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**‘DEVIANT’ OR CRIMINAL? ON-FIELD ‘SPORTS VIOLENCE’ AND THE
INVOLVEMENT OF CRIMINAL LAW IN ENGLISH RUGBY UNION**

By

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Words: 45,936

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TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	I
LIST OF CASES	IV
LIST OF LEGISLATION.....	V
ABSTRACT	VI
CHAPTER 1: INTRODUCTION.....	1
1.1. BACKGROUND	1
1.2. RESEARCH PROBLEM	5
1.3. OVERVIEW OF STUDY	5
1.4. WHO AM I, AND WHAT LED ME TO THIS RESEARCH?	6
1.5. IMPLICATIONS OF STUDY	8
CHAPTER 2: LITERATURE REVIEW INTRODUCTION.....	10
2.1. OVERVIEW	10
CHAPTER 3: DEFINING SPORTS RELATED ‘VIOLENCE’	14
3.1. DEFINING ‘SPORTS VIOLENCE’	14
3.2. BROADER DEFINITIONS OF ‘VIOLENCE’ AND AGGRESSION.....	15
3.2.1 <i>‘Violence’ and Intent.....</i>	16
3.2.2 <i>‘Violence’ and Harmful Outcomes</i>	19
3.2.3 <i>‘Violence’ and Legitimacy</i>	20
3.2.4 <i>‘Violence’ as Unwanted Behaviour</i>	22
3.2.5 <i>A Definition of ‘violence’</i>	22
3.3. DEFINING ‘VIOLENCE’ IN SPORT	24
3.3.1 <i>Formations of Sports Related ‘violence’</i>	24
3.3.2 <i>A Typology of ‘sports violence’</i>	25
3.3.3 <i>Usefulness of Smith’s Typology</i>	30
3.3.4 <i>The RFU and CPS Definitions of ‘violence’</i>	31
3.4. SUMMARY.....	32
CHAPTER 4: THEORISING THE OCCURRENCE OF ‘SPORTS VIOLENCE’	36
4.1. THEORETICAL OVERVIEW	36
4.2. FIGURATIONAL (PROCESS) SOCIOLOGY	37
4.2.1 <i>The Civilising Process</i>	38
4.2.2 <i>The Civilising Process and Sport.....</i>	39
4.3. MARXIST SOCIOLOGY	42
4.3.1 <i>The Centrality of the Economic Structure of Society and the Exploitation of the Proletariat ...</i>	42
4.3.2 <i>Marxism and Sport.....</i>	44
4.4. SYMBOLIC INTERACTIONISM AND THE SPORTS ETHIC	47
4.5. SUMMARY.....	49
CHAPTER 5: LEGAL DOCTRINE: APPLYING THE LAW TO SPORTS.....	54
6.1. INTRODUCTION	54
6.2. CONTEMPORARY SPORT AND THE PLAYING CULTURE.....	54
6.2.1 <i>Rules and Injury as Accepted Risk.....</i>	54
6.2.2 <i>Beyond the Rules</i>	56
6.2.3 <i>Usefulness of the Playing Culture Standard.....</i>	59
6.2.4 <i>Limitations of the Playing Culture.....</i>	61
6.3. ‘SPORTS VIOLENCE’ AND CRIMINAL OFFENCES	64
6.3.1 <i>Violent Conduct in Sport and the Statutory Assaults</i>	64
6.3.2 <i>The Legal Principle of Mens Rea</i>	68
6.4. THE DOCTRINE OF CONSENT	72

6.4.1. <i>The Ontological Foundations of Consent</i>	72
6.4.2. <i>'sports violence', Consent and Legal Fiction</i>	75
6.4.3. <i>The 'Unreasonableness' Limb of Recklessness</i>	77
6.5. PROSECUTORIAL DISCRETION THE ANSWER?	79
6.5.1. <i>Sport as a 'Private Government'</i>	80
6.5.2. <i>Civil Law and Sport</i>	82
6.6. SUMMARY	84
CHAPTER 6: THE RFU: DISCIPLINARY STRUCTURE	90
5.1. THE PROCESS OF PROFESSIONALISM IN RUGBY UNION	90
5.2. RFU DISCIPLINARY OBJECTIVES	92
5.2.1. <i>Ensuring that Disciplinary Objectives are Met</i>	94
5.3. STRUCTURE OF RFU DISCIPLINARY SYSTEM	94
5.4. SANCTION ENTRY POINTS	98
5.5. SUMMARY	101
CHAPTER 7: METHODOLOGY	102
7.1. DESIGN	102
7.1.1. <i>Interviews</i>	103
7.1.2. <i>Questionnaires</i>	104
7.1.3. <i>Sampling</i>	105
7.2. PARTICIPANTS	106
7.2.1. <i>Justification</i>	107
7.3. ANALYSIS	108
7.3.1. <i>Phase One</i>	108
7.3.2. <i>Phase Two</i>	108
7.4. ETHICS	110
7.4.1. <i>The Ethics of Treatment of Participants</i>	110
CHAPTER 8: DISCUSSION OF RESULTS	115
8.1. OVERVIEW OF RESULTS	115
8.2. DANGEROUS PLAY PART OF THE GAME	116
8.3. THE RFU MAY BE MORE SUITABLE	121
8.3.1. <i>Ease of Establishing Culpability</i>	124
8.3.2. <i>Reluctant Involvement of the Criminal Law</i>	126
8.3.3. <i>Increased Legal Intervention May Increase Inconsistency</i>	129
8.4. DISCIPLINARY SANCTIONS AND CARDS ARE EFFECTIVE BUT INCONSISTENT	130
8.4.1. <i>Success of the RFU Disciplinary Objectives</i>	131
8.4.2. <i>Cards and Bans are not Being Used Effectively</i>	137
8.5. IS A LINK BETWEEN THE RFU AND CPS THE ANSWER?	140
8.6. SUMMARY	143
CHAPTER 9: CONCLUSION	147
9.1. OVERVIEW OF STUDY	147
9.2. CONCLUDING REMARKS	147
9.4. LIMITATIONS	154
9.3. IMPLICATIONS OF THE STUDY AND FURTHER RESEARCH	154
REFERENCES	156
APPENDIX	164
APPENDIX 1 – INTERVIEW SCHEDULE – DISCIPLINARY PANEL MEMBERS	165
APPENDIX 2 – INTERVIEW SCHEDULE – REFEREES	167
APPENDIX 3 – INTERVIEW SCHEDULE – LEGAL PROFESSIONALS	169
APPENDIX 4 – ONLINE QUESTIONNAIRE	171

LIST OF CASES

Condon v Basi [1985] 1 WLR 866
Donovan [1934] 2 KB 498 (CA)
DPP v Smith [1961] AC 290 (HL)
Fagan v MPC [1969] 1 QB 539 (DC)
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Offences Against the Persons Act, 1861

The Law Commission, 1993, *Legislating the Criminal Code: Offences Against the Person and General Principles*, No. 218.

National Highways Act, 1835

NSW State Coroners Court Glebe NSW [2016] ‘Inquest into the death of Phillip Joel Hughes’

ABSTRACT

Like many contact sports, rugby union has danger at its core, and those acts deemed acceptable within rugby would likely be termed ‘violence’ were it to happen away from the sporting arena. This thesis embarks on an exploration of legal interference in on-field ‘violence’ cases in English rugby union. The seemingly sporadic intervention by the criminal law in on-field ‘violence’ incidents was examined, whilst also considering both the complications encountered when applying criminal proceedings to participator ‘violence’, and whether the RFU might better serve as regulator. The perspectives of twenty participants, nine of whom were interviewed, and eleven of which completed an online questionnaire, were utilised to examine the most effective means of regulation in English rugby union, and the issues attached to using the criminal law as a method of governance. Out of the nine interviewed, three were legal professionals, two were currently referees in the Aviva Premiership, and four were presently RFU disciplinary panel members. The eleven who completed the online questionnaire were all professional players for a club currently competing in the Aviva Premiership. Thematic analysis revealed four major themes, these were: 1) dangerous play is part of the game; 2) disciplinary sanctions and cards are effective deterrents but inconsistent; 3) the courts have a role to play, yet, the RFU may be better suited to regulate; and, 4) establishing a formal link between the law and RFU could help find equilibrium. It was concluded that the RFU seems to be better suited to dealing with all but the most egregious incidents of participator ‘violence’. The borders of suitability were found to be breached when intent to cause serious harm was present. For participants, this was when the criminal law should interfere. Participants also proposed the use of an RFU referral system, whereby the RFU can refer particularly deplorable cases to the police for investigation. Moreover, the disciplinary devices used by the RFU, sanctions and cards, were seen as effective deterrents and punishments, yet, their issuing was seen as inconsistent and in need of reform.

CHAPTER 1

INTRODUCTION

1.1. Background

The examination of the relationship between the criminal law and sporting regulation has become an area of growing interest in both academic and sporting discourse. The need for increased legal intervention has arisen from views the law should be the ultimate adjudicator (MLRA, 1976), an omnipresent legal entity which branches out into all areas of society, including the regulation of sport (Livings, 2016). Lord Justice Ebsworth provides a statement fitting to the recent developments in sport and the law:

There are likely to be many people who take the view that the processes of the law have no place in sport and the bodies which run sport should be able to conduct their own affairs as they see fit. ... However, sport today is big business. Many people earn their living from it one way or another. It would be, I fear, naive to pretend that the modern world of sport can be conducted as it used to be not very many years ago. (*Jones v The Welsh Rugby Union* [1996] QB 1591 (HC), 11).

Ebsworth's words are reminiscent of the popular statement made by Lord Justice Bramwell in the case of *Bradshaw*: “[n]o rules or practice of any game whatever can make lawful that which is unlawful by the law of the land” (84). In short, sport cannot expect to be what Livings (2016: 8) aptly describes as a “zone of legal exemption”, whereby the criminal law operates prosecutorial discretion when it comes to sporting contests. Commentators of sports law have provided discussions over the necessity for legal interference in areas such as crowd disorder and football hooliganism (James, 2013), the corruption of global sporting mega events (Lewis and Taylor, 2008), match fixing and sports gambling (Gardiner et al., 2012), and anti-doping in sports (Lewis and Taylor, 2002). Yet, the area of participator ‘violence’ seems to suffer from a dearth of attention, particularly when it comes to providing

remedies or analysis as to the best method for regulating participator 'violence'. Such a lack of research may be attributed to the numerous complications arising when attempting to apply legal doctrine to the sporting arena.

The first problem is one of definition. How exactly do we define 'sports violence'? Defining 'violence' has been a centre for debate over the last century (Smith, 1988 and Hamby, 2017), with each discipline constructing bespoke interpretations of the concept. The central question: What is 'violence'? remains differentially defined and understood by legal experts, criminologists, sociologists, animal biologists, law enforcement officials, and policy makers. Such ambiguity is not absent when attempting to define 'sports violence', particularly that of participator 'violence'. Especially in contact sports, where both aggressive and violent behaviours are intrinsic to the very nature of the contest. Numerous scholars (Smith, 1988; Young 2012; and, Coakley and Pike, 2014) have attempted to provide a definition of 'sports violence' that reflects the aggressive manner of contact sports. However, such definitions, when viewed from the perspective of the law, would also fall unequivocally under definitions of unlawful 'violence' provided by the law. Of course, participants of contact sports are to expect more 'violence' than a member of the public walking down the street. Yet, to provide a useful definition of participator 'violence', and one that can work effortlessly with the criminal law, would require an exploration into the breadth of consent in contact sports.

Delineating consent in contact sports has perhaps received the most deliberation by academics in the field of participator 'violence' (MRLA, 1976, James, 2001, and Fafinski, 2005). The topic has come under such debate that some have called for the boundaries of consent to be defined by the rules of the given sport (MRLA, 1976). By using the rules alone as a boundary of consent, demarcation of unlawful and lawful would be relatively straightforward. Nevertheless, such a notion has been described as "untenable", since "the

acceptability of ‘violence’ is a matter of legal policy not of private regulation” (McCutcheon, 1994: 273). Therefore, “[t]o use the rules of the sport as a test would be to confer on a private agency, the sport's governing body, the power to license ‘violence’” (McCutcheon, 1994: 273). Moreover, it has been widely recognised that “the courts have been clear that transgression of the rules will not automatically attract criminal liability, and neither will it necessarily preclude the availability of the defense consent” (Livings, 2006: 497). As such, others have referred to the “unwritten conventions” (Dunning and Sheard, 2005: 29) of sport as offering definitions of consent. Such conventions are not easily captured by reference to the rules alone, but only understood by those who fully understand the culture of a respective sport. Yet, this leads on to the question: what is the limit of such unwritten conventions, and therefore the point to which one doesn’t consent? As of yet, no one has been able to provide a definition of consent for contact sports. Therefore, the appliance of criminal law to sporting incidents has maintained ambiguity.

Due to the enigmatic nature of defining both ‘sports violence’ itself and the limits of consent, applying legal doctrine to the sports setting has been troublesome. Such complications mainly arise when attempting to establish *mens rea*. For Ormerod (2007: 105), “[t]he word ‘*rea*’ refers to the criminality of the act, not its moral quality”; this means that “English courts focus on the accused’s cognitive state – whether he foresaw risk, etc – rather than whether he was acting in a morally culpable manner”. As such, establishing *mens rea* in contact sports requires the assessment of whether an act was reckless, insofar as the perpetrator knew there was a possibility that the requisite harm may occur, or intentional, whereby the defendant intended to cause the requisite harm (OAPA, 1861). Prosecuting under recklessness would prove impractical in contact sports. Lord Woolf proposes that “anyone going to tackle another player in possession of the ball can be expected to have the necessary malicious intent” (*Barnes*, 915). Thus, there would be a proliferation of relatively

minor offences clogging up the courts. As such, most cases which go through the courts have been attempts to prosecute under intention. Establishing intent can prove problematic when applying it to a matter of everyday life, let alone in an arena where harm is implicit to nearly all aspects of the game.

The issues associated with applying the law to the sports setting have led some to propose prosecutorial discretion as the answer. In *Barnes*, Lord Woolf discusses such possibilities:

In determining what the approach of the courts should be, the starting point is the fact that most organised sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct. As a result, in the majority of situations there is not only no need for criminal proceedings, it is undesirable that there should be any criminal proceedings (911).

In the case of sport, it is often considered that, not only are there alternative methods to the criminal law, but also that these alternatives may prove more effective at achieving the aims of sport than the criminal law itself. Cohen (1990: 322) indicates that, “[t]he decision not to prosecute does not mean that a professional athlete acting violently during a game goes without punishment”. Cohen (1990: 322) continues referring to how the “[v]arious alternative dispute resolution methods, including civil mechanisms, game officiating, league fines and suspensions” may actually “control violent behavior in sports more effectively than the imposition of criminal liability”. Some commentators see the regulatory tools used by sporting bodies as the most effective method. For Anderson (2013: 57), “there is little doubt that a speedy, consistent and fair internal disciplinary regime within a sport is the most effective deterrent against unnecessarily violent play, as opposed to the more distant and unpredictable applicability of the criminal law”. Despite this, as mentioned previously, sport cannot become a “zone of legal exemption” (Livings, 2016: 8) whereby the criminal law leaves it to become its own private government. However, to the

researcher's knowledge, there has yet to be a study which aims at finding equilibrium between the law and internal regulation for contact sports.

1.2. Research Problem

As mentioned, applying the law to participator 'violence' can prove arduous, especially in contact sports, where violent behaviours are inherent to the playing of the game. Such issues are reflected in the paucity of on-field incidents in rugby union going to court, and the current reliance placed on the national governing body of the sport, the Rugby Football Union (RFU), for regulation. The scarcity of cases attracting legal interference calls for an inquiry into the complications which the Crown Prosecution System of England and Wales (CPS) face when attempting to prosecute on-field rugby incidents. Moreover, the RFU as an internal regulator needs to be assessed. Is the RFU suitable to deal with all incidents of 'violence' on the rugby pitch? Or could incorporating the criminal law be a more effective approach? Indeed, such queries are imperative when attempting to find the most effective means of regulation in rugby union. However, such questions can also provide an understanding of how contact sports should or could be regulated, and how far legal doctrine penetrates sport.

1.3. Overview of Study

The present thesis will investigate the most effective means of regulating participator 'violence' in English rugby union. Rugby union, as a contact sport, encounters similar problems to those discussed in Section 1.1, whereby the aggressive nature of the sport has made it difficult to establish an effective method of incorporating the criminal law effectively. Therefore, rugby union was seen as an ideal opportunity to engage in a discussion about the most effective means of regulating a contact sport, and the how might the law be involved in such. Furthermore, by focusing on a singular case, one can provide

a more meticulous analysis when compared to the use of numerous cases. This notion is discussed by Durkheim (1976: 95) when explaining the value of focusing on a singular case, rather than multiple:

[T]he value of ... facts ... is much more important than their number. ... to establish relations it is neither necessary nor always useful to heap up numerous experiences upon each other; it is much more important to have a few that are well studied and really significant. One single fact may make a law appear, where a multitude or imprecise and vague observation would only produce confusion

As such, English rugby union was seen as being both representative of contact sports generally, whilst also offering the opportunity for a comprehensive examination of how the criminal law can be incorporated into a contact sport.

Within such an examination, the issues discussed in regard to applying the criminal law to contact sports will be investigated further. The literature review is split into four chapters: Defining Sports Related ‘violence’; Theorising the Occurrence of ‘sports violence’; The RFU: Disciplinary Structure and Review; and, Legal Doctrine: Applying the Law to Sports. Each chapter will provide a review of previous research, revealing areas of interest and those requiring further discussion. Moreover, the views of current stakeholders within both the Rugby Football Union (RFU) and the criminal law will be compared to the literature. Here, it is hoped that the opinion of the participants can provide a more realistic inspection of the literature, whilst also revealing any unique perspectives which could push the current body of knowledge forward.

1.4. Who Am I, and What Led me to this Research?

Before one embarks on the socio-legal discourse contained within this thesis, it is important that the social identity and social presentation of the researcher is considered. Metacognition of one’s previous experience is critical to the research process as “our personal biographies

shape our research interests, access to the field, relationships with the researched, and our interpretation and representation of the culture under examination” (Poulton, 2014: 4). In the present context, being aware of my position as a researcher may prove beneficial when contemplating my standpoint on the relationship between the criminal law and english rugby union.

Having been a participant in rugby union since the age of five, the acceptance, and even encouragement of severe on-field violence has been both observed and performed on numerous occasions. I have been in the changing room during the half time of a very close and heated game, and witnessed my coach encourage us to get more ‘aggressive’, even if that means ‘throwing a few punches’ at the opposition. I have also seen my teammates be sent off for delivering such aggression, only to be back the following week, ready to administer another serving of violence. As a young rugby player progressing from the grassroots level of Chester RFC to the elite arena of England and GB Sevens, I was shocked, on many occasions, by the lack of intervention by the courts in extreme violence cases. Such acts, if performed outside the protective sphere of organised sport, would indubitably spark judicial castigation. However, when performed on the rugby pitch, all but a few go unnoticed by the courts. As I progressed through the ranks of elite rugby, my confusion deepened, as I experienced not only more acts of violence on the pitch, but also the encouragement of such acts by senior coaches and players. However, this was not all, there seemed to be a marked reluctance that the law should get involved in such cases, and even at times, a sense of invincibility from the courts.

My bewilderment of such inconsistent juridical structures led to me seek further understanding through my undergraduate dissertation, where I was hopeful that the incongruity would be explained or where such structures could be developed. Yet, I found myself asking more unanswered questions. It quickly became apparent that answering such

a question is both complex and multidimensional. With the boundaries of consent constantly in motion, judicial intervention needs to be able to adapt in accordance with the lines of consent. However, such flexibility also adversely effects its practicality. Furthermore, it was proposed that a relationship between the RFU and the CPS of England and Wales would be prudent, however the means of developing such a relationship remained illusive. Thus, I believed that a larger scale examination would reveal vital details of how such questions can be answered. Moreover, with my background in elite rugby, obtaining access to those individuals directly involved in the performing and regulation of violence would prove relatively painless. Thus, I hope that this research will offer an opportunity to discuss the inconsistencies I have experienced during my time as an elite rugby player, and perhaps uncover solutions which can be implemented in the future.

1.5. Implications of Study

It is hoped that this thesis can provide a remedy for the complications of applying the criminal law to contact sports. Such a proposal will not only be a result of an academic review, but also the outcome of an analysis of the viewpoints of current stakeholders in both the criminal law and RFU. As such, this research has the capacity to inform the regulatory bodies of the RFU on the most appropriate means of regulating ‘violence’ in English rugby union. Furthermore, the information uncovered may aid in understanding how the relationship between the RFU and the CPS can be established or possibly redefined. From an academic perspective, this work will add to the body of research viewing the alliance between sports and the law as necessary and unavoidable. Moreover, this study may spark the start of a new field of research within sports law, where the lines between criminal liability and sporting deviance in rugby union are further explored.

CHAPTER 2

LITERATURE REVIEW INTRODUCTION

2.1. Overview

The review of salient academic literature, as well as other pertinent resources, will be split into three chapters: 1) *Defining Sports Related 'violence'*; 2) *Theorising the Occurrence of 'sports violence'*; and, 3) *Legal Doctrine: Applying the Law to Sports*, with an additional chapter, *The RFU: Disciplinary Structure*, to provide further contextual background. Segregation of chapters was implemented as it allowed for a more detailed dissection of topics in a manner which granted a more straightforward read. Similarly, splitting up topics also offers the opportunity to reference sections of the review when discussing participant opinion, without the reader having to search through the entirety of the review. Of course, separation of chapters does not mean that associations cannot be made between topics. Each chapter, when appropriate, will establish links to alternative subjects, whether this be within different chapters or outside the discourse of the thesis.

Chapter 3, *Defining Sports Related 'violence'*, will focus on the complications associated with constructing a definition of 'sports violence'. Within this, key ideas from Smith (1988), and the more contemporary work of Hamby (2017), will provide an insight into how composing a generalised definition of 'violence' can prove troublesome, let alone a translation appropriate to the violent arena of contact sports. Moreover, discrepancies in the interpretation of 'violence' between the RFU and CPS will be examined, revealing how easily one can fit into the other, and thus, what factors might be affecting such fluidity. Through the use of academic discourse, it is hoped that an applicable definition for 'sports violence' can be established, and the issues arising when doing so can be further understood.

Chapter 4 will discuss how social theory can aid in understanding why participator ‘violence’ materialises during contests on the pitch. Theoretical explanations for the occurrence of ‘violence’ will be explored, with the aim of providing an illustration of the factors pushing an individual to perform ‘violence’ on the pitch. Such a discussion will utilise a composition of Norbert Elias’ (1969) figural sociology and elements of Karl Marx’s (1818-83) assumptions to explain how the processes of society throughout history has created the conditions for legitimate ‘sports violence’. This will be complimented with an interactionist approach broached by George Mead (1934) and Herbert Blumer (1969) to aid in understanding how individual interactions with such societal structures establish a sports ethic that contributes to the reproduction and maintenance of ‘sports violence’.

Chapter 5, *Legal Doctrine: Applying the Law to Sports*, includes an extensive discussion of how the criminal law can be applied to participator ‘violence’ in rugby union, and the problems associated with doing so. Firstly, the demarcation of consent will be investigated. The playing rules as a stringent limit for consent (MRLA, 1976) will be scrutinised, proposing the development of a playing culture (Gardiner, 2012; and, Livings, 2016) as a means of delineating consent coterminous with the “unwritten conventions” (Dunning and Sheard, 2005: 29) of a sport. Secondly, the intertwining issues arising out of establishing a *prima facie* case in contact sports will take centre stage, paying particular focus to the *mens rea* requirements of the statutory assaults in the OAPA 1861. Here, the ontological implications of consent, intention and recklessness will be dissected, whilst the efficacy of prosecutorial discretion will be reviewed as a remedy for such ontological complications. Finally, the various other dispute resolution approaches will be examined, but most importantly, the applicability and capability of internal regulation will be put under inspection, and whether such regulation would prove more effective with absolute legal discretion.

The final chapter, *The RFU: Disciplinary Structure*, will provide a meticulous review of the current RFU disciplinary system, assessing for any possible areas for improvement. Within the review, the transformation of RFU discipline with the turn of professionalism will be explored, whereby the increased commercial pressures associated with the growth of the sport led the RFU to reform its disciplinary structure and become a more legalistic entity. Moreover, the hierarchical system of RFU discipline will be explained to make understanding the process as a whole more straightforward. Further to the hierarchical structure, the sanctioning process and its entry points will be discussed, offering an explanation of how the RFU works towards issuing a sanction.

CHAPTER 3

DEFINING SPORTS RELATED ‘VIOLENCE’

3.1. Defining ‘sports violence’

Defining ‘violence’ has been a centre for debate over the last century, with each discipline constructing bespoke interpretations of the concept (Smith, 1988). The central question regarding the composition of ‘violence’ remains differentially defined and understood by legal experts, criminologists, sociologists, animal biologists, law enforcement officials, and policy makers. Indeed, noteworthy advances have been made in the study and prevention of ‘violence’. However, in a statement by Smith (1988: 1), which is as applicable to the subject today as it was then, is that “the concepts of ‘violence’ have come to have so many meanings that they have lost a good deal of their meaning”. Jackman (2002: 388) concurs, suggesting how many scholars “bemoan the lack of cohesion in research on ‘violence’ ... (yet) most scholars have proceeded without hesitation as though the conceptual tangle has been cleared”. Jackman (2002: 388) continues, proposing that “researchers commonly refer to phenomenon called ‘violence’ that implies a clearly understood, generic class of behaviours, and yet no such concept exists”.

The following section will explore the problems associated with establishing a definition of ‘violence’, particularly player ‘violence’ in contact sports. When considering the problems associated when interpreting ‘violence’, the facets of ‘violence’ provided by both sport sociologist Smith (1988) and the more recent socio-psychologist Hamby (2017) will be applied. Additionally, Smith’s (1988) typology of player ‘violence’ will be assessed to see how it has aged, and if it can still be applied to definitions of ‘sports violence’ today. Finally, the definition of ‘violence’ provided by the RFU and CPS will be compared for

aligning or contrasting features, and therefore, if there are any obstacles affecting the application of such definitions to the sports setting.

3.2. Broader Definitions of 'violence' and Aggression

As mentioned, authors of 'violence' have tended to focus on certain elements of 'violence' when constructing definitions to make it more applicable to their academic discipline. One scholar provides a narrow definition, describing 'violence' as "the threat or exertion of physical force which could cause bodily injury" (Ball-Rokeach, 1972: 101). Another presents a broader definition: "any violation of the human rights of a person" (Riga, 1969: 145). A third theorist defines it in more abstract terms as "extensive and radical changes within a short interval of time produced by given forces in the qualities and structures of anything" (Gotesky, 1974: 146).

Observation of just these three examples displays the vast variations in definition. For Smith (1988), such conceptual confusion is caused by two interrelated factors. Firstly, each discipline tackles the definition of 'violence' from their own unique perspective, hoping to make it applicable to their domain. These disciplines explore various aspects of the phenomena, or the same aspect from a different angle. Secondly, scholars are mistaken if they view 'violence' and aggression from a unitary outlook, as if all their forms were merely aspects of the same phenomenon. Rather, Smith (1988: 1) proposes that "different dimensions of these behaviours stem from different sources, not any single source, such as instinct or frustration, as has been claimed in the past". Therefore, if forms of aggression and 'violence' are more dichotomous than alike, then an inquiry into a single, universally purposeful definition may prove trivial.

Exploring definitions of aggression is not within the scope of this discussion, however, a brief clarification can only aid in understanding the disparities between

aggression and ‘violence’. Aggression is widely considered a generic concept, forming a collective term for “any form of behaviour directed toward the goal of harming or injuring another living being who is motivated to avoid such treatment” (Baron and Richardson, 1994: 37). ‘Violence’ on the other hand, is a form of aggression which is typically identified as behaviour in which “extreme harm is its goal” (Anderson and Bushman, 2002: 29). To provide a sporting example, a rugby player pushing another player after a ruck is a form of aggression, but not ‘violence’. This would only turn violent once serious harm is the aim – a concept which will be explored later on in the analysis. In an attempt at making defining ‘violence’ for given disciplines clearer, both Smith (1988) and Hamby (2017) provide elements which are essential for consideration. The ensuing sections will encompass a review of both authors’ perspective, comparing them to the setting of sport for reliability.

3.2.1 ‘Violence’ and Intent

Intent is a concept under much deliberation to those who study ‘violence’ due to the ambiguous nature of determining it. Intentions are exclusive to the individual, not directly observable and difficult to establish. Some scholars, such as Toch (1980), consider the notion ‘intent to injure’ in their discussions. Yet, this immediately encounters several difficulties as to the meaning of ‘intent to injure’. Baron and Richardson (1994) propose that one common characteristic of intent is that the harm-doer voluntarily injured the victim. But this raises the complex question of whether human behaviour is really a matter of free will, in a world where all decisions are influenced, however so mildly, to some degree. This convoluted question is best left to philosophical minds, however, it does raise awareness as to the degree to which an individual’s violent behaviour is a result of direct or indirect means.

Smith (1988: 4) condemns the idea of ‘intent to injure’ suggesting it “diverts attention from what is often called instrumental ‘violence’, in which harm doing is not an

end in itself, but only a means of achieving some other end”. Of course, it could be proposed that all forms of ‘violence’ have external motivators outside of simply causing the harm itself. Yet, it is the divergent nature of the ends sought which may separate the intent. For example, in the game of rugby, a player may employ the use of ‘violence’ to target a particularly talented player on the opposition team. In this instance, the subsequent harm caused is only a means of achieving a tactical aim – removing the player from the pitch, thus making the probabilities of winning greater – not an end goal in itself. Moreover, such aims may be the consequence of vicarious liability, whereby the individual is coached, or even ordered to inflict such harm, despite it not necessarily being their desired intention.

This is not also to say that incentives for ‘violence’ cannot change prior or during a violent act. Smith (1988) considers how the prospect of rewards or punishment for violent behaviour can alter the probability of the behaviour occurring, and the severity of the act. This notion is observed by Toates, Smid and van Den Berg (2017) in their study on the impact of incentive-motivation and hierarchical control on sexual ‘violence’. Toates et al (2017: 241) suggest that “inhibitory factors arise from ... cognitions (e.g. concern about the consequences of sexual transgression)”. This concern for the consequences of action can be observed in the rugby setting, where, as in the previous example, the player is planning on using ‘violence’ to target a proficient opposition player. The perpetrator may lift the opponent into the air, with the plan of dropping them on their head. However, the possibility of the referee giving a red card for such action causes the player to drop them on their lower back instead. Here, the probability of punishment caused the individual to change their incentive and goal, and thus their intent.

Although the tackle in the previous example may not have had the intent to cause serious injury, dropping another player onto their back with force could still be seen as violent as the probability of serious injury resulting was high. Hamby (2017: 175) advocates

that “intent cannot be limited to incidents when the perpetrator admits to a desire to cause the specific resulting harm”, thus, it needs to be expanded to include “intent to engage in reckless and dangerous behaviour, where the harmful outcome could have been foreseen” (Hamby, 2017: 175). Acknowledgment of reckless and negligent behaviour can be seen in the realms of public health and law and needs to be acknowledged when considering definitions of player ‘violence’. The legal sphere has shown willingness to define intent in terms of intent to cause the outcome, but also of knowing that in achieving such an outcome, certain actions may be inevitable. This is outlined in the 1993 document *Legislating the Criminal Code: Offences Against the Person and General Principles Report* (Law Commission, No. 218: 8):

[A] person acts . . . ‘intentionally’ with respect to a result when-

- (i) it is his purpose to cause it; or
- (ii) although it is not his purpose to cause that result, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.

Here, intent is not stringently attached to the presence of purpose, but rather includes aspects of recklessness, insofar as the individual acted intentionally if they had knowledge that such an action may occur when attempting to achieve their goal. Such a definition may prove insightful when constructing a definition of ‘violence’, particularly in the sport setting, where acts of aggression are inherent to the nature of the sport. As such, it becomes incredibly important to recognise that some acts which fall under reckless, may constitute ‘violence’, and thus, deserve their place in definitions of ‘violence’ on the pitch.

Further complications arise when considering the various levels of a sport, as those actions considered deliberate at one level may not be similarly regarded at another. For example, due to the proficiency of players at the top level of rugby, the occurrence of a

tackling player swinging their arm into the face of an opposition attacking player, might be considered intentional. Here, the tackling player would have been expected to tackle appropriately considering their competence in the game. As such, the most likely explanation is that it was intentional. In contrast, a similar incident at the lower level of the game, may be more likely to be labelled as reckless, as individuals can easily make a seemingly dangerous mistake due to their inefficiency in the sport. Thus, when considering the inclusion of intent in definitions of ‘violence’, particularly ‘sports violence’, one must acknowledge its circumstantial nature, and the need for an interpretation that can be adapted accordingly.

3.2.2. ‘Violence’ and Harmful Outcomes

The outcome of a violent act, similar to that of intent, is a hotly debated issue when considering definitions of ‘violence’. Smith (1988) discusses how the inherent problems when talking about intent could be completely bypassed if the definition focused purely on the outcome. Olweus (1999: 12) defines ‘violence’ as “aggressive behaviour in which the actor or perpetrator uses his or her own body or an object to inflict injury or discomfort upon another individual”. This definition displays the problems associated with what Toch (1980) describes as ‘product-centred’ interpretations. Olweus’ (1999: 12) definition broadly includes acts which may not necessarily be seen as ‘violent’, such as accidental occurrences or acts with universally accepted prosocial ends (e.g. surgery). Product-centred definitions can also run the risk of being too narrow.

When considering his definition of ‘violence’, Smith (1988: 3) refers to ‘violence’ as ‘physical’, proposing that “physical ‘violence’ is qualitatively different from other forms of ‘violence’, it has a finality that others do not”, while also advocating that “physical ‘violence’ represents the end point on a continuum of aggressive behaviour: it is the most

extreme form of aggression”. While physical ‘violence’ may have a severity that other forms of ‘violence’ do not, this is not to say that it is the only form of ‘violence’ that should or can be acknowledged. Hamby (2017: 174) agrees, stating that those “definitions that suggest that harm requires visible physical injury or death are defining harm too narrowly”. For Hamby (2017), those acts which cause adverse health implications long after its occurrence – such as domestic or caregiver ‘violence’ – need to be categorised as ‘extreme’ harm.

When contemplating outcome in ‘sports violence’ definitions, it should be noted that in contact sports, particularly in light of the recent evidence on concussion (Marshall and Spencer, 2001; Strain et al., 2013; and Piertosimone and Mihalik, 2015), the understanding of acceptable force is constantly being redefined. The recent efforts by World Rugby to clamp down on dangerous play, particularly high tackles and ‘tip tackles’ (tackles where the focal of the force is around the head area), is an example of this. Here, World Rugby (2016) adopted “a zero-tolerance approach to reckless and accidental head contact”, whereby the minimum sanction for a reckless tackle is now a yellow card rather than a mere penalty. Therefore, when defining ‘violence’ in sport the rules of the game, and the general attitude towards certain dangerous play within the sporting community should be taken into account.

3.2.3. ‘Violence’ and Legitimacy

One reason for why definitions of ‘violence’ vary considerably between disciplines may be due to the extent ‘violence’ is perceived as necessary, justified or good by the labeller. For instance, institutionalised ‘violence’ – that performed by individuals and groups backed by the state, such as the police – is largely referred to as force, and therefore ‘appropriate’ ‘violence’ (Smith, 1988). Whereas, when looking from the eyes of the victim, one might perceive institutionalised ‘violence’ to be unjustified or unnecessary. This phenomenon is discussed by Scott (2015) in his review on police brutality towards black people in America.

Here, Scott (2015: 16) refers to the “knot in their (black population) chests when a squad car slides up next to them in traffic is the twinge of sheer terror”. Yet, Scott states how many of the cases of police brutality – although seen as violence by the black community – were either dismissed completely, or those officers involved received very light or unspecified punishment. This creates a situation which leaves the “police feeling comfortable in deploying any act of violence in their toolbox, no matter how reckless” (Scott, 2015: 16). Indeed, Scott’s focus is very different to that framed in this essay, however, sports, particularly contact sports, can also be considered to have contrasting views of legitimate ‘violence’. The behaviour deemed acceptable, and therefore non-violent, in sports like rugby, would most definitely be viewed as ‘violence’ if performed outside the sporting arena. Therefore, even though agents within the institution of sport see contact in their sport as legitimate, when viewed from an outside perspective, one might have a contrasting opinion on such legitimacy.

The legitimacy of potentially violent behaviour can also be considered from an alternative perspective; what Hamby (2017) terms ‘nonessential behaviour’. This kind of behaviour would constitute those acts where the force used was maladaptive and “does not serve a legitimate function that could not also be obtained by nonviolent means” (Hamby, 2017: 170). This concept was observed in Thomas and Louis’ (2014) study on the effectiveness of violent and non-violent collective action. They found that violent forms of protest were deemed more unnecessary and less effective in most situations than their non-violent counterparts. This idea of ‘nonessential behaviour’ may prove important when considering definitions of ‘violence’, as it “provides more insight into acts that are appropriately considered human aggression, but not ‘violence’” (Hamby, 2017: 170).

3.2.4. ‘Violence’ as Unwanted Behaviour

It may seem obvious that ‘violence’ is unwanted, but it is an important point for consideration when distinguishing ‘violence’ from other prosocial or innocuous behaviour. Some forms of physical force, even injurious force, have the possibility to not be unwanted (Hamby, 2017). In contact sports, players participate in the sport knowing and willingly subjecting themselves to sometimes extreme physical acts. Indeed, this is not to say that a player cannot step onto a rugby pitch and deem a tackle unwanted. However, by simply agreeing to play the sport, that person is showing that they want, and accept, that a certain amount of force is going to be used. Such a notion is termed ‘*volenti non fit injuria*’ in the legal domain (James, 2001), and is literally translated to: ‘to a willing person, injury is not done’. Within the sphere of legal principle, *volenti non fit injuria* refers to the obligation of an individual to accept the contact implicit to an activity if they are to be a participator in such activity (Young, 1991). In reference to sport, this concept suggests that by simply agreeing to participate in the sport, an athlete is consenting to the inherent dangers associated with that sport. In the case of Hamby’s (2017) approach, the athlete would be implying that any dangers are not ‘unwanted’. It must be noted, although this seems relatively straight forward in its approach, the extent of force which is deemed legitimate and thus ‘wanted’ in contact sports is a particularly enigmatic area, and one discussed in Chapter 6. Nevertheless, such questions regarding unsought behaviour is a must consideration when applying an annotation to ‘violence’, even more so in the context of sport where the lines of expected behaviour may become blurred.

3.2.5. A Definition of ‘violence’

After considering the elements discussed in the previous sections – intent, outcome, legitimacy and unwanted – it is now possible to establish a definition of ‘violence’ which takes into account the fundamental facets discussed, but also the complications attached to

the sport setting. Young (2012: 14) proposes that the definition provided by the World Health Organisation (WHO, 2018) presents a particularly applicable definition:

[T]he intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation.

The WHO's (2018) interpretation of 'violence' addresses the issue of intent. It refers to "the intentional use of physical force or power" while also referring to acts with a "high likelihood of resulting in injury" (reckless). Moreover, it includes a specific list of outcomes - injury, death, psychological harm, maldevelopment, and deprivation - which can be considered 'harmful outcomes' of a violent act. Despite this, it lacks attention to the unwanted facet of 'violence'. One reason for this may be to include self-harm within its definition, as it explicitly refers to 'violence' "against oneself". However, this leads to the tricky question of whether those who self-harm truly want to experience the violent behaviour, or whether it is something that is unwanted but the individual feels like it is needed or deserved. Such queries are not within the scope of this discussion, but, for the purpose of establishing a definition of 'violence' the present study will propose that the WHO's definition does not account for the unwanted element. As such, the definition has been redefined below to recognise the unwanted facet of 'violence':

[T]he intentional use of *unwanted* physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation.

Such a definition accounts for all the elements of 'violence', whilst also providing enough breadth to account for the convoluted nature of 'violence' in the sporting arena. As such, for the purpose of this study, when discussing 'violence', one will be referring to the

definition provided above. Following this definition, the various formations of ‘sports violence’ (Young, 2012), which are found under such a definition can be considered. As will be proposed, formations of ‘sports violence’ not only include those actions performed by participators, but also include a vast landscape of harmful, or abusive, behaviours. A fully comprehensive discussion of all formations is not within the ambit of this study, however a brief mention of what Young (2012) refers to as ‘sports related ‘violence’’ (SRV) will be presented.

3.3. Defining ‘violence’ in Sport

3.3.1. Formations of Sports Related ‘violence’

In his seminal work on ‘sports violence’, Young (2012) proposes not only the sociological usefulness, but also the sociological necessity to approach ‘sports violence’ as a vast landscape of multiple forms of ‘violence’ which are all connected under the banner of ‘sport’. This is in contrast to simply focusing on the obvious and highly researched individual areas of ‘sports violence’. For Young (2012) these various forms, or formations as he refers, make up the components of SRV. Young (2012: 98) submits what he terms the ‘SRV matrix’, comprising of eighteen cells (formations) as a method of “expanding understanding of behaviours that threaten, harm and victimise *in and through* sport”. This matrix is provided in Table 1, which is an extract from Young (2012). When analysing the matrix, one should avoid looking at the cells as mutually exclusive. Rather, the cells can be used in combination with one another to “account for the genesis, manifestation and ramification of sport cultures in many settings and ... at different levels” (Young, 2012: 99). Indeed, the present study aims its focus towards player ‘violence’, however, Young’s (2012) concept of sports related ‘violence’ and its subsequent formations, is a useful method for

understanding that ‘sports violence’ is a complex, multidimensional phenomena that is not restricted to the confines of player and crowd ‘violence’.

The ensuing sections will centre discussion on how the legitimacy of player ‘violence’ can be characterised, despite the enigmatic complexion of legitimacy that accompanies contact sports. Smith’s (1988) typology of player ‘violence’ will be examined and compared to contemporary perceptions of legitimacy in an attempt to understand the boundaries of acceptability.

Table 1: Formations of sports-related ‘violence’ (Young, 2012)

1. Player violence	2. Crowd violence
3. Individualised fan-player violence	4. Player violence away from the game
5. Street crimes	6. Violence against the self
7. Athlete initiation/hazing	8. Harassment, stalking and threat
9. Sexual assault	10. Partner abuse/domestic violence
11. Offences by coaches/administrators/medical staff	12. Parental abuse
13. Sexism/racism	14. Other identity violence
15. Animal abuse	16. Political violence/terrorism
17. Offences against workers and the public	18. Offences against the environment

3.3.2. A Typology of ‘sports violence’

The preceding sections outlined the complications when constructing a definition of ‘violence’, even more so when applied to the sport setting. In his seminal work on legitimate ‘violence’, Smith (1988) developed a typology which may aid in understanding and defining on-field player ‘violence’ in rugby. Smith (1988) proposes four forms - brutal body contact, borderline ‘violence’, quasi-criminal ‘violence’, and criminal ‘violence’ - under two headings: relatively legitimate and relatively illegitimate. A brief summary of each category can be found in Table 2. Within this work Smith (1988) considers the viewpoints of the law, the players and the public. The following discussion will review Smith’s work in the context of modern sport to assess how the typology has matured, and thus, how it might be altered to reflect contemporary perceptions of player ‘violence’ in contact sports.

Table 2: Smith's (1988) typology of 'sports violence'

Relatively Legitimate	
<p>Brutal Body Contact</p> <p>The normative actions of a sport. Such acts can be found within the official rules of the sport, and as such are deemed acceptable inside and outside of the sport (e.g. normal tackle, safe clear out of a ruck).</p>	<p>Borderline Violence</p> <p>Includes actions that, although prohibited by the formal rules of a sport, is very much accepted as 'part of the game'. Therefore, these acts are typically deemed acceptable within the sport, and usually outside, not without occasional scrutiny however (e.g. accidental high tackle, fair contest for a high ball).</p>
Relatively Illegitimate	
<p>Quasi-Criminal Violence</p> <p>Consists of those actions that not only violate the formal rules of a sport, but also breaches the informal rules. Such acts always lead to disciplinary proceedings by the sporting regulatory body (e.g. intentional high tackle/shoulder charge, singular strikes).</p>	<p>Criminal Violence</p> <p>Encompasses those actions so serious and obviously outside the rules of the sport, that they demand criminal proceedings (e.g. multiple intentional punches/kicks/stamps).</p>

Relatively Legitimate

Brutal Body Contact

This category of 'violence' "comprises all significant body contact performed within the official rules of a given sport" (Smith, 1988: 10). Actions within this class encompass the normative actions of a sport, and it is taken for granted that by simply playing the sport, players accept that this form of behaviour will occur. From a legal perspective, the term

volenti non fit injuria (to a willing person, injury is not done) will apply as a defence, as players are said to have consented to such force by agreeing to play the sport. This type of ‘violence’ is relatively unproblematic, as the behaviour one can expect is clearly defined in the rule book. As such, when considered brutal body contact in rugby union, one would refer to the collisions found in tackles, rucks and mauls as examples.

Nevertheless, it becomes of interest when it develops into what Smith (1988) terms ‘brutality’. This is where there is a pandemic of a particular act, which has become so frequent in the sport that it may demand review. This is best seen in World Rugby’s tightening on the laws surrounding high tackles in response to evidence regarding concussion (Marshall and Spencer, 2001; Strain et al., 2013; and Pietrosimone and Mihalik, 2015). Such changes were introduced as a means of “changing the culture in sport to ensure that the head is a no-go area” (World Rugby, 2016).

Borderline ‘violence’

Borderline ‘violence’ includes actions that, although prohibited by the formal rules of a sport, is very much accepted as ‘part of the game’ (Smith, 1988). Dunning and Sheard (2005: 29) describe this category of behaviour as comprising the ‘unwritten conventions’ of a sport. Here, such conventions are not easily captured by reference to the rules alone, but only understood by those who understand the culture of a sport. Behaviour in this category can occasionally result in serious injury, nonetheless, such injury is usually dismissed as an unfortunate consequence of the sport. Borderline ‘violence’ very rarely goes beyond the realm of the referee, with higher authorities – such as the disciplinary officers of the sport, or law enforcement – leaving it to be dealt with on the pitch. Gardiner (1994, cited in Gardiner, 2012: 50), justifies this sense of discretion by referring to the ‘working culture of a sport’:

An injury caused due to an illegal tackle that amounts to a foul within the rules of the sport is also likely to be seen as consensual. It may be contrary to the rules of the game but may well be inside ... the 'working culture' of the sport. Consent is not limited solely by the formal rules in contact sports.

An example of a rule within these 'unwritten convention' in rugby, could be the high tackle. Many players will view the high tackle as simply being a by-product of a fast paced, physical game. However, it should be made apparent that similar to the tightening of certain acts in brutal body contact, the actions comprising this category of 'violence' is flexible. For instance, World Rugby (2016) introduced a "zero tolerance approach" to contact with the head in rugby, increasing the sanctions for a high tackle to a minimum of a yellow card. As a result, this has meant more and more high tackles, which were once considered acceptable as part of the game, are making their way into rugby disciplinary hearings. Therefore, this section of Smith's typology is constantly in motion, with many of the acts once considered firm residents, now moving more towards the Quasi-Criminal category.

Relatively Illegitimate

Quasi-Criminal 'violence'

This group of 'violence' consists of those actions that not only violates the formal rules of a sport, but also breaches the 'unwritten conventions' (Dunning and Sheard, 2005) of the sport. Often leading to serious injuries, these type of acts are deemed so inappropriate by players, referees and sporting officials, that there is no question that it should go through the sporting disciplinary process. An example would be punching or kicking in rugby, which is forbidden under law 9, section 12, of World Rugby's Laws of the Game. Committing either a punch or a kick would almost certainly be deemed worthy of the grant of a red card from the referee, and a ban from the sporting authorities. For Smith (1988) such incidents can cause public outrage, because of the injury caused or from the inappropriateness of the

act, that it puts pressure on both the victim and legal authorities to go down the criminal law route. Despite Smith's (1988) considerations of the law, criminal authorities are still reluctant to get involved. In *Barnes*, Lord Woolf suggests that most cases of sporting 'violence' should be kept within the sport:

In determining what the approach of the courts should be, the starting point is the fact that most organised sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct. As a result, in the majority of situations there is not only no need for criminal proceedings, it is undesirable (911).

This tier of Smith's (1988) typology is still largely applicable to modern contact sports, but, as mentioned in the previous section, many of the acts which would have constituted borderline 'violence', have now moved more towards the quasi-criminal end of the scale, largely due to the efforts of many sports and the legal authorities to clamp down on dangerous play.

Criminal 'violence'

Smith (1988: 21) refers to this category as comprising of "'violence' so serious and obviously outside the boundaries of what could be considered part of the game that it is handled from the outset by the law". It could be suggested that this category of Smith's (1988) typology is relatively outdated, as he suggests that "death is often involved" and that "almost all incidents, though closely tied to the game events, take place prior to or after the contest itself" (Smith, 1988: 21). Indeed, there are cases where death occurs, such as the infamous incident involving the death of Australian cricketer Philip Hughes (NSW State Coroners Court, 2016), or there is an assault off the pitch, yet, this is not an exhaustive account of all incidents that go down the route of the law. Those acts which constitute criminal 'violence' are no longer the obscene acts of 'violence' referred to by Smith (1988).

Rather, it now encompasses less extreme incidents, such as severe assaults. In the case of *Calton*, a young rugby player was convicted of GBH after kicking an opponent in the face. Another example would be the case of *Gingell*, where repeated punches to an opposition rugby player resulted in six months imprisonment.

3.3.3. Usefulness of Smith's Typology

Smith's (1988) classification system provides a useful framework for understanding and defining player 'violence' in contact sports. Yet, the categories quasi-criminal and criminal 'violence' may need alteration, in that modern sport is more sensitive to violent acts than it was in 1988. Moreover, sporting regulatory bodies are much more active in the modern, professional game. This may be due to external societal pressures, whether that be from the courts or fans. However so, sporting disciplinary bodies regulate far more stringently than previous. As such, some acts which fell into borderline 'violence' when Smith (1988) created the typology, would now potentially fall under the heading of quasi-criminal 'violence' (e.g. the high tackle in rugby). In a similar manner, some incidents that Smith (1988) would have regarded as quasi-criminal (e.g. repeated punching or kicking), may find themselves being categorised as criminal 'violence' in the modern era.

Nevertheless, Smith's (1988) typology can help towards understanding how the boundaries of acceptability may be categorised in contact sports, whilst also offering an opportunity to reveal how perceptions of legitimate behaviour are constantly being redefined in accordance with societal pressures. Indeed, legal intervention into the sporting arena has become more frequent (Young, 2012), but, this is not to say that establishing legal liability is now effortless or homogeneous. Generally, the boundaries of legal intervention are still shrouded in ambiguity and debate, as will be explored in Chapter 6. The following section will briefly consider the similarities in definition between the RFU and CPS, in an

attempt to reveal how the ambiguity in applying legal liability to English rugby union is not a problem of definition.

3.3.4. The RFU and CPS Definitions of ‘violence’

Now definitions of ‘violence’ and ‘sports violence’ have been considered, one can compare the definitions of ‘violence’ provided by World Rugby and the CPS to look for aligning or problematic features affecting the application of each. World Rugby does not refer to ‘violence’ explicitly in their Laws of the Game, however, they provide details of what they label as ‘dangerous play’, which is largely behaviour that is unacceptably dangerous in the sport. Thus, for the purpose of comparison, dangerous play shall be used interchangeably with ‘violence’.

In Law 9, section 11 of the Laws of the Game, World Rugby (2018) state that “[p]layers must not do anything that is reckless or dangerous to others”, continuing in section 12 to propose that:

A player must not physically or verbally abuse anyone. Physical abuse includes, but is not limited to, biting, punching, contact with the eye or eye area, striking with any part of the arm (including stiff-arm tackles), shoulder, head or knee(s), stamping, trampling, tripping or kicking.

Law 9 then goes on to describe a wide array of other forms of behavior which are prohibited, such as, but not limited to, late tackles (s. 13), tackling an opponent in the air (s. 17), and ‘tip’ tackles (s. 18). Nonetheless, sections 11 and 12, are the areas of most relevance when discussing what most people refer to as ‘violence’.

When comparing World Rugby’s interpretation of dangerous play to definitions of ‘violence’ in English criminal law, it becomes apparent that those actions proscribed by section 12 of the Laws of the Game comfortably coincide with that of the law. For instance, section 47 of the Offences Against the Persons Act, 1861, states that “[w]hosoever shall be

convicted upon an indictment of any assault occasioning actual bodily harm shall be liable ... to be imprisoned for any term not exceeding five years” (OAPA, 1861). In *Donovan*, actual bodily harm (ABH) is referred to as “any hurt or injury calculated to interfere with the health or comfort of the victim”. This definition of ABH is relatively broad and doesn’t offer much in the way of delineating specific acts. The CPS Charging Standard only suggests that there has been indication of ABH when “[m]ore than minor injury is caused by kicking or head-butting” (CPS, 2018).

The definition of section 12 provided by World Rugby would fall directly into this category. World Rugby’s definition would even fall straight under the more serious s. 18, where wounding or inflicting GBH is required. Wounding is characterised in *Moriarty v Brooks* as “a breaking of the inner and outer skin”, while GBH is interpreted as “serious injury” (*Saunders*, 1985). Brooks et al (2005) in their study on the epidemiology of injuries in English rugby union reported that of 1000 player-hours, there were 56 fractures, 588 serious joint and ligament issues, and 18 serious lacerations. This displays the vast array of incidents which, in the eyes of the law, would be deemed serious enough to fall under either s. 47, 2. 20, or s. 18 of the OAPA 1861). This then brings us to the question: what is stopping all these incidents from being brought under scrutiny from the courts? Such a topic is discussed later in the study, where Chapter 6 will focus on why prosecutorial discretion has made sport a “zone of legal exemption” (Livings, 2016). The following chapter will consider how sociological theory can aid in understanding the occurrence of player ‘violence’ in rugby.

3.4. Summary

Defining ‘violence’ is not unequivocal, it is subject to ambiguity due to the term holding various interpretations in different academic disciplines. Each discipline, such as criminology, biology and law, hope to create a bespoke interpretation whereby the facets of

such a definition best describe their outlook on ‘violence’. The socio-legal realm of sport is no different. As can be seen in the preceding discussion, constructing a definition of ‘violence’ in sport requires certain attention not only to the formal rules but also to the ‘unwritten conventions’ (Dunning and Sheard, 2005) of a sport. Moreover, as was postulated by Young (2012), ‘sports violence’ is not limited solely to crowd and player ‘violence’. Rather, ‘sports violence’ includes a wide array of formations of ‘violence’ which are all linked under the general banner of sport. As such, rather than referring to ‘violence’ in sport as sport ‘violence’, it was concluded that Young’s (2012) term of sports-related ‘violence’ is more suitable. Through consideration of Smith’s (1988) and Hamby’s (2017) four key elements of ‘violence’ – intent, harmful outcome, legitimacy, and unwanted behavior – and Young’s (2012) examination of relevant definitions, it was determined that the WHO’s (2018) definition acknowledged by Young (2012) best describes sports-related ‘violence’ in sport. As such, when discussing sports-related ‘violence’, one will be referring to the WHO (2018) definition.

Yet, when discussing player ‘violence’ in contact sports, applying the WHO’s (2018) definition can face some issues, such as the confinements of acceptability, and therefore what constitutes illegitimate and unwanted ‘violence’. This is where Smith’s (1988) typology of player ‘violence’ becomes useful. The four categories of ‘violence’ provided by Smith (1988) – brutal body contact, borderline ‘violence’, quasi-criminal ‘violence’, and criminal ‘violence’ – separated under two titles, relatively legitimate and relatively illegitimate, helps understand how ‘violence’ can be interpreted in contact sports. However, Smith’s (1988) typology is not immune from scrutiny. It is suggested that Smith’s (1988) typology may be slightly outdated, insofar as what constituted legitimate and illegitimate has changed in the thirty years since its conception. Legal intervention in sport, particularly in contact sports such as ice hockey, American football, rugby union and rugby

league, has increased (Young, 2012) over the years meaning those acts that fall into quasi-criminal may perhaps now fall under criminal 'violence'. Similarly, disciplinary bodies of sports are also more willing to provide a stringent system. As such, those acts suggested by Smith (1988) to fall under borderline 'violence', may now find themselves in the quasi-criminal category. Despite the adaptations needed to Smith's (1988) typology, it still provides a useful framework for considering how player 'violence' in contact sports can be categorised and defined.

Finally, the definitions of 'violence' provided by the World Rugby and the CPS were compared. It became clear that not only do World Rugby's and the CPS's definitions of 'violence' fall hand in hand, but also that out of all the countless injuries in rugby, that most would fall under definitions of 'violence' required by the law. The viewpoint of the current literature as to why reality does not display such fluidity between World Rugby and CPS will be explored in Chapter 6. Whilst the perspective of those presently involved in regulating rugby union within and outside of the RFU will be examined in Chapter 8. For now, however, the study will turn to the realm of theory, and particularly that of figurational, Marxist and interactionist, to help explain why 'violence' occurs in sport, despite it being rejected in the sphere of everyday life.

CHAPTER 4

THEORISING THE OCCURRENCE OF ‘SPORTS VIOLENCE’

4.1. Theoretical Overview

It is typically agreed that there is no single cause of ‘violence’ in society. This is easily observed in the countless number of theories spread across a diverse array of academic disciplines. Similar to definitions of ‘violence’, approaches towards explaining it can be hugely dependent on the domain and reason for such investigation. Yet, if we truly want to gain an understanding of the social world one must adopt a broader view and acknowledge what Mills’ (1959) termed ‘the social imagination’. Giddens (2009: 6) refers to the social imagination as the ability to “break free from the immediacy of the personal circumstances and put things in a wider context”, this is achieved by “thinking ourselves away from the familiar routines of our daily lives in order to look at them anew”. In other words, one must be willing to view a phenomenon from a different perspective, a perspective which requires the mind to be open to views outside of our everyday lives.

Such perspectives can be at the micro-level, such as the interactions between individuals, or at the macro-level, such as the social climate of societies. Some theorists subscribe to single approaches, criticising the other for either being too narrow or too broad. However, one could argue that a supplementation of both is needed to fully understand the inner workings of the social realm. It must be recognised that structures of society are established through the interaction of individuals, while the interaction between persons is subtly informed by larger social configurations. As such, the ensuing sections will utilise a composition of Norbert Elias’ (1969) figurational sociology and elements of Karl Marx’s (1818-83) assumptions to explain how the processes of society throughout history has created the conditions for legitimate ‘sports violence’. This will be complimented with an

interactionist approach broached by George Mead (1934) and Herbert Blumer (1969) to aid in understanding how individual interactions with such societal structures establish a sports ethic that contributes to the reproduction and maintenance of ‘sports violence’.

4.2. Figurational (Process) Sociology

Based centrally on the work of Norbert Elias (1969), figurational, or ‘process’ sociology, refers to the “complex chain of interdependencies and power relationships that exist in, and across, human communities” (Layder, 1986: 370). Life itself is a process where human beings form figurations through interdependencies and interactions both with each other and the environment, in attempts to secure the production and reproduction of their lives (Dunning, 1993). Figurational sociologists attempt to bridge the divide between the macro and micro, viewing the individual and society not as dichotomous, but rather two divergent yet inseparable levels of the human world. Elias (1978: 129) proposed that in order to understand mankind, rather than focusing on discrete people, or the figurations of many independent people, one must constantly consider both or the “level of observation will suffer”. Elias (1978: 130) explains the nature of such figurations, referring to a game of cards as an example:

[T]he course of a game is relatively autonomous from every single player. ... But it does not have substance; it has no being, existence independently of the players. ... The ‘game’ is no more abstract than the ‘players’. The same applies to the figuration formed by the four players sitting around the table. ... By figuration we mean the changing pattern created by the players as a whole – not only by their intellects but by their whole selves, the totality of their dealings in their relationships with each other.

Observation of the game of cards illuminates how it is the relationship between individuals, in this case the players, which make the game. We learn nothing about the intricacies of the game if we look at the game itself without the players, and we

learn nothing if we focus on an individual player. The following section will explore one of the key concepts of Elias' figurational approach, the civilising process. Firstly, a brief overview of the civilising process will be provided. Then, the process will be examined against the development of sport to help understand how sport, in the modern world, has become a social enclave for legitimate 'violence'.

4.2.1. The Civilising Process

Fundamental to Elias' theories of figuration is the concept of a civilising process in society, which is said to have occurred just after the middle ages. Dunning and Sheard (2005: 7) explain the civilising process as:

an elaboration and refinement of social standards regarding the control of 'natural' functions and the conduct of social relations generally; a concomitant increase in the social pressure on people to exercise self-control; and, at the level of personality, an increase in the importance of 'conscience' as a regulator of behaviour. In the course of this, external constraints grew more subtle and all pervasive, and the use of direct force was pushed increasingly behind the scenes. At the same time, social standards were more deeply and firmly internalised

Elias and Dunning (1986) further this, suggesting that the Occident has experienced a gradual decline in people's propensity for obtaining pleasure from directly engaging in and witnessing violent acts. This is suggested to have entailed, firstly, due to the lowering of the threshold of repugnance regarding bloodshed and other direct manifestations of physical 'violence', and secondly, the internalisation of a stricter taboo on 'violence' as part of the 'superego'. Elias' explanations for why such a process would occur are focused around the level of state formation, and how this affects the development of manners and repression. Elias (1982) links the level of state formation to his figurational perspective, suggesting that the increased interdependencies between the aristocracy and the working class produced a civilising effect:

As more and more people must attune their conduct to that of others, the web of actions must be organised more and more strictly and accurately, if each individual action is to fulfil its social function. The individual is compelled to regulate his conduct in an increasingly differentiated, more even and more stable manner. (Elias, 1982: 232).

The web of actions grows so complex and extensive, the effort required to behave ‘correctly’ within it becomes so great, that, beside the individual’s conscious self-control, an automatic, blindly functioning apparatus of self-control is firmly established.

4.2.2. The Civilising Process and Sport

Figurational sociologists have considered sport a “collective invention” (Coakley and Pike, 2014: 51) that provides people with a form of excitement. As such, theorists have focused on sport as a means of displaying how the chains of interdependencies have influenced society. Much of figurationalist work has been to explain how ‘sport’ acquired its modern meaning, which is generally accepted to have developed in eighteenth-century England (Murphy et al., 2000). Central to Elias’ (1971) explanation was the link between what he termed the ‘sportisation’ process and the process of ‘parliamentarisation of political conflict’.

Elias (1971) used the term ‘sportisation’ to refer to the process whereby the framework for sport became more formalised. Rules applying to sports became stricter, the rules governing sport became more explicit, precise and written down, while the regulation and enforcement of such rules expanded. Moreover, in conjunction with this, people developed a greater level of self-restraint while playing sports (Elias and Dunning, 1986), finding a balance between combat-tension and protection from injury. Dunning and Sheard (2005) document the development of rugby from its polymorphous folk forms, to the modern system we see today. Dunning and Sheard (2005: 27) refer to the early forms of

football as “rough and wild, closer to ‘real’ fighting than modern sports”. The rules of these early forms of football have been described as “virtually non-existent” (Reyburn, 1971: 2), with local variations to the way in which the game was played. Howsoever the games were played, it is clear that ‘violence’ was at the centre, with Reyburn (1971: 2) describing how “the players ... went at it with such verve that there was always much property damage, not to mention injury to persons”. According to Elias (1986), this notion of a ‘sportisation process’ was also linked to the level of state formation in England. Dunning and Coakley (2000) reference the seventeenth-century Civil War and the demand for a powerful naval force as factors abolishing movements towards a highly centralised state. This then contributed to the “landed ruling class not only retaining a high degree of autonomy relative to the monarchical state but, via parliament, sharing with the monarch in the tasks of ruling” (Dunning and Coakley, 2000: 95). With more people informing the ruling of the state, it meant that the interdependency chains between people grew stronger, requiring more civilised behaviour if people were going to work together effectively. Elias also describes how the more civilised habits developed by the gentry and aristocracy found way into their leisure time in the form of organised sports clubs. This in turn added fuel to the ‘sportisation processes’ of games. The progression of the rule system, from its local variation in the public schools, to the formal inauguration of rules that accompanied the establishment of the RFU in 1871 (Dunning and Sheard, 1979), is an example of Elias’ process of sportisation.

From this position, it would be fair to question why sport has remained a social enclave for legitimate ‘violence’ considering the seemingly linear nature of the civilising process. Such queries have been the primary focus for attack by critiques such as Curtis (1986) and Redner (2015), who are keen to label the theory as following a ‘unilinear evolution’. Yet, Elias makes particular emphasis on the relative autonomy of the process.

Such autonomy is maintained because of the significance of learning on human processes. Dunning et al (1993: 42-43) suggest that individuals may “lead it to become more differentiated and integrated at a higher level, less differentiated and integrated at a lower level, or to remain for a greater or lesser length of time fixed”. Elias (1982: 253) postulated the fact the civilising process is fully attuned to the occurrence of short and long-term regression:

This movement of society and civilisation certainly does not follow a straight line. Within the overall movement there are repeatedly greater or lesser counter-movements in which the contrasts in society and the fluctuations in the behaviour or individuals, their affective outbreaks, increase again.

As such, the continued popularity of contact sports such as rugby, mixed martial arts (MMA) and boxing, could be said to be a slight regression or slowing in the civilising process of sport. However, a regression which Elias’ predicted would accompany the wider civilising process (Van Bottenburg and Heilbron, 2006). With all other aspects of social life succumbing to the pressures of the civilising process, it is not surprising that societies cling on to the competitive, war like contests we see in sport. This is reinforced by the fact that sport is closely linked to the state in monetary terms (Young, 2012), insofar as sport can generate high amounts of revenue for the state through the use of state-controlled facilities and the marketing of land. This then leads on to Marxist assumptions of sport, whereby the state, or others, feeding off sport for power or monetary factors, accentuate the ‘violence’ in contact sports to make the sport more popular and thus increase their revenue. Such notions will be discussed further below, where the ideas of Karl Marx and the exploitation of athletes will be used to clarify why sport has become this seemingly anomalous entity in the civilising process.

4.3. Marxist Sociology

The Marxist theoretical approach is rooted in the work of Karl Marx, 19th-century German philosopher, economist and political revolutionary. Marx developed a theory of social development based on the analysis of class and class conflict and social change (Collins and Jackson, 2007). Central to Marx's work was socio-economic and political relations, interdependencies and power imbalances, paying particular focus to how the bourgeois system (capitalism) was "characterised by increased efforts to establish a totalitarian form of social differentiation and integration" (Dunning and Coakley, 2000: 30). Marx's ideas are vast and complex, and it is difficult to do the complexity of his work justice in the relatively brief overview of this discussion. Nevertheless, at the risk of oversimplification, it could be considered that the ensuing sections were central to his work.

The following sections will discuss Marx's idea of the economic structure of society as a pivotal tool in understanding all aspects of social life, including sport. Within this, the exploitative relationships between capitalists and workers will be linked to the way in which societies are controlled and class struggles maintained. Yet, the primary message of such discussions will be to demonstrate how Marxist assumptions can help explain why 'violence' has been maintained as an emblematic feature in sport, despite the backdrop of a civilising society. Firstly, however, it is vital to clarify the fundamentals of Marx's work before it can be examined in relation to sport. Such discussions are the focal point of the ensuing section.

4.3.1. The Centrality of the Economic Structure of Society and the Exploitation of the Proletariat

Marx (1859/1951) emphasises the importance of the economic structure for understanding all aspects of social life. For Marx (1930), it is the 'mode of production of material life' – the organisation of social processes for producing goods and services – that forms the 'real

foundation' of society. If we are to understand what Marx terms 'superstructures' – those not related to the base economy such as the legal system, sport, culture, politics - then we need not focus on such structures explicitly, but rather, pay attention to the 'base' or 'substructure' of society, as such superstructures can only be fathomed as indirect or direct reflections of the economic architecture of society.

In his work, Marx (1951) distinguishes between various mechanisms for producing goods and services, or 'modes of production' as he refers to them. Collins and Jackson (2007: 30) reference the numerous terms of such modes of production, paying attention to the "pattern of relationships between those involved in the production of goods and services". Rigauer (2000: 31) emphasises such relationships as one of "conflict". Rigauer (2000) continues, suggesting that capitalistic economic structures provide a setting for socio-economic conflict between the 'direct producers' (proletariat, or workers; owners of labour power) and the 'masters of production' (bourgeoisie, or capitalists; owners of the means of production). This in turn produces a class struggle for power, as the "owners of the means of production exploit the direct producers financially and suppress them politically" (Rigauer, 2000: 31). This power imbalance is also characterised by alienation and impoverishment. The worker is divorced from the product of labour, they no longer live to work, but must work to live. Marx and Engels (2008: 43) refer to such alienation, proposing that "the work of the proletarian has lost all individual character, and consequently, all charm for the workman. He becomes an appendage of the machine".

Marx argued that all existing and previous modes of production have been based on an exploitative relationship between the direct producers and masters of production. In such modes, the surplus value is benefitted to the bourgeoisie at the expense of an exploited proletariat, who, in order to fulfil primary needs, must sell their labour power (Johnston and Dolowitz., 1999). As a result of this exploitative relationship of production, an ever-present

class struggle arises, one which establishes the central cause of historical development and social change. As Marx and Engels (2008: 33) stated in *The Communist Manifesto*, “the history of all hitherto existing society is the history of class struggles”.

The presence of an exploitative model of production contributes to the maintenance and reinforcement of the capitalists’ dominant position. As mentioned previously, Marx (1972) emphasises the idea that the economic ‘base’ or substructure of society determines the superstructures, such as ideologies or political structure. Therefore, by controlling the means of economic production, the bourgeoisie could also be said to have a certain amount of control over the state and, as such, the production of ideas. For Tant (1999), having so much control in various forms of superstructures meant they had a significant degree of control over the social dynamics of the lower classes. This enforcement of control can lead to a sense of “false class consciousness” (Collins and Waddington, 2007: 30) in lower classes that involves the acceptance of their exploitative position, thus, reinforcing the dominant position of the bourgeoisie.

4.3.2. Marxism and Sport

It should be noted that the following discussion will focus on what could be considered the orthodox or traditional form of Marxist theory. Scholars adopting the conventional approach, such as Brohm (1978), Rigauer (1981), Carrington (2008) and McDonald (2008), focus on the dynamics of class relationships in sport, paying particular attention to sport as a reflection of the exploitative character of capitalism in society. The following analysis will consider the fundamentals of Marx’s theory of power imbalances and class struggles and link it to how this is presented in sport. Moreover, such theories will be used to help fathom why ‘violence’ has enjoyed a certain degree of maintenance despite the increasing sophistication of the outside world.

It is largely agreed that Marxist approaches to sport assume that the sporting sphere is used as a tool for preparing labourers for capitalist industrial work by encouraging acceptance of the type of discipline that is demanded in modern production. Rigauer (2000) argues that capitalism dampens creativity and spontaneity, making sport just another form of work. Athletes, just like any worker, must sell their labour power to meet their primary needs for living. This notion is perhaps best epitomised by Brohm (1978) who describes sport as a 'Prison of measured time'. By this, Brohm (1978: 67) is referring to how "principles of capitalist, commercial society structurally determine sport" by transitioning it from a symbol of freedom to one of constraint. Such a transition is characterised by the abolishment of enjoyment and playful impulse. Moreover, the buying and selling of players for their labour power reinforces the idea of players as commodities, making players a unit, just like any other commodity under capitalism (Collins and Jackson, 2007).

As discussed in Section 4.2, with seemingly the entirety of society succumbing to a civilising process (Elias, 1982), whereby a repugnance for violence has grown, it is unsurprising that high powered entities saw sport as an opportunity to display violence and make profits from such. Therefore, it may be that athletes, particularly in contact sports, are encouraged to display forms of 'violence' as this is what the capitalists believe will create more revenue (McDonald, 2008). Such believes may be appropriate considering websites such as RugbyDump, who advertise themselves as showing "big hits, great tries, funny moments, dirty play, amazing skill" (RugbyDump, 2018), have amassed almost 400,000 likes on Facebook. The athletes, attempting to meet their primary needs for living, act on such encouragements, believing that by doing so they could have a more illustrious sporting career.

The belief by athletes within contact sports, that by displaying 'violence', they may increase their success as an athlete, is discussed more in an alternative strand of Marxism.

This strand of argument is centred on how sport can be used to provide strong superstructural support to the capitalist forms of production. Here, it is argued that under capitalist influence, sport reinforces and perpetuates capitalistic ideology, such as achievement, competition, and persistence (Carrington, 2008). Brohm (1978: 59) makes reference to the sporting ideology as a “direct reflection of the competition between sportsmen and women who compare their performances (their ‘commodities’) on the ‘market’ of records and sporting achievements”. Here, capitalists reinforce and perpetuate an ideology where competition, determination and achievement are at the forefront. Again, such an ideology is conceived as a means of creating more fierce, competitive and potentially violent confrontations in sport, as a way of increasing revenue and popularity in the sport. The athletes are left with no choice but to conform to such an ideology if they want to push their athletic career forward and thus provide the basic necessities of life. Remnants of this capitalist ideology can be seen in the many motivational quotes reiterated by athletes around the globe, such as ‘whatever it takes’ or ‘no pain no gain’. However, one prominent example is that by Lance Armstrong in his book *It's Not About the Bike: My Journey Back to Life* (2001: 269) who stated:

Pain is temporary. It may last a minute, or an hour, or a day, or a year, but eventually it will subside and something else will take its place. If I quit, however, it lasts forever.

The rhetoric uttered in this quote directly affirms the fiercely competitive nature of the capitalist ideology, where in this case, pain is just a derivative on the path to success. Indeed, such a culture does not necessarily forebode violence in a sport. Yet, it could be seen to offer encouragement for athletes to do whatever they can to be successful.

This idea that a capitalist structure of sport influences and reproduces an ideology which helps maintain the capitalist system can perhaps be better understood when looked at

through a micro-level approach, particularly that of an interactionist outlook. In particular, George Mead's (1934) and Herbert Blumer's (1969) symbolic interactionism and how this explains what Young (2012) terms a 'sports ethic'. By discussing the concepts postulated by such scholars, it may be clearer as to why athletes conform to the capitalist ideology, despite the ideology being of capitalistic endeavour. The notions of Mead (1934), Blumer (1969), and Young (2012) are considered in the following section.

4.4. Symbolic Interactionism and the Sports Ethic

The ensuing discussion will firstly provide a brief examination on the fundamentals of Mead's (1934) and Blumer's (1969) concept of symbolic interactionism. Then, how symbolic interactionism can link into Young's (2012) idea of a 'sports ethic' when attempting to explain why athletes conform to the capitalist ideology will be provided. Symbolic interactionism is a micro-level approach first developed by George Herbert Mead (1934) and then later by Herbert George Blumer (1969). For Blumer (1969) the theory rests in the analysis of three simple premises. Firstly, "that human beings act towards things on the basis of the meanings that the things have for them" (Blumer, 1969: 2). Secondly, that "the meaning of such things is derived from, or arises out of, the social interaction that one has with one's fellows" (Blumer, 1969: 2). Finally, all these meanings are "handled in, and modified through, an interpretative process used by the person in dealing with the things he encounters" (Blumer, 1969: 2). Central to symbolic interactionism is the fact that, because of their high level of development compared to other animals, humans are able to interpret or define one another's actions, rather than simply reacting in a mechanistic stimulus-response pattern.

Mead (1934) advocated that through interaction with symbols, a ‘self’ develops which allows humans to be the object of their actions. This is fundamental to the theory of symbolic interactionism, as it is this ‘self’ which determines how we act in everyday situations. Mead (1934: 167) explains how the ‘self’ is produced:

The self ... arises when the conversation of gestures (symbols) is taken over into the conduct of the individual form. When this conversation of gestures can be taken over into the individual's conduct so that the attitude of the other forms can affect the organism, and the organism can reply with its corresponding gesture and thus arouse the attitude of the other in its process, self arises.

Here, Mead (1934) refers to how the symbols of a conversation – this can be a verbal conversation or a physical conversation – is assessed by the individual, who then alters the output of their symbols to produce a certain outcome in the conversation. An example of this is found in Young's (2012) perception of the sports ethic.

Young (2012: 12) proposes that from an early age athletes “are taught to strive for distinction, accept no limits as players, make sacrifices for their sports and play through pain and injury”. As some will notice, the sports ethic is incredibly similar to the aforementioned capitalist ideology. For Young (2012), this axiom is so pervasive in modern sport, that most athletes will encounter it, and must conform to it, at some points in their career. Here, it could be argued that athletes are adopting a sporting ‘self’, whereby they interpret discourse among agents as having the meaning that athletes must portray the sports ethic, or capitalist, characteristics in order to have a lucrative sporting career. In other words, athletes are attaching meaning to the sports ethic as a requirement if they are to succeed in the sporting sphere. Yet, this ‘sporting self’ which athletes adopt is not the only ‘self’ in their repertoire, for an individual may have many selves for many different confrontations. Mead (1934: 175) terms this the ‘me’:

“Now, in so far as the individual arouses himself the attitudes of the others, there arises an organised group of responses. And it is due to the individual’s ability to take the attitudes of these others in so far as they can be organised that he gets a self-consciousness. The taking of all those organised sets of attitudes gives him his ‘me’; that is the self he is aware of. He has their attitudes, knows what they want and what the consequence of any act of his will be, he has assumed responsibility for the situation”.

This idea of adopting a ‘front’ for a certain situation is perhaps best encapsulated by former England International rugby player Johnny Wilkinson (2008: 1) in his book *Tackling Life: Striving for My Type of Perfection*, where he stated that: “[w]riting this book has been a pretty big deal for me. I have never been the most expressive person. I have the habit of hiding the revealing stuff inside, and just telling people what I think they want to hear”.

The development of what Mead (1934) terms the ‘self’ and how this causes athletes to adopt an ideology despite it not necessarily defining their ‘me’, is an idea which can help explain the occurrence of ‘violence’. As agents within the sport put pressure on the athletes to adopt an ideology, in this case the ‘sports ethic’ (Young, 2012), an athlete feels the need to act accordingly to the ideology, even when on the pitch. For instance, Young (2012) mentions playing through pain as an aspect of the sports ethic. Here, due to the pressure from coaches, spectators and even other players, an athlete will feel need to play through injury if they want to be regarded as a ‘dedicated’ and ‘talented’ athlete. The same could be said for ‘violence’. As agents within the sport put pressure on an athlete to show ‘violence’ and aggression, an athlete conforms, believing by doing so they are propelling their identity as a successful athlete upwards.

4.5. Summary

When considering the civilising process of sport, and how sport moved towards being a more formalised entity, one must also acknowledge the role of the state, and how it used leisure time as a means of controlling the working population. Upon observation of how the

bourgeoisie pushed sport down the route of what Elias' (1971) terms 'sportisation', it becomes apparent that sport was used a vehicle to achieve capitalist goals of suppression and control over the proletariat population, an idea postulated by Marx.

The eighteen-hundreds was a time of change in the field of leisure and recreation, with Brailsford (1999: 161) writing of the Georgian period as "the age when sport first became a matter of institutions and systems almost as much as of people". The work of the rational recreation reformers took place against this backdrop of rapid societal change, and a shift in social attitudes underpinned the movement. Recreational games were becoming increasingly popular, but were also becoming a favoured working-class past-time. The disruption caused through such games were one problem, but the potential for protest and political movement was another, more threatening prospect for the middle-class bourgeoisie movement. As Brailsford (1999: 63) notes, the politics were such that "the mass football found few articulate friends".

As such, the bourgeoisie looked to control the nature of recreational games by making more formalised structures and rules whereby such games could be used as a tool for creating productive labourers, rather than revolutionaries. The higher classes could utilise a variety of legal mechanisms as a means of suppressing and regulating the 'working-class revolution' of recreational sports. One such effective weapon was the national *Highways Act, 1835*, which imposed a criminal penalty on any person who obstructed the highway by playing "football or any other game on any part of the said highways, to the annoyance of any passenger or passengers". Magistrates and judges gave the police force consistent support in the enforcement of such acts. The extent of such support quickly turned the police into what Storch (1976: 496) describes as "domestic missionaries", employed in order to "act as a lever of moral reform on the mysterious terrain of the industrial city's inner core"; "an all-purpose lever of urban discipline" (Storch, 1976: 481) which could be

deployed in order to enact the “attitudes, prejudices, and momentary reformist enthusiasms of the municipalities, magistrates, and local elites who employed them”.

As can be seen, the ‘sportisation’ of games was a change which occurred not only in conjunction with the civilising of society in general but was also directed by capitalist influence to create a capitalist entity which could not only create productive laborer’s, but eventually lead to increased revenue. This capitalistic ‘sportisation’ of games eventually led to the ideas produced by Marxist sports scholars such as Brohm (1978) and Rigauer (1981, 2000), whereby athletes became a commodity to capitalist structures. With the civilising nature of the outside world, capitalists quickly noticed that sport offered the ideal enclave to present legitimised, acceptable ‘violence’, to which spectators and athletes alike could participate free from the civilising shackles of the outside world. Therefore, a capitalist ideology, or what Young (2012) labels the ‘sports ethic’, was established as means of ensuring that athletes displayed aggressive and violent acts on the pitch, and thus increasing the revenue accrued.

The concepts developed by Mead (1934) and Blumer (1969) on symbolic interactionism helped explain why athletes, despite the capitalistic drive of the sports ethic, conform to such an ideology. Here, it was suggested that athletes develop a sporting ‘self’ through the assessment of symbols in a conversation, who then alter the output of their symbols to produce a certain outcome in the conversation. In other words, athletes interpret the capitalist pressure exerted on them as a means of achieving an illustrious sporting career, and as such conform.

In the final analysis, adopting both a figurational (Elias, 1969, 1971, 1978, 1986; Dunning et al., 1993; Dunning and Sheard, 2005) and Marxist (Marx, 1972; and Marx and Engels, 2008) viewpoint allows us to view the development of sport as a capitalist driven machine, with the goal of moulding the working population into efficient labourers who can

enhance surplus value for the bourgeoisie. Leisure time was of particular focus by the bourgeoisie, as by transforming the past time of the working class, they were able to make every area of working class life a means of producing effective labourers (Dunning et al., 1993; and Marx and Engels, 2008). A result of this endeavour was that a capitalist ideology was adopted in sport that encouraged and maintained a certain level of 'violence', as violence was understood to increase the revenue potential of sport (Young, 2012). By referring to the work of George Herbert Mead (1934) and Herbert George Blumer (1969) on symbolic interaction, it was understood how athletes may attach positive meanings to this capitalist ideology, whereby it can be used as a means of bolstering their athletic career. As such, players will adopt a 'sporting self' which conforms to the capitalist sports ethic, displaying acts of 'violence' to prove themselves as sportspeople (Hughes and Coakley, 1991). Moreover, sport has become a social enclave for legitimate 'violence' in a society where repugnance for 'violence' is high and extreme self-control is demanded as a result of the civilising process. Therefore, sport is one of the only (apart from war) times when the interdependency chains between individuals are strengthened by controlled 'violence', rather than weakened.

CHAPTER 5

LEGAL DOCTRINE: APPLYING THE LAW TO SPORTS

6.1. Introduction

The focal point of the ensuing section will be on the boundaries of legitimate behaviour in sports, particularly contact sports, and thus, the demarcation of consent. Firstly, the notion that the rules of a sport can act as device for delineating the breadth of consent will be explored. Here, it will be shown that using such a method, may result in too specific an intervention from the criminal law. As such, Gardiner's (2012) emphasis on the playing culture will be examined, whereby the limits of consent are not coterminous with the rules of the sport. Rather, they can be found in the "unwritten conventions" (Dunning and Sheard, 2005: 29) of a sport. Adopting such a culture may allow for a more relevant and applicable definition of consent in contact sports. Yet, such an approach is not without its limitations. The playing culture will be critiqued, paying particular attention to the seemingly paradoxical nature of applying such a culture.

6.2. Contemporary Sport and the Playing Culture

6.2.1. Rules and Injury as Accepted Risk

Rules are paramount to sport. Connor (2011: 146) suggests that "they determine the purpose of the game, what it means to win, and the way it is to be played". Vamplew (2007:844) expands on the rules as a fundamental concept:

Generally, rules can define the size of the space on which the sport is played; the length of time that a contest can last; the actions that are permitted; and how a result is determined. They identify the legitimate means by which targets can be attained"

The rules of a sport serve not only to sculpt how a game is played, but also to impose boundaries on the normative expectations of the participants. Rugby anticipates and legitimises a degree of ‘violence’, and its rule systems are devised to demarcate the expected standard of players and to provide sanctions for those participants who are held to have transgressed. For instance, the foreword to the 2015 edition of World Rugby’s (2015:3) *Laws of the Game* recognises the overt physicality intrinsic to rugby, referring to the risks that this may pose: “Rugby Union is a sport which involves physical contact. Any sport involving physical contact has inherent dangers”. A further example can be found in Law 10.4, which proscribes ‘dangerous’ conduct; ‘retaliation’; ‘acts contrary to good sportsmanship’; and ‘misconduct while the ball is out of play’.

The rules and safety provisions described above, when added to the considerations provided in Chapter 3, shed some light on the degree of ‘violence’ anticipated in rugby. It is empathically clear that the modern forms of rugby are less violent, and as such, less dangerous than their antecedent forms, as was discussed in Chapter 4. However, it is equally clear that, despite the rules seeking to manage it, ‘violence’ is a fundamental component. In *R v Brown* [1993] UKHL 19, the House of Lords sought to differentiate contact sports from the sado-masochism with which the case was interested. Within this, Lord Jauncey notes that during contact sports “any infliction of injury is merely incidental to the purpose of the main activity” (p. 241), while Lord Templeman suggested there to be a fundamental difference between “‘violence’ which is incidental and ‘violence’ which is inflicted for the indulgence of cruelty” (p. 237). There have, of course, been developments in the judiciary outlook on contact sports since *Brown*, however the statement used in *Brown* displays the problematic nature of distinguishing legal and criminal acts on the rugby pitch. One such technique, which will be discussed further below is the ‘playing culture paradigm’ (Gardiner, 2012).

6.2.2. Beyond the Rules

It is evident from the rules and provisions relating to violent conduct and participant safety that physical contact is anticipated in the modern form of rugby union, and that such conduct fulfils the portrait of ‘sports violence’ presented in Chapter 3. It is also clear that the violent conduct seen in the game of rugby can frequently fall into the quasi-criminal category, as described by Smith (1988) in Chapter 3. Which category each form of conduct falls into is generated from within the sport. They point both to accepted practice at a general level, and the normative expectation of those who participate. The challenge for the criminal law is whether and, if so, how to calibrate responses to ‘sports violence’ in reference to the simple categories laid out by Smith (1983).

There have been egregious examples of violent conduct on the rugby pitch going to court. One such case is that of *R v Garfield* [2008] EWCA Crim 130, where the appellant had been convicted of unlawful wounding, contrary to s 20 of the OAPA 1861, after “stamp[ing] on the head of a defenseless man” (62) during a game of rugby, causing what was described as “a 10cm laceration between his left eye and the back of his head” (365), requiring 30 stitches. Despite acknowledging that there were “substantial mitigating factors” (366) the Court of Appeal upheld his sentence of 15 months’ imprisonment. Another example is that of *R v Calton* [1999] 1 Cr App R (s) 64, in which the defendant kicked the prone victim in the face, resulting in a broken jaw and 12 months detention in a Youth Offenders’ Institution. These cases illustrate that even if it can be suggested that there is a ‘zone of legal exemption’ operating in contact sports such as rugby, it is not exhaustive, and so simply crossing the touchline will not bring exemption from the criminal law. Beyond this, however, such cases offer little in terms of insight in to substantive law, for two reasons. Firstly, the defendant had pleaded guilty in each case, meaning the appeal only concerns sentencing. Secondly, each are particularly egregious examples of behavior

unequivocally outside of the rules, so much so that there is very little contest surrounding the absence of consent. What is of more interest, when it comes to establishing criminal liability, is how the criminal law attaches liability to conduct less serious, that of a quasi-criminal nature. In other words, those actions which are not as clear cut in their prosecutorial approach.

It has been argued that the breadth of consent should be coterminous with, and defined stringently, by the rules of the given sport. Thus, the notion of 'legitimate sport' would be easy to quantify (MRLA, 1976). While some have subscribed to such an approach, McCutcheon (1994: 273) describes it as "untenable", since "the acceptability of 'violence' is a matter of legal policy not of private regulation". Therefore, "[t]o use the rules of the sport as a test would be to confer on a private agency, the sport's governing body, the power to license 'violence'". Furthermore, Livings (2006: 497) reminds us that "the courts have been clear that transgression of the rules will not automatically attract criminal liability, and neither will it necessarily preclude the availability of the defense consent".

Opposition to such a strict interaction between the rules and criminal liability can also be found much earlier, in the nineteenth-century case of *R v Bradshaw* [1878] 14 Cox CC 83. Here, it was stated that: "No rules or practice of any game whatever can make lawful that which is unlawful by the law of the land" (85). This approach is, in some ways, redolent of the contemporaneous case of *R v Coney* [1882] 8 QBD 534, in that, in spite of the rules, liability still depends upon "malicious motive or intention" as to the likelihood of "death or injury". Therefore, as was the case in *Coney*, the courts will willingly look beyond the formal constitution of the sport and assess the lawfulness of the contest according to its underlying nature when judging how to view the behavior of the defendant. A similar issue was revisited by the Court of Appeal in the more recent case of *R v Barnes* [2004] EWCA Crim 3246, in which Lord Woolf declared:

[T]he fact that the play is within the rules and practice of the game and does not go beyond it, will be a firm indication that what has happened is not criminal ... conduct outside the rules can be expected to occur in the heat of the moment, and even if the conduct justifies not only being penalised but also a warning or even a sending off, it still may not reach the threshold level required for it to be criminal. (P. 914-915)

The comments made in the *Barnes* judgement could be seen as an acceptance of the ‘playing culture’ of sport as a standard in which the courts can establish the suitability of criminal sanction. Gardiner (2012) advocates the use of such a culture, arguing that this would provide an effective tool to which to delineate the extent of a player’s consent. Livings (2006: 500) describes the aspects of such a culture:

Such a playing culture would take account of all of the relevant circumstances of the sport, including the level of ability of the players concerned, in order to determine at what point criminal liability should be imposed.

A playing culture would accommodate those acts which are not only found as within the rules of the game, but also those that are coterminous with the culture, or ‘unwritten’ rules of the sport. Gardiner (1994, cited in Gardiner, 2012: 50) talks about the relationship between criminal liability and these unwritten rules:

An injury caused due to an illegal tackle that amounts to a foul within the rules of the sport is also likely to be seen as consensual. It may be contrary to the rules of the game but may well be inside... the ‘working culture’ of the sport. Consent is not limited solely by the formal rules in contact sports.

Such ‘unwritten rules’ to which the playing culture pays homage, can be found in most sports, and rugby union is no exception. Despite World Rugby prohibiting dangerous play, particularly high tackles, as is stated in Law 10.4(e):

A player must not tackle (or try to tackle) an opponent above the line of the shoulders even if the tackle starts below the line of the shoulders. A tackle around the opponent’s neck or head is dangerous play.

When a high tackle occurs on the pitch, this does not necessarily mean it is not accepted as an unfortunate by-product of the game. This can be seen in players reactions to high tackles. The circumstances of the tackle will vary widely between incidents, and all effect the acceptability of the act. Nevertheless, if the high tackle is accidental, and does not result from an aggressive behavior, then it is usually accepted as part of the game, and will equate to a penalty or yellow card, but no grief from those involved in the sport. For Gardiner (2007: 24), it is imperative that the criminal law acknowledges and respects this playing culture, as “[b]y ignoring the wider playing culture in specific sports and reifying the rules alone as a determining guide, what may be seen as being an attempt to provide consistency in application of the law may well lead to “too specific” an intervention by the criminal law”.

6.2.3. Usefulness of the Playing Culture Standard

The notion of a playing culture as a standard by which to measure criminal liability may prove fruitful in a number of ways. Firstly, as discussed above, the rules alone cannot be used as an exhaustive means of measuring liability as they do not signify the full extent to which the game will be played. Dunning and Sheard (2005: 29) refer to “unwritten conventions” that are not easily captured by reference to the rules alone, but only understood by those who fully understand the culture of the sport. An example of this is given by Riesman and Denney (1954), who suggest that the invention of American Football can be attributed to a lack of clarity in the written rules of rugby which had been imported from Britain, making it difficult for those unfamiliar with the game to understand how it should be played. This indicates how an understanding beyond the literal interpretation of the rules is required to grasp fully how a sport is played, and the normative expectations of those participating.

As the playing culture helps present a realistic portrait of a sport, Gardiner (2007: 27) suggests that it can be used to “help demarcate what is legitimate and illegitimate”. In terms of the criminal law, understanding the ‘working culture’ of a sport, and as such the reciprocal normative expectations this creates on its participants, may help develop consent in concert with the playing culture of the sport in question. The playing culture of sport has been referred to on occasion by the criminal courts elsewhere in the world, as seen in Saskatchewan Court of Appeal in *R v Cey* [1989] 48 CCC (3d), where Gerwing JA pointed out that in certain sports (in this case ice hockey), “intentional bodily contact and ... the risk of injury therefrom” is typical to the sport, and thus expected by its participants. In delineating the legitimacy of such contact, the court held that “[t]hose forms sanctioned by the rules are the clearest example”, but continued, suggesting that this can be expanded to cover “[o]ther forms, denounced by the rules but falling within the accepted standards by which the game is played” (490).

In a more recent Canadian case, the Provincial Court of British Columbia applied the argument in *Cey* in *R v TNB* (2009) BCPC 0117. This case concerned injuries inflicted during a game of rugby between two high school teams. The judge held that it was necessary to look beyond the rules when establishing criminal liability, and to decide whether the conduct of the defendant was “legitimate play within the amalgam of the ‘rules’ of this game” (22). This ‘amalgam’ was considered to encompass the “written rules, unwritten code of conduct and guidelines set by a referee in a particular game” (93), and the court was notably liberal in its construction of this, holding it to include “the legitimate strategy of intimidation of the opposite team by head-butting, eye gouging, elbowing, raking and punching” (94). Indeed, the judge accepted that “[n]one of these infractions is permitted by the written rules”, however, he also held that they were “accepted by the unwritten code of conduct at this level of play in the game of rugby” (94).

A second advantage of the playing culture standard can be drawn from its constitutionally contingent nature, which “would allow for flexibility of approach” (Livings, 2006: 501) when assessing the acceptability of physical contact, and whether such contact might warrant the attention of the criminal courts. Brailsford (1999: 7) writes of “definitions of sport” as “never easy and seldom stable”, illustrating the dynamic and ever-changing practices that exist within, and across, sports. Acknowledging and attempting to accommodate such variations in the normative expectations of participants, the court in *Cey* held that the expected conduct of the players would “vary, for example, from setting to setting, league to league, age to age, and so on”, and thus it was necessary “to have regard for the conditions under which the game at issue is played” (490). In this way, assessments of the playing culture can be accustomed to align with the normative expectations of the participants. Such expectations are likely to be different in a top-level professional game to that of one which takes place between teams comprising of a mixture of both junior and senior players. Such a malleable line of acceptability offers the flexibility needed to accommodate for the “unwritten conventions” (Dunning and Sheard: 29) of contact sports. However, having such a pliable culture also holds its disadvantages.

6.2.4. Limitations of the Playing Culture

Firstly, the most obvious problem with the playing culture is that of definition: it may be difficult to know exactly what the culture is in any particular set of circumstances. On a practical level, such issues may become more apparent when considering less formal forms of a sport, such as training. Lumer (1995: 269) concurs, stating:

Often it is not clear what game the players have agreed to play, and even the players themselves may have divergent opinions about this. This divergence may give rise to moral reproaches or indignation because one player thinks that another player acts contrary to his (moral) duties, as is the case in soccer if the other player follows rougher informal rules.

The ramifications of this are twofold. Firstly, variation in the limits of acceptable conduct between players can potentially make inducing consent problematic in the criminal law. Secondly, any such uncertainty threatens to attenuate the playing culture's primary asset of flexibility. Livings (2006: 501) concurs, suggesting that "Gardiner's standard ... appears paradoxical, and indeed oxymoronic". Livings (2006: 501) expands suggesting:

The degree of flexibility that the standard purports to offer would ... appear contrary to the characteristic of certainty with which Gardiner ... imbues the concept: the two virtues are difficult to reconcile ... the greater the degree of flexibility, the less predictable the outcome; the more certain a rule, the less this allows for flexibility.

Following this statement, it is interesting to note that the Court of Appeal in *Barnes* did little to mitigate the possible uncertainty in accommodating the playing culture standard of soccer. Lord Woolf notes, that "[t]he jury were not given any examples of conduct which could be regarded as 'legitimate sport' and those which were not 'legitimate sport' for the purposes of determining whether they were criminal" (918). However, this seems to be of little concern to him as goes on to suggest that "[t]he jury did not need copies of the rules, but they did need to be told why it was important to determine where the ball was at the time the tackle took place" (918). Here, the Court of Appeal emphasise that understanding the rules and practices of a sport, and how they should be viewed under the eyes of the criminal law, is not a proposition to be decided within sport, but instead is a standard that will be established by the courts. As such, whilst the criminal law might be inclined to be informed by the wider knowledge of sport (e.g. normative expectations of players, managers etc.), it appears unwilling to defer to external standards of conduct.

A further issue when adopting such a standard is the source of the norms from which the playing culture is established. Put simply, what is it that gives a particular sport its playing culture? If the playing culture standard is to be of any use to the criminal law, the

courts must accept a legally significant connection between the playing culture and the choices, attitudes and practices of those playing the sport in question. Such a contention may prove particularly useful when discussing matters in relation to the quality of consent that is said to be given by those players involved in a contact sport.

The participants of modern professional sports are now seen as a minority. As early as the mid twentieth century, Stone (1955: 86) pointed towards the “unique occupational morphology” of professional sport:

Those engaged first hand in the production of the commodity – the game or the match – constitute a minority within the industrial complex, while those engaged in the administration, promotion, and servicing of the production constitute a sizable majority.

Rigauer (1981: 16-17) follows Stone (1955) in Marxist assumptions about the exploitative character of work in capitalist societies, asserting that “the individual who resolves to participate in top-level sports has already subordinated himself to a high degree to the reigning system of values and conventions of behavior”. Therefore, it could be said that sporting authorities in general and the law do not have shared goals when it comes to deterring and reducing instances of overtly violent and dangerous conduct. In some sports, it may be the case that ‘violence’ beyond that which is permitted by the rules is encouraged for entertainment and commercial purposes. For instance, when referring to ‘violence’ in the NFL, Adubato (2016: 23) proposes that “‘violence’ tantalizes the fans. Promising ‘violence’ guarantees viewers”. Moreover, Tyler Shipley, founder and editor of the Left Hook, a website which publishes articles on politics in sport, stated in his interview with Simon Black, that “we are structured to be passive recipients of whatever spectacle the NHL or NBA wants us to buy into” as it “provides a perfect space to push a particular political line, because there is very little possibility of anyone pushing back” (Black, 2013: 42). Thus,

it could be argued that the normative expectations of a particular playing culture are not a realistic portrayal of the desires and expectations of the participants, but rather of those accruing revenue from the sport. As such, this may affect the consent given by participants in respect of the risk of harm.

Despite the scrutiny provided in the present section, the playing culture standard could be considered a useful tool in delineating consent in sports. Indeed, one needs to understand the ‘working culture’ of the sport – which is an aim of this study. Nevertheless, once such information has been yielded, providing a demarcation of consent seems closer than ever.

6.3. ‘sports violence’ and Criminal Offences

Now the breadth of consent in sports, particularly in rugby union, has been discussed with reference to the playing culture, one can begin to assess how such information can be attached to the criminal law. The following section will pay reference to the statutory assaults and how applying such offences can prove troublesome and complex when in the context of contact sports. A key focus will be on the *mens rea* of such offences, specifically intention and recklessness, and the difficulties establishing these in the seemingly violent arena of contact sports.

6.3.1. Violent Conduct in Sport and the Statutory Assaults

The offences to which violent conduct during the game of rugby may be susceptible is encapsulated by the Court of Appeal in *Barnes*:

When criminal proceedings are justified, then, depending upon their gravity, the prosecution can be for: assault; assault occasioning actual bodily harm contrary to Section 47 of the 1861 Act; unlawfully wounding or inflicting grievous bodily harm contrary to Section 20 of the 1861 Act; or wounding or causing grievous bodily harm with intent contrary to Section 18 of the 1861 Act. If, unfortunately, death results from the assault, the charge could be one of manslaughter or even murder depending upon the defendant's intent

In this statement, Lord Woolf refers to a broad spectrum of offences against the person. He firstly introduces the summary offence of assault, which can comprise one or both of a technical assault (intentionally or recklessly causing the victim to apprehend the immediate infliction of unlawful personal force) and a battery (intentionally or recklessly inflicting unlawful force) (*Fagan v MPC* [1969] 1 QB 539 (DC)). In relation to ‘sports violence’, assault has been seen as relatively unproblematic. It is a minor offence that causes very little or even no harm to the victim, and as such is easily contained within the context of sport. On the opposite end of the spectrum, liability for homicide may arise in the event of a death on the pitch. However, discussing the death of participants (and thus the potential liability for homicide) is beyond the scope of this work. Thus, those discussed by Lord Woolf as comprising of the middle of the spectrum are the indictable offences outlined by ss 18, 20 and 47 of the OAPA 1861.

Sections 18, 20 and 47 could be said to form a “ladder of offences graded in terms of relative seriousness” (Ashworth and Horder, 2013: 313). Such seriousness is determined by a combination of the gravity of the resultant injury and the requisite *mens rea*, a concept discussed in Section 6.3.2. At the lower end of the ladder is s 47. The *actus reus* requirement for s 47 is that the defendant ‘occasion’ actual bodily harm (ABH) to the victim. ABH can comprise any harm that interferes with the comfort or health of the victim (*R v Miller* [1954] 2 QB 282 (DC)); in *R v Chan-Fook* [1994] 2 All ER 552 (CA), Hobhouse LJ stated that the word ‘harm’ is synonymous for ‘injury’ and that ‘actual’ illustrates that, despite there being no specification that the injury be permanent, it should not be so trivial as to be wholly insignificant. ABH can therefore refer to a wide range of injuries, such as fractures or serious bruising. Indeed, these can be relatively minor or more serious. In *R v Davies* [1991] Crim LR 70 (CA), the defendant punched another player who had just fouled him during a game

of soccer, fracturing his cheekbone. The defendant was found guilty of an offence under s 47 and was sentenced to six months' imprisonment.

The *mens rea* for an offence under s 47 is intention or recklessness as to whether contact is made with another person (*R v Venna* [1976] QB 421 (CA)), however there is no requirement that any degree of harm be intended or even foreseen. The required level of injury for s 20 and 18 are the same and are typically more serious than that in s 47, as ss 18 and 20 require either a 'wound' or 'grievous bodily harm' (GBH). A wound is when the skin has been broken (*Moriarty v Brooks* (1834) 6 C&P 684), whereas GBH means "really serious harm" (*DPP v Smith* [1961] AC 290 (HL)). In contrast however, the *mens rea* for s 18 is intent to do GBH, whereas the lower-level offence provided for by s 20 requires an intention or recklessness as to the causing of some harm.

Sections 47, 20 and 18 have received a considerable amount of judicial and academic scrutiny, perhaps due to their widespread use, breadth of application and longevity. Whilst the view is not universally assented, Gardiner (2007: 33) alludes to the fact that the provisions are "much disparaged by today's criminal lawyers", while Livings (2016: 115) suggests they are "anachronistic and confused, and their nomenclature barely suited to the modern world". Other commentators, such as Jefferson (2012) and Ashworth (2008) invoke the rudimentary interrelation between the sections and questions their ability to apprehend gradations in the seriousness of offences. Ashworth (2008: 236) focuses on s 47 in particular, criticizing its lack of conformity to the 'correspondence principle', stating:

[I]f there were a crime with a conduct element of "causing serious injury", the correspondence principle would require that the fault element should be intention or recklessness as to causing serious injury and not as to some lesser degree of harm.

Ashworth's comments are particularly admissible when it comes to sport 'violence' where a high degree of physical 'violence' is normalised, and the fast-paced nature of the game can result in small errors of judgment which can easily lead to more severe consequences than that foreseen by the participants. For instance, a defending player in rugby union can easily misjudge the speed or height of an opposition attacking player. Thus, the probability of a high tackling occurring in rugby is probably quite high. With the speed and strength of players in the game, such high tackles also have a likelihood of causing serious injury to the victim. Nevertheless, as discussed previously, such acts are normalised as unfortunate consequence of the game.

The concerns outlined above have necessitated a flexible approach to the translation and use of ss 18, 20 and 47. For example, when it comes to the enigmatic nature of the language used, coherence has been added to make the meaning of such language clearer. The current view is that 'occasion' and 'inflict' can be viewed as effectively synonymous with 'cause', and that such cause has been expanded to include more injury-causing behavior. In light of the pragmatic interpretation that has been added to these offences, the application of them to instances of 'sports violence' has proven relatively unproblematic. As seen in the straightforward and inclusive approach taken in *Barnes*, the elements of a statutory assault can be defined relatively easily, since establishing a *prima facie* case needed no more than satisfaction of causation of the requisite level of harm, allied to the presence of the requisite *mens rea*. Despite the *mens rea* requirements of ss 18, 20 and 47 causing little controversy in the courts when applied to 'sports violence', they have the potential to be somewhat more complex than they at first appear. As such, this will take focus in the upcoming sections of this chapter.

6.3.2. The Legal Principle of *Mens Rea*

Intention and ‘sports violence’

The concept of *mens rea* underpins the liberal ethos of the law. Its function is outlined by Ormerod (2007: 105):

The literal meaning of ‘*mens rea*’ – ‘a guilty mind’ – is misleading unless it is kept in mind that we are concerned with legal, not moral, guilt. A person may – though only in exceptional circumstances – have *mens rea* even though neither he, nor any reasonable person, would regard this state of mind as blameworthy. *Mens rea* is the mental element required by the definition of the particular crime – typically, intention to fulfill the *actus reus* of that crime, or recklessness whether it be fulfilled.

Ormerod (2007: 105) continues, suggesting “[t]he word ‘*rea*’ refers to the criminality of the act, not its moral quality”, and this means that “English courts focus on the accused’s cognitive state – whether he foresaw risk, etc – rather than whether he was acting in a morally culpable manner”.

Following on from the orthodox subjectivist approach, it is no surprise that *intention* to cause harm initiates the highest form of censure from the courts. This is an intuitive approach insofar as the individual who causes harm intentionally might be seen as more culpable than that person who does so recklessly. Establishing intent is enough to suffice the *mens rea* for any of the statutory assaults, however, intent alone is required to ground an offence under s 18, where such intent must be to cause some GBH to a person. Inaugurating intent in ‘sports violence’, particularly in violent contests, may become complicated when intentions are difficult to discern, either due to evidential reasons, or more principally, from divergent intentions existing concurrently. Such complexities are highlighted by Gardiner and Jung (1991: 579), and discussed in greater depth below:

The fact that I act intentionally under a given description ... does not entail that I act intentionally under other descriptions which may apply to what I am doing. One and the same action may be both the moving of my foot (intended) and the kicking of the cat (unintended). But the individuation of intentions and other mental states, the isolation of a particular description under which what I do is intended or foreseen or known or whatever, will often be extremely difficult.

The issues raised in this passage have led to the construction of legal definitions of *direct* and *indirect* intention. In its primary construction, the legal definition of (direct) intention is broadly synonymous with purpose, whereby an individual could be said to have acted intentionally if he acts with the purpose of causing a particular consequence. Duff (1990) propounds a test, whereby a defendant who acted intentionally to harm would regard their actions as failed if no harm was caused. Conversely, a defendant for whom intention to cause harm is not a priority, would consider resultant harm itself to be a 'failure'. To provide a context for such concepts, when a defender in rugby goes to tackle but also injure an attacking opponent, the defender would refer to their efforts as failed if injury was not caused during the tackle. Here, we can undeniably say that the defender is displaying direct intention to cause harm. However, when there is digression between the outcome desired and their intentional conduct, an indirect form is suggested. This concept is derived from the writings of Bentham (1996) and refer to situations where the defendants purpose was not necessarily to initiate the consequences that eventuated, but where such consequences were nevertheless seen as an inevitable feature in achieving their primary goal.

However, despite the attempt to increase clarity, issues may still arise when establishing intent in 'sports violence'. For instance, the current authority on indirect intent derives from the House of Lords' judgment in *R v Woollin* [1999] 1 AC 82 (HL), wherein it was held that intention may be inferred where the defendant viewed the outcome as a 'virtual certainty'. As such, asserting indirect intention on the part of a rugby player making

a tackle or committing a foul which seemingly injures the opponent, demands satisfaction of ‘virtual certainty’ that outcome would have occurred. Anticipating that there might be a risk, even a risk with a high probability, will not be enough.

Recklessness and ‘sports violence’

As discussed, *intention* is enough for any of the statutory assaults, however, recklessness alone will suffice for ss 20 and 47 of the OAPA 1861. As would be expected, there can be complications when applying recklessness in contact sports. An investigation of *Barnes* uncovers some of the limitations of *recklessness* as a *mens rea* standard when applied to liability in contact sports, a sphere where dangerous physical contact between the players is inexorable, and the likely consequences of such contact is known by most, if not all, of its participants. Lord Woolf in *Barnes* (915) gives a relatively straightforward characterisation of recklessness in sports, stating:

‘Recklessly’ in this context means no more than that the defendant foresaw the risk that some bodily harm (however slight) might result from what he was going to do and yet, ignoring that risk, the defendant went on to commit the offending act. (915)

Lord Woolf then continues, suggesting that “anyone going to tackle another player in possession of the ball can be expected to have the necessary malicious intent” (915). This statement applies only where this matter has not been raised by the defence. where it is an issue, the criminal law is governed by s 8 of the Criminal Justice Act 1967, which states:

A court or jury, in determining whether a person has committed an offence,
(a) shall not be bound in law to infer that he intended or foresaw a result of his actions; but
(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

Notwithstanding this caveat, the approach taken by Lord Woolf in relation to the issue of foresight in recklessness ostensibly points towards a willingness to attach *prima facie* liability to incidents of ‘sports violence’. Moreover, under this approach, recklessness seems to be a disembodied concept, existing mainly outside the social context in which conduct occurs. If this is the exhaustive means of recklessness, it is inevitably the case that many sportspersons will potentially be in a permanent state of *prima facie* liability. However, it could be argued that the Court of Appeal in *Barnes* omitted an important qualifying clause that is central to what many would view to be the accepted test of recklessness. Ormerod (2007: 118) acknowledges such concerns, suggesting that “[n]ot all risk-taking constitutes recklessness”; the risk taken must also be deemed “unreasonable” in the circumstances.

The House of Lords in *R v G* [2003] UKHL 50 overruled the objective *R v G* [2003] UKHL 50 test of recklessness, with what could be considered the authoritative and definitive statement of recklessness as a *mens rea* standard. It was declared that “a person acts recklessly ... with respect to (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk” (1057). As such, in the game of rugby, if an attacking opposition player is stumbling whilst running, meaning that their body, and thus their head, is lower than usual, and a defending player decides to go in for a powerful tackle to the chest area of the attacker, which results in a dangerous high tackle. Then it could be suggested that the tackling player acted recklessly as they knew that the risk of a high tackle was higher than usual (due to the attacker stumbling), and that such a risk was magnified by the fact that they went for a chest tackle. Intention may be difficult to establish, as it cannot be proven that the tackler wanted and intended to make a high tackle. Nevertheless, recklessness may still be established as it was a reasonable risk that accompanied the action, and as such, the tackler was more than likely aware of such risk

before performing the tackle.

6.4. The Doctrine of Consent

The following section will focus on the legal principle of consent. Within this, the ontological foundations of consent will be discussed, whereby the notions of attitudinal and expressional consent will be explored. Moreover, the idea that consent forms a legal fiction when observed in the context of sport will be investigated. Here, it will be proposed that consent is implied by simply agreeing to play the game. As such, consent is de-individualised; an entity which does not vary between players, but rather is given to players through agreed participation. Finally, the ‘unreasonable’ limb of recklessness will be examined to see if it could be used as a more effective method at attaching culpability to ‘violent’ conduct on the pitch.

6.4.1. The Ontological Foundations of Consent

Consent can have a significant moral and legal effect, however, for it to become an effective doctrinal mechanism that can negate *prima facie* offences it must do more than provide a philosophical basis for distinction. It must also acquire a granularity which allows it to be of aid when delineating between the lawful and unlawful. To do this, it is necessary to delve deeper into the realities of consent: at its ontological and empirical foundations. Wertheimer (2003: 7) considers the legal and moral place of consent, suggesting “the content of the morally impermissible and the legally impermissible can be captured by the concept of consent. The hard work will be to say what that means”.

In an attempt to understand the ontological concepts of consent, Westen’s (2016) division in what he terms ‘attitudinal’ and ‘expressive’ consent will be explored. Westen’s (2016) two concepts of consent display variant priorities. Attitudinal consent induces an acknowledgment for the autonomy of a person who is willingly involved in conduct that

might otherwise be an offence. Expressive, on the other hand, refers to the lack of culpability of the defendant who genuinely believed that the individual was willing. Hurd (1996) discusses how the transformative power of consent lies in a respect for autonomy, of which the corollary is that the moral core of consent must be found in the subjective mind. An example of this approach, found in surgery, would be how effective consent would be measured by reference to the attitude of the patient. Attitudinal consent from the patient would render the normally illegal conduct of the surgeon legal. Establishing the existence of attitudinal consent amounts to questions like, “did this particular individual (expressly or otherwise) desire, permit or acquiesce (consent) to this particular conduct on the part of the defendant?” (*R v Cey*, 490). In contrast, the expressive construction would judge the effectiveness of consent by reference to its outward manifestation, and thus from the viewpoint of the individual being offered the consent, or possible through the eyes of a ‘reasonable observer’. Returning to the example of the surgeon, consent would be judged not by the attitudinal consent of the patient, but rather by articulation of consent on the part of the patient. Put simply, consent would be determined in reference to the defendant in whether they honestly believed the individual to be consenting. In effect, constituting expressional consent turns to queries such as: ‘Did the defendant believe (or would a reasonable person have believed) that this particular individual was (attitudinally) consenting to this conduct?’.

Using attitudinal consent alone can prove problematic, as it “tells us only about the moral situation of the person who inflicted the harm” (Dempsey, 2013: 13). However, the moral position of the defendant is also of importance in order to understand how consent can absolve them of wrongdoing. It may also be that in a given situation there is no conflict between the two constructions, since expressional and attitudinal consent can exist concurrently. If the patient considered above is actively willing to undergo the procedure,

and also signs forms to declare this willingness, then it could be said that both attitudinal and expressional consent are present. However, the existence of expressive consent is not entirely dependent upon the presence of attitudinal, and so may exist independently. In this light, when an individual nods or signs a consent form when asked whether they consent to their ears being pierced, it is that form of consent that is operative, not the subjective mindset of the person getting pierced. The fact that the person concerned may have been coerced through peer pressure into getting the procedure done would hold no weight in negating consent if it had not come to the attention of the person performing the piercing.

When considering which form of consent might be most effective at establishing liability, it could be suggested that the prevailing preference for subjective constructions of liability make expressive favourable. Despite this, the umbilical connection between consent and autonomy points towards the fact that attitudinal conceptions cannot be ignored, as they are woven through dialogues of consent and its legal accommodation. Despite this, applying either attitudinal or expressive consent to sports is not as straightforward as providing medical services. It encounters problems associated back to the flexibility of the playing culture of a sport.

When considering notions of consent in rugby union, establishing attitudinal consent may seem relatively straightforward, whereby an individual will imply consent to occurrences of the game by simply agreeing to play. Indeed, this is true. However, it may prove more difficult to attach attitudinal consent to actions outside of the official rules. As discussed in Chapter 3, the breadth of consent stretches further than the rules of the sport, to the ‘unwritten conventions’ (Dunning and Sheard, 2005). Yet, finding a limit to such conventions is both ambiguous and enigmatic, as the culture is in constant flux, and therefore so is a participant’s consent. Similarly, when attempting to assign expressive

consent as a means of justifying the action of a player, it becomes increasingly difficult to locate for those actions outside of the official rules. Of course, expressive consent will be provided for actions within the rules, such as a safe, low tackle. However, as the line of consent is in constant flux, expressive consent can become enigmatic. Such deliberations are the subject for discussion in the ensuing section.

6.4.2. 'sports violence', Consent and Legal Fiction

The preceding section outlined the ontological constructions of consent, and how these have been practiced in relation to medical treatment. Yet, when considering cases of 'sports violence', a key differentiator is the concept of a playing culture and how this demarcates the quality of consent in terms of 'legitimate sport'. It is undoubtedly possible to argue that the rules and the expected standard of behaviour created by such rules, as well as the normative 'unwritten conventions' of a sport, fail to differentiate sport from other contexts in any meaningful way. Of course, implied consent in sexual relations can occur in numerous behavioural cues which must be interpreted by the courts. In such instances, jurors will utilise their understanding and experience of the facts and disputes with which they are faced, and the evidence supporting them. But, the qualitative difference between the individualised constructions of consent when considering other contexts, such as sexual offences or medical treatment, and that of 'sports violence', lies in the normative role of the 'legitimate sport' standard. As discussed, in relation to medical treatment, consent is aimed to be established by attitudinal and/or expressive conceptions by reference to an individualised construction of consent. As such, the criminal law accentuates aspects such as coercion or deception which would impair its effectiveness.

In sports, however, consent is established according to whether it comprised 'legitimate sport', which makes the subjective view of attitudinal or expressive consent

unnecessary. The court in *Cey*, advocate an approach that produces a multilateral and objective measure of consent, and which is established by considering all the relevant circumstances of a case:

[C]onduct which is impliedly consented to can vary, for example, from setting to setting, league to league, age to age, and so on... The conditions under which the game in question is played, the nature of the act which forms the subject matter of the charge, the extent of the force employed, the degree of risk of injury, and the probabilities of serious harm are, of course, all matters of fact to be determined with reference to the whole of the circumstances. In large part, they form the ingredients which ought to be looked to in determining whether in all of the circumstances the ambit of the consent at issue in any given case was exceeded. (490)

What is interesting about the approach adopted in *Cey* is that although it seemingly sets out to define the consent of the participant's, there is no reference to their individual attitudes or beliefs, which appear inferior to the circumstances of the sport, to the constructions of 'legitimate sport'. Although *Cey* was a Canadian case involving ice hockey, it seems the approach adopted can also be equally applied to other sports. Another excerpt, from Gerwing JA (490), states:

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

Gerwing JA's comments de-individualise the participant, referring to them as a "[ice] hockey player", not as an individual. Moreover, the grounding of consent is attributed to a question of voluntary participation, of simply agreeing to play the game. Livings (2016) concurs, suggesting that the consent assigned to a rugby player could be defined as fictitious. Livings (2016: 194) expands:

It does not need to rely upon a construction of consent that amounts to anything more than participation, since consent is imputed to a player on the basis of his participation. In other words, those taking part will be treated ‘as if’ they had consented to that which is deemed legitimate. This effective ‘de-individualisation’ sets imputed consent apart from most other instances of consent.

Upon observation, it becomes apparent that in the sporting context, and therefore within rugby, that consent is de-individualised. Rather than each individual providing their own delineation of consent, an individual is deemed to have consented to the parameters of legitimacy by simply agreeing to play the game. This is a particularly unique stance, and one which seems to solve none of the issues surrounding the actual limits of a player’s consent. Indeed, by saying that a player is implying consent to the legitimate behaviors of a sport, makes it seem as if consent is unequivocal to establish. Yet, it seems to ignore the nature of the playing culture, whereby the line of legitimacy is in constant flux, and one which is incredibly hard to define. As such, more research is needed as to the confinements of legitimate behaviour in sport. A topic with which the present study hopes to provide a degree of insight when considering the sport of rugby union.

6.4.3. The ‘Unreasonableness’ Limb of Recklessness

As suggested in the preceding section, the orthodox view surrounding consent appears to be fictitious due to the de-individualised approach adopted from the courts. This leaves an opening for alternative ways of framing the criminal law of ‘sports violence’ which may prove more effective. One such approach was discussed in the Law Commission 134 (LCCP 134), which was suggested to have been needed because although *Brown* “had confirmed the broad outlines of the law”, there remained “considerable disagreement about its basis, policy, detailed limits and possible future development” (para 1.5). However, despite this, the Commission seemed to follow the structure of the majority opinions in *Brown*, with

consent forming a tripartite construction of defense which effectively supported ‘rule-plus-exceptions’ approach utilised by the House of Lords, going as far as to say that it was “conceptually necessary” (8.2).

The Commission proposed that, as Lord Mustill outlined in *Brown*, consent is not the dispositive consideration when it comes to the lawfulness of ‘sports violence’:

[T]he actual consent of the victim is not the dispositive consideration, but rather that the law will formulate a series of rules as to the permitted conduct of the inflictor of injury. The effect of those rules may be expressed as representing the limits of the deemed consent of the injured party, but in truth they are objective criteria imposed by the courts to limit the field of intervention of the criminal law. (para 10.9)

The Commission then continued, advocating that the straightforward and implicitly flexible approach to ‘sports violence’ founded in the objective, ‘unreasonableness’ limb of recklessness. This can be seen in the following comments:

[A]pplying the normal approach to recklessness, based on unreasonable risk-taking, and without formulating any special exception for sports and games, it seems clear that even non-intentional aggression or dangerousness, which one would expect to be outside the rules laid down for the playing of the game, can lead to criminal liability. That is a conclusion not based in any real sense on the consent of the victim, but on a more general assessment of what, in those particular circumstances, constitutes reasonable conduct. Like all questions of reasonableness, its resolution is essentially a jury question. (para 10.17)

Thus, the reasonableness of risk would be determined in reference to the activity, meaning that “[g]ratuitously aggressive and dangerous conduct ... may well be characterised as the unreasonable taking of a risk, even within the extended limits of normally acceptable behaviour that apply when playing a contact sport” (para 10.16). As such, the ‘general test’ of recklessness would be: “whether the defendant took a risk of injury of which he was aware, and in the circumstances, it was unreasonable for him to take that risk” (para 46.1). An immediate advantage of this proposal can be found in its applicability to a broad spectrum of sports and contexts. For instance, it allows for the variances in consent between

amateur and professional players. In sports such as rugby union, where the probability for error is high and the consequence of such error can sometimes be severe, those who are not as adept in the sport may be more likely to make mistakes. As such, there may be more acts of ‘violence’, or unintentional ‘violence’, in the lower leagues than in the top leagues – purely due to the incompetence of the players in the lower leagues.

By adopting the reasonableness standard, one may be able to apply the law situationally by adapting it to fit what the player would have, or should have, viewed as unreasonable in the given circumstances. Which would be different for each level of the game. Moreover, it operates under a loose definition of sport, which also accommodates the player’s consent through a holistic appraisal of the acceptability of the conduct in a particular circumstance. Such an advantage was acknowledged by Ormerod (1994: 934), who considered it to “strike a good balance in protecting all players”, while also attempting to create a “straightforward workable test, involving concepts with which the courts are already familiar”.

In contrast, Leng (1994: 487) refers to the report as “entirely misconceived”, suggesting the report appears paradoxical. Leng (1994) points to how the statement, despite advocating that sport should be treated as unexceptional under the eyes of the criminal law, frames its analysis in accordance with exceptional treatment, and as such awards sport a unique standing. Nonetheless, the approach taken in the Commission can be considered a clarification, presenting illustrations of, and guidance as to, how reasonableness might be understood in cases of ‘sports violence’.

6.5. Prosecutorial Discretion the Answer?

The enigmatic nature of attaching the criminal law to ‘sports violence’, as demonstrated in the preceding sections, has led some to look at alternative regulatory mechanisms as a more

effective strategy in tackling ‘sports violence’. In *Barnes*, Lord Woolf discusses such possibilities:

In determining what the approach of the courts should be, the starting point is the fact that most organised sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct. As a result, in the majority of situations there is not only no need for criminal proceedings, it is undesirable that there should be any criminal proceedings. Further, in addition to a criminal prosecution, there is the possibility of an injured player obtaining damages in a civil action from another player, if that other player caused him injuries through negligence or an assault. (911)

In the case of sport, it is often considered that, not only are there alternative methods to the criminal law, but also that these alternatives may prove more effective at achieving the aims of sport than the criminal law itself. Cohen (1990: 322) indicates that “[t]he decision not to prosecute does not mean that a professional athlete acting violently during a game goes without punishment”. Cohen (1990:322) refers to how the “[v]arious alternative dispute resolution methods, including civil mechanisms, game officiating, league fines and suspensions” may actually “control violent behavior in sports more effectively than the imposition of criminal liability”. The following sections will discuss the regulatory and governing bodies of sport as a ‘private government’ (Macaulay, 1986, cited in Livings, 2016), while examining the potential benefits of using the civil law for redress and deterrence.

6.5.1. Sport as a ‘Private Government’

As discussed previously, sport encompasses a set of normative expectations upon its participants. Such expectations are etched by a sophisticated rule structure, as well as numerous other factors, such as commercial pressures, level of play and desire for competition, all of which generate a playing culture for the sport. This culture is stringently regulated by a composite of both tribunals and in-game adjudication that could be seen to

resemble the criminal justice system. Macaulay (1986, cited in Livings, 2016) refers to this arrangement as following a system of ‘private government’. It is recognised that the disciplinary limbs of governing bodies have broad powers to impose and regulate sanctions for those sportspersons who have transgressed, including playing suspensions, fines and payment of compensation. Anderson (2013: 57) sees sports bodies as having a greater impact in deterring and regulating ‘violence’ than the criminal courts:

There is little doubt that a speedy, consistent and fair internal disciplinary regime within a sport is the most effective deterrent against unnecessarily violent play, as opposed to the more distant and unpredictable applicability of the criminal law. Such matters are clearly better dealt with ‘in-house’ because that is where the expertise lie and it is where long-term preventative measures, such as rule changes, can be implemented in a coherent way in order to ensure that such ill-discipline will not occur again in the future.

Although he accepts that, “[i]n theory the best way to deal with ‘sports violence’ and deter athletes from injuring other athletes is through internal controls in the sport”, Jahn (1988: 250) reminds us that commercial interests and the associated internal politics of sport mitigate the use of strident penalties. This is reminiscent of the Marxist perspective adopted by Stone (1955), Rigauer (1981), Adubato (2016), and Tyler Shipley in Black (2013), as discussed in Section 6.2.4. Here, it may be suggested that the direction of discipline in a sport may be influenced by the interests of the commercial elite. Thus, disciplinary action may not necessarily take the form of the most effective and appropriate means for regulation. As such, Jahn (1988: 250) suggests that the sanctions implemented by the sporting bodies are often “largely ineffective in deterring athletes from ‘violence’”.

6.5.2. Civil Law and Sport

The previous section discussed the use of internal sporting disciplinary bodies as an alternative means of regulation in sport in comparison to the use of criminal law. Despite such a method being backed by scholars (Cohen 1990; Anderson, 2013), it seems as though it is still susceptible to criticism, particularly when it comes to the interests of such bodies (Jahn, 1988, Black, 2013). The ensuing section will consider the use of civil law in regulating 'violent' acts on the pitch.

The Court of Appeal in *Barnes* refers to “the possibility of an injured player obtaining damages in a civil action from another player, if that other player caused him injuries” (911). It could be said that the tort of negligence is the most likely avenue of civil recourse when it comes to those who have been injured by others during the course of play in sport. Lord Woolf suggests that “[t]he circumstances in which criminal and civil remedies are available can and do overlap” (911), thus, it should come as no surprise that grounding negligence encounters similar issues to that faced by the criminal law. Fafinski (2005) concurs, commenting on the closeness of civil and criminal doctrines in determining liability of ‘sports violence’, suggesting these similarities extend to the complications they face when deciding the circumstances which may initiate liability.

In *Condon v Basi* [1985] 1 WLR 866, the first English civil case to address the issue of negligence between participants, and thus the duty of care owed to each other, the Court of Appeal looked to the Australian case of *Rootes v Shelton* [1968] ALR 33 for guidance, and quoted Barwick CJ: “By engaging in a sport...the participants may be held to have accepted risks which are inherent in that sport...but this does not eliminate all duty of care of the one participant to the other” (34). However, similar to how the criminal courts have “been reluctant to allow for a precedent to be created whereby the existence of sports, and their inherent characteristics, would be duly impinged upon” (Livings, 2016: 272), so have

the civil courts. This viewpoint has been granted statutory force; with the Compensation Act 2006 urging courts to consider whether a claim might “prevent a desirable activity from being undertaken at all ... or discourage persons from undertaking functions in connection with a desirable activity” (S. 1.). Nonetheless, Jahn (1988: 253) advocates that in addition to offering compensation to the injured person, the civil tort of law also presents “the best way to deter violent conduct among athletes”, as it “imposes financial liability on the athlete ... and this will hit him where it hurts the most – in his pocket”. Furthermore, this financial liability may also stretch to the player’s club through vicarious liability if its commission is sufficiently linked to the player’s employment.

Potentially the most famous case of ‘violence’ on the rugby pitch going through the civil courts is the case of *Smoldon v Whitworth* [1996] ELR 249. Here, the claimant sued another player and the referee after a he was catastrophically injured from a collapsed scrum during a rugby union match. The claim against the other player was dismissed, on the grounds that the player had not done anything deliberate to collapse the scrum, and thus had not breached their duty of care to the claimant. Yet, when considering the duty of care of the referee, it was found that the referee had not exercised their duty of care to prevent the collapsing of scrums. Thus, Smoldon was awarded £1.9 million compensation for the incident in 1999. This is an example of how civil law can be used as a method for deterrence in sports. Indeed, the possibility for such significant amounts of compensation make it an attractive technique. Yet, the potential for receiving such sums are very unlikely when it comes to the frequently seen ‘violent’ acts in rugby. The case of *Smoldon* was a particularly distinctive case, where the claimant had suffered a momentous life changing injury at the hands of another’s negligence. Those cases where consequences are not as severe will receive only fraction of the compensation awarded in *Smoldon*. Moreover, as mentioned previously, the issues associated with forming liability in criminal cases extend to the civil

law domain. Establishing that a duty of care had been breached requires that the defendant be proven to have passed the confinements of consent, as the boundaries for one's duty of care run parallel to those of consent. As such, the complexities encountered when attempting to define consent in a sport, are also confronted in civil law.

When considering alternative methods of dispute resolution in sport, it seems that there is no escape of the maladies associated with commercialism and consent. Nevertheless, Gardiner (2007: 29) suggests that "the reality of potential civil liability seems to have had a positive effect on the promotion of safety and good practice in sport". As such, future research as to how independent and reliable regulation can be acquired outside of the criminal law may prove valuable.

6.6. Summary

Delineating the boundaries of consent is an arduous task, and one that cannot be defined through use of the official rules of the sport alone. Indeed, subscribing to such an approach would make defining 'legitimate sport' relatively straightforward (MRLA, 1976). Yet, scholars have been quick to remind us that such a notion is "untenable" (McCutcheon, 1994: 273), providing that "the courts have been clear that transgression of the rules will not automatically attract criminal liability, and neither will it necessarily preclude the availability of the defense consent" (Livings, 2006: 497). Such conclusions are not purely limited to the academic sphere. The court in *Brown* (pp. 914-915) advocates that "even if the conduct justifies not only being penalised but also a warning or even a sending off, it still may not reach the threshold level required for it to be criminal". As such, the courts have seemed to imply conformity to Gardiner's (2012) and Livings' (2006: 500) idea of a playing culture, whereby they "take account of all of the relevant circumstances of the sport, including the level of ability of the players concerned, in order to determine at what point

criminal liability should be imposed”. In *Barnes*, Lord Woolf alludes to the presence of a playing culture when making verdicts in cases within the sporting arena:

[T]he fact that the play is within the rules and practice of the game and does not go beyond it, will be a firm indication that what has happened is not criminal ... conduct outside the rules can be expected to occur in the heat of the moment, and even if the conduct justifies not only being penalised but also a warning or even a sending off, it still may not reach the threshold level required for it to be criminal. (P. 914-915)

Despite the potential of the playing culture standard, it encounters issues. The first is one of definition: it may be difficult to know exactly what the culture is in any particular set of circumstances. For Lumer (1995: 269), “[o]ften it is not clear what game the players have agreed to play, and even the players themselves may have divergent opinions about this”. Furthermore, the playing culture “appears paradoxical, and indeed oxymoronic” (Livings, 2006: 501). Livings (2006: 501) expands suggesting that “the greater the degree of flexibility, the less predictable the outcome; the more certain a rule, the less this allows for flexibility”. This may be true, however, it seems that the playing culture standard offers a valuable tool to be considered when attempting to define a player’s consent in sport.

The issues arising when attempting to interpret consent in contact sports makes applying criminal offences to incidents of participator ‘violence’ incredibly difficult. Fulfilling the *mens rea* requirements of the statutory assaults becomes troublesome when intent and recklessness have to be proven against the backdrop of a sport with ‘violence’ at its core. The House of Lords’ judgment in *Woollin* held that intention may be inferred where the defendant viewed the outcome as a ‘virtual certainty’. As such, asserting indirect intention on the part of a rugby player making a tackle or committing a foul which seemingly injures the opponent, demands satisfaction of ‘virtual certainty’ that outcome would have occurred. Anticipating that there might be a risk, even a risk with a high probability, will not be enough. Establishing that a player knew with ‘virtual certainty’ that their actions

would have caused the outcome is arduous. Such complexities are also found when attempting to establish recklessness. Lord Woolf in *Barnes* gives a relatively straightforward characterisation of recklessness in sports, stating:

“Recklessly’ in this context means no more than that the defendant foresaw the risk that some bodily harm (however slight) might result from what he was going to do and yet, ignoring that risk, the defendant went on to commit the offending act. (915)

If Lord Woolf’s opinion in *Barnes* is the exhaustive means of recklessness, it is inevitably the case that many sportspersons will potentially be in a permanent state of *prima facie* liability. However, it could be argued that the Court of Appeal in *Barnes* omitted an important qualifying clause that is central to what many would view to be the accepted test of recklessness.

Ormerod (2007: 118) acknowledges such concerns, suggesting that “[n]ot all risk-taking constitutes recklessness”; the risk taken must also be deemed “unreasonable” in the circumstances. As such, the unreasonable limb of recklessness provided in the Law Commission 134 (LCCP 134) was suggested to provide an effective framework for establishing liability in contact sports. the reasonableness of risk would be determined in reference to the activity, meaning that “[g]ratuitously aggressive and dangerous conduct ... may well be characterised as the unreasonable taking of a risk, even within the extended limits of normally acceptable behaviour that apply when playing a contact sport” (para 10.16). Thus, the ‘general test’ of recklessness would be: “whether the defendant took a risk of injury of which he was aware, and in the circumstances, it was unreasonable for him to take that risk” (para 46.1). Adopting such an approach would make it applicable to a broad spectrum of sports and contexts. Moreover, it operates under a loose definition of sport, which also accommodates the player’s consent through a holistic appraisal of the

acceptability of the conduct in a particular circumstance.

Despite the potential that the unreasonableness limb of reckless holds, there are some who promote the use of alternative regulatory mechanisms as a more effective means of regulating contact sports. In *Barnes*, Lord Woolf discusses such possibilities:

In determining what the approach of the courts should be, the starting point is the fact that most organised sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct. As a result, in the majority of situations there is not only no need for criminal proceedings, it is undesirable that there should be any criminal proceedings. Further, in addition to a criminal prosecution, there is the possibility of an injured player obtaining damages in a civil action from another player, if that other player caused him injuries through negligence or an assault. (911)

Anderson (2013: 57), when referring to the internal disciplinary bodies of a sport, suggest that [t]here is little doubt that a speedy, consistent and fair internal disciplinary regime within a sport is the most effective deterrent against unnecessarily violent play, as opposed to the more distant and unpredictable applicability of the criminal law. Yet, Jahn (1988: 250) reminds us that the interests of such bodies are directed by the commercial elite, and thus may not truly reflect the most effective means of deterring ‘violent’ play.

Jahn (1988), on the other hand, refers to the compensatory remedial of the civil law as “the best way to deter violent conduct among athletes”, as it “imposes financial liability on the athlete ... and this will hit him where it hurts the most – in his pocket”. Furthermore, this financial liability may also stretch to the player’s club through vicarious liability if its commission is sufficiently linked to the player’s employment. However, the issues associated with forming liability in criminal cases also extend to the civil law. As such, establishing that a duty of care had been breached requires that the defendant be proven to have passed the confinements of consent, as the boundaries for one’s duty of care run parallel to those of consent. Therefore, grounding liability in civil law cases can encounter

just as many issues as that of the criminal court. Accordingly, it is suggested that further research is needed into how alternative regulatory mechanisms, such as internal disciplinary bodies and the civil law, can improve to provide effective means for regulating participator 'violence' in contact sports.

CHAPTER 6

THE RFU: DISCIPLINARY STRUCTURE

5.1. The Process of Professionalism in Rugby Union

Since the inauguration of the RFU in 1871, rugby union has been a sport which has long celebrated and emphasised its amateur ethos. Following the split between the South of England (rugby union) and the North (rugby league), rugby union fought hard to maintain its amateur values in the face of the threat posed by the incipient professionalisation in the North (Dunning and Sheard, 2005). For Dunning and Sheard (1979), the public school elite reinforced an amateur ideology that rested on three fundamentals. Firstly, the pursuit of playing rugby should be an end in itself; individuals should play the sport simply for the pleasure afforded. Secondly, the idea of ‘sportsmanship’ in victory or defeat was emphasised. Players should display self-restraint, and above all, show respect by masking emotion despite the result of a game. Finally, the notion of ‘fair play’ was endorsed. Dunning and Sheard (1979: 153) refer to “the normative equalisation of game-chances between contending sides, coupled with a stress on voluntary compliance with the rules and a chivalrous attitude of ‘friendly rivalry’ towards opponents”.

Despite the struggle to maintain amateur ideals, rugby union’s turn to professionalism was seen by some as inevitable (Howe, 1999). The development of competitive league rugby, such as the introduction of the WRU Challenge Cup in 1971, drove the standards of the game higher and higher, and with this, the commitment required from players intensified (Howe, 1999). Howe (1999) also discusses how commercial interest in rugby grew as the popularity of the game developed. For Howe (1999), the increased access to consumers which larger competition brought, led many local businesses to want to contribute to their local club, in the hope that it would grant exposure for their

enterprise. The duet of increased competition and demand on players, and the growing interest commercially eventually led to the announcement of rugby union as an 'open' game in 1995.

The direct impact of professionalism on the disciplinary structures of the RFU, particularly in relation to 'violence' on the pitch, would seem far more appropriate in the scope of the current discussion. However, there is a dearth of literature reviewing such a relationship. As such, the following discussion will observe how the rule structures of rugby altered concurrently with the development of professionalism, while also looking to how professionalism has affected the bureaucracy of sport in general, and how this is reflected in the current procedures of the RFU.

If we are to observe how the rule structures of rugby have transformed since the birth of professionalism, it becomes apparent that a large proportion of rule changes have been to make the sport a more compelling entity for commercial interest, largely through making the game more enjoyable to watch for spectators. Howe (1999) provides an illustration of this direction for change in his consideration of Welsh rugby union. In 1992, the International Rugby Board, now named World Rugby, increased the points awarded for scoring a try from four to five, believing that, by making it worth more than a penalty, teams would be encouraged to play more of a running style of rugby. By 1994-95, clubs in the Welsh Premiership were competing for places in the European Club Championships, and so competition between teams was intense. During this period, Howe (1999: 170) describes how "players began to break the rules deliberately by being off-side or killing the ball, preferring to give away a chance of a penalty goal rather than allow a try to be scored, as a result of their poor play". Consequently, those teams with skilled goal kickers were dominant. As a counter measure, the Welsh Rugby Union (WRU) introduced bonus points for scoring a sufficient amount of tries against your opponent, in an attempt to bring back a

more enjoyable, running game. Because of this, the game was “forced to be more fluid and thus more entertaining, increasing the amount of media coverage” (Howe, 1999: 170). Here, it is obvious that both the IRB and the WRU did their utmost to ensure that rugby remained a commercially attractive investment for fans and corporations.

Not only did professionalism produce more commercial pressure for the governing bodies of rugby, but it also evoked a response for the safety of players. Murray et al (2014) suggest that since the IRB have attempted to make the game more fluid and fast paced, the physical demands of the game have increased, proposing a fourfold increase in tackles and rucks per game. The increase in physical demands, combined with the increased fiscal capabilities of clubs, meant that the size, speed and power of player’s sky rocketed (Duthie et al., 2003). Therefore, teams with the tallest and heaviest players outperformed their counterparts, as Sedeaud et al (2012) noted in their study of the Rugby World Cup 2011. However, this increase in body size and power has been accompanied by an escalation in injury risk and prevalence (Murray et al., 2014). This inflation of injury prevalence and risk may be reflected in World Rugby’s recent efforts to clamp down on dangerous play (Rugby World; 2013; and World Rugby, 2016), largely through the harsher sanctions when it comes to contact with the head (Smith, 2017).

5.2. RFU Disciplinary Objectives

The RFU has developed an extremely sophisticated disciplinary system. Much of the system has been altered to resemble a more legalistic approach, an approach which is seen as necessary under the newfound pressures of professionalism. A discussion on the disciplinary structure and processes can be found in Section 5.3. But, if we are to understand the disciplinary mechanisms of the RFU, first we must explain their disciplinary objectives, as this reveals an insight into the context of each element of the system.

In their *Regulation 19* (s. 19.1.5), the RFU provide a clear overriding objective for the discipline of the game:

[T]o maintain and promote fair play, protect the health and welfare of players (and others involved in the game), ensure that acts of foul play and misconduct (on and off the field of play) are dealt with expeditiously and fairly by independent means within the game and that the image and reputation of the game is not adversely affected. Furthermore, to achieve consistency in the way in which discipline is administered and uniformity in the manner in which the assessment of seriousness of foul play is conducted.

Upon observation, it is clear that the RFU have very broad, yet basic, disciplinary goals. Put simply, the RFU are looking to create an environment where fair play and player welfare is protected, and the system for punishing acts of foul play are dealt with fairly and consistently. The notion of the system being equitable plays a huge part, so much so that the RFU state that “[d]isciplinary hearings shall be conducted in a fair and just manner and in accordance with the fundamental principles of natural justice” (Regulation 19, s. 19.1.6), continuing to suggest that “in the interests of achieving a just and fair result, procedural and technical considerations shall take second place to the overriding objective of being just and fair” (Regulation 19, s. 19.1.6). Here displays the biggest difference between the disciplinary structure of the RFU and the legal structure of the criminal law. The RFU look first and foremost to the fair regulation of the game, not allowing “findings or decisions be invalidated by reason of any defect, irregularity, omission or technicality, unless ... [it] raises a material doubt as to the reliability of the proceedings” (Regulation 19, 19.1.6). Indeed, the legal system is the forefront of justice, and obviously has the notion of just litigation at heart. However, many of the processes within the legal system are heavily influenced by technicalities, meaning sometimes justice cannot always be served. This disparity between the two is acknowledged by the RFU since they advocate that disciplinary hearings must “recognise that neither a disciplinary panel nor an appeal panel is a court of law” (Regulation 19, s. 19.1.6). This is also perhaps best encapsulated in the contrasting

levels of guilt between the two. The law requires that it be proven beyond reasonable doubt that the act occurred, and for some offences, that the individual intended to cause the outcome of the act. Whereas the RFU only demands that the act occurred on the “balance of probabilities” (Regulation 19, 19.5.6), thus, making it much easier to find culpability.

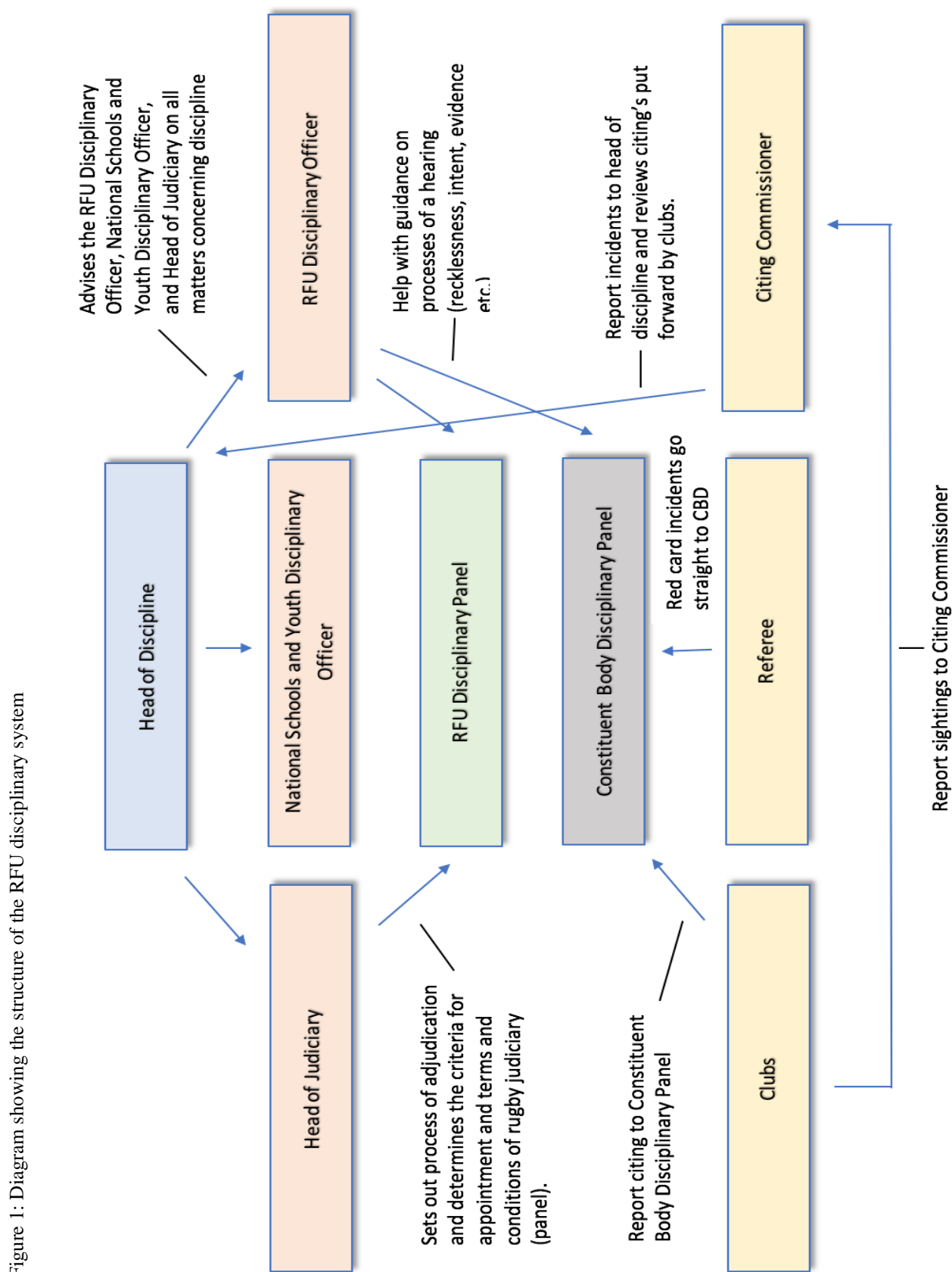
5.2.1. Ensuring that Disciplinary Objectives are Met

In order to achieve the just and consistent disciplinary system which the RFU defines in their objectives, they incorporate a strict set of provisions whereby all RFU disciplinary members and constituent body members must abide. Such provisions are clearly set out in *Regulation 19*. The following discussion will examine the structure of RFU discipline, outlining the process for nominating a player for disciplinary hearings (known as citing in the rugby sphere). Furthermore, the process for sanctioning players will be explored, making particular reference to the low, mid and top range system adopted by the RFU.

5.3. Structure of RFU Disciplinary System

Before the structure of the disciplinary system is explored, it should be noted that all the information provided in the following discussion, excluding figure 1, can be found in the RFU document *Regulation 19* and its relevant appendices. The RFU disciplinary system consists of numerous individuals under a hierarchical umbrella. The structure of individuals and their web of responsibilities can be found in Figure 1. As can be seen from the diagram, the web of responsibilities is very complex, with each individual having multiple chains of interdependency. Nonetheless, it is clear that the RFU Head of Discipline is the chief stakeholder in the process. Currently, the RFU Head of Discipline is former England international rugby player David Barnes, who took over the role in July 2017. Barnes’ role is to oversee the whole disciplinary process, offering guidance to the RFU Disciplinary

Officer, National Schools and Youth Development (NSYD) Officer and the Head of



Judiciary in all disciplinary matters. Moreover, Barnes also has the power to perform hearings in relation to misconduct from anyone involved with the RFU, such as council members, referees, clubs and players.

The RFU Head of Judiciary, currently occupied by Philip Evans QC, is responsible for providing an independent process of adjudication. The Head of Judiciary “determines the criteria for appointment and terms and conditions of the independent members of the rugby judiciary” (Regulation 19, s. 19.1.16). In other words, the Head of Judiciary has the responsibility of ensuring that an independent and appropriate panel is appointed for disciplinary and appeal hearings. For instance Philip Evans QC will ensure that “[n]o person with an interest in the proceeding shall ... sit on a disciplinary panel” (Regulation 19, 19.2.4).

The NSYD Officer heads up all disciplinary proceedings involving misconduct in the youth or school sector. Ian Skillen JP is currently in the role, and will offer guidance to constituent body disciplinary panels on any cases involving youth or schools. Skillen will also regularly meet with the Head of Discipline to discuss the direction of youth and schools discipline within the RFU. The RFU Disciplinary Officer will offer guidance to all panels on the procedures of a hearing. Such guidance has been documented in *Regulation 19 Appendix 5*, and mainly focuses on delineating the entry point of a hearing. As such, whoever sits in the role of RFU Disciplinary Officer requires experience in areas of the law, particularly the *mens rea* of establishing accidental, reckless or intentional conduct, while also understanding the procedures of providing and weighing the impact of evidence.

At the lower end of the system are the clubs, referees and disciplinary panels who cite and punish misconduct on the pitch. When there has been a form of misconduct, the first point of regulation is the referee. The referee will make an immediate decision as to the severity and as such the punishment of the act, awarding either a penalty, yellow card (ten

minute suspension from the game) or red card (permanent suspension from the game). Those incidents where a red card is given will go directly to a hearing in front of a panel. If the game in which the incident occurred is in the National Leagues 2 or the Women's Premier 15s and above, or serious injury resulted from the act, or the incident is being investigated by the police, then the hearing will be headed by an RFU Disciplinary panel. All hearings outside of the parameters mentioned will be dealt with by a Constituent Body Disciplinary Panel instead.

A citing may occur "where there is an allegation that a player committed an act of foul play but was not awarded a red card for the act" (Regulation 19, Appendix 4.2). For Levels 3-12, Premiership A League and all Women's Matches (save for Women's Premier 15s 1st XV), all citing must be made to the relevant Constituent Body. Here, the club must show that either the match official made the wrong decision, or if the incident was not seen by a match official, "it must be shown that had the match official seen the act, a red card would have been awarded" (Regulation 19, Appendix 4.4.5). If either of these can be proven on the balance of probabilities, then a Constituent Body Disciplinary Panel will go ahead with the hearing. In contrast, for Levels 1 and 2, and Women's Premier 15s (1st XV), a club participating in a match can refer any incidents they deem worthy of revaluation to the citing commissioner within 4 hours following the conclusion of the match (8 hours for Championship and Women's Premier 15s). Before bringing a citing complaint, the citing commissioner must be "satisfied that in his/her opinion the act of foul play merited the award of a red card" (Regulation 19, Appendix 4.9). If the citing commissioner warrants the act of foul play worthy, he/she will then refer the incident to the RFU Head of Discipline, where it can then be dealt with by the relevant RFU Disciplinary Panel.

5. 4. Sanction Entry Points

The RFU adopt an entry point system when delineating the sanctions for misconduct on the pitch. A complete guide to the minimum and maximum length of suspension for all forms of foul play is provided in the *RFU Regulation 19 Appendix 2*. However, it is beyond the scope of the current discussion to examine all forms of misconduct, as such the following section will explain how the entry point system works, and the factors impacting the length of suspensions using reference and examples from *Regulation 19 Appendix 2*.

Table 2 is an excerpt taken from *Regulation 19 Appendix 2* of the entry points for conduct contrary to law 9.11 and 9.12 of World Rugby's *Laws of the Game* (this is not an exhaustive list of acts discordant to law 9.12, it is only an extract from the larger document). It is clear from the table that each act has a lower end, mid-range and top end entry point, with the minimum starting suspension increasing with each range. A disciplinary panel shall undertake an assessment of the seriousness of the player's conduct which constitutes the offending and shall categorise the offence as being at the lower end, mid-range or top end of the scale of seriousness in order to identify the appropriate entry point for consideration of a particular incident(s) of foul play. *Regulation 19* (s. 19.11.8) provides an extensive list of features to which a disciplinary panel should pay reference to when making their decision. Such a list includes, but is not limited to, the *mens rea* of the act, the nature and manner of the offence (body parts used – studs, fists etc, area of impact on the victim – head, neck etc.), whether it was retaliation and the timing of such, whether it was self-defence, extent of injury caused, and impact of the offence on the match.

Law No	Description	Entry Point based on Scale of Seriousness of the Player's conduct, which constitutes the offending. Lower End (LE), Mid-Range (MR), Top End (TE).	Maximum Entry Point
9.11	Players must not do anything that is reckless or dangerous to others	LE – 2 weeks MR – 4 weeks TE – 8+ weeks	52 week
9.12	A player must not physically abuse anyone. Physical abuse includes, but is not limited to:		
	Biting	LE – 12 weeks MR – 18 weeks TE – 24+ weeks	208 weeks
	Punching	LE – 2 weeks MR – 4 week TE – 8+ weeks A punch to the head shall result in at least a mid-range entry point sanction	52 weeks
	Contact with Eye(s) ¹	LE – 12 weeks MR – 18 weeks TE – 24+ weeks	208 weeks
	Contact with Eye Area ²	LE – 4 weeks MR – 8 weeks TE – 12+ weeks	52 weeks
	Striking with hand or arm (including stiff-arm tackle)	LE – 2 weeks MR – 4 weeks TE – 8+ weeks A strike to the head shall result in at least a mid-range entry point sanction	52 weeks
	Striking with the elbow	LE – 2 weeks MR – 6 weeks TE – 10+ weeks A strike to the head shall result in at least a mid-range entry point sanction	52 weeks
<i>1 & 2 The “eye” involves all tissues including the eye lids within and covering the orbital cavity and the “eye area” is anywhere in close proximity to the eye.</i>			

Table 3: Sanctioning table for Laws 9.11 and 9.12. Source: The RFU Disciplinary document *Regulation 19 Appendix 2*

Having identified the applicable entry point for consideration of a particular incident, the disciplinary panel will continue to identify any relevant off-field aggravating factors and determine what additional period of suspension, if any, above the applicable entry point for the offence should apply to the case in question. Aggravating factors will include the player's status as an offender of the laws of the game, the need for a deterrent to combat a pattern of offending, and any other off-field aggravating factors which the panel see relevant. Thereafter, a disciplinary panel will identify all relevant off-field mitigating factors and determine if there are grounds for reducing the period of suspension and the extent, if at all, by which the period of suspension should be reduced. Such mitigating factors may include the presence and timing of admitting culpability by the offender, the offender's disciplinary record, the youth and inexperience of the offender, and the conduct of the offender at the hearing.

It should be noted that, in alliance with s. 19.11.12, disciplinary panel cannot apply a greater reduction than 50% of the relevant entry point. In assessing the reduction applicable for mitigating factors, the disciplinary panel shall start at 0% reduction and apply the amount, if any, to be allowed as mitigation up to the maximum 50% reduction. Finally, excluding those actions constituting a yellow card, in cases where a player's actions compose mid-range or top end offending, a disciplinary panel may impose any period of suspension including a suspension for life if the offence had the potential to result, or did in fact result, in serious consequences to the health of the victim. Nonetheless, panel members are advised to acknowledge the maximum entry point set out in *Regulation 19 Appendix 2* as guidance when making their decision.

5.5. Summary

The development of rugby union from its amateur roots, into the cultivated hands of professionalism, has caused not only the rule system of the sport, but also the disciplinary structure of its bodies to develop in accordance. As Figure 1 displays, the RFU has developed a particularly sophisticated disciplinary structure, and one which aims to create an environment where fair play and player welfare is protected, and the system for punishing acts of foul play are dealt with fairly and consistently. In establishing such a system, RFU discipline has had to adopt legalistic characteristics, whereby evidence and independent panels decide the fate of transgressors. Yet, the RFU are keen to declare that “neither a disciplinary panel nor an appeal panel is a court of law” (Regulation 19, s. 19.1.6), which is perhaps best encapsulated in the contrasting levels of guilt between the two. The law requires ‘beyond reasonable doubt’, whereas the RFU only demands the “balance of probabilities” (Regulation 19, 19.5.6).

In an attempt to follow through on their disciplinary objectives, the RFU adopted World Rugby’s entry point method, whereby each act of transgression is characterised and given a lower, mid and top level of sanction (RFU Regulation 19, Appendix). This is dependent of course on the circumstances of the foul play, nevertheless, it provides a clearer and more stringent system for regulating the game. When considering whether the RFU are currently meeting their objectives, particularly that of consistency, an analysis of four cases during the 2017-18 season can be found in Chapter 8. Here, details of both the sanction afforded, and the facts attributing to such, will be examined.

CHAPTER 7

METHODOLOGY

7.1. Design

Nine semi-structured interviews and an online questionnaire were used in the study to gain an insight into the perspectives of the participants in relation to the regulation of on-field sport ‘violence’. Forcese and Richer (1973: 176) suggest a combination of both devices “would embody a richness of data not possible with one technique alone”. Both semi-structured interviews and questionnaires rely on language and the interpretation of its meaning, as such, they “tend to involve close human involvement and a creative process of theory development” (Walliman, 2006: 37).

The present study could be considered, what Guba and Lincoln (1989) refer to as, a fourth-generation evaluation, insofar as the study aims to evaluate the effectiveness of the current regulatory procedures for on-field ‘violence’ adopted by the RFU. Moreover, it is hoped that the result of such an evaluation will offer areas for improvement, and thus move the sport forward. By focusing inquiries on the RFU, CPS of England and Wales, and the Laws of England and Wales, one could suggest that the external validity of the study will suffer. However, it is not the purpose of this thesis to generalise to other national bodies’ regulatory practices or to any other sports beyond that analysed in this study. Triangulation of data sources was achieved by comparing the perspectives of current professional players, premiership referees, legal professionals and current RFU disciplinary panel members to reveal underlying themes. Triangulation helps “map out, or explain more fully, the richness and complexity of human behaviour by studying it from more than one standpoint” (Cohen et al., 2007: 141).

All RFU disciplinary panel members, referee's and legal professionals were contacted via an email which included an explanation of the study and why they have been chosen as a candidate, and a question of whether they would happily be involved. Finally, a link to the online questionnaire was sent to two current premiership rugby clubs who then forwarded it to players within the first team.

7.1.1. Interviews

Interviews were chosen as they centre around a goal which aims "to expose differences, contradictions and, in short, the complexity of unique experiences" (Bennett, 2002: 151). Emotionalists consider interviews to elicit authentic accounts of subjective experience, with Miller and Glassner (2016: 133) suggesting they "provide us with a means for exploring the points of view of our research subjects, while granting these points of view the culturally honoured status of society". Orbuch (1997: 455) takes this further, proposing interviews offer a means of determining "culturally embedded normative explanations [of events and behaviours, because they] represent ways in which people organise views of themselves, of others, and of their social world".

The process of interviewing - including collecting information, evoking stories, learning about meanings, experiences, relationships and emotions – reveals information that may not be evident from observation alone. Pugh (2013: 42) agrees, suggesting interviewing "allows ... access to an emotional landscape that brings a broader, social dimension to individual motivation". However, I would argue that interviews do much more than simply provide information on subjective and cultural meanings. Analysis of language offers two convoluted findings: evidence of the contexts and situations of the phenomenon under investigation, and the cultural frames individuals adopt to understand such experiences. When combined, they can offer valuable theoretical understandings. Personal accounts of

experiences are imperative in social research as language shapes meaning, but also “permits intersubjectivity and the ability of wilful persons to create and maintain meaningful words” (Miller and Glassner, 2016: 135).

Semi-structured interviews were selected over open-ended, as undoubtedly, the direction an interview will follow – in relation to its structure and guidance - will be heavily influenced by the research itself and previous research on the topic area. As such, using the research to direct interaction between interviewer and interviewee meant that unique and appropriate areas could be discussed, while also maintaining the possibility for those accounts not directly influenced by research to be revealed (Lamont and Swidler, 2014).

7.1.2. Questionnaires

An online questionnaire was created and sent to two current premiership rugby teams for players to complete. Indeed, questionnaires are cost-effective and swift, while also having the ability to reach a large sample, possibly over a broad geographical area in a short period of time (Denzin and Lincoln, 1994). However, they also elicit responses which are unaffected by interviewer effects. David and Sutton (2011: 243) suggest that during an interview (or any conversational interaction) “[t]he responses given by the interviewee can be affected by the presence of the interviewer, who influences the replies made by their wording of questions, their tone of voice, their mannerisms or their general characteristics”.

The questionnaire adopted an online format for three primary reasons. Firstly, the questionnaire could be distributed to a large number very quickly – by simply sending a link to participants. Secondly, parameters of the questionnaire could be set using online tools. For instance, in the present study, once the participant had started the questionnaire, they were required to complete every question before they could submit, meaning it was ensured

that there would be some form of response to every question. Thirdly, the researcher can be notified once a respondent has completed the survey, to which the researcher can then access the results instantly; subsequently speeding up the analysis process.

The questionnaire consisted of twenty-one open ended questions, in which the respondent could write as much as they desired in response to each question. Furthermore, the questionnaire was divided into three sections, all representing the exploration of a different topic within the study. The first section, headlined ‘Dangerous Play in Rugby’, focused its questions around the players’ definitions and experiences with dangerous play. It was hoped that through answering such questions players would reveal how dangerous play is viewed from the eyes of the players, and how prominent it may be as a facet of their culture. The second section had the ‘Regulation of Dangerous Play’ as its focal. This section examined the players’ perceptions of the current regulatory procedures adopted by the RFU, while also exposing their views on how increased criminalisation might affect the game. Finally, the third sector, titled ‘Legitimate Sport’, hoped to uncover the players thoughts on what they consider to be acceptable ‘unwritten conventions’ (Dunning and Sheard, 2005: 29) in the game of rugby. Through answering this, it may help make the boundaries demarcating acceptable and unacceptable, and thus legal and illegal, clearer.

7.1.3. Sampling

The present study adopted a purposive sampling method (Bryman, 2016). Purposive sampling is non-probability form of sampling, whereby the goal is to sample participants strategically, so that those sampled are both relevant and valuable to the research questions being used. Bryman (2016: 408) suggests that in purposive sampling, “sites, such as organisations, and people within sites are selected because of their relevance to the research questions”. The study took a priori purposive sampling or as Bryman (2016: 410) calls it, a

“non-sequential approach”, in that the criteria for participant selection was established prior to the commencement of the research. Hood (2007: 152) also refers to purposive sampling in her “generic inductive qualitative model”, insofar as she suggests it is relatively open-ended, emphasising the generation of theories and concepts, yet does not involve the iterative tone of grounded theory.

Adopting a non-probability sampling method over that of a probability sample can of course affect external validity (David and Sutton, 2011). By choosing a sample which is not representative of general population, the results of the study cannot be assumed generalised across the wider population. However, it is not the purpose of the present study to generalise its results to that of other nations, governing bodies, or other sports. Nor is it focused on making assumptions about the views of the wider population of legal professionals, referees, players and disciplinary panel members based on the opinions of those involved in the study. Sjoberg and Nett (1968: 152) justify the use of non-probability sampling techniques by suggesting the “value system and power structure of both the society within which the researcher functions and the special universe he is studying” can make certain units within the population more desirable for research than others. In other words, the opinions of those in the present study offer more value to answering the research question than those who might be incorporated in a probability sample.

7.2. Participants

A total of twenty participants were used in the study, nine of which were interviewed, while the other eleven were current professional players who completed the online questionnaire. Out of the nine who were interviewed, three were legal professionals, two were currently referees in the Aviva Premiership, and four were presently RFU disciplinary panel members. It should be noted that some of the participants were involved in more than one category. For instance, there were numerous legal professionals who were also involved in

the disciplinary system of the RFU. As such, these individuals were able to provide a unique viewpoint from both perspectives.

7.2.1. Justification

Four legal professionals, all of whom were mature in the criminal side of the law, were approached and interviewed for the study due to their personal and long-lasting experience with how the criminal law is applied to ‘violence’ cases, in particular those cases occurring during the course of play in sport. It was thought that their detailed knowledge and experience would prove valuable when considering the issues and most effective ways of attaching criminal liability to egregious cases of ‘violence’ in rugby. Additionally, referees hold a particularly intriguing insight into the said study, as they are the primary officiators during matches and as such implement disciplinary measures during the course of a game. Therefore, two referees currently officiating games in the Aviva Premiership offered their opinion on the RFU’s disciplinary methods, and how they believe, if needed, a relationship might form between the RFU and CPS. Similarly, the four members of the RFU disciplinary panel members are at the forefront of regulation in English rugby union. They offer a perspective from the viewpoint of those who decide the acceptability of an act, the punishment, and how far the criminal law gets involved with ‘violence’ cases.

It was decided that the outlook of professional players would also prove valuable to the study. Players are directly involved in the committing and punishing of violent acts, and as such will be the most affected by any changes to the current disciplinary model. Therefore, players would offer a bottom up viewpoint, a perspective which lies concealed when looking from the top up alone.

7.3. Analysis

The analysis process was conducted in a two-phase procedure. The first centres around transcription and idiographic profiling, while the second has the generation of themes and concepts at its core. Both phases are discussed below.

7.3.1. Phase One

The audio recorded interviews with all twelve participants were transcribed verbatim by the researcher. Each transcript was then read repeatedly, with the audio recording playing concurrently so that the researcher could gain a clearer sense of the meaning and emotion portrayed by the participants. During the reading process, potential codes and units were noted, alongside the researcher's initial thoughts about the interview in regard to the substance and conducting of the interview itself. As a result of the transcription process, multiple page idiographic profiles - which summarised the general theme and direction of the interview – were created for each participant. Such profiles provided a holistic appraisal of the interview, ensuring that during the coding process the overall meanings conveyed by each participant was not lost.

7.3.2. Phase Two

The second phase of data analysis incorporated thematic analysis. In particular, Braun and Clarke's (2006) guiding principles were considered, while also acknowledging insights from Attride-Stirling (2001) and Gioia et al., (2012). Braun and Clarke (2006) describe thematic analysis as one of the core methods adopted by qualitative researchers, due to its flexibility across theoretical approaches. Thematic analysis boasts further elasticity as it can be used both inductively and deductively. Patton (1980: 306) suggests that in inductive analysis, "the patterns, themes, and categories of analysis come from the data; they emerge out of the data rather than being imposed on them prior to data

collection and analysis”. Because the study is both exploratory and analytical in nature - insofar as it looks to give a voice to the participants views on the regulation of ‘violence’ in rugby, while also using such views to analyse existing concepts from the literature – the study utilised a mix of both inductive and deductive analysis. As such, the coding process will encompass an amalgam of Strauss and Corbin’s (1990) and Charmaz’s (2006) approach to coding. Walliman (2006: 133) describes codes as: “labels or tags used to allocate units of meaning to the collected data ... and provides a first step in conceptualisation”.

The coding process generally followed three stages, with each stage adopting a different form of coding to sift through the data effectively. Firstly, Strauss and Corbin’s (1990: 61) open coding was used as a process of “breaking down, examining, comparing conceptualising and categorising data”. Bryman (2016: 574) furthers, suggesting that during the open code stage, those codes identified as “concepts” are grouped into categories in preparation for further grouping in later stages. Focused coding (Charmaz, 2006: 57-58) was then implemented, to which those concepts identified as being the most dominant during the open coding stage were categorised into themes which “make the most analytical sense” and group the data both “incisively and completely”. Finally, theoretical coding was applied. Theoretical codes, as Charmaz (2006: 63) proposes, “lend form to the focused codes” by conceptualising the links between dominant themes, moving the “analytical story [of the data] in a theoretical direction”. Throughout this stage, external literature was consulted in case it could enhance the story being developed. Additionally, throughout the coding process, what Strauss (1987) calls ‘in vivo codes’ were used. This refers to the use of the subjects’ natural language in the creation of codes, rather than the researcher using their own terminology and creating ‘socially constructed codes’.

Once themes had been established, they were all reviewed to ensure that they could be substantiated based on the data contained. This meant that the researcher checked whether the codes within each theme were well supported and consistent based on the meaning units of each code. Furthermore, an effort was made to ensure that themes were independent, insofar as they could no longer be coupled with other themes. This confirmed that each theme captured its own portrayal of the data. It should be noted that throughout the analysis process the idiographic profiles created in phase one were repeatedly consulted. This was to ensure that the codes reflected the true meaning behind the participants views

7.4. Ethics

When undertaking sociological research, or any research for that matter, Singleton and Straits (1999) emphasise two areas taking the focal of ethical concern: the ethics of treatment of participants and the ethics of data collection and analysis. The former refers to the appropriate treatment of participants, in that “[b]asic ethical principles in our cultural and legal tradition demand that research participants be treated with respect and protected from harm” (Singleton and Straits, 1999: 514). Whilst the latter demands that researchers are honest in their analysis and observations; placing the pursuit of knowledge and understanding above personal gain or the promotion of a particular philosophy or ideology” (Singleton and Straits, 1999: 513). The ensuing sections will focus on the ethical concerns of the study in reference to the two factors outlined above.

7.4.1. The Ethics of Treatment of Participants

Harm

Throughout the study, the British Sociological Association’s (BSA) *Statement of Ethical Practice* (2017) was consulted. The overarching ideology of the BSA statement was that indeed sociologists, similarly to other researchers, commit themselves to the advancement

of knowledge, however such a goal, in itself, does not grant an entitlement to override the rights of others.

The possibility for inflicting harm – physically, psychologically and socially - should be considered in all studies. Singleton and Straits (1999: 515) compare this to the Hippocratic oath taken by physicians, suggesting that researchers should “abstain from whatever is deleterious”. At times, research can incorporate sensitive topics, particularly when exploring new areas, insofar as the researcher may probe deeper to gain unique underlying perspectives. In light of this, sensitive topics, or the potential for, were acknowledged and taken into consideration when creating questions prior to the commencement of the study. Moreover, all participants were made aware of the topic under exploration through a participant information sheet, whilst a copy of the interview schedule was made available to them for observation prior to the study. It was hoped that by doing so, the researcher would be made aware of topics or questions proving noxious for the participants.

Consent

Despite in covert ethnographic research studies, “participation in sociological research should be based on the freely given informed consent of those studied” (BSA, 2017: 5). As such, the BSA’s (2017: 5) recommendations of explaining “in appropriate detail, and in terms meaningful to the participants, what the research is about, who is undertaking and financing it, why it is being undertaken, and how it is to be distributed and used” will be adopted. Therefore, informed consent was gathered from all participants. Furthermore, a participant information sheet, providing full details of the study, was distributed to all participants. Of course, all participants were made aware that they could withdraw from the

study at any time without reason, and that any information provided by the subjects could be destroyed at their request.

Privacy

Singleton and Straits (1999: 522) refer back to the Hippocratic oath, suggesting researchers should follow that “[w]hatever ... I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge as reckoning that all such should be kept secret”. Following on from this, it was ensured that Ruebhausen and Brim’s (1996: 432), right to privacy was adopted in the present study. Such a right involves:

The freedom of the individual to pick and choose for themselves the time and circumstances under which, and the extent to which, their attitudes, beliefs, behaviours and opinions are to be shared with, or withheld from others

In many circumstances, and particularly in the present study, the issue of privacy is invariably linked to issues of anonymity and confidentiality (Bryman, 2008). Indeed, it is vital that participants have the option to be promised anonymity (Sarantakos, 2005). However, due to the particular cachet of those involved in the study, and the potential weight behind their views, all those being interviewed were asked if their names could be included in the study. Of course, if anonymity was desired by a participant, then a pseudonym was used as a point for reference throughout the thesis. In regard to the professional players approached in the online questionnaire, no names or potentially revealing information was asked for amidst the questions. Therefore, replacement numbers (such as Player 1) will be adopted throughout the duration of the study.

Data Storage and Archiving

All interviews were audio recorded for transcription at a later date, after which recordings were destroyed. This information was provided to the participants through the participant

information sheet. Furthermore, participants were asked to consent to the audio recording of interviews via an informed consent form. If consent was not granted, recording of the interview through note taking would then be proposed as an alternative. Both transcriptions of interviews and questionnaire responses were stored on a password protected computer, as recommended by the BSA (2017), both of which were destroyed once analysis of data had been completed.

The Ethics of Data Collection and Analysis

The ethics of data collection and analysis was referred to as early as 1977 by Cournand, who suggested that researchers should be “unremittingly honest” by avoiding “the undisciplined introduction of subjective elements into their perceptions” whilst also preventing “their desires and aversions from penetrating their observations of the phenomena that they study and their analysis of these observations” (Cournand, 1977: 700). Put simply, Cournand (1977) is referring to the significance for researchers to be honest in their recording and analysis of results; not letting personal opinion influence the outcome of the study. Thus, in alignment with this, the completed thesis was made available to the participants to ensure that all quotes, ideas, and themes generated from the research is that of the participants.

CHAPTER 8

DISCUSSION OF RESULTS

8.1. Overview of Results

As mentioned in the previous chapter, thematic analysis was performed on the views of nine interviewees and eleven individuals who completed an online questionnaire to expose underlying themes within the data. A mixture of inductive and deductive analysis (Patton, 1980) revealed four major themes. These were: 1) dangerous play is part of the game; 2) the criminal law has a role, but the RFU may be more suited to regulate; 3) disciplinary sanctions and cards are effective but inconsistent; and, 4) establishing a formal link between the law and the RFU could be the answer.

The data produced displayed inconsistencies which would be expected with triangulation of subjects. Such inconsistencies should not be viewed as a weakness, as diversity in opinion allows one to uncover deeper meaning from the data (Cohen et al., 2007). In summary, the opinion which regarded interference from the law as inessential and undesirable was pervasive among participants. Yet, interestingly, the professional players seemed to have more recognition of the need for legal intervention than the referees, legal professionals and disciplinary panel members. Explanations of such a trend may come in the form of ‘unwritten conventions’ (Dunning and Sheard, 2005), insofar as the players may have a deeper understanding of what is regarded as acceptable by those playing rugby, and as such, can acknowledge a point to which the RFU fails to offer suitable castigation.

Each key theme, and how they can be related to the literature is discussed below. It should be noted that components of certain themes were unique to the study, meaning there was little or no previous academic research on the topic. Thus, reference to literature was limited, and so discussion focused on the views of participants and how these might be

developed. For the purpose of confidentiality, when referring the opinion of a participant, they will be referred to by their role in accordance to the study (e.g. legal professional 1).

8.2. Dangerous Play Part of the Game

The intrinsic physicality and dangers in rugby union are well documented and universally acknowledged (Murray et al., 2014). World Rugby encapsulated its recognition of such dangers in its foreword to the 2015 edition of World Rugby's (2015:3) *Laws of the Game*: "Rugby Union is a sport which involves physical contact. Any sport involving physical contact has inherent dangers". Moreover, in *Brown*, the House of Lords attempt to dissociate the violent conduct in sport to that of sado-masochism, proposing that in contact sport "any infliction of injury is merely incidental to the purpose of the main activity". This regard for innate 'violence' in rugby is reiterated on numerous occasions by participants. One of the Legal Professionals interviewed discussed how physicality and dangerous play is part of the game when asked about the implicitly of 'violence' in rugby:

I think it is an inevitable part of the sport. I say that because when you have a gravely physical contest that is rugby union, it is inevitable that with such ferocity of contact that you will end up in repeated situations of what is dangerous play. (Legal Professional 1)

Another participant, this time an RFU disciplinary panel member, reinforced the notion of a naturally dangerous sport:

[I]n any contact sport there are dangers of getting involved, and you know somebody just needs to tackle someone slightly wrong and it's dangerous. But I think it is inherent in the actual game. (Panel Member 1)

These two statements seem to be reflections of the overall mind set of the participants, who also displayed similar opinions towards the acceptability of dangerous play in sport, suggesting it to be inherent to the nature of the game. Yet, one player went further,

suggesting that “coaches and fellow players want you to be physical, and sometimes if that means playing a bit dangerously, then it is just part of the game”. This statement not only reaffirms the acceptance of dangerous play, but also reinforces the Marxist ideas discussed in Chapter 4. The desire for, and encouragement of, physicality, and the acceptance of its by-products - in this instance dangerous play - by coaches brings us back to the notion that players are simply a commodity; a tool in the coach’s armory. Here, the wellbeing of a player seems to be secondary to the success of the team. Moreover, although no participants directly referred to such Marxist views as having an impact on their view of dangerous play, it could be said that if the coaches are willing to accept the potential repercussions of physicality, then the players are too, as the coaches, being in charge of who plays, are directly in control of the success of their careers. Such an assumption would not only explain why so many players referred to dangerous play as being simply part of the game but would also reflect Mead’s (1934) and Blumer’s (1969) concept of symbolic interactionism. According to Mead and Blumer, players would attach meaning to their coach’s viewpoint, a meaning which in this case would refer to increased physicality, and a disregard for its by-products, as a vehicle to success.

Despite the demonstration of Marxist and symbolic interactionist ideas, players were also quick to reassure that modern rugby union is a much less ‘violent’ game than it was in the past. Many players pointed towards “[n]ew and improved laws and enforcement” that have “increased the visibility and punishing of foul play”. Whilst others referenced how “athletes are always getting bigger, stronger and faster, and therefore there are more bigger collisions”. This viewpoint coincides with evidence suggesting that professionalism instigated the development of players physically and tactically (Duthie et al., 2003; and Murray et al., 2013). This sentiment, that the sport is becoming increasingly stringent on dangerous play, may seem at first glance to be antithetical to the Marxist interpretations

discussed previously. Yet, when considering the ideas of Norbert Elias' (1969) discussed in Chapter 4, namely the sportisation of games, it is unsurprising that the civilising trend of society is starting to seep into contact sports. Nevertheless, a more sophisticated rule structure surrounding dangerous play does not necessarily mean players are not treated as commodities. Rather than be pushed to display dangerous play or 'violence', players seem to be encouraged to be as physical as possible. Here, the message is still the same, that players' bodies are devices used by agents to achieve success.

Numerous scholars acknowledge the acceptance of a certain level of dangerous play, however the limits of such acceptance is of considerable debate. The Michigan Law Review Association (MLRA, 1976) argue that the rules of the game offer a simple delineation of consent, whereby all infractions of such rules can be labelled as 'liable' in the criminal court. Indeed, this would offer simplicity, yet, Livings (2006: 497) reminds us that "the courts have been clear that transgression of the rules will not automatically attract criminal liability, and neither will it necessarily preclude the availability of the defense consent". This has led some to look beyond the official rules of a sport, rather referring to the 'unwritten conventions' (Dunning and Sheard, 2005) for directions as to what is acceptable in a sport.

As mentioned in Chapter 6, the unwritten conventions constitute parameters that are not easily understood by reference to the rules alone, but rather, include the non-formal, accepted standard to which those involved adopt and adhere. These unwritten conventions have been the center for much discussion in both court rooms and academic discourse. As early as the late nineteenth century case of *Bradshaw* - where Lord Justice Bramwell made reference to "the rules and practice of a game" (83) as the delineating constructs of consent – the courts, in at least embryonic form, started to develop some notion of these unwritten conventions as extending to play beyond the formal rules of a sport, and into its playing

culture. The extent of these unwritten conventions is of particular importance, as this could be seen as the point to which the law can intervene. One referee explained how they view the presence of intention as being the differentiating factor:

I think the difference would be if a player did it deliberately rather than if he does it recklessly, that would be the big difference in my view. If someone did something intentionally, and I can only think of a couple off the top of my head, that is where people would expect a heftier sanction. (Referee 1)

The players also saw intention as holding significant value when delineating acceptability, with players referring to “deliberately trying to harm someone”, and “any action done with the intent to harm another player” as being points to which an act is no longer tolerable. Yet, some players also associated an amalgam of the level of injury and the presence of intention with acceptability. One player stated that if “[a] player is deliberately trying to injure another player and has damaged their quality of life” it is unacceptable. Another noted that those acts “where a deliberate action is taken with intent by a player [and] has resulted in significant injury (life changing injuries) for another player” should be considered by the courts. The ideas expressed in these answers to the questionnaire, reinforce the findings of James (2001), who concluded a universal agreement across sports, insofar as the line of acceptability is breached when serious injury is inflicted deliberately. Indeed, this is not an objective standard whereby criminal liability can be clearly established. Yet, it is a ubiquitous perspective which reflects the opinions of those immersed in the playing culture and can be of assistance when deciding criminal proceedings.

In summary, dangerous play was thought of by many as part of the game; a mere appendage of the fierce physicality brought to existence with the growth of professionalism. The apparent encouragement of such physicality by coaches, and the disregard for its repercussions, reflected Marxist ideas, whereby the players’ bodies seemed to be merely a tool for the coach’s success. The fact that the players consistently referred to dangerous play

as simply part of the game, suggests that they also buy into this premise, an assumption which would be explained by Mead's (1934) and Blumer's (1969) ideas on symbolic interactionism. Here, mainly due to the coach's encouragement, players would view physicality, and the accompanying by-products (e.g. dangerous play), as a vehicle towards a lucrative sporting career, and thus a normal facet of the sport. Despite the appearance of Marxist values, players made it clear that the sportisation (Elias, 1971) of rugby union is still on the rise, as new rules are incorporated to tackle dangerous and foul play. Nevertheless, a more sophisticated rule structure surrounding dangerous play does not necessarily mean players are not treated as commodities. Rather than be pushed to display dangerous play or 'violence', players seem to be encouraged to be as physical as possible. Here, the message is still the same, that players' bodies are devices used by agents to achieve success.

Participants contradicted the idealistic and outdated view that the breadth of consent should be coterminous with and defined stringently by the rules of the given sport (MLRA, 1976). In contrast, participants reiterate Dunning and Sheard's (2005: 29) concept of 'unwritten conventions', whereby those not only participating in rugby union, but also involved through alternative means such as coaches, managers and media representatives, accept and consent to a level of 'violence' beyond that permitted by the rules. The limits of such unwritten conventions were found in the presence of intention and serious injury. Here, participants repeatedly referred to how intent to cause harm, or serious injury, breached the lines of acceptability. The occurrence of severe injury is secondary to the presence of intent, but, when found together, the act reaches the upmost threshold of unacceptability.

The following section will pay focus to how cards and bans were seen as effective deterrents, but are used inconsistently by the RFU, thus negating their efficacy. The reasons for such inconsistencies were pointed towards the subjective interpretation of what

constitutes dangerous play by the referee, and similarly the subjectivity of the disciplinary panel when making their regulatory decisions.

8.3. The RFU May be More Suitable

The following section will pay focus to how cards and bans were seen as effective deterrents, but are used inconsistently by the RFU, thus negating their efficacy. The reasons for such inconsistencies were pointed towards the subjective interpretation of what constitutes dangerous play by the referee, and similarly the subjectivity of the disciplinary panel when making their regulatory decisions. The previous section discussed the overwhelming opinion that the occurrence of dangerous play was seen as adjunct to the nature of the game, insofar as those involved in playing and running the sport had a high level of acceptance for the dangerous behaviors common to the game. Participants displayed a high tolerance to dangerous behaviors not only within the rules but also beyond. Nevertheless, participants also showed a limit to such tolerance; the presence of intention, with or without the occurrence of serious injury. Thus, subjects exhibited a point to which they thought the law needed to interfere. As such, one theme which emerged in the data was the view that the courts have a role to play in regulation, however such a role is only in the most serious of cases. A referee emphasised this point:

I think there is a role to play. So, if someone goes well beyond what is acceptable. You know, I guess take it to the extreme, if someone gouges someone and blinds them, that probably takes it to different level. (Referee 1)

One legal professional considered why the courts need to have a role in regulation, paying tribute to the required omnipresence of the law:

[T]hey are the ultimate arbitrator on what is right and wrong in society, and it is right that they have some sort of supervisory jurisdiction over sport when things go beyond the realms of acceptability. (Legal Professional 2)

Another legal professional also contemplated the fact that the rugby pitch cannot act as a zone of legal exemption:

The fact is there is no difference on the pitch or off the pitch about offences of 'violence' in the criminal law. When you walk across the whitewash and go onto a pitch, you are not subject to different laws, you are subject to the same laws. And that means, if you ... [pause] ... let's start with punching and breaking somebody's nose. You are equally culpable for assault occasioning actual bodily harm, as if you did it in the street. Similarly, if you stamp on somebody and knock his eye out, that is GBH etc. So, there is no difference in law whatsoever (Legal Professional 3).

The comments of these two legal professionals were echoed in the views of the players. One player justified why they thought those actions which are deliberate need to be regulated by the courts by proposing the question: "they are completely unacceptable in every facet of life, why should it be acceptable in rugby?". Another player similarly suggested that deliberate acts which cause serious injury "have no place in the game of rugby or society". Both the responses of the legal professional and the players hold remnants of the famous line uttered by Lord Justice Bramwell in *Bradshaw*: "No rules or practice of any game whatever can make lawful that which is unlawful by the law of the land" (84). Moreover, Kuhlmann's (1975: 784) remarks seem as applicable today as they were in 1975, that "it seems fair to say that the legislature, as representatives of the people, decide what conduct shall be considered criminal. To allow a private, profit-seeking group to make such decisions is tantamount to a grant of a part of the state's jurisdiction".

The comments made by participants illustrate the preeminent opinion that there is a role for the law in rugby, however such a role is only in the most serious of cases. Participants were ardent in their assurance that the courts should only interfere in the most extreme of cases, and that all other incidents are to be handled by the RFU. The idea that it may prove more effective to keep the regulation of sporting incidents within the regulatory

domain of sporting bodies is a concept contemplated throughout academic discourse. Cohen (1990: 322) discusses how the law is not the exhaustive means for finding justice, and that the “[v]arious alternative dispute resolution methods, including civil mechanisms, game officiating, league fines and suspensions” may actually “control violent behavior in sports more effectively than the imposition of criminal liability”. Such a notion has even reached the courtroom, with the Court of Appeal in *Barnes* making it clear that the law may not always be the most effective method of dealing with incidents on the sports field:

In determining what the approach of the courts should be, the starting point is the fact that most organised sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct. As a result, in the majority of situations there is not only no need for criminal proceedings, it is undesirable that there should be any criminal proceedings (911).

The stance taken by Lord Woolf in *Barnes* and Cohen (1990), was also a ubiquitous opinion among the participants. For many, the RFU and its disciplinary procedures were more than capable of dealing with most, if not all cases on the rugby field. One legal professional made the proposition that the RFU can in fact deal a more severe punishment to a rugby player than could the result of criminal proceedings:

[A]nd in those circumstances [a fight on the pitch] most people who play rugby will suggest that it being dealt with by the disciplinary process is better than going to court. Going to court in those circumstances ends up with a fine, a financial penalty, and in the rugby sense you would be stopped from playing, which is probably worse for rugby players than paying a fine (Legal Professional 3)

The reasons for advocating the powers of the RFU disciplinary mechanisms as more effective than that of the law were diverse in direction. Yet, correlation was found in three factors: easier to find guilty and therefore deal suitable punishment using the RFU; the law is reluctant to get involved; and, using the law as a regulatory instrument creates another level of inconsistency. Each factor is discussed in turn below.

8.3.1. Ease of Establishing Culpability

As discussed in Chapter 3, the RFU and criminal law hold many similarities – such as the requirement of an independent panel of adjudicators, the demand for a decision to be made based on the available evidence – however one significant differentiator is the level of guilt required for indictment. When attempting to prosecute an individual under the law, the courts must conclude that the act occurred beyond all reasonable doubt. When establishing beyond reasonable doubt, it must be agreed that the individual met the *mens rea* and *actus rea* requirements. In other words, an individual cannot be prosecuted by simply fulfilling the *actus rea* (performing the act), it must also be proved that the individual met the *mens rea* (mindset) requirements. In contrast, the RFU demands a much lesser level of guilt. As discussed in Chapter 5, the RFU insist that an act be proved to have occurred on the balance of probabilities (Regulation 19, s. 19.5.6). Here, an RFU disciplinary panel only needs to look at the evidence and establish that it was likely that the act of foul play occurred, not that it definitely did occur. Furthermore, *mens rea* does not need to be established in order to find an individual guilty, it only determines the weight of the sanction. One of the legal professionals interviewed summed up the variant levels of guilt between the law and RFU, and how dealing with dangerous play within the RFU may prove more effective:

Now, you will have punches which break things, which are less capable of proof in the criminal crown court, because in the crown court you have to prove ... *mens rea*. So, you have to show you intentionally intended to do the act of causing the injury, and that is quite difficult in the sporting context. So, for instance, if you high tackle somebody with a swinging arm, and that arm goes across the face and smashes the nose of the opponent, that is dangerous play and it is violent play. But, it would be very difficult to prove in court that it was an act that had the mental element of it. The *mens rea* would be difficult to prove. On a rugby pitch there is no *mens rea*, you don't have to prove it. The assessment is: was it dangerous, yes or no? And, *mens rea* is only relevant to sanction, not to proof of offence. (Legal Professional 3)

In short, the RFU can more easily establish culpability in those circumstances where the mentality of the culprit is ambiguous. For many, this was a key component when considering interference from the law, with one disciplinary panel member displaying their dissent towards the police having more involvement:

No, I think you are going down a dangerous road. If clubs have to start to liaising with police ... [pause] ... two levels of guilt, you can't do it. You can't say x is committing an offence on the balance of probability to a police force that wants beyond all reasonable doubt. You can't mix it. I think the policing comes from within, and I think the policing comes from the clubs. (Disciplinary Panel Member 3)

Not only did participants consider the RFU to have more capability to punish than the criminal law, the punishments issued by the RFU were also seen as more relevant and calculated than that of the law. One of the legal professionals described the bans dealt by the RFU as “weighed properly”, and that they “reflect rugby opinion”. While the players referred to the lack of specialty in the criminal law, with one player disapproving of the law’s involvement by saying “a lot of the time it is judged by people who have never played rugby in their life”. Such remarks are reminiscent of Livings (2006: 502) statement that “tribunals and disciplinary bodies presided over the sporting authorities are better qualified to adjudicate over matters arising from sporting situations”. Whilst Gardiner’s (2005, cited in Livings, 2006: 502) proposition that “[c]riminal law is very much a last resort, and one that should consistently defer to robust internal disciplinary sporting punishments” can also be traced throughout the participants comments.

One disciplinary panel member provided examples of the expertise in the RFU, and how it makes it better suited than the criminal law to deal with cases on the pitch:

If it happens on the field of play, it has to be dealt with by the RFU. ... [I]f you look at the top of the RFU food chain, you know, you have high court judges. You've got James Dingemans who has just stepped down because of work. He was on the Western circuit. He was a high court judge for goodness sake. I think the RFU has got all the right people to deal with it. ... So, if there was an eye gouging one which was so serious he lost his sight in his eye, it would be Philip Evans QC ... might be David Barnes, but it would also be Barry O'Driscoll, consultant eye surgeon ... they would have a specialist input. And, in some cases they would maybe even put a former player on. (Disciplinary Panel Member 3)

In summary, the RFU was seen by many as a more effective adjudicative tool for regulating on-field 'violence' in rugby union. The two levels of guilt between the RFU and criminal law was a major factor bolstering such an argument. The fact that the law is required to prove beyond all reasonable doubt that not only the *actus rea* but also the *mens rea* was fulfilled, whereas the RFU only has to prove on the balance of probabilities that the *actus rea* was satisfied, meant for many that the RFU could provide both greater castigation and deterrent. Furthermore, numerous participants regarded the RFU to comprise of better suited expertise, whereby those with not only a specialist knowledge of the law, but also the playing culture of rugby, are involved in the discipline process. As such, it could be concluded that it is the opinion of the participants in the current study that the RFU should deal with all but the most serious of cases on the pitch. Such severity was suggested in Section 8.2 to consist of intention to cause serious injury, whether such injury was caused seemed to be irrelevant.

8.3.2. Reluctant Involvement of the Criminal Law

Involvement of the criminal law in incidents in the sporting arena have been scarce, with a majority of those arising either due to the severity of the act or because of mass public interest. Yet, the reasons for such discretion have suffered from a paucity of evidential research. Those commentators who have discussed the concept of prosecutorial discretion

in sport, have largely focused, as did the previous section of the present review, on the efficacy of sporting regulatory bodies to punish and deter incidents of on-field ‘sports violence’ (Cohen, 1990; Gardiner, 2005; and, Livings, 2006). However, a key theme which emerged from the data related to the lack of police resources to investigate and provide evidence at all levels of the game. One disciplinary panel member considered how, with the current climate of police resource expenditure, regulation by the law, and therefore the police, would be impractical:

If you go to regulate the game with the police, you can only do so if you’ve got witnesses and evidence. Now, that is a big problem that we find. I get some racial cases, I get some stamps, and it’s getting sufficient evidence to do it. To say to regulate by the police, there is no way you’re going to get police watching rugby matches. I wouldn’t think the police would be too over keen on getting involved because their resources are stretched thin and I think they would appreciate that rugby union do treat these cases very seriously. (Disciplinary Panel Member 2)

The strain on police resources since the dawn of austerity has been a topic of debate in academic and political discourse (Heaton, 2009). Since the election of a coalition government in 2010, the UK has been functioning within a framework of austerity (Elliot-Davies et al., 2016). The 2010 *Spending Review* drew attention to a number of cuts to public services, one of which was a 14% reduction in police funding by 2015 (Her Majesty’s Treasury, 2010). The release of the 2010 *Spending Review* was following what Heaton (2009: 112) describes as a time where “the police are at, or close to, their capacity of service delivery”, and thus, the further cuts laid out in the 2010 *Spending Review* will only strain such capacity farther. A result of seven years of austerity since the release of the 2010 *Spending Review*, is a police workforce of 121,929, the lowest number recorded since comparable records began in 1996 (Home Office, 2018).

As such, it comes as no surprise that the sphere of ‘sports violence’ has remained aloof from the breadth of police responsibility. As the disciplinary panel member noted in the previous passage, if the courts were to take on rugby union as an area within their jurisdiction, either police would have to be present at every game of rugby in the country, or they would have to find an alternative means of inserting their supervision into games. Another disciplinary panel member – referring to his experience working with legal professionals and a book written by a barrister – discusses how the legal system “can’t cope and you’ve got seven or eight months before it even thinks of going to trial”. Such a statement is comparable to the figures released in *Courts Statistics Quarterly 2014* (Ministry of Justice, 2014), where the average case took 24 weeks (6 months) to be completed, with some areas of the country taking up to 68 weeks (17 months) to complete a case. However, just 19% of this time was actually spent in the courtroom (Ministry of Justice, 2014).

Yet another complication to having increased police intervention, is the lack of evidence available for establishing a *prima facie* case. It has already been established that having the police at every game is unrealistic and impractical, so another suggestion might be to accept and investigate every case which is reported to the police. A disciplinary panel member proposed that currently, the police do not investigate every case, largely due to the lack of evidence available:

We have had the cases where the police have been involved. I mean I had an age grade one, an abandoned schoolboy under 15 game, and they reported it to the police. The police went through the process, but it’s down to the lack of evidence, and you have got to have evidence. ... If the police do get involved, the police won’t take any action. I haven’t seen any evidence, that doesn’t mean that they don’t do it, but I have not seen any evidence where the police have taken action. (Disciplinary Panel Member 3).

Both the thoughts of participants and the literature reinforcing such notions, makes it clear that the police cannot attend and investigate every incident the public desires, predominantly

because of impracticality and lack of evidence. Indeed, nothing is stopping spectators of a game from reporting dangerous or potentially violent conduct to the police. However, attaching liability to an incident still requires a certain level of evidence. Evidence the police would trouble to find in a lot of instances. This again reinforces the opinions discussed in the previous section, that the law should only become involved in those cases of extreme severity – namely the presence of intent with or without the occurrence of serious injury.

8.3.3. Increased Legal Intervention May Increase Inconsistency

An interesting, but less prominent theme which emerged from the data was a view from a disciplinary panel member that increasing the criminal law's adjudicative interference in rugby would increase the inconsistency of regulation in rugby union. This notion was based on the fact that World Rugby attempt to make regulation in rugby consistent, by making each governing body regulate similarly. However, the disciplinary panel member points out that because legal systems can differ slightly between countries, it would be nearly impossible to maintain a consistent regulatory atmosphere:

Everything revolves around World Rugby. All sanctioning revolves around World Rugby. ... If you have got France, they will just laugh you out of court. You see the French operation ... [pause] ... you can have a local council in France that will just ignore what the national body says. ... [W]hat World Rugby is trying to do is have the same system in place. As soon as you say the English courts are here, well what are the Scottish courts going to do? You know. You are into a very, very complicated realm (Disciplinary Panel Member 3)

This is a helpful consideration, considering the current objectives of both World Rugby and the criminal justice system of England and Wales is to maintain a consistent and fair regulatory system (World Rugby, 2014; and, Office for Criminal Justice Reform, 2007), which may be put under jeopardy by the small differences between national justice systems. To put this into context, in South African criminal law, the notion of intent is based on a slightly different definition to that of English law (Kwanje, 2016). The South African

system relies on the defendant having knowledge that an unlawful act may occur, whether this be a direct intention, or an acknowledgement that it is a possibility (Kwanje, 2016). This would make it harder to prosecute in ‘sports violence’ cases, as there is no formal clarity as to what is and isn’t legal in rugby union. Therefore, establishing that the defendant knew that he/she was, or possibly could, commit an unlawful act would be very difficult. This is in comparison to English criminal law, whereby the defendant must be proved to have foresaw that the requisite harm would occur as a result of their actions, not that what they were doing was unlawful (OAPA, 1861).

The idea that increased or more formalised intervention from the law could threaten global consistency in the regulation of rugby union was a small, but important theme in the data. It is not the scope of the current research to suggest methods for creating a consistent transnational relationship between criminal justice systems and World Rugby, however, it could be suggested that such a goal is both unrealistic and unattainable. This may be an area of interest for future research on the regulatory relationship between the law and sporting governing bodies.

8.4. Disciplinary Sanctions and Cards are Effective but Inconsistent

Section 8.4 discussed how there was a consensus of opinion among those interviewed and questioned that the RFU was better suited to regulate all but the most serious incidents of dangerous play on the rugby pitch. One reason for such a position was that the bans “reflect rugby union” because of the specialist expertise involved in the sanctioning process. However, a prominent theme in the data was that bans and cards are effective when used properly, but the current usage is inconsistent – making their efficacy fruitless. The below discussion will provide two separate analysis. The first will be a case review, insofar as the sanctions and procedures of various cases will be compared, looking for similarities and

differences, and the reasons for any deviations. Here, four cases will be analysed, two of which will be incidents of striking, whereas the others will be cases involving dangerous tackles. The second will take a look at the participant's opinions, outlining any points which align with either that found in the first analysis, or that discussed elsewhere in the study.

8.4.1. Success of the RFU Disciplinary Objectives

As mentioned previously in Chapter 5, an area of focus for the RFU is to ensure consistency in their disciplinary proceedings (*Regulation 19*, s. 19.1.5). Such consistency can come in the form of sanctions, procedures of hearings and the use of appropriate red cards by referees. Unfortunately, there is no previous research on the whether the RFU, or any other rugby judiciary, is meeting their disciplinary objectives. As such, perhaps the most effective method for assessing whether the RFU have achieved a consistent disciplinary system is to compare the sanctions and procedures of various cases, looking for similarities and differences, and the reasons for any deviations. The following discussion will compare four cases; two of which will be incidents of striking, whereas the others will be cases involving dangerous tackles.

The first comparison is of two incidents where the defendant struck another player in the head, one with his fist, and the other with his shoulder. In October of 2017, Sam Tuitupou of Coventry RFC was given four weeks suspension following a red card for punching another player (RFU, 2017). The referee described the incident as follows:

Following a breakdown two players emerged holding each other: The Coventry number twelve (with his back to me) and the Cambridge replacement centre. With no obvious provocation seen, the Coventry number twelve punched the Cambridge player with a closed right fist to the face. The Cambridge player fell to the ground (RFU, 2017: 1).

This statement reveals what the referee initially saw during the game. However, after reviewing video footage of the incident, the referee added:

We viewed the footage several times. It clearly showed the Player using his elbow at the beginning of the incident ... The Player then punched with his right fist causing the opposition player to fall to the ground. The Player then moved away from the immediacy of the incident and another opposition player ran to him to remonstrate with him. The two players became engaged in a melee (as described by the referee). The Player struck out again with his right fist and punched a different opposition player who was also yellow carded for his intervention (RFU, 2017: 1).

This incident involved two punches to two different opposition players, both of whom had not thrown any punches at the defendant. One of the punches had hit an opposition player with such force that it knocked him to the ground. Such an incident could very easily be regarded as violent, and completely unacceptable in the game. The panel viewed the incident as a top range offence, due to the contact with the head, number of blows and the intentional nature of the act. However, decided to start at the lower end of eight weeks due to the relatively minor resultant injuries, and the limited effect it had on the game (RFU, 2017: 4). The panel then went on to award the maximum mitigation of fifty percent, mentioning the players conduct at the hearing, disciplinary record, admittance of culpability, the remorse shown by the player, and the player's off-field circumstances as relevant factors for mitigation. Furthermore, the panel saw no aggravating factors worthy of increasing the sanction (RFU, 2017: 4-5).

In contrast, the second matter also involved striking, however this time it was with the shoulder. The incident occurred in January of 2018, when Joe Marler of Harlequin F.C struck an opponent player in the head with his shoulder, and consequently received a six week ban (RFU, 2018). The referee described the event in their disciplinary report:

Harlequins had possession around the halfway line, moving the ball from right to left towards the centre of the field. They took the ball into contact with 2/3 Sale Sharks players effecting the tackle and bringing Kyle Sinckler (Harlequins No 3) to ground. One of these players was Tj Ioane (Sale No 20) who went to ground and rolled out to Sale's left hand side of the tackle. At this point Joe Marler (Harlequins No 1) who was in support of the ball carrier appeared to illegally target Tj Ioane on the ground far enough away from the tackle not to be a clear out. I immediately stopped the game as I wanted to review the incident to see the point of contact to determine the level of sanction. On the screen it was quite clear to me that Joe Marler had tucked his arm and struck Tj Ioane directly to the head with his shoulder. I decided on a red card for Joe Marler, which the TMO and AR1 agreed with (RFU, 2018: 1).

Similar to the previous act, the behaviour of Joe Marler was completely unacceptable in the sport of rugby, and could be seen to have deserved the red card awarded. However, the decision to grant a six week ban for this incident, but only a four for the earlier one, seems unreasonable. The panel decided that the act falls into mid-range offending, whereby the starting suspension is six weeks for striking with the shoulder. They decided against a top end entry due to the lack of injury caused (RFU, 2018: 4). The panel also decided that the addition of a week should be added to the suspension, considering Marler's disciplinary record to be an aggravating factor. However, the panel then removed the added week, on grounds of mitigation – regarding the conduct of the defendant at the hearing and immediately after the commencement of the game as adequate mitigating factors (RFU, 2018: 4-5).

The two incidents are very different, despite both referring to incidents of striking. The first involved multiple, forceful striking to the head of numerous players, in an unprovoked off the ball attack. Whereas, the second was a targeted, careless attempt to protect the ball in a ruck. Indeed, both actions require tough disciplinary castigation, yet, it is difficult to see the second as demanding a more severe punishment. The ensuing discourse will investigate two similar cases of dangerous tackling, but resulting in two very distinct judgements.

The first case occurred on the 18 February 2018, in a match between London Wasps and Exeter Chiefs. Gabriele Lovobalavu of London Wasps was suspended for four weeks following a citing for a dangerous tackle (RFU, 2018). The incident occurred in the last play of the game, as Exeter made a half break up the pitch. Lovobalavu made the tackle, which resulted in the Exeter player knocking the ball into touch. The referee had not initially viewed the tackle worthy of any sanction, and drew the game to a close following the tackle. The tackle was reviewed post game, and the referee made the following observation when viewing the footage:

The front-on camera view shows that the Wasps 13 puts his head down as he is about to complete the tackle. His head initially makes transient contact with the upper chest of Exeter 12, with the back of his head going just under 12's chin. The right shoulder of Wasps 13 makes a direct hit on the left side of Exeter 12's jaw, the force of which visibly rattles 12's head. Although the right arm of Wasps 13 does make contact with the shoulder of Exeter 12, the point of his shoulder makes connection with the side of 12's head as first point of impact. The back of Wasps 13's head makes transient contact with the chin of Exeter 12 at most (RFU, 2018: 2).

In the citing commissioner's report, they mentioned that the Exeter player "was unaware as to where contact had been made and apparently had not been conscious of an impact with his head" (RFU, 2018: 2). Moreover, no reaction was noted from the Exeter or Wasps players at the time. Due to the incident involving contact with the head, the panel established mid-range entry, and thus starting on a sanction of six weeks. After mitigation, the panel reduced the sanction by two weeks when considering the conduct of the player at the hearing, clear disciplinary record and acknowledgement for the dangers of such a tackle (RFU, 2018: 6).

Charlie Ewels of Bath Rugby was cited for a dangerous tackle in a match on the 29 October 2017, however, the citing was reduced to a yellow card following a review by the

disciplinary panel (RFU, 2017). The citing commissioner described the incident in their report:

During a Gloucester attack down the left flank, No 13 (Henry Trinder) passed the ball to his fullback and then got tackled by Bath No 5 (Charlie Ewels) immediately afterwards. Although the pass had been completed before the tackle, Ewels was fully committed and didn't have clear sight of the pass. However in the actual tackle, Ewels makes contact directly to the head with his arm, in an accelerated swinging arm motion. He started high and made a direct hit to the head (RFU, 2017: 1).

The report then continues to mention that:

[T]here was a reaction by some of the Gloucester players, with No 15 motioning to the referee (Tom Foley). Foley did not have a clear line of vision but the assistant referee did have a better angle and the TMO (Stuart Terheege) intervened and they reviewed the incident. Both Terheege and Foley agreed it was a high tackle and decided it was penalty only (RFU, 2017: 1).

The citing commissioner concluded, proposing:

This tackle was dangerously high, it had force (with a swinging arm) and contact was made directly to the side of the head; the player left for the field to be medically assessed. With all that has been already outlined with this tackle, it has passed the red card threshold and therefore I am citing Charlie Ewels for a dangerous tackle, contrary to Law 10.4(e) (RFU, 2017: 1).

The citing commissioner insisted that it was a red card offence and thus demanded an appropriate sanction. Moreover, the commissioner also stated that "the Player used a swinging arm which made contact to the side of the head around the lower jaw area" and that "there was an element of force to that contact, whereby Gloucester 13 received medical attention and had to undergo an HIA" (RFU, 2017: 2). Despite such notions from the commissioner, the panel disagreed that it was a red card offence, and thus, in accordance with *RFU Regulation 19, Appendix 4, paragraph 15*, concluded that an on-field yellow card be recorded on the Player's disciplinary record.

Upon analysis of the cases discussed, it seems clear that the RFU is failing to maintain a consistent disciplinary system. The two incidents of dangerous tackles are an example of such inconsistency. The case involving Lovobalavu was ambiguous, with many failing to see any wrong doing in the tackle (RFU, 2018). Whereas Ewels tackle was widely regarded as a clear red card offence, which was asserted by both the citing commissioner and the players within the game (RFU, 2017). Therefore, it is confounding as to why one act has received an entirely different result to the other. Similarly, the cases of striking mentioned previously also reveal unpredictable disciplinary conclusions. The case of Tuitupou was blatantly unacceptable, having no relation to any part of the game (RFU, 2018). Yet, Tuitupou received a two week shorter ban than Joe Marler, whose action could be said to have been a careless attempt to protect the ruck. Furthermore, it could be suggested that referees are inconsistent when awarding cards for dangerous play. The fact that both Charlie Ewels and Gabiriele Lovobalavu did not receive any form of card for their conduct, despite later being deemed worthy, is evidence of this.

After reviewing the evidence, it could be said that indicators – in this case the outcome of hearings – are pointing towards an inconsistent disciplinary system within the RFU. This is antithetical to the objectives stated in their disciplinary document, *Regulation 19*. It is not within the scope of this discussion to suggest reasons for such inconsistency, or how it may be avoided. That is a topic reserved for future research. Yet, examination into the training of citing commissioners and panel members may help understand how such variance is existent.

8.4.2. Cards and Bans are not Being Used Effectively

The previous section reviewed four cases, concluding that the current RFU disciplinary system seems to be inconsistent, insofar as both bans and cards are not awarded under a universal logic. The ensuing section will seek to test this further, using the sentiments of the participants as evidence.

As mentioned previously, a prominent theme in the data was that the use of both bans and cards are effective when used appropriately. One of the referees suggested that cards are an effective tool for deterring foul play on the pitch, using the tip tackle as an example:

I think a good example is the tip tackle from playing the man in the air. There has been a clear change in player behavior because of the increase in yellow and red cards. It has deterred players from lifting tacklers and from playing the man in the air. So, I do think it can have a big effect. You know, things like tripping five or six years ago was a bit more prevalent, that has now gone from the game, you very rarely see it. So, I think yellow and red cards do deter and punish (Referee 1).

Numerous players were found in agreement with the referee, proposing they “will encourage people to do it [dangerous play] less”, with one making similar comparisons to the referee when suggesting, “I think it is a strong deterrent. ... [s]uch things as the tip tackle have been completely abolished, this used to be a common tackle”. Despite such praise for the effectiveness of the disciplinary card system by the players, one disciplinary panel member expressed their grievance with the inconsistency of their issuing by referees:

I get frustrated by referees who give yellow cards to offences that should be red.
I get frustrated by referees who ignore the rules of the game and decide to do it their own way (Disciplinary Panel Member 1).

Another disciplinary panel member discussed how the issuing of cards can vary from game to game, a phenomenon which is not desirable:

Well you're still in a dangerous world of subjective judgement, and what you are trying to do is get ... [pause] ... you don't want somebody getting a yellow card in one game, and getting a red card in another game, but that is what you're getting (Disciplinary Panel Member 3)

The comments here are reflections of those made in the previous section, whereby it was concluded that the RFU appears to have a sophisticated yet inconsistent system, largely due to the subjective judgement of those involved. Here, the disciplinary panel member is referring to the inconsistency when issuing cards – an issue identified when comparing the details of Gabriele Lovobalavu's case to that of Charlie Ewels'.

Similarly, bans were seen as having significant deterrent effects, yet, the length of bans in accordance with the severity of the incident was seen as widely unpredictable. One disciplinary panel member highlighted such inconsistencies, referring to how subjective the disciplinary process can be, and therefore, how big an impact the personal views of the panel members can have on the outcome:

[W]hat you're trying to do is ... [pause] ... somebody who gets sent off in Cheshire gets the same sanction as somebody who is sent off in Durham. Now, I can tell you now that they won't. I've been to our national training. Now, in our national training you get CB [Constituent Body] panels from all over the country. ... So, they put a case up, and everyone has to decide what entry point they would put this (the case). You would be amazed. ... [Y]ou get some people who put in 14 weeks, and others who are going to put in 4. (Disciplinary Panel Member 1)

The comments in this passage are congruent with that of one of the players, who suggest that they “can potentially punish accidental or reckless ... dangerous play too harshly”. The statements of both the disciplinary panel members and the players reflect the analysis presented in the preceding section, insofar as the awarding of cards and sanctions seems to be unpredictable, whereby some incidents are awarded far harsher sanctions than others, despite potentially being similar or even less severe in nature.

The participants in the present study refer to the subjectivity of the referee and disciplinary process as explanations for an inconsistent disciplinary operation. However, Austin Healey, Aviva Premiership commentator, pundit and former professional player, has chosen another avenue of explanation. Writing for the Telegraph (2018), Healey suggests that, “Rather than being outcome based, the disciplinary process seems to be all about protecting rugby’s precious reputation rather than the players themselves”. Healey (2018) continues, attributing such an attitude to the attempt to “present this holier-than-thou picture to sponsors, television and the children of the world”. In reference to the protection of the image of the game, Healey (2018) proposes that the outcome is predetermined, thus, the disciplinary process is merely a tool for deciding weight of sanction. The standpoint of Healey (2018) is alluring, and much of what he discusses aligns with the following evidence. Firstly, as noted in Chapter 5, the RFU advocate in their disciplinary objectives that proceedings should be such “that the image and reputation of the game is not adversely affected” (*Regulation 19*, s. 19.1.5). Moreover, a legal professional, who is also heavily involved with RFU discipline, when discussing the role of the RFU disciplinary process, suggests it is there to “uphold the image of the game”, continuing to suggest that “there is a risk that lawyers get all lawyerly about it rather than looking at what the disciplinary process is trying to do, which is protect the image of the game”. Secondly, as mentioned previously in Chapter 5, the RFU disciplinary process does not require *mens rea* as proof of offence, only for weight of sanction. As such, the panel only needs to establish that the offence occurred to find the individual culpable. For instance, World Rugby have announced a “zero-tolerance approach to reckless and accidental head contact in the sport” (World Rugby, 2016). Thus, the panel only needs to concede that contact was made with the head, no matter how trivial, to find an individual guilty. Of course, the speculations of Healey (2018) are mere theories, expounded in an exasperated expression of discontent.

Yet, they forge a compelling argument when compared to the facts presented, and therefore deserve to be taken seriously.

The present section discussed how the participants regarded cards and bans to be extremely effective methods of punishment and deterrence but are issued inconsistently. A similar assumption was also made in Section 8.4.1., when four cases in the 2017-2018 season were compared. Explanations for such inconsistency focused on the subjective nature of disciplinary proceedings, with one panel member proposing that sanctioning can vary between counties. Indeed, the RFU disciplinary process relies heavily on the idiosyncrasy of individuals, as does much of the criminal law. However, the allegations laid out by Healey (2018) cannot be ignored. Could the disciplinary process be setting the image of the game as a priority in their disciplinary dealings? According to the disciplinary objectives as mentioned by a legal professional interviewed and the RFU document *Regulation 19*, as well as the lack of *mens rea* evidence required for liability, it may well be possible. Perhaps this question could be a topic of interest in further research.

8.5. Is a Link Between the RFU and CPS the Answer?

Within the present discussion, there has been much consideration of how the RFU is better suited and more effective in regulating dangerous play on the rugby pitch, and the law should only interfere in the most egregious incidents. Participants proposed that the bounds of the RFU's suitability can be found with the presence of intent, with or without serious injury. However, despite recognising that there is a role to play for the law, many participants placed this role at the victim's discretion. In other words, the law should only become involved in a case if the victim is the instigator of such involvement. This was

justified by a legal professional as being “the way of the land”. Another legal professional discusses how such a process works, and why it is needed:

Well, there is no clear route to go to court for anybody except for a claimant who feels aggrieved and he complains to the police. So, whether you’re in a punch up outside a pub on a street in Newcastle on a Friday night and the police aren’t there, if somebody smashes and punches you in the face and breaks everything, then as you’re lying in your bed in hospital, you’ll say: ‘I want to press charges’, and that is how it happens. ... So, there is no difference, it has to be a matter of an individual complainant going to the police. (Legal Professional 3).

Indeed, most criminal investigations are initiated by a complaint from a victim, as otherwise the police have no way of knowing the offence was committed. However, a number of participants pointed towards an alternative means of the laws interference. Numerous players cited RFU referral as a potential method for directing certain cases to the police. One player stated that “if the courts were to be involved it should be through direct referral from the RFU to ensure a streamlined process that takes all the relevant factors into account”. Another advocated that criminal intervention should only ensue “if referred to by a rugby (disciplinary) panel”. It should be noted, that players who endorsed an RFU referral system, emphasised the need for it to be “rugby based” with “input from people who can relate”. This may be found in the form of ex-players, coaches and medical professionals providing their specialist opinion in the court room, as a way of aiding in delineating the breadth of an individual’s consent. This is an intriguing concept, and one that has suffered from a significant dearth of both academic and RFU examination. As such, in the absence of being able to discuss any academic literature on this idea, the following analysis will consider how an RFU referral system may take form.

A referral system may hold the key to tackling the paucity of on-field ‘violence’ cases making their way into the court room. Such referral could perhaps take place at the point to which a panel has received and reviewed a case and has deemed the incident too

severe for the RFU to handle itself. At this point, the RFU could then contact the police and refer the case to them, thus, the police would become the lead investigators. This would require a formal relationship between the RFU and CPS, whereby routine communication and sharing of evidence would be at the forefront. Furthermore, once the police have received the evidence, they can then assess the likelihood of successful prosecution, whereby if the evidence seems insufficient, the case can be passed back to the RFU for sanctioning. However, despite offering elements which may smooth the process, it may also encounter similar problems to the current system. A legal professional interviewed indicates the complications of needing the victims:

[T]he police never want to take anything forward unless the member of the public is really keen to do it. So, that is why they basically really on direct referral. ... Could the RFU be better at referring stuff out to the police? Probably. But, you'd have the same issue with the victim potentially not wanting to be involved. So, I think at the moment the balance is probably right, because, particularly in cases where you don't have video footage, you need evidence of the victim otherwise you are stuffed. (Legal Professional 2)

The comments made by the legal professional highlight how important the victim's consent is when making a criminal investigation, particularly at the lower levels where the videoing of games is not as common. At the higher levels - such as levels 1, 2, and 3 - it is typical for games to be recorded, usually for the purpose of performance analysis. Therefore, establishing a credible case for the prosecution would prove much easier. Moreover, there may not be any need for compliance of the victim, if the incident is clear cut, and an offence can easily be discerned, then the police would have it within their interests to bring a case against someone who has clearly committed an illegal act. Yet, in the absence of video footage, the only evidence would be found in witness statements – either from the referee(s), players, spectators and coaches. As such, the victim would need to play a pivotal role in delineating whether an illegal act occurred, who committed the illegal act, and the

circumstances surrounding the incident. It could be said that the requirement for the victim's consent renders the referral system no different to that of going to the police individually, as is the current method. However, the fact that police involvement has been instigated by RFU concerns, may embolden the victim to become more involved, and view legal intervention as necessary.

In conclusion, participants accentuated the role of the criminal law to that of only the most severe incidents. For some, such a role was established in the form of an RFU referral system, whereby the RFU can refer cases they feel are egregious and outside their breadth of responsibility, to the police. Such a system found complications, as participants referred to the requirement of the victim's consent and compliance in cases where evidence may be ambiguous or limited. Indeed, the RFU referral theory is susceptible to scrutiny, as would be expected with its current embryonic form. Yet, it also offers potential for equilibrium between the law and rugby union, providing the possibility of fluidity in regulation, and equitable legal intervention.

8.6. Summary

Participants within the study saw dangerous play as an integral part of the game, a facet of the inherent nature of the sport. Such views were reminiscent of the 'unwritten conventions' discussed by Dunning and Sheard (2005). Indeed, dangerous conduct is permitted as a by-product of the game, however participants discussed a limit to such conduct. Participants considered the limits of acceptability to be found in the presence of intention, with serious injury serving as an escalator to further unacceptability when paired with intention to harm. When an act egregiously surpasses the limits of this acceptable conduct, the participants believed that this is when the criminal law should become involved. In short, the law should only intervene in the most serious of cases which display intention to cause serious harm.

Other than in these most extreme examples, participants considered the RFU to be better suited to dealing with incidents on the pitch for a number of reasons. Firstly, the RFU can more easily find culpability for dangerous conduct, as the RFU is not required to fulfill the *mens rea* requirement as to whether the incident occurred. *Mens rea* merely helps define the sanction. Secondly, due to lack of resources and the difficulty associated with establishing culpability, the law is seemingly reluctant to get involved in most cases of dangerous play. Finally, one disciplinary panel member proposed that increased legal intervention would create greater inconsistency overall. Here, they suggested that if the law was to get involved in every country then inconsistency would be found in the variances of law between countries. This would be antithetical to the purpose of both the law and World Rugby, who strive to create consistency in regulation.

Moreover, the disciplinary sanctions issued by the RFU and the disciplinary cards given by referees were viewed as effective methods of punishment and deterrent in English rugby union, as they stop players doing what they love whilst also having severe implications – such as losing significant sums of money, potentially hindering their team's performance. Yet, despite the positive effect of sanctions and cards, they are issued inconsistently. Participants referred to how the subjectivity which defines when and how they are issued greatly affects their consistency. For instance, an act which was awarded a yellow card in one match may be given a red in another, largely due to the referee's personal opinion on the incident. Healey (2018) also stated that the interests of the game can greatly influence the outcome of sanction. Here, Healey referred to how the RFU look to protect the game by manipulating their disciplinary outcomes to best reflect their objectives. This, in contrast to the RFU's objectives, creates not only an inconsistent but also an unjust system where players are not being judged independently.

Lastly, participants proposed an RFU referral system as a means of creating a fluid relationship between the law and the RFU. Such a system could perhaps take place at the point to which a panel has received and reviewed a case and has deemed the incident too severe for the RFU to handle itself. At this point, the RFU could then contact the police and refer the case to them, thus, the police would become the lead investigators. Participants saw such a system as prudent, as well as a way of ensuring those egregious acts on the pitch are dealt with appropriately.

The following chapter will conclude the thesis, referring to the literature examined in Chapters 3, 4, 5 and 6, as well as the views of the participants provided in this chapter. The conclusion will lay out the findings and discuss how such results affect what we currently know, and how they can be taken forward to improve our understanding further.

CHAPTER 9

CONCLUSION

9.1. Overview of Study

This study has explored legal interference in on-field ‘violence’ cases in English Rugby Union. The seemingly sporadic intervention by the criminal law in on-field ‘violence’ incidents was examined, whilst also considering the complications encountered when attempting to apply criminal proceedings to the realm of participant ‘violence’. Such an investigation also assessed the propriety of the RFU’s disciplinary system, with the aim of revealing any deficiencies. Throughout the analysis, it was hoped that the opinions of participants would provide unique insights into the said topic, thus allowing for a more relevant and sports specific analysis. The aim of the thesis was to present a detailed account of the difficulties associated with applying the criminal law to participant ‘violence’, whilst also utilising the perspectives of those currently involved in the regulation of participant ‘violence’ to provide a possible resolution to finding equilibrium between the law and on-field ‘violence’ in rugby union.

9.2. Concluding Remarks

Through the investigation of such objectives, a consistent outlier was the difficulty associated with establishing criminal liability to incidents of ‘sports violence’. As discussed in Chapter 3, defining ‘violence’ can prove enigmatic. The diverse facets of constructing a definition are all interpreted variably by scholars hoping to make a definition individualised

to their academic domain. Therefore, Smith (1988: 1) proposed that, “the concepts of ‘violence’ have come to have so many meanings that they have lost a good deal of their meaning”. Correspondingly, both Smith (1988), and the more contemporary Hamby (2017), attempt to establish a definition of ‘sports violence’ in accordance with the playing culture of sport.

Such ambiguity of definition was found to be absent when comparing interpretations of ‘violence’ by World Rugby and the criminal law. Those behaviours included in World Rugby’s *Laws of the Game* were found to fall effortlessly under definitions of unlawful acts in the Offences Against the Person Act 1861, which led to an inquiry as to why legal interference has been so inconsistent. It became apparent that the *mens rea* requirement for finding someone culpable created issues when applied to ‘sports violence’. The intent component of the *mens rea* is incredibly arduous, as proving that an individual deliberately caused the outcome to another is difficult in itself, let alone in a setting where aggressive and ‘violent’ behaviours are implicit to the very nature of the game. Similar complications were found when attempting to apply recklessness to the sporting arena. However, what was perhaps more decisive, was the fact that reckless acts were frequent to the sport of rugby. Thus, there would be a proliferation of incidents, which could be suggested to be within the ‘unwritten conventions’ (Dunning and Sheard, 2005) of rugby union, in the courts.

The unwritten conventions described by Dunning and Sheard (2005) were found to extend well beyond the formal rules of the sport. For many participants, dangerous play was seen as simply part of the game. Utilising theory, namely Marxism and symbolic interactionism, to understand why participants may adopt this viewpoint it became apparent that under capitalist influence, sport reinforces and perpetuates capitalistic ideology, such as achievement, competition, and persistence (Carrington, 2008). Players may then attach meaning to such an ideology, insofar as they believe that by demonstrating such traits they may have a more lucrative sporting career. Thus, for the sake of recommendations, although arduous, it may prove prudent to focus research on how agents of sport (e.g. media, sponsors, coaches, parents) present this ideology, and therefore how it might be altered to further limit dangerous play in sports.

The participant's boundaries of such conventions were found to align with James' (2001) findings, at the presence of intention. Here, intention was seen as well outside the acceptable limits of legitimacy, whilst the occurrence of severe injury from the deliberate act was seen to push the incident even further outside such confinements. The demarcation of acceptability by participants could be suggested to provide an insight into the breadth of consent in rugby union. Consequently, if only those actions outside the limits of a player's consent are considered to be criminal, then it would be futile for the law to get involved in anything but those cases where intent can be established.

The complications of establishing culpability was discussed by participants, who discussed the variant levels of guilt between the criminal law and the RFU. As noted in Chapter 5, the RFU insist that an act be proven to have occurred on the balance of probabilities (Regulation 19, s. 19.5.6). Here, an RFU disciplinary panel only needs to look at the evidence and establish that it was likely that the act of foul play occurred, not that it definitely did occur, as is required within criminal law. Furthermore, *mens rea* does not need to be established in order to find an individual guilty, it only determines the weight of the sanction. This makes it much easier to constitute guilt in comparison to the beyond all reasonable doubt requirements of the criminal law.

Ease of accountability was not the only factor influencing participants gravitation towards RFU regulation over the criminal law. For many, increased police involvement was seen as both impractical and unrealistic. The implementation of a 14% reduction in police funding under the conservative government (Her Majesty's Treasury, 2010) has resulted in a severely depleted police workforce of 121,929, the lowest number recorded since comparable records began in 1996 (Home Office, 2018). As such, participants were confident that the police would not only struggle to meet the demands of participant 'violence', but would also be reluctant to spare what little resources they do have on something which could easily be regulated by private organisations.

Furthermore, one disciplinary panel member made an important proposition relating to too much involvement of the criminal law: that such involvement would greatly increase inconsistency of regulation between nations. The nuances between national judicial systems

would create vast inconsistencies when regulating violent play on the pitch. An example was provided of the South African judicial system, which relies on the defendant having knowledge that an unlawful act may occur, whether this be a direct intention, or an acknowledgement that it is a possibility (Kwanje, 2016). This would make prosecuting much difficult compared to the law in England and Wales, whereby the defendant must be proved to have foresaw that the requisite harm would occur as a result of their actions, not that what they were doing was unlawful (OAPA, 1861).

This is a pertinent speculation, considering the current objectives of both World Rugby and the Criminal Justice System of England and Wales is to maintain a consistent and fair regulatory system (World Rugby, 2014; and, Office for Criminal Justice Reform, 2007). Thus, the idea that increased or more formalised intervention from the law could threaten global consistency in the regulation of rugby union was a small, but important theme in the data. It is not the scope of the current research to suggest methods for creating a consistent transnational relationship between criminal justice systems and World Rugby, however, it could be suggested that such a goal is both unrealistic and unattainable. This may be an area of interest for future research on the regulatory relationship between the law and sporting governing bodies

Nevertheless, despite propounding the use of the RFU disciplinary system over that of the law, complete prosecutorial discretion was seen as imprudent, with many still acknowledging there was a role to play for the law. Such a role was to regulate only the most serious of incidents. Severity was based on the definitions of acceptability discussed previous; the presence of intent, with or without serious injury. Participants justified why the courts should have a role, echoing the words of Lord Justice Bramwell in *Bradshaw*, that “[n]o rules or practice of any game whatever can make lawful that which is unlawful by the law of the land” (84). This is an imperative concept, considering the law should

embody an omnipresent entity, stemming its limbs into all areas of society. The form of such a role, however, was found to be illusive, with many participants referring to the orthodox view that the law should only become involved when instigated by the victim. Of course, the consent of the victim is crucial in many incidents of criminal investigation. Yet, a small number of players proposed an alternative means of dictating interference from the law: an RFU referral system.

Such a system would allow an RFU disciplinary panel to refer any cases they feel are outside their breadth of suitability to the police for investigation. The police then have the option to take the case ahead or return it to the RFU where sanctioning can continue. Indeed, the system is susceptible to complications, as participants referred to the requirement of the victim's consent and compliance in cases where evidence may be ambiguous or limited. Scrutiny is expected of an concept in such embryonic form. Yet, it also offers potential for equilibrium between the law and rugby union, providing the possibility of fluidity in regulation, and equitable legal intervention.

As mentioned, the RFU and its disciplinary system was viewed by participants to constitute the most suitable tool for regulating most dangerous play on the pitch. However, the RFU system was not without criticism. Participants referred to the disciplinary sanctions and cards used by the RFU as effective punishments, but inconsistently used. This standpoint is reflected in the case analysis provided in Section 8.4.1. Here, the cases of Sam Tuitupou, Joe Marler, Gabiriele Lovobalavu, and Charlie Ewels were compared. Analysis revealed that the length of sanction given was disproportionate to the incident. For instance, the Sam Tuitupou incident was an outlandish, and completely unacceptable attack on numerous opposition players. Yet, he received a two-week shorter ban than what could be described as a careless attempt to protect the ruck by Joe Marler. The analysis was limited to only four cases, and so the generalisability could be questioned. However, both the

conclusion of the analysis and the statements provided by the participants concurred with the views of Healey (2018).

Writing for the Telegraph (2018), Healey suggests that “[r]ather than being outcome based, the disciplinary process seems to be all about protecting rugby’s precious reputation rather than the players themselves”. Healey (2018) continues, attributing such an attitude to the attempt to “present this holier-than-thou picture to sponsors, television and the children of the world”. In reference to the protection of the image of the game, Healey (2018) proposes that the outcome is predetermined, thus, the disciplinary process is merely a tool for deciding weight of sanction. Healey’s (2018) speculations reinforce the presumption that the RFU is inconsistent in its disciplinary proceedings. It is not within the scope of this thesis to discuss remedies for such inconsistency, however, one may begin by analysing the training given to disciplinary panel members. Moreover, future research may provide a critique of the current disciplinary objectives, and the weight of such objectives on the structure of the system.

In conclusion, the RFU seems to be better suited to dealing with all but the most egregious incidents of on-field ‘sports violence’. The borders of suitability were found to be breached when intent to cause serious harm was present, such as purposefully striking another players head in the attempt to seriously injure them. For participants, this was the point to which the criminal law should interfere. Such interference could perhaps be inaugurated through an RFU referral system, whereby the RFU can transfer cases it feels are outside of its responsibility to the police for investigation. Furthermore, the disciplinary devices used by the RFU – sanctions and cards – were seen as both effective deterrents and punishments for acts of dangerous play on the pitch. However, their issuing was seen as inconsistent and in need of reform. Despite this, it is still maintained that the RFU should

deal with most cases on the pitch, with the courts playing a role with the most serious incidents.

9.4. Limitations

This thesis was limited by the nature and number of personnel included in the sample. All those incorporated in the study either had personal involvement with the RFU or with sport in general, whether it be as a participant or regulator. This of course provided specific knowledge of the topic under consideration, and so allowed for underlying themes to emerge. However, using subjects who were so closely linked to sport may have permitted for a biased viewpoint, insofar as subjects may have had a predisposed opinion in favour of internal regulation. Nevertheless, legal professionals associated with sport were chosen for the study as they were able to provide expert insider knowledge, understanding and experiences of the application of the law to sport, and the associated processes and practices.

In reflection, including individuals outside of the sport – such as legal professionals not involved with sporting affairs – may have eliminated such bias, and granted access to viewpoints from a purely legal perspective.

9.3. Implications of the Study and Further Research

This research has the capacity to inform the regulatory bodies of the RFU on the most appropriate means of regulating ‘violence’ in English rugby union. Moreover, the data yielded from the study may aid in understanding how a relationship between the RFU and the CPS can be established or possibly redefined. Although this study could not offer a categorical answer to how such relationship ought to be shaped, I urge those involved in the regulation of rugby union to consider the potential of the RFU referral system and focus further research on how to tackle the complications associated with its appliance to the lower

levels of the game. Moreover, it has become alarmingly obvious that the RFU disciplinary system is inconsistent; antithetical to the very aims of the system itself. Indeed, the present thesis could not accurately outline the source of such inconsistency, however, targeting the training of disciplinary panel members may prove prudent in the fight towards a more consistent regulatory process.

From an academic perspective, this work will add to the body of research viewing the alliance between sports and the law as necessary and unavoidable. Moreover, this study may spark the start of a new field of research within sports law, where the lines between criminal liability and sporting deviance in rugby union are further explored. Here, it is hoped that the discourse presented in this thesis is built upon to develop knowledge in an area that is currently vastly under researched.

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APPENDIX

Appendix 1 – Interview Schedule – Disciplinary Panel Members

Introduction

1. When did you first get involved with regulating rugby?
2. What level of rugby do you regulate?
3. What do you enjoy about regulating rugby?
4. Is there anything you do not enjoy about regulating rugby?
5. Why did you get involved with regulating rugby?

Dangerous Play in Rugby

1. How would you define dangerous play in rugby?
2. What is your view on dangerous play as part of the game?
3. What is your opinion on some academic's/physio's/media representative's concerns that the level of dangerous play in rugby is increasing alarmingly?
4. What is your experience with players/coaches accepting dangerous play on the pitch?
5. What is your experience with players/coaches encouraging dangerous play on the pitch?
6. How does the degree of injury suffered during a dangerous act affect the acceptability of the act?

Regulation of Rugby

1. What is your opinion on the effectiveness of yellow and red cards to deter and punish dangerous play on the rugby pitch?
2. In the Case of R v Calton, a young rugby player was convicted of inflicting grievous bodily harm and sentenced to 12 months. Calton kicked an opponent in the face as they were getting up off the floor after a ruck, resulting in a fractured Jaw. What are your thoughts on the judgement of this case?
3. What is your opinion on the effectiveness of bans and fines to deter and punish dangerous play on the rugby pitch?
4. What are your thoughts on the courts having more of a role in regulating dangerous play on the rugby pitch?
5. Which dangerous acts, if any, do you feel should or need to be regulated by the courts rather than the RFU?
6. Why do you think the act(s) you mentioned in the previous question deserve a response from the courts rather than the RFU?
7. How do you judge which cases to get involved in? Is there a line dictating your intervention into 'violence' on the pitch?
8. Do you have an opinion on whether the RFU and courts should have a relationship?
9. To what extent does this relationship go, and how do you feel this relationship could be formed?

Legitimate Sport

1. Are there unwritten rules in rugby in relation to dangerous play?
2. If yes, at what point does an act fall outside the acceptable behaviour of these unwritten rules?
3. Do some players intentionally cause harm to their opponents?
4. If yes, why do you think some players intentionally cause harm to their opponents?
5. If no, what stops players from intentionally causing harm to their opponents?
6. How much do you think the ability of the individual affects the amount of dangerous play in a game of rugby?
7. How much do you think the atmosphere of a game affects the amount of dangerous play in a game of rugby?
8. How would you take into the ability and/or atmosphere of the game when making your regulatory decisions?
9. Some academics suggest that not all play within the laws of rugby are always acceptable. What is your opinion on this?
10. To what extent do you think expectations of dangerous play varies between individual players?

Appendix 2 – Interview Schedule – Referees

Introduction

1. When did you first get involved with refereeing rugby?
2. What do you enjoy about refereeing rugby?
3. Is there anything you do not enjoy about refereeing rugby?
4. Why did you get involved with refereeing rugby?

Dangerous Play in Rugby

1. How would you define dangerous play in rugby?
2. What is your view on dangerous play as part of the game?
3. What is your opinion on some academic's/physio's/media representative's concerns that the level of dangerous play in rugby is increasing alarmingly?
4. What is your experience with players/coaches accepting dangerous play on the pitch?
5. What is your experience with players/coaches encouraging dangerous play on the pitch?
6. How does the degree of injury suffered during a dangerous act, affect the acceptability of the act?

Regulation of Dangerous Play

1. What is your opinion on the effectiveness of yellow and red cards to deter and punish dangerous play on the rugby pitch?
2. In the Case of R v Calton, a young rugby player was convicted of inflicting grievous bodily harm and sentenced to 12 months. Calton kicked an opponent in the face as they were getting up off the floor after a ruck, resulting in a fractured Jaw. What are your thoughts on the judgement of this case?
3. What is your opinion on the effectiveness of bans and fines to deter and punish dangerous play on the rugby pitch?
4. What are your thoughts on the courts having more of a role in regulating dangerous play on the rugby pitch?
5. Which dangerous acts, if any, do you feel should or need to be regulated by the courts rather than the RFU?
6. Why do you think the act(s) you mentioned in the previous question deserve a response from the courts rather than the RFU?

Legitimate Sport

1. Are there unwritten rules in rugby in relation to dangerous play?
2. If yes, at what point does an act fall outside the acceptable behaviour of these unwritten rules?
3. Do some players intentionally cause harm to their opponents?
4. If yes, why do you think some players intentionally cause harm to their opponents?

5. If no, what stops players from intentionally causing harm to their opponents?
6. How much do you think the ability of the individual affects the amount of dangerous play in a game of rugby?
7. How much do you think the atmosphere of a game affects the amount of dangerous play in a game of rugby?
8. Some academics suggest that not all play within the laws of rugby are always acceptable. What is your opinion on this?
9. To what extent do you think expectations of dangerous play varies between individual players?

Appendix 3 – Interview Schedule – Legal Professionals

1. Introduction

1. When did you first get involved with ‘sports violence’ cases?
2. Have you ever been involved with cases regarding ‘violence’ on the rugby pitch?
What level of rugby have you been involved with? (Semi/Pro, Leagues?)
3. What do you enjoy about regulating ‘violence’ in sports?
4. Is there anything you do not enjoy about regulating ‘sports violence’?
5. Why did you get involved with regulating ‘violence’ in sports?

Dangerous Play in Rugby

1. How would you define dangerous play in rugby?
2. What is your view on dangerous play as part of the game?
3. What is your opinion on some academic’s/physio’s/media representative’s concerns that the level of dangerous play in rugby is increasing alarmingly?
4. What is your experience with players/coaches accepting dangerous play on the pitch?
5. What is your experience with players/coaches encouraging dangerous play on the pitch?
6. How does the degree of injury suffered during a dangerous act, affect the acceptability of the act?
7. What extent of ‘violence’ do you believe players on the pitch expect?

Regulation of Rugby

1. How can you establish the *mens rea* for ‘violence’ cases in rugby? How do you establish intent and recklessness?
2. In the Case of R v Calton, a young rugby player was convicted of inflicting grievous bodily harm and sentenced to 12 months. Calton kicked an opponent in the face as they were getting up off the floor after a ruck, resulting in a fractured Jaw. What are your thoughts on the judgement of this case?
3. Do you think there is a set of criteria which the courts can use to establish the boundaries of an individual’s consent (conditions of the game, nature of the act, extent of force, act closely related to play?)
4. Are there any public policy reasons for the prosecutorial discretion of ‘sports violence’, or in particular for those cases in rugby?
5. Are there any other issues affecting the viability of prosecution under s. 47, s. 20 and s. 18?
6. Are there any other offences for which a violent player may be liable to prosecution?
7. Do you think the current bans and fines are enough to deter and punish ‘violence’ in rugby?
8. What is the RFU’s current relationship with the courts in relation to ‘violence’ on the pitch?

9. Do you have an opinion on whether the RFU and courts should have a relationship?
10. To what extent does this relationship go, and how do you feel this relationship could be formed?
11. What are your thoughts on the criminal legal system having more of a role in disciplining on-pitch 'violence'?
12. Do you think the RFU is suitable in dealing with all on-field 'violence' cases in rugby? If so, why? If not, why?
13. Do you think the CPS is suitable in dealing with all on-field 'violence' cases in rugby? If so, why? If not, why?

Legitimate Sport

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2. If yes, at what point does an act fall outside the acceptable behaviour of these unwritten rules?
3. Do you think some players intentionally cause harm to their opponents?
4. If yes, why do you think some players intentionally cause harm to their opponents?
5. If no, what stops players from intentionally causing harm to their opponents?
6. How much do you think the ability of the individual affects the amount of dangerous play in a game of rugby?
7. How much do you think the atmosphere of a game affects the amount of dangerous play in a game of rugby?
8. How would you take into the ability and/or atmosphere of the game when making your regulatory decisions?
9. Some academics suggest that not all play within the laws of rugby are always acceptable. What is your opinion on this?
10. To what extent do you think expectations of dangerous play varies between individual players?

Deviant or Criminal? On-Field 'sports violence' in English Rugby Union and the Involvement of Criminal Law

The below questionnaire forms part of the research evidence examining the relevance and effectiveness of using the courts to regulate on-field dangerous play in rugby union. It is hoped a deeper understanding of the views and opinions of professional players will provide a valuable insight into the following research questions:

1. Is the RFU, and its current regulatory methods, effective at regulating on-field dangerous play in rugby?
2. Would increased or total criminalisation benefit professional rugby in any way?
3. What ways could the current prosecution process for dangerous play be made clearer and more viable?
4. Is the idea of an adaptable playing culture a viable method for simplifying the prosecution process and making the relationship between the RFU and Crown Prosecution Service more effective?

It should be noted, no names or potentially revealing information will be asked for during the questionnaire, to ensure anonymity and confidentiality of answers. The answers received will only be used for the purpose of the thesis, and will be destroyed following completion of the thesis

* Required

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4. What is your experience with other players/coaches accepting dangerous play on the pitch? *

5. What is your experience with other players/coaches encouraging dangerous play on the pitch? *

6. How does the degree of injury suffered during a dangerous act, affect the acceptability of the act? *

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5. Which dangerous acts, if any, do you feel should or need to be regulated by the courts rather than the RFU? *

6. Why do you think the act(s) you mentioned in the previous question deserve a response from the courts rather than the RFU? *

Legitimate Sport

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8. Some academics suggest that not all play within the laws of rugby are always acceptable. What is your opinion on this? *
9. To what extent do you think expectations of dangerous play varies between individual players? *