training, which left one of them with very severe knee injury. It seems indisputable that both players have breached this clause.)

(6) an undertaking to abide by all "reasonable" instructions and directions.

(7) an undertaking not to be engaged in any advertising or promotional activity contrary to ABC sponsorship. Specifically this contains an agreement that the player will not engage in any advertising for a product that is competitive with that of any sponsor of the A.C.B.
(This is a clause which is going to put a great deal of cricketers in a quandary. For some Victorian cricketers have personal contracts with Puma, while the Victorian team is about to sponsor the rival boots of Adidas!)

(8) clauses relating to apparel (the players must wear clothing specified).

Player Rules

(9) a clause concerning betting (the player must not directly or indirectly bet on a match in which he is taking part).

(10) a clause restricting press relations, advertising and publishing.

(11) a clause assigning to the A.C.B. the copyright of any photograph taken by the player during a tour.

The above clauses are now typical of professional sportsmen's contracts which are becoming the norm in all professional sports.

They pose some intriguing questions, such as:

(a) Are they void for vagueness?

(b) Are they in any case enforceable, and if so, how?

(a) The first question brings into play two important principles of contract law:

(1) A clause which is so vague as to be meaningless is void. But the courts strive as hard as possible to avoid a decision to this effect. Nevertheless they will very often admit *parol* evidence of what the parties meant.

(2) The *contra proferentem* rule. That is that, in the event of an ambiguity, a contract is construed against the party that prepared it.

Let us consider one of the Australian Cricket Board's clauses in the light of the above principles. It reads as follows:

The player agrees . . . that he will not . . . commit any act or be guilty of any act or conduct calculated to render him unfit to play . . . ".

Does "calculated" require an *intention,* or only reasonable foreseeability? If a player injured himself using a chain saw to cut some wood, is that a breach?

(b) The second question is extremely tricky. How are such clauses to be enforced?

This brings into play some rules about contractual remedies. A breach of contract nearly always entitles the other party

to damages. These are as of right. But the Australian Cricket Board would probably wish to rescind the contract, or perhaps seeking an injunction preventing a threatened breach. These are equitable remedies and are discretionary.

What is clear is that an order of specific performances cannot be made to compel a player to comply with the clauses. For specific performance will not be ordered of a contract for personal services. And as specific performance requires mutuality, neither can the player compel his employer or governing body to comply. That is why some seemingly contrived orders have been sought in respect of sporting contracts - usually involving an injunction restraining a player from playing for any other club except the one to whom he is contracted.

Nevertheless, despite the difficulties of enforcing clauses relating to moral duties, it is clear that they are *prima facie* legal and binding, and that sportspersons do have high duties, which are not merely moral, but also legal. Some sportsmen seem to have assumed that contracts are not worth the paper they are written on. The *Buckanara* and *Harding* cases should finally set this fallacy at rest.

Frequently, however, the detriments to a sportsman who fails to uphold high standards of behaviour are extra-legal. In 1985, the American athlete, Edwin Moses, was *acquitted* of soliciting a policewoman, but he lost sponsorship contracts worth over $1m, on the basis, presumably, of "no smoke without fire".

The role of the professional sportsman or woman as a model is a subject worthy of greater attention than it has received. It may be that a Diploma in Human Relations or counselling in Social Issues will become a necessary part of a professional sportsperson's qualifications!

NOTES ON THE CONTRIBUTORS

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