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The Regulation of on-the-ball Offences: Challenges in Court

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Abstract

Following the Court of Appeal's judgment in *R v Barnes* it was argued that on-the-ball contacts in sport, in breach of the rules of the game, were unlikely to be classed as criminal. It was perceived that these types of injury-causing acts were not sufficiently grave to warrant criminality and were better regulated internally or by the civil law. However, the imprisonment of amateur footballer Mark Chapman, for an injury-causing tackle, has challenged this viewpoint. This paper will explore the incident in *Chapman* in the light of *Barnes*, and argues, that the boundaries of criminality in contact sports are increasingly difficult to ascertain. It will revisit case law concerning incidents of on-the-ball offences and assess whether the prosecution and subsequent guilty plea in *Chapman* could have been an anticipated outcome. Internal disciplinary mechanisms will be scrutinised to whether they can impact on the criminal law's involvement. Finally the paper will put forward that the amateur status of the participant may have been a key factor in the resulting finding of criminality.

Keywords

Sport, On-the-ball Violence, Consent, Playing Culture

Introduction

In sports such as association football and the two codes of rugby there are contacts during the course of play that can result in injury. Some of the injuries occur as a consequence of contacts that are outside the rules of the sport and are referred to as 'on-the-ball offences'. Examples of on-the-ball offences in football, as stated in Fédération Internationale de Football Association's (FIFA) Law 12, include, *inter alia*, careless tackles, recklessly jumping for a ball and using excessive force when charging an opponent. (See <http://www.fifa.com/mm/document/affederation/generic/81/42/36/lawsofthegame_2010_11_e.pdf>) The International Rugby Board's Rule 10, states that late or dangerously tackling of an opponent, tackling an opponent above the line of the shoulders and 'stiff-arm tackles' are all examples of on-the-ball offences. (See <http://www.irblaws.com/EN/laws/3/10/92/during-the-match/foul-play/obstruction/#clause_92>)

Gardiner and James (1997) posited the question of whether these types of incident should be immune from prosecution as 'normal' play, or alternatively criminal as they are 'well beyond' what should be expected from 'normal' play? Following the case of *R v Barnes* [2004] EWCA Crim, James argued that on-the-ball contacts in sport, in breach of the rules of the game, were unlikely to be classed as criminal (James, 2010, p118). Fafinski added that only a high degree of departure from the accepted rules of play should cross the policy threshold that 'justifies the interference of the courts in regulating sporting activities.' (Fafinski 2005, p. 423) The rationale for this was in the fact these incidents were not 'sufficiently grave' to lead to a finding of criminality; they were better regulated by internal disciplinary mechanisms or the civil law. In March 2010 there was a challenge to this way of thinking when Mark Chapman, an amateur footballer, was sentenced to six months

imprisonment after pleading guilty to maliciously inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861 (OAPA 1861) (*R v. Chapman* (unreported) Crown Court (Warwick), 3 March 2010) (<<http://www.telegraph.co.uk/news/uknews/crime/7369009/Footballer-first-to-be-jailed-for-on-field-tackle.html>>).

In terms of sports participatory violence, this was not a particularly unusual occurrence. In recent years, players have been imprisoned for various offences committed on the sports-field (For examples see *inter alia* : *Gingell* [1980] Crim. L.R. 661; *Bishop*, *The Times*, October 12, 1986; *Johnson* (1986) 8 Cr. App. R. (S) 343; *Lloyd* (1989) 11 Cr. App. R. (S.) 36; *Moss* [2000] 1 Cr. App. R. (S.) 307; and *Bowyer* [2001] EWCA Crim 1853, [2002] 1 Cr. App. R. (S.) 101). What was distinctive about *Chapman*, was the fact, the participant was jailed for an injury-causing *tackle*. Previous cases of incarceration have concerned, for the most part, acts of 'off-the-ball' violence such as punches, kicks or head-butts. This paper will revisit some of the on-the-ball violence jurisprudence, and assess whether, in the light of it, the decision to prosecute and subsequent guilty plea, was an anticipated outcome. The analysis will be informed by a contextual approach, paying particular attention to the Court of Appeal's ruling in *Barnes*, in which, the legal boundaries of consent, relating to injury-causing contacts were discussed in great depth. It will assess whether the incident is a 'sufficiently grave offence' that warranted criminal prosecution and will comment on whether Chapman's imprisonment for this type of offence is appropriate given the way similar 'sporting assaults' in both professional and amateur sport have been dealt with. Internal disciplinary mechanisms will be scrutinised to assess whether they can impact on the criminal law's involvement. Finally, the paper will assess whether the amateur status of a sportsperson is likely to have any influence on the involvement of the criminal law and the eventual finding of criminality. 3

R v Chapman: Tackling Violence in the Crown Court

On October 10th 2009, during a Rugby and District Sunday League football game between Long Lawford and Wheeltappers, Lawford player, Mark Chapman, challenged Wheeltappers' Terry Johnson. The ball was running out of play in the Wheeltappers' half with Johnson shadowing it towards the touchline. Chapman continued to close in and used a stamping motion, with a raised right foot and studs showing, on the back and side of Johnson's right leg. The challenge resulted in a serious injury to Johnson's leg, the repercussions of which were reconstructive surgery and a skin graft. This description of the incident was substantiated by the account of the match official who referred to the incident as a 'callous deliberate act with intent to cause injury to the player.' 4

At a Birmingham County Football Association (FA) disciplinary hearing Chapman was suspended from all football for a period of 84 days. Unfortunately for Chapman, the internal mechanisms did not bring the matter to a close. Johnson, who was much aggrieved by the challenge made a complaint to the police. After a police investigation the file was passed to the Crown Prosecution Service (CPS) who decided to prosecute Chapman for unlawfully and maliciously inflicting grievous bodily harm, contrary to section 20 of the OAPA 1861. The decision to prosecute accords with the sentiments of the CPS at their 2005 *Crime in Sport conference*, at which Paul Hayward a CPS spokesman stated: 'We don't want a situation where sportsmen are getting away with something on the pitch that they would be prosecuted for if it happened in the high street' (Harris, 2005, p.67). 5

At Warwick Crown Court, Chapman pleaded guilty to the offence. Sentencing Chapman to six months imprisonment, Judge Robert Orme stated: 6

'This is a deliberate act, a premeditated act. A football match gives no-one any excuse to carry out wanton violence ... The result of what you did was that Mr Johnson suffered a badly broken leg - it horrified those who saw it. I accept you showed very early remorse and there is substantial mitigation which can be put forward for you. But I have also had to consider the position of the victim and your very deliberate criminal act.'

This highlights the point that violence on the sports-field will not be tolerated and accords with previous judicial comments concerning incidents of participatory violence. In imposing custodial sentences, the courts have been unwilling to grant a 'licence for thuggery' (*R v Moss* [2000] 1 Cr. App. R. (S.) 307 at 309, Potts J.) or endure 'gratuitous violence' (*R v Bowyer* [2001] EWCA Crim 1853, page 6 of the transcript) in the same way Judge Robert Orme was unwilling to excuse 'wanton violence'. What was unique about this case, was the fact the wanton violence, was established in the course of a challenge as opposed to the aforementioned cases of off-the-ball punches to the face. Despite the distinctive nature of this case there is support for its approach in the sentiments of Barrister Edward Grayson who states: 7

'If a person intentionally or recklessly causes harm to another in order to prevent them from reaching a ball or for reason of sheer thuggery, then these actions are in breach of the criminal law ... Why should offenders who commit a crime in their game not be punished for their villainy? The law of the land

never stops at the touchline.’(Grayson, E, 1993 p. 694)

Grayson was a proponent of the philosophy that all acts of foul play, causing injury, should be dealt with by the criminal law. This stance received some support from Sepp Blatter, the President of FIFA, who following a leg breaking tackle during the course of an English Premier League match in 2008, called for lifetime bans and criminal prosecutions of footballers guilty of dangerous tackling (Syed, 2008). Grayson’s stance, however, is even more interventionist than Blatter as he argues for the criminal law’s involvement in all acts of foul play that result in injury. His approach to the professional foul conveys this point well. 8

‘Suffice it to say that [the Professional Foul] should be expunged from the vocabulary of every self-respecting sports lover and condemned except to explain that what has been called the professional foul in the past is in reality an actionable criminal and civil assault.’ (Grayson, 1994, p. 157)

The professional foul is defined as ‘an intentional foul (= act which breaks the rules) especially one which is intended to prevent the other team from scoring a goal.’ 9
<<http://dictionary.cambridge.org/dictionary/british/pro-fessional-foul>> In the light of this definition, Grayson’s stance could be seen as rather absurd given that the foul need not be violent and could easily be a shirt pull. It is probably best interpreted as any acts of foul play that would satisfy the mens rea of any of the aggravated assaults under the OAPA 1861.

Grayson’s thesis has received very little academic support with Gardiner (2007, p. 23) arguing that; ‘the reality is that in contact sports there is a continued risk of injury. If consent is only limited to the operation of the specific rules of the sport it will be overly restrictive.’ In other words Grayson’s stance is too idealistic and a more pragmatic response is to accept that ‘deliberate, reckless and foul play occurs at all levels of many sports’ (James 2010, p126). Therefore, certain injury-causing contacts outside the rules of the game can be consented to. However, even the pragmatic response to sports-field violence has its difficulties as the extent of criminal liability for injury-causing contacts, caused outside the rules of the game, is not certain. 10

The Offence

Chapman was charged with unlawfully and maliciously causing grievous bodily harm contrary to section 20 of the OAPA 1861. For this offence the consequences of the act must be either a wound or Grievous bodily harm. A wound is when the continuity of the skin is broken. Grievous bodily harm can be defined as really serious harm. It can be submitted that the fact Johnson required reconstructive surgery and a skin graft following the challenge, that this type of harm would be deemed really serious. 11

The *mens rea* of section 20 is intention or recklessness as to whether force is applied to another person. In addition to this the prosecution must prove that at the time of the act, the defendant foresaw some injury as a result of his action. However, the defendant does not have to foresee a wound or GBH, just some harm. Therefore, in making the decision to prosecute, the CPS would have been compelled to ascertain whether, at the time of the challenge, Chapman foresaw the risk of some harm being caused to Johnson as a result of his act. It would seem that the fact the victim was shepherding the ball out of play, the force of the challenge and the positioning of Chapman’s studs in relation to Johnson’s leg would evidentially point to there being foresight of some harm on the part of Chapman. Nearly all charges brought under s.20 involve off-the-ball incidents of violence (James, 2006.) but *Chapman* makes it clear that even acts associated with the playing of the game can result in criminality if the mens rea and actus reus of the offence are satisfied. 12

Consent

Having established a prima facie case of section 20 this paper will now turn its attention to the defence of consent. The law of consent relating to injury causing contacts in sport has been the subject of intense academic debate in recent years (Anderson, 2005, 2008; James, 2002, 2010; Gardiner, 2007; Pendlebury, 2006; Livings, 2006; Fafinski 2005). These debates were fuelled by the House of Lords’ obiter statements in *R v Brown* [1993] 2 WLR 556 that sports are the exception to the general rule that you cannot consent to having harm inflicted on your person. 13

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

does not agree that this more serious kind of injury may be inflicted deliberately.’ (*R v Brown* [1993] 2 WLR 556, p. 592 per Lord Mustill)

It can be ascertained from this quote that any injury-causing contacts within the rules of the sport will be consented to. Further support for this can be taken from the Law Commission’s paper *Consent in the Criminal Law*, 1995, in which injury-causing contact, within the rules of the game was held to be something that the participants in sport could consent to. However, as James (2006, p. 605) posits, there is little guidance as to how the criminal law should address contacts that are outside the rules of the game. Following *Brown* and the Law Commission report it could not be said with any great certainty what, if, any contacts outside the rules of the game could be consented to. 14

There was, however, tacit acknowledgement that contacts outside the rules of the game could be consented to in the 19th century case of *R v Bradshaw* (1878) 14 Cox’s CC 83, in which, Bramwell LJ acknowledged that contacts within the ‘rules and practices’ of the game could be consented to. The reference to practices, in addition to rules, indicates something outside the rules of the game could be consented to. This concept has been referred to as the ‘playing culture’ of sport. The playing culture of sport refers to the way that the game is played and how it is expected to be played by those who are in some way involved in it. It would include codes of conduct, tactics and commonly occurring incidents of foul play (James, 2006, p. 602). Despite *Bradshaw*’s elicit elusion to the concept, the entire 20th century went by without any express acceptance by the courts that contacts outside the rules of the game could be consented to. If this was applied to *Chapman* he would be unable to rely on consent as a defence as his contact was clearly outside the rules of the game. 15

Barnes and Beyond: Contextualising Chapman

The case of *Barnes* has many comparisons to *Chapman*. Like *Chapman*, the incident occurred in an amateur football match, during which the victim sustained a serious leg injury as a result of a late tackle. Further, the tackle was late and reckless and resulted in the defendant being sent from the field of play. Both players were disciplined internally by their respective regional FAs and subsequently charged with unlawfully and maliciously inflicting grievous bodily harm contrary to section 20 of the OAPA 1861. At fist instance, however, Barnes pleaded not guilty to the charge. Before Judge Vand der Bijl and a jury at Canterbury Crown Court he was convicted of the offence. In his summing-up, Vand der Bijl directed the Jury that the appellant could be guilty only if the prosecution had proved that the injury resulted from conduct that was not done by way of ‘legitimate sport’. Barnes was granted leave to appeal on the grounds that the judge erred in directing the Jury that the unlawfulness of the appellant’s action and the definition of recklessness were both related to the notion of ‘legitimate sport’ without giving guidance as to what constituted legitimate sport; furthermore, that the jury received no explanation of the concepts of consent or accident as a defence, nor the relevance of a genuine attempt to play by the laws of the game. In the course of allowing the appeal the Court of Appeal provided an intense-focus on the law relating to sporting assaults and the role the defence of consent plays. Lord Woolf C.J., delivering the judgment of the court, took as his starting point the fact that most organised sports have their own sophisticated disciplinary mechanisms. For example, in English Rugby Union, the Rugby Football Union Discipline Department are in place to hear cases concerning violations of the rules and other breaches of discipline. It is headed up by an independent Judge Jeff Blackett and comprises of three full-time staff based at Rugby House, Twickenham. These internal procedures, allied to the fact that there was also the possibility for an injured player to obtain damages in a civil action, led Lord Woolf to conclude that ‘a criminal prosecution should be reserved for those situations where the conduct is sufficiently grave to be properly categorised as Criminal’ (*R v Barnes* [2004] EWCA Crim, para. 5 Per Lord Woolf, CJ). The express support for the concept of playing culture was by virtue of paragraph 15 of Lord Woolf’s judgment. 16

‘In making a judgment as to whether conduct is criminal or not, it has to be borne in mind that, in highly competitive sports, conduct outside the rules can be expected to occur in the heat of the moment, and even if the conduct justifies not only being penalised but also a warning or even a sending off, it still may not reach the threshold level required for it to be criminal.’ (My emphasis added) (*R v Barnes* [2004] EWCA Crim, para. 15 Per Lord Woolf, CJ)

It is this part of the judgment that allows for the playing culture of sport to be incorporated into English law. The reference to foul play, warnings or sending offs not essentially leading to criminality conveys the Court of Appeal’s willingness to accept that certain injury-causing contacts, outside the rules of the game could be legally consented to. In assessing which contacts outside the rules of the game are capable of being consented to the Court of Appeal, stated ‘that the type of the sport, the level at which it is played, the nature of the act, the degree of force used, the extent of the risk of injury and the state of mind of the defendant are all likely to be relevant in determining whether the defendant’s actions go beyond the threshold’ (Para 15). As Anderson (2008, p. 763) eludes to ‘thanks to the Court of Appeal in *Barnes* ... the demarcation line between physicality that can be considered reasonable in light of the rules and spirit of the game in question and that which is clearly criminal in nature, is more readily identifiable.’ Despite it being easier to ascertain, there are certain 17

issues that remain uncertain. Fafinski argues that 'in failing to set out clear tests to be applied in the determination of conduct sufficiently grave to be labelled as criminal, the Court of Appeal is either acknowledging that it is impossible to lay down clear guidance, or delegating the determination of criminal liability to the CPS and the jury' (Fafinski, 2005, p. 421).

A further problem with *Barnes* is the questionable application of the criteria to the given facts. The guidelines in themselves are not unhelpful but as (James, 2010, p. 118) argues, the fact the court failed to apply them correctly to the facts of the case provides an element of confusion. It would seem unquestionably that if the guidelines had been applied to the incident in question then Barnes would have failed in his appeal (James, 2006, p. 611; James, 2010, p. 118). The jury relied heavily on evidence from the match official who referred to the challenge as a two-footed lunge. In terms of the nature of the act, the degree of force used and the risk of injury it would seem that the challenge was inconsistent with an act that would be consented to. At trial, the jury seemed to consider that the challenge was almost akin to a stamp, which was evidently excessive force that could lead to a high risk of injury. Further, the evidence suggested that Barnes, after making the challenge, said words to the effect of 'have that' – an epithet certainly consistent with a state of mind intent on injuring an opponent rather than playing the game. 18

Fafinski (2005), referring to the judgment in *Barnes* states: 19

'the Court of Appeal has given some authoritative guidance as to where the line is drawn between legitimate and unlawful violence in the sporting arena. In doing so, it could be argued that they are attempting to stem a slowly increasing tide of criminal prosecutions following sporting injuries. *The judgment will facilitate an evaluation of the likelihood of success for those considering bringing a criminal prosecution.*' (My emphasis added)

Conversely, it could assist defendant legal teams in advising their clients as to the chances of successfully relying on the defence of consent. Evidently of course, it will also influence the defendant's decision to enter a guilty plea. Given this fact it seems astounding that Chapman pleaded guilty to the offence. As mentioned above, the facts are not dissimilar to *Barnes* where the defendant's conduct was not sufficiently grave to warrant a finding of criminality. It could even be argued that the conduct of the defendant in *Chapman* should be less likely to result in criminality than in *Barnes*. The nature of the act (stamp from behind), the degree of force used (excessive to achieve the aim of getting the ball) and the risks involved (serious injury) would all be detrimental to Chapman's defence. However, the mindset of the defendant in *Chapman* would appear to be more akin to over-aggressive than of Barnes' retaliatory nature. Chapman had been criticised by his teammates earlier on in the match for showing a lack of effort and it could be argued that this reckless act was a way of dispelling the accusation. In the light of these facts, it must be reiterated that the unwillingness to defend the charge before a jury is somewhat surprising. The decision in *Barnes* would at least put doubt into the minds of the jury as to whether the nature of the act, degree of force, risks involved and state of mind of Chapman would support a finding of criminality. Further support that the pleading was unanticipated was the fact the other post-*Barnes* cases concerning on-the-ball offences, which warranted prosecution, resulted in acquittals at crown court. In *R v Evans* (Unreported), Crown Court, (Newcastle), 15 June 2010, the defendant was acquitted of the offences of assault occasioning actual bodily harm and common assault after he had caused slight bruising when stamping on an opponent's head during the course of a rugby union match. At Newcastle Crown Court, Judge Bolton ordered the jury to acquit the defendant of both offences. This was despite the court seeing full video footage of the incident and the seemingly deliberate nature of the defendant's actions. Furthermore, Judge Bolton stated she was 'flabbergasted' by the CPS' decision to prosecute. Post-dating *Chapman*, before York Crown Court, Nigel Chester, an amateur footballer, was cleared of maliciously causing grievous bodily harm contrary to section 20 of the OAPA 1861, after admitting to the court that he had injured his opponent James Burkitt, during the act of committing a professional foul (*R v Chester*, (Unreported), Crown Court, (York), 16 August 2010). *Evans and Chester* both convey that an act of foul play is ultimately not determinate of criminality. Despite the two courts not expressly making reference to *Barnes*, it can be submitted that both acts were not interpreted as being sufficiently grave to be categorised as criminal. What can be presumed, however, is that in the making a decision on how to plea, both defendant legal teams would have had *Barnes* at the forefront of their minds and it would seem to have been an eminently sensible decision to advise their clients to plead not guilty. It is at this juncture important to explore previous on-the-ball incidents that have merited the criminal law's involvement and assess whether Chapman's incarceration could in anyway have been anticipated. 20

On-the-Ball Violence in the Courts

The only previous imprisonment of a sportsperson for an on-the-ball incident in England was seen in the case of *R v Goodwin* [1995] 16 Cr. App. R.(S.) 885. The incident took place during the course of an amateur rugby league match between Gasson Rangers and Wath Brow Hornets. The victim had possession of the ball and was running towards the opposition's defence. Goodwin was nearby and approached him in order to tackle him. The victim chipped the ball over Goodwin's head and ran as if to collect it. According to witnesses, including the 21

impartial referee, Goodwin then deliberately swung his elbow at the victim's head and struck the right side of his face. The referee was some five metres away. He had a clear view of the incident and immediately dismissed Goodwin from the field of play. The victim suffered serious facial injuries including a broken cheekbone. As with the aforementioned cases, Goodwin was subject to an internal sanction of 14 months suspension from participating in the sport. Despite the lengthy suspension, at Carlisle Crown Court, Goodwin was convicted of inflicting grievous bodily harm contrary to section 20 of the OAPA 1861 and sentenced to six months imprisonment. Goodwin appealed against his sentence to the Court of Appeal. In reducing the sentence to four months imprisonment, made an important comment for the purpose of the on-the-ball violence discussion. In deliberating on whether to reduce the sentence he stated:

'An important consideration ... is whether the criminal violence occurred at or about the time one or other of the parties was playing the ball. Clearly, if the assault occurred then rather than when the ball was being played elsewhere on the field it may be possible to take a less severe view of the offence. In such circumstances, if serious injury resulted, the claim that the seriousness was unintentional and unexpected may be made with more justification.' (*R v Goodwin* [1995] 16 Cr. App. R.(S.) 885, p.887 Per Mitchell J.)

The fact the incident was during the course of play or on-the-ball was seen by the Court of Appeal as a relevant factor in ascertaining the appropriate sentence for Goodwin. However, it was of course not pertinent in determining his guilt. It can, however, be put forward that post-*Barnes* the on-the-ball nature of the offence in *Goodwin* could have assisted the defendant's legal team in persuading the jury that the act was not sufficiently grave to lead to a finding of criminality. 22

The discussion thus far has focussed on on-the-ball incidents that have occurred during the course of amateur games. There has, however, been a debate concerning the criminalisation of violence in professional sport. 23

On-The-Ball Violence in Professional Sport: Kicking the Law into Touch.

As mentioned above, the head of world football has recently called for criminal prosecutions for dangerous tackles that result in injury. However, the criminal justice system has for the most-part not involved itself with incidents of violence in professional sport. There have only been a handful of successful prosecutions for off-the-ball offences (Examples include *R v Kamara* (Unreported), Magistrates Court (Swindon), 14 April 1993 and *R v Stein* (Unreported), Crown Court, (Shrewsbury), 27 October 1993). As far as on-the-ball incidents are concerned only *R v Blissett* [1992] Independent, 4 December has warranted the involvement of the criminal law. Whilst playing in a professional football match in the English Third Division, Blissett had risen to challenge for the ball with an opponent. Both players were attempting to head the ball. In the course of the challenge, Blissett's elbow came into contact with his opponent's face, fracturing his cheekbone and eye socket. The victim was unable to play professional football again. Blissett was sent off by the match referee. At the trial, the court placed great emphasis on the evidence of the then chief executive of the FA, Graham Kelly who claimed that this was the kind of challenge that a regular spectator of football would expect to see at least 50 times per game. In other words the head of the national governing body did not regard the challenge as sufficiently grave to be considered criminal. In the Post-*Barnes* world the *expert* evidence would have supported Blissett's defence as the 'nature of the act' would be put to the jury as being something that was within the boundaries of what is expected and accepted to happen during the course of a sporting encounter. It would be interesting to explore the Birmingham County FA's response to *Chapman* and whether they would be as sympathetic to his case. It would seem that they have remained silent on this matter. 24

Since the decision of the Court of Appeal in *Barnes* not one on-the-ball incident in professional sport has been subject to prosecution. In recent seasons there have been a number of injury-causing challenges that have resulted in dismissal from the field of play that have not been thought worthy of criminal law involvement. A pertinent case for the purpose of this discussion is *FA v Thatcher* Independent Disciplinary Commission, 12 September 2006. On 23 August 2006, during a Premier League football match at the City of Manchester Stadium, and as the two players chased the ball going out of play, Manchester City player Ben Thatcher hit opponent Pedro Mendes in the face with his elbow; Mendes was hospitalised as a result of the challenge, which had rendered him unconscious. Comments from Mendes, the Portsmouth players and even the viewpoint of his own boss, Stuart Pearce highlights that the challenge was an unacceptable attempt to injure an opponent (see Hughes, 2006). In the light of these facts and following a number of complaints, Greater Manchester Police (GMP) launched an investigation into the incident. In an unprecedented move, GMP waited for the outcome of the FA disciplinary tribunal before deciding whether to pass the file onto the CPS (See James 2008, pp. 771 - 772). Given the fact they chose not to proceed in the case, the eight match suspension, with a further 15 suspended for two years and a fine of £30,000 must have been seen as sufficient. Presumably the police and 25

CPS were taking note of paragraph 5 of *Barnes* which states:

'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, section 17(c) of the *Code for Crown Prosecutors* states that a prosecution will be less likely to satisfy the public interest requirement for prosecution if the suspect has been subject to any appropriate regulatory proceedings, which adequately addresses the seriousness of the offending. Again it has to be presumed that the police and CPS thought the extended period of suspension did adequately address the seriousness of the offence. It is perhaps this novel approach to the decision to prosecute and also the allowing of *Barnes*' appeal that led James to state that if there is any connection between the assault and the game then it will not be appropriate for the criminal law to intervene (James 2010 p. 126). It would seem pertinent to add that this is on the proviso the relevant disciplinary body has adequately (and responsibly) dealt with the incident. As Pendlebury (2006 Para. 32) argues; 'if the governing body is not responsible in its fight against violence then the Criminal Law would have to involve itself.' Anderson (2005, p. 26), considering *DPP v McCartan* unreported, District Ct (Ireland), November 1, 2004, adds weight to Pendlebury's argument. He states: 'ill-discipline of a serious nature had been allowed to fester for too long and the GAA's existing disciplinary mechanisms had failed and needed to be overhauled.' An example of responsible governance of violence would appear to be the RFU's disciplinary mechanisms. As mentioned above, they have sophisticated almost court-like proceedings which incorporate evidential rules and allows for the accused to put forward mitigation and the panel to consider any aggravating factors. Transcripts of the hearings appear on <http://www.rfu.com/TheGame/Discipline/Judgements.aspx> with individual panels referring back to previous disciplinary decisions. Pertinent examples of the above attributes are the disciplinary appeal hearings in, *RFU v. Jennings* of 28 April 2010 and 14 July 2010. Not only are the findings laid out like court transcripts, but it is clear from the outset that the hearing was quasi-judicial in its form and procedure. The parties' legal representatives were present at the hearings and witnesses were called by both sides. 26

In Part one of the hearing, the Panel made clear their findings of fact. This included in particular that Jennings had performed a hand-off to the eye of an opponent with the heel of his hand causing it to implode and blind his victim. The rules state that a hand off must be performed with the palm of the hand. The panel required expert evidence on the application of the Laws of Rugby Union to the findings of fact it had made. (See <http://www.rfu.com/TheGame/Discipline/Judgements/Judgements2009-2010/~media/Files/2009/Discipline/2009-2010/jennings%20%20judgementinterim%20decisionpart1.ashx>) 27

In Part Two, the Panel analysed the expert opinion and provided a full and robust explanation of why a five-year ban should be imposed on Jennings. In particular, it defined the use of the heel of the hand to be a striking of the opponent and not a hand-off. As a result, the Panel found that this 'striking' was intentional and that Jennings had been reckless as to the degree of harm that would be caused by such an act. As he had shown no remorse, had not apologised and had sought to deny foul play, these aggravating factors were used to increase the initial ban of 78 weeks to one of five years. (See <http://www.rfu.com/TheGame/Discipline/Judgements/Judgements2009-2010/~media/Files/2009/Discipline/2009-2010/jenningswhitehavenappealfinaljudgmentpart2jul10.ashx>) 28

The injury in Jennings was of greater severity than that which occurred in *Chapman* but despite Cumbria Police investigating the incident, it was passed on to the Rugby Football Union's disciplinary processes. This would appear to indicate that, like Thatcher, they were comfortable with a responsible quasi-judicial body dealing with this particular incident. 29

Conclusion

This article has conveyed that despite the Court of Appeal's apparent non-interventionalist approach to on-the-ball violence in *Barnes*, and to the surprise of many leading academics, including this author, criminal prosecutions have continued. This approach led to Judge Bolton, being 'flabbergasted' by the decision to prosecute in the case of *Evans*. Fortunately for offenders, the decision to prosecute, has for the most-part, been followed by a not guilty plea and a subsequent acquittal. However, *Chapman* has shown that there is also still some confusion circulating in criminal defendant legal teams as to what constitutes a sufficiently grave act that warrants a finding of criminality. Notwithstanding, the similar nature of the injury-causing act in *Chapman*, unlike *Barnes*, Chapman did not put his defence before a jury. Whatever his rationale was for this, it can be suggested that an alternative plea may have resulted in similar outcomes to the other post-*Barnes* on-the ball violence cases. 30

In addition, this work has revealed that post-*Barnes*, there seems to be a differential prosecutorial policy 31 depending on the status of the offending party. There has not been a prosecution brought post-*Barnes* for an on-the-ball assault in professional football or professional Rugby Union / League. *Thatcher* seems to indicate that the decision to prosecute is dependant on the internal disciplinary procedures being dispensed appropriately. Despite the availability of fairly conclusive video evidence indicating a particularly reckless, injury-causing tackle, and in spite of an initial police investigation, the case was dropped. Paragraph 5 of *Barnes* does appear to defend this approach but it does not explain why an amateur sportsperson does not seem to be afforded the same protection against prosecution. *Chapman* highlighted that an 84 day FA internal suspension did not bring an end to Chapman's punishment. The CPS still felt that the case was worthy of prosecution. If it is not the type of sportsman that is determinative of criminality then it could be argued that it is the robustness of the disciplinary mechanisms available that may impact on the criminal law's involvement. Jennings has conveyed that having sophisticated internal disciplinary mechanisms in place may afford a sportsperson some level of protection against a finding of criminality. The problem with both of the above propositions is that that there is inherent uncertainty. If contrary to Grayson's thesis, the law of the land does stop at the touchline, that touchline should be in the same place for any level of sportsperson.

In summary, *Chapman* has reignited the debate as to when as a matter of policy and on what basis, might 32 criminality be attached to on-the ball offences on the sports-field. A dialogue needs to take place between the criminal law enforcement bodies and key stakeholders at all levels of sport. *Barnes* seemed to allow for on-the - ball offences to be tackled by sports governing bodies. It would seem that at the amateur level of association football at least, this can no longer be stated with any real degree of certainty.

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