

Pitched BATTLE



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What is the standard of care owed to those entering the sporting arena – and when do acts committed on the field of play become acts of negligence or criminal assault?

Alban O'Callaghan draws the red card

“Out of the blue, this guy came running onto the pitch, came up behind my son, thumped my son in the back of the head just below the right ear, and then followed up with a punch to his eye. He left him on the ground dazed and confused. It was a full-blooded punch.” So begins the tale of the father of a 13-year-old explaining how a man in his late 40s attacked his son after a [pitch confrontation](#).

In the world of competitive sport, events may occur during a match that do not exactly conform to the [Queensberry Rules](#). It is often the case that a tackle to one person is considered an assault to another. This is inherent in nearly all sports and is generally regarded as coming under the legal principle of *volenti non fit injuria* – the voluntary assumption of risk. However, there are certain acts that happen during the course of a contest that depart from the rules of the game entirely.

What is the standard of care owed to sporting participants throughout the course of a match? What constitutes an act that falls so outside the rules of the game to render it an act of negligence or even criminal assault?

The game plan

It has been argued that the standard of care is subjective, and largely hinges on the type of sport in question and the level of skill associated with it. This approach places emphasis on what was reasonable under the

circumstances, as recognised in *Bolam v Friern Hospital Management Committee* (1957), and raises the issue of ‘playing culture’ and the uncertainty it attracts – in that conduct that may *not* be permitted under the laws of the game may still be accepted as being within the boundaries of what is deemed reasonable. Furthermore, there is a variation of levels under which this can be judged, meaning that a higher degree of care is required for a higher-level match (*Condon v Basi* [1985]).

In *Basi*, a footballer playing in a local league match suffered a broken leg as a result of a tackle. The court had to consider the standard of care expected of a football player. The court decided that one of the criteria in this regard was the level of expertise a player had – and the defendant was held to have acted recklessly, even for

at a glance

- Sports participation and the voluntary assumption of risk
- The standard of care owed to those taking part in matches
- What constitutes an act that falls so far outside the rules of the game to render it an act of negligence or criminal assault?
- Five principles by which liability may be adjudged
- The duty of care that exists between the athlete, coach and referees

“ One of the criteria in this regard was the level of expertise a player had – and the defendant was held to have acted recklessly, even for the standard of a local league player ”



the standard of a local league player.

This issue of playing culture has been considered several times before the English courts, most notably in *R v Bradshaw* (1878), *R v Billingham* (1978) and *R v Blissett* (1992), each of which implicitly recognised the existence of playing culture and the manner in which the rules and practices of a game can dictate what conduct is legally acceptable.

Caldwell v Maguire and Fitzgerald (2001) set out five principles by which liability may be adjudged. The case concerned a claim by a professional jockey against two other jockeys. The plaintiff, both defendants, and a fourth jockey who was not a party to the proceedings had been taking part in a race in Hexham in England. The two defendants, in effect, cut off the fourth jockey's line of riding, causing his horse to veer off course, which in turn caused the plaintiff to fall and break his back and end his career. The defendants were found guilty of careless riding and banned from racing for three days.

The crying game

The English Court of Appeal found that there had been no negligent conduct on the part of the defendants and approved five principles as a means of assessing the liability of a defendant for negligently or recklessly

inflicting injury on another contestant:

- Each contestant in a lawful sporting contest owes a duty of care to the other participants,
- This duty is to exercise all care that is objectively reasonable under the circumstances, so as to avoid the infliction of injury on other participants,
- These circumstances rest on the contest, its objects, the demand made of the contestants, and the skill, standards and judgement that may be reasonably expected from such contestants,
- The threshold for liability of the given sport would be high so as to render a lapse in judgement insufficient to establish a breach of the duty of care, and
- Without proof of an act that was reckless for the other contestant's safety, it may be difficult to prove a breach of the duty of care.

Upon application of these factors, the defendants were held to have made errors of judgement and, as such, had not actually acted

with reckless disregard for the plaintiff's safety.

This issue was again considered in *R v Barnes* (2004), which concerned a two-footed tackle by the defendant during the course of an amateur football match. The defendant was subsequently charged with unlawfully and maliciously inflicting grievous bodily harm on the victim. While Barnes admitted to tackling with two feet, he maintained that it was a fair sliding tackle.

The Court of Appeal also adopted several guidelines previously considered in the Canadian cases of *R v Ciccarelli* (1989) and *R v Cey* (1989), which concerned violent conduct during an ice hockey game to determine this, including the particular sport involved, the standard involved, the nature of the act, the force applied, as well as

the defendant's state of mind. The Court of Appeal upheld the defendant's appeal and held that criminal prosecutions should be reserved for situations where the conduct is sufficiently grave to be properly categorised as criminal. Furthermore, the court recognised that, although the act complained of was outside

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FOCAL POINT

ah ref! duty of care and referees

What of the duty of care that exists between the athlete, coach and referees? If a player's actions during a match can be pardoned due to being 'in the heat of battle', how far does this extend to a non-playing participant who is nevertheless involved in the match?

This was considered in the United States' Supreme Court decision in *Cerny v Cedar Bluffs Junior/Senior High School* (2001). This case concerned a game of American football, during which the plaintiff hit his head off the ground while attempting to make a tackle. The player was disorientated, short of breath, and had a tingling sensation in his neck. He removed himself from the game but returned later and hit his head again, this time off an opposing player, while making a tackle. He subsequently brought a personal injury action against the school and its coaching staff, alleging negligence on their part. Both coaches held coaching endorsements in this instance. It was held that the appropriate standard by which to assess a coach's actions was that of the reasonable man with regard to having such coaching endorsements.

This issue arose recently in *Neville v St Michael's College and St Vincent's University Hospital* (2014). In this case, a student enrolled in St Michael's College sustained a head injury during rugby training in November 2009, which caused him to lose consciousness. He was admitted to St Vincent's Hospital and diagnosed four days later with sinusitis and discharged home without a scan being performed, despite the request for one by his mother. He subsequently returned to school on the understanding that he was not to take part in contact sports. Despite this arrangement, the plaintiff took part in the last ten minutes of a rugby match and sustained a second blow to the head. He lost consciousness and was brought to hospital where a scan revealed that he had sustained permanent brain damage. Ultimately, liability was admitted in respect of the plaintiff's claim.

The liability of referees was considered in the case of *Vowles v Evans* (2003), which related to an injury sustained as a result of a collapsed scrum in amateur rugby in Wales. The plaintiff was playing in the front row when another

player, who was vastly inexperienced in that position, replaced another more experienced player. The scrum ultimately collapsed. The plaintiff broke his neck and was paralysed. The claimant alleged that the referee had breached his duty of care and had violated one of the rules of the game by failing to make adequate enquiries of the replacement player to determine if he was suitable to play in that position. It was argued by the plaintiff that the replacement player should have been identified as unsuitable for the front row by the referee.

The Court of Appeal held that, when a referee undertakes to perform this very function, it is reasonable that the players may rely upon him or her to discharge this duty with reasonable care. The referee was found liable in this regard, and the Welsh Rugby Union were held vicariously liable. Of note in this decision is that the referee had time to consider his decision to allow the player to play in the front row, yet still proceeded to do so, thus rendering the argument that it was a lapse in judgement difficult to agree with.


the laws of the game, it could be expected and thus might be consented to.

In *Cey* (1989), the defendant was found to have acted within the playing culture of the sport when he pushed the victim into the side of an ice rink, causing facial injuries. However, in another Canadian case, *R v Ciccarelli* (1989), the defendant struck another player several times with his stick during a break in play. This was held to constitute unusual practice for a game even as physical as ice hockey, and thus was held to fall outside of the playing culture.

This matter has been considered in Ireland several times, most notably in *DPP v Greaney* and *DPP v McCartan* (2004), two District Court prosecutions that concerned acts committed by the respective defendants during Gaelic football matches. In *Greaney*, the defendant received a nine-month suspended prison sentence following an incident in a junior football match in which he struck another player off the ball, causing the other player to sustain brain damage. In *McCartan*, the defendant was found guilty of assault after breaking another player's jaw during a match following an off-the-ball altercation.

In line with the English decisions above, the court in *McCartan* implicitly acknowledged the playing culture in which this incident had occurred, and how it "overcame [McCartan's] own scruples".

It is clear that there is no one formula to determine the liability for acts committed during a sporting contest that result in injury. However, the nature of the sporting contest, the demands made of its participants, and the level to which it is played will all be taken into account. Crucially, it can be seen that the threshold of liability is considerably high, and a mere lapse of judgement will not suffice in bringing a claim. There must be a significant

level of intent from the accused to inflict injury on the opposing player. The approach adopted in the Canadian decisions of *R v Cey* and *R v Ciccarelli* appears to me to be the most practical, due to their recognition of players' consent to actions that fall outside the rules, while being able to distinguish acts that are so removed from the normal course of a game, in terms of their force and intent, so as to render them criminally liable. 

look it up

Cases:

- *Benjamin Roger Smoldon v Thomas Whitworth and Michael Nolan* [1996] EWCA Civ 1225
- *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, [1957] 2 All ER 118
- *Caldwell v Maguire & Fitzgerald* [2001] EWCA Civ 1054
- *Cerny v Cedar Bluffs Junior/Senior High School* (Supreme Court of Nebraska, 29 June 2001)
- *Condon v Basi* [1985] EWCA Civ 12
- *DPP v McCartan* (District Court, unreported, 1 November 2004)
- *Neville v St Michael's College and St Vincent's University Hospital* (High Court, unreported,

24 March 2014)

- *R v Barnes* [2004] EWCA Crim 3246
- *R v Cey* (Court of Appeal for Saskatchewan, 8 May 1989)
- *R v Ciccarelli* [1989] 54 CCC (3d) 121 (Ont Dist Ct)
- *Vowles v Evans* [2003] EWCA Civ 318

Literature:

- Findlay, Hilary (2002), 'Violence in sport, part I – it's your responsibility too'
- Findlay, Hilary (2003), 'Violence in sport, part II – dealing with violence as a legal issue'
- Zvulony & Co (2010), 'Assault and battery on the hockey rink'

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