Consent and the Rules of the Game: The Interplay of Civil and Criminal Liability for Sporting Injuries

Stefan Fafinski*

Abstract Each year, millions of people are injured whilst playing sport. An increasing number of these seek civil redress for their injuries; however, the infliction of an injury during the course of sporting activity may also give rise to criminal liability if caused in a way that satisfies the requirements of a particular offence. This article examines the nature of the law's intervention in the sporting area. It provides a brief outline of the relatively well-established position at civil law before moving to consider how the issue has been addressed by the criminal law with particular emphasis on the role of consent. Finally, the article engages with the complex interplay between the law and the rules of the relevant sport that has been a pervasive feature at both civil and criminal law.

Participation in sporting activities is an extremely popular recreational pastime; currently around 46 per cent of the UK's population,or 27 million people, take part in sports more than 12 times per year—a figure which the Government is keen to increase.[1] In turn, a large number of these play organised sports under the regulation of recognised sporting bodies; for instance, the English Football Association reports 500,000 men playing football in affiliated clubs[2] and the English and Welsh Rugby Football Unions add a further 185,500 senior level rugby players.[3] Given this level of participation, particularly in sports involving physical contact, it is hardly surprising that it is estimated that there are at least six million new sporting injuries each year.[4] A combination of the sheer volume of injuries with increasingly prevalent conditional fee arrangements has resulted in an increasing number of injured sportsmen speculatively seeking civil remedies against their opponents, generally founded in the tort of negligence. Of course, there is also the potential for injuries inflicted during sport to attract the interest of the criminal law, if the incident in question satisfies the requirements of an appropriate offence.

This article will explore the extent to which the law intervenes within sports to impose liability, civil or criminal, on those who cause harm to

* Research Fellow in Law, University of East Anglia; e-mail S.Fafinski@uea.ac.uk. The author is extremely grateful to Dr Emily Finch for her invaluable comments on earlier drafts; any remaining errors or inaccuracies are solely those of the author.

1 Game Plan: a strategy for delivering the Government's sport and physical activity objectives (Strategy Unit, December 2002), available at www.number–10.gov.uk/su/sport/report/01.htm, accessed 13 July 2005.

2 See www.thefa.com/Grassroots/PlayingFigures/, accessed 13 July 2005.

3 See www.irb.com/, accessed 13 July 2005.

4 T. Kevan, 'A Brief Guide to Sports Injury Cases' (2002) Autumn/Winter *Medico-Legal News* 5.

others during sports and evaluate whether a coherent and cohesive approach has emerged from the relevant case law. It will examine the way in which both the requirements of the law of negligence in civil law and the elements of non-fatal offences against the person in criminal law have been interpreted in relation to sporting injuries and evaluate the problems arising from the consensual nature of participation in sport. Finally, the interrelationship between the imposition of legal liability and the 'rules of the game' must be examined to establish whether the conduct outside the boundary of acceptable behaviour in a particular sport would automatically give rise to civil or criminal liability.

The civil law—negligence[5]

Since it has already been identified that most injured parties would seek a civil remedy based in negligence, it is important to summarise the requirements for a negligence action to succeed. The position in relation to negligence is relatively well established, although some difficulties arise when considering the level of skill that it is reasonable to expect participants to exercise; this is further complicated by the role of consent. The basic principles of negligence had their origins in the neighbour principle, famously laid down by Lord Atkin in *Donoghue* v *Stevenson*:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.[6]

Therefore, the elements of liability in negligence can be listed as follows: the defendant must owe the claimant a duty of care which is just, fair and reasonable; the defendant must have breached that duty; the breach must have caused the claimant loss (this loss extends to pain, suffering and loss of amenity resulting from a sporting injury); that the breach caused the loss suffered; the loss was not too remote (alternatively, that the loss was foreseeable) and the defendant is unable to establish a successful defence to the claim.[7]

It is therefore necessary to consider the concept of the standard of care, or the threshold at which a defendant's behaviour is considered to be unreasonable. The first notable evaluation of the standard of care in a sporting negligence case was that of the Court of Appeal in *Wooldridge* v *Sumner*,[8] where an experienced rider at an equestrian event galloped his horse around a corner so quickly that the horse went out of control, plunged off the track and injured a photographer in the ensuing chaos.

5 For a comprehensive exposition of the evolution of the civil law position, see C. Charlish, 'A Reckless Approach to Negligence' (2004) 4 *Journal of Personal Injury Law* 291–6.
6 [1932] AC 562 at 580.
7 *Caparo Industries Ltd* v *Dickman* [1990] 1 All ER 568.
8 [1963] 2 QB 43.

This was held to be 'an error of judgment' on the part of the rider rather than actionable negligence; furthermore, the Court of Appeal held that the duty of care would only be breached where a competitor demonstrated a 'reckless disregard' for the safety of the spectator. It is generally accepted that recklessness implies a greater degree of culpability or wrongdoing than negligence; negligence arising from a failure to protect against a realistic possibility of harm, as opposed to the wilful exposure of another to the risk of harm. The decision in *Wooldridge* v *Sumner* therefore seemed to be at odds with the general principle in tort that the defendant must 'only' reach the standards of the reasonable man;[9] in effect, an uncertainly defined band of behaviour between reasonable and reckless became acceptable in sport in the eyes of the civil law.

The introduction of the reckless disregard standard in *Wooldridge* v *Sumner* and the corresponding uncertainty immediately attracted some academic criticism[10] which eventually led to a retreat from that position. The first indication of this was seen in *Wilks* v *Cheltenham Hospital Homeguard Motorcycle and Light Car Club*,[11] Phillimore LJ stating that:

> Whether or not the competitor was negligent must be viewed against all the circumstances—the tests applied in *Wooldridge* v. *Sumner* are only applied if the circumstances warrant them.[12]

Therefore, the reckless disregard test could be avoided if the circumstances warranted such avoidance. Furthermore, Lord Denning MR, whilst tacitly accepting the standard in *Wooldridge*, used language that was arguably far short of an acceptance of the notion of reckless disregard, concluding that:

> The rider is, I think, liable if his conduct is to evince a reckless disregard of the spectators' safety: in other words, if his conduct is foolhardy.[13]

Reckless disregard, then, became diluted to foolhardiness, thereby lowering the threshold for unreasonable behaviour in sports. The gap was finally closed altogether in the landmark case of *Condon* v *Basi*,[14] where an amateur footballer was held liable for breaking his opponent's leg in a tackle; his sliding tackle was adjudged to constitute 'serious foul play' and to have been made in a dangerous manner (albeit without malicious intent) and to have been worthy of a sending off. The Court of Appeal described the standard of care to be applied as follows:

> There is a general standard of care, namely the Lord Atkin approach in *Donoghue* v. *Stevenson* [1932] AC 562 that you are under a duty to take all reasonable care taking account of the circumstances in which you are placed, which in a game of football, are quite different from those which affect you when you are going for a walk in the countryside.[15]

It is interesting to note that the conduct in *Condon* v *Basi* was outside the rules of the game; this was deemed sufficiently bad to constitute a

9 *Blyth* v *Birmingham Waterworks Co.* (1856) 11 Exch 781.
10 A. L. Goodhart, 'The Sportsman's Charter' (1962) 78 LQR 490.
11 [1971] 1 WLR 668.
12 Ibid. at 676.
13 Ibid. at 670.
14 [1985] 1 WLR 866.
15 Ibid. at 868.

breach of the duty of care and would also have prevented any prospect of a consent defence succeeding. This return to 'ordinary' negligence principles in sport seemed to restore the harmony disturbed by the introduction of the concept of reckless disregard in *Wooldridge* v *Sumner*; however, it did not engender complete support with subsequent cases showing a tendency to move back toward the requirement of at least some degree of recklessness.

In *Caldwell* v *Maguire and Fitzgerald*,[16] the Court of Appeal considered that two jockeys who had seriously injured a fellow jockey in the course of a race had not breached their duty of care and were not, therefore, negligent. Tuckey LJ considered that:

> In practice . . . the threshold for liability was high . . . there will be no liability for errors of judgment oversights or lapses of which any participant might be guilty in the context of a fast moving contest. Something more serious is required. [17]

Furthermore Judge LJ stated that:

> In the context of sporting contests it is also right to emphasise the distinctions to be drawn between conduct that is properly to be characterised as negligent, and thus sounding in damages, and errors of judgment . . . of which any reasonable jockey might be guilty in the hurly burly of a race.[18]

In other words, the Court of Appeal upheld the proposition of Holland J at first instance that it might be 'difficult to prove a breach of duty in the absence of reckless disregard for fellow contestants' safety'.

The defendants in *Caldwell* v *Maguire and Fitzgerald* had been found guilty of careless riding under the rules of the Jockey Club. Considering *Condon* v *Basi,* this may have been sufficient to be deemed negligent; however, in *Caldwell* v *Maguire and Fitzgerald*, Tuckey LJ clearly stated:

> The finding that the respondents were guilty of careless riding is not determinative of negligence . . . there is a difference between response by the regulatory authority and response by the courts in the shape of a finding of legal liability.[19]

This apparent return to a position more closely related to that established in *Wilks* v *Cheltenham Hospital* some 30 years earlier was most recently considered in *Blake* v *Galloway*;[20] a case which involved five 15-year-olds who engaged in horseplay, throwing twigs and pieces of bark chippings at each other, ultimately causing the infliction of a 'significant' eye injury. Although this is obviously not a recognised or regulated sport, the Court of Appeal considered that:

> There is a sufficiently close analogy between organised and regulated sport or games and the horseplay in which these youths were engaged for the

16 [2001] EWCA Civ 1054, [2002] PIQR 6.
17 Ibid. at [23].
18 Ibid. at [37].
19 Ibid. at [28].
20 [2004] EWCA Civ 814, [2004] 1 WLR 2844.

> guidance given by the authorities to which I have referred[21] to be of value in the resolution of this case. The only real difference is that there were no formal rules for the horseplay.[22]

Dyson LJ went on to conclude that:

> I would, therefore, apply the guidance given by Diplock LJ in *Wooldridge*, although in a slightly expanded form, and hold that in a case such as the present there is a breach of the duty of care owed by participant A to participant B only where A's conduct amounts to recklessness or a very high degree of carelessness.[23]

Although this case involved horseplay, it is clear that the Court of Appeal intended its definition of the standard of care as 'recklessness or a very high degree of carelessness' equally to apply to organised and regulated sport or games and can be viewed as its recognition of the unique nature of such activities. It could be argued that there is a different standard of care in sports *because* there is consent to the physical contact that necessarily is involved; a standard based on ordinary principles of negligence and the behaviour of the reasonable man could give rise to such an influx of claims that it would be impractical to use it as a basis for liability. Since participants consent to activity that inherently carries a risk of negligently caused injury in an adrenaline-fuelled fast-moving contest, this justifies the higher threshold necessary for a claim in negligence to succeed. Furthermore, since both parties are aware of the nature of the injuries that can occur during the normal course of play, the injury and the conduct causing it must exceed the accepted and expected boundaries of play to be actionable, as the ordinary spectrum of injuries is consented to by virtue of participation.

Ordinarily and unfortunately for an injured claimant, there is a defence encapsulated in the maxim *volenti non fit injuria* (literally 'no injury done to a consenting party'), meaning that an injury suffered with consent could not give rise to a successful action in negligence; thus a seemingly negligent defendant could not, by virtue of the claimant's consensual participation, be liable in negligence.

The operation of consent as a defence to negligence in the sporting context was considered in *Smoldon* v *Whitworth and Nolan* where a rugby player in the front row of a scrum was catastrophically injured when the scrum collapsed, causing him to break his neck.[24] He brought an action in negligence against the referee for failing to enforce the rules of the game. Despite the traditional view that the defence of consent would absolve the referee of civil liability, the Court of Appeal was quick to dismiss it:

> The plaintiff had of course consented to the ordinary incidents of a game of rugby football of the kind in which he was taking part. Given, however, that the rules were framed for the protection of him and other players in

21 *Wooldridge* v *Sumner* [1963] 2 QB 43; *Condon* v *Basi* [1996] 1 WLR 866; *Rootes* v *Shelton* [1968] ALR 33; *Caldwell* v *Maguire and Fitzgerald* [2001] EWCA Civ 1054, [2002] PIQR 6.
22 *Blake* v *Galloway* [2004] EWCA Civ 814, [2004] 1 WLR 2844 at [13–15].
23 Ibid. at [16].
24 [1997] PIQR 133.

> the same position, he cannot possibly be said to have consented to a breach of duty on the part of the official whose duty it was to apply the rules and ensure so far as possible that they were observed.[25]

Here, then, the Court of Appeal considered that, although the claimant had implicitly consented to conduct which was within the rules of the game, he had not consented to a failure by an official to enforce those rules. It could also be inferred from this that the Court of Appeal would therefore have considered conduct outside the rules of the game to be beyond the scope of the player's consent.

The interrelationship between consent and the duty of care was encapsulated in the Australian case of *Rootes* v *Shelton*,[26] followed in *Condon* v *Basi*, where Barwick CJ stated that:

> By engaging in a sport . . . , the participant may be held to have accepted risks inherent in that sport . . . but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connection, the rules of the sport . . . may constitute one of those circumstances, but . . . they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist.[27]

In summary, liability in negligence requires conduct that is either reckless or shows a very high degree of carelessness; the defence of consent is extremely unlikely to succeed and conduct that is outside the rules of the game will not automatically give rise to liability. There is a complex interplay between the rules of the game and consent that creates problems as regards the ordinary operation of the principles of negligence in a sporting context. Playing within the rules protects against liability, but contravention, whilst indicative of a failure to meet the appropriate standard of care, will not inevitably engender civil liability. Similar issues arise in relation to the imposition of criminal liability; arguably, so similar that it is difficult to see any meaningful delineation between the basis for civil and criminal liability.

The criminal law position

Until recently there has been little guidance as to when it is appropriate for criminal proceedings to ensue after a sporting injury has been caused. However, the Court of Appeal has recently provided some clarification following the case of *R* v *Barnes*.[28] Here, the appellant had been charged with unlawfully and maliciously inflicting grievous bodily harm contrary to s. 20 of the Offences against the Person Act 1861 after seriously injuring the right ankle and calf bone of an opposing player during an amateur football match. The CPS considered that the elements of the offence were satisfied since the injury was (sufficiently) serious and that Barnes committed the tackle either intentionally or

25 [1997] PIQR 133 at 147.
26 [1968] ALR 33.
27 Ibid. at 34.
28 [2004] EWCA Crim 3246, [2005] 1 WLR 910, (2005) 69 JCL 201.

with foresight of at least some harm. Barnes himself admitted that the tackle was hard, but contested that it was a fair sliding tackle in the course of play and that the injury was, therefore, accidental; however, in the words of the Crown, it was 'a crushing tackle, which was late, unnecessary, reckless and high up the legs'.

In his summing-up, the judge directed the jury that the appellant could only be guilty if the prosecution had proved that the injury resulted from conduct that was 'not done by way of legitimate sport'. He later issued a further direction after the jury asked for clarification: that the appellant would be guilty if 'he realised when he did the act that some injury, however slight, which was over and above legitimate sport, might result from what he was going to do' and yet he ignored, or was willing to take that risk, or even deliberately set out to take the risk when tackling his opponent. The appellant was convicted, but was granted leave to appeal on the grounds that the judge erred in directing the jury that the unlawfulness of the appellant's action and the definition of recklessness were both related to the notion of 'legitimate sport' without giving guidance as to what constituted legitimate sport; furthermore, that the jury received no explanation of the concepts of consent or accident as a defence, or the relevance of a genuine attempt to play by the laws of the game. The appeal was upheld on the basis that the summing-up was inadequate and thus the conviction was unsafe; of more importance, however, is the Court of Appeal's opinion on the types of behaviour within sport which should attract criminal liability and the role of consent within the criminal law to physical contact within organised sports.

The Court of Appeal in *Barnes* set out unequivocally that, given most organised sports have their own standards of conduct and their own disciplinary procedures for enforcing the rules of the game, it is unnecessary and indeed undesirable for criminal proceedings to be instigated in the majority of situations. However, it also recognised a 'steady, but . . . still modest' flow of cases, thus recognising the need to provide some guidance in cases which did give rise to criminal proceedings. Although the Court of Appeal in *Barnes* recognised that criminal and civil remedies can have concurrent availability, it clearly restricted the availability of criminal redress to situations where the conduct is 'sufficiently grave to be properly categorised as criminal';[29] this is reminiscent of the 'so bad' justification for the imposition of criminal liability for manslaughter based on gross negligence that was established in *R* v *Adomako*.[30]

While this guidance might not be especially helpful in itself, the Court of Appeal went on to consider the exceptions within the sporting context to the proposition that an individual cannot consent to the infliction of bodily harm upon himself. It is established within the criminal law that availability of the defence of consent to the infliction of bodily harm in relation to sporting contests extends only to organised

29 [2005] 1 WLR 910 at [5].
30 [1995] 1 AC 171, HL.

sporting events that occur within the parameters of rules under the scrutiny of a recognised regulatory body. Boxing perhaps provides the clearest illustration: it is a lawful sport, but prize-fighting is not, despite the fact that there is little distinction between the two activities, both involving a clear and deliberate intention to inflict physical harm and, generally, the more the better.[31] The distinction therefore lies between regulated and unregulated activities and illustrates the delegation of responsibility for determining the acceptable boundaries of the use of force to sporting organisations and their regulatory bodies.

The availability of the defence of consent is founded in public policy. This was made clear from the House of Lords judgment in *R* v *Brown (Anthony)*,[32] albeit that *Brown* concerned sado-masochistic activities between consenting adults and not sports. Lord Mustill, whilst dissenting as to the outcome of the particular appeal in Brown, provided an illuminating analysis of the position of consent in sports which have deliberate bodily contact as an essential element; these include rugby and football, and are considered to lie at some mid-point between fighting (where there is intention to hurt) and more 'mild' sports (where there is at most an acknowledgement that someone may be accidentally hurt):

> In the contact sports each player knows and by taking part agrees that an opponent may from time to time inflict upon his body (for example by a rugby tackle) what would otherwise be a painful battery. By taking part he also assumes the risk that the deliberate contact may have unintended effects, conceivably of sufficient severity to amount to grievous bodily harm. But he does not agree that this more serious kind of injury may be inflicted deliberately.[33]

This implies, then, that consent is available as a defence to accidental serious injury, presenting the problem of delineation of accidental and intentional infliction of harm. This issue was discussed in a series of Canadian cases involving ice hockey, a sport in which a high degree of physical contact is expected; these cases were referred to in *Brown* and, subsequently in *Barnes*. In *R* v *Cey*,[34] a player was cross-checked from behind into the boards, causing facial injuries, concussion and whiplash. The defence argued that the victim consented to being checked in that way merely by stepping onto the ice. However, the Saskatchewan Court of Appeal stated that although some forms of intentionally applied force clearly fall within the scope of the rules of the game and are recognised as having implied consent, very violent acts which are 'clearly beyond the ordinary norms of conduct' are not recognised by the court as legitimate, and no consent is recognised: in evaluating the norms of conduct the court had special regard for the risk of injury and the severity of any potential injury. The reasoning in *Cey* was followed in *R*

31 *R* v *Coney* (1882) 2 QBD 534.
32 [1994] 1 AC 212. The public policy foundation for the defence has also been reinforced by *R* v *Dica* [2004] EWCA Crim 1103, [2004] QB 1257 and *R* v *Konzani* [2005] EWCA Crim 706 (see case note on *Konzani* at p. 389 above).
33 Ibid. at 262.
34 (1989) 45 CCC (3d) 176, SCC.

v *Leclerc* where, in a recreational *non-contact* hockey league, the defendant hit an opposing player in the back with his stick, dislocating a portion of his cervical spine and permanently paralysing him from the neck down.[35] Here, it was held that:

> The ultimate question of implied consent, as in *R* v. *Cey*, is whether the cross-checking or push of the complainant across the neck in close proximity to the boards was so inherently dangerous as to be excluded from the implied consent.[36]

Finally, *R* v *Ciccarelli*,[37] where a professional player struck his victim in the head three times with his stick, the test of consent was stated (applying *Cey* and *Leclerc*) as follows:

> [There is] such a high risk of injury and distinct probability of harm as to be beyond what, in fact, the players commonly consent to, or what, in law, they are capable of consenting to.[38]

As Lord Mustill summarised in *Brown*:[39]

> The [Canadian] courts appear to have started with the proposition that some level of violence is lawful if the recipient agrees to it, and have dealt with the question of excessive violence by enquiring whether the recipient could really have tacitly accepted a risk of violence at the level which actually occurred.

In other words, the courts recognised that even where a particular level of violence is expected, and thus implied consent is given to consequent harm by dint of participation in light of that expectation of violence, it may be so inherently dangerous as to preclude legal recognition of such consent as a means of excluding criminal liability.

With this in mind, the Court of Appeal in *Barnes* went on to approve the approach taken by the Law Commission in its Consultation Paper *Consent and Offences against the Person*;[40] specifically (albeit in relation to criminal injuries compensation) the Law Commission viewed that in contact sports there is consent to such contact even if serious injury may result through 'unfortunate accident', but there is no consent to 'being deliberately punched or kicked'.[41] Furthermore, in determining whether reckless infliction of injury should be properly labelled as criminal, consideration should be given to whether the injury occurred during play, in the heat of the moment when play has ceased, or 'off the ball'; an injury occurring during play can still be criminal if it results from unreasonable risk-taking.[42] Therefore, the more the act that causes injury is spatially or temporally remote from play, the more likely it is that the act will attract criminal liability.[43] Moreover, if the conduct is

35 (1991) 7 CR (4th) 282, CA.
36 Ibid. at [27].
37 (1989) 54 CCC (3d) 12, Ont. Dist. Ct.
38 Ibid. at [12].
39 [1994] 1 AC 212 at 266.
40 Law Commission, *Consent and Offences against the Person*, Law Com. Consultation Paper No. 134 (1993).
41 Ibid. at para. 10.12.
42 Ibid. at para. 10.18.
43 A player does not, and could not, consent to deliberate acts of violence 'off the ball'; *R* v *Billinghurst* [1978] Crim LR 553.

within the laws of the game there is a strong presumption that it is not criminal. The converse is not true; if the conduct is outside the laws of the game and results in a caution or sending off it does not necessarily follow that it is criminal:

> In highly competitive sports, conduct outside the rules of the game can be expected to occur in the heat of the moment, and even in the conduct justifies not only being penalised but also a warning or even a sending off, it still may not reach the threshold level required for it to be criminal.[44]

The threshold level will therefore depend on all the circumstances; the jury should consider whether the act was so obviously late and/or violent that it could not be regarded as instinctive, or an error in the heat of the game.

The presumption that criminal lawfulness corresponds with sporting lawfulness effectively allows sports governing bodies to self-police, by framing the gravity of violent acts on the field of play in terms of the laws of the game; expansion or contraction of the boundaries of fair play within sports will result in a corresponding movement at the boundaries of criminality, such that only conduct that markedly departs from that permitted within the laws of the game will justify the attention of the Crown Prosecution Service.

The boundaries of criminal liability

In *Barnes*, then, the Court of Appeal has given *some* authoritative guidance as to where the line is drawn between legitimate and unlawful violence in the sporting arena. In doing so, it could be argued that they are attempting to stem a slowly increasing tide of criminal prosecutions following sporting injuries. The judgment will facilitate an evaluation of the likelihood of success for those considering bringing a criminal prosecution. However, it could also be argued that in failing to set out clear tests to be applied in the determination of conduct sufficiently grave to be labelled as criminal, the Court of Appeal is either acknowledging that it is impossible to lay down clear guidance, or delegating the determination of criminal liability to the CPS and the jury; whether infliction of a sporting injury is criminal will depend, in reality, on what those who can enforce the law choose to do.

This deliberately vague approach to imposition of liability is not unfamiliar; the test for gross negligence manslaughter as set down by Lord Mackay in *Adomako* deploys a similarly amorphous approach that abdicates to the demarcation of criminal and civil liability to the jury as a question of fact:[45]

> The essence of the matter, which is supremely a jury question, is whether having regard to the risk of death involved, the conduct of the defendant is so bad in all the circumstances as to amount in their judgement to a criminal act or omission.

44 *R* v *Barnes* [2004] EWCA Crim 3246, [2005] 1 WLR 910 at [15].
45 [1995] 1 AC 171 at 187, HL.

Just as the jury is required to determine whether, in all the circumstances, a breach of duty that led to death is 'so bad' as to merit the imposition of criminal liability for gross negligence manslaughter, the arbiters of fact—magistrates or the jury—in sporting injury cases involving non-fatal offences will be required to have regard to all the circumstances surrounding the infliction of the injury, including the degree of the breach of the rules of the particular sport, to determine whether the imposition of criminal liability is appropriate. Such an approach will be inherently uncertain; what is 'sufficiently grave' conduct to one person may appear as an enthusiastic approach within the boundaries of the rules of play to another. Moreover, this interpretation may depend on factors such as the individual's level of knowledge of the sport or their views about the particular sport in general. A person who thinks that footballers are all overpaid ruffians who contribute to the degeneration of social standards by engaging in brutish behaviour that is emulated by adoring fans is likely to take a far more censorious approach to a controversial tackle then, say, an ardent football supporter who has seen worse tackles pass without meriting any attention from the referee on other occasions.

The inherent difficulty is that the rules of play themselves are open to interpretation. What amounts to an unreasonable tackle in football may be a matter of the referee's own judgement and different referees may reach divergent conclusions after observation of identical events. For instance, Law 12 of FIFA's laws of the game of football states that:

> A direct free kick is awarded to the opposing team if a player commits any of the following six offences in a manner considered by the referee to be careless, reckless or using excessive force:
>
> kicks or attempts to kick an opponent
> trips or attempts to trip an opponent
> jumps at an opponent
> charges an opponent
> strikes or attempts to strike an opponent
> pushes an opponent.[46]

Therefore, in this example, the referee is the first arbiter of recklessness, unreasonable breach of an appropriate standard of care or whether excessive force has, in fact, been used; all of which are open to subjective evaluation. In light of this, determination of criminal liability for injuries caused during the course of sports seems to rest on an inherently unknowable standard. The situations that have occupied both the civil and criminal courts are less likely to involve extreme violent outbursts that bear no relation to the sport involved such as punching an opponent following an unfavourable exchange of play than situations that are aggressive or reckless examples of ordinary play; conduct that could be considered to be an amplification of normality that, more as a matter of chance than design, crosses the boundaries of acceptable play within

46 Fédération Internationale de Football Association (1 July 2004), available at www.fifa.com/en/regulations/regulation/0,1584,3,00.html, accessed 30 August 2005.

that sport by a significant degree. As such, the imposition of civil or criminal liability is problematic.

A further difficulty concerns the boundaries between the civil and criminal law. As the case law illustrates with clarity, the civil law is troubled by the imposition of liability based on the usual 'breach of duty of care' principles of negligence. As outlined earlier, to use a test of liability based upon foreseeable injury would create an influx of claims in a sporting context purely because participation in sports, particularly fast-paced team sports involving physical contact, always carries a foreseeable risk of injury. Applying the usual principles of negligence would render any sporting injury actionable in tort; clearly an unacceptable situation. The response to this has been to elevate the standard of care required in sporting cases, thus imposing civil liability only if injury is caused by reckless conduct that is outside of the acceptable parameters of conduct within that particular sport. Whilst this is a pragmatic and wholly explicable approach, to require reckless conduct as a basis for a claim in negligence seems somewhat incongruous, if only as a matter of terminology.

Furthermore, the use of a recklessness standard as the basis for civil liability for negligence somewhat obfuscates the boundary between civil and criminal liability as the mental element of the offences most likely to be used in sporting injury cases involves recklessness. In *Barnes*, the defendant was charged with inflicting grievous bodily harm contrary to s. 20 of the Offences against the Person Act 1861. The *mens rea* of this offence is satisfied if the defendant foresaw the risk of *some* harm albeit not harm of the severity that ensued; thus creating a low threshold of criminal liability that would be easily satisfied in the context of the majority of sporting injuries.[47] However, how this interacts with the requirement that the conduct must be such that it is outside the ordinary rules of play is unclear. Must the defendant foresee a risk that his conduct could result in a contravention of the rules? This issue and the general level of overlap between the civil and criminal law was not addressed in *Barnes* and so the issue remains unresolved.

The final difficulty that emerges from the sports cases is the degree of variability that may arise. Not only do different sports involve different types of risk and variable probabilities that harm will occur, but the same sport played at different levels of skill will involve a range of levels of proficiency. Irrespective of the range of ability levels, the same rules of professional conduct under the auspices of the same professional body will regulate play, yet there must surely be scope for accommodating the inherent variability of proficiency that is demonstrated. Again, liability seems to rest on an interpretation not only of the incident involved, but also of the rules as applicable to the standard of the player; further uncertainty therefore seems inevitable.

One feature that is consistent in relation to both the civil and criminal law is the primacy given to the rules of play within any particular sport

47 The 'Mowatt gloss' (*R* v *Mowatt* [1968] 1 QB 421) as approved by the House of Lords in *R* v *Parmenter* [1992] 1 AC 699.

and the reliance placed upon the appropriate regulatory body to develop and police rules that ensure an acceptable standard within the game. Behaviour within these parameters will not engender civil or criminal liability. Conduct that breaches the rules of play will not necessarily give rise to either civil or criminal liability; this is a pragmatic acknowledgement of the nature of sport and the acceptance of the risk of injury by the participants. What the civil cases and, latterly, the criminal court in *Barnes* have made clear is that a high degree of departure from the accepted rules of play is necessary both to vitiate the implied consent to injury that arises from participation in the sport and to cross the policy threshold that justifies the interference of the courts in the business of regulating sporting activities. All that remains unclear is the relative responsibilities of the civil and criminal law; an issue that was not resolved in *Barnes* and one which will inevitably undergo future judicial scrutiny.