

# *The Role of Law within Sport*

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This piece is loosely based on a guest lecture given at the Public Library in Malmö on 20th May 2003. It is intended as an overview of, or as an introduction into, a number of complex and contentious arguments. In particular it seeks to illustrate that the relationship between sport and the law is a vexed one, and the lines of demarcation between the two entities are not always easy to draw. One key issue is the contrast and tension between self-regulation (via the sports' authorities) and external regulation (by the application of law). In particular, this hints at a central dilemma – where and when should the law become involved within sport? What is clear is that law is further encroaching into a number of different areas of sport and that self regulation is threatened in a number of areas. This has serious implications for those involved with the administration of sport.

This piece illustrates some of the debates in the area and, in particular when law overrides the idea of self-regulation. As such this deals with three central components. Firstly the example of Roy Keane will be used to illustrate the inter-relationship and overlap between the law and self regulating regimes within the context of sport. Secondly, the question of what the law can contribute to sport is briefly considered as a means of introducing the debate over law's applicability to the area. Lastly, some examples of the application of law to sport will be analysed, particularly in the areas of criminal and civil law, before considering where the law may be moving towards next. Many of the issues touched upon here relate to work we have conducted and covered in more depth in *Regulating Football* (Pluto Press, 2001)

## 1) Double Jeopardy? Roy Keane and the rule of law

During the 1997/8 FA Premier League (PL) season Roy Keane suffered a serious cruciate ligament injury following a challenge with Alf Inge Haaland. Keane (2002, p171) details it thus in his autobiography:

Throughout the game I'd been having a private feud with Alfie Haaland. He was winding me up from the beginning of the game. The late tackles I could live with, they were the normal part of football. But the other stuff – pulling my shirt, getting digs in off the ball – really bugged me... Five minutes from time, as we pushed forward in their box, I lunged in desperation at Haaland. I was trying to trip him up rather than kick him. I knew it would probably mean a booking, but fuck it, he'd done his job. He'd done my head in. As I slid in to make the challenge my studs caught the turf. I actually heard my cruciate ligament snap. The pain was instant and agonizing. Haaland stood over me shouting 'Get up, stop faking it'. His colleague was gesturing to the same effect.

Keane was upset, to say the least, by both the challenge and the reaction of the opposing players to his injury. The issue played upon his mind over a long period of time as his autobiography makes clear, until he was eventually able to 'exact his revenge' in a premeditated fashion during the Manchester derby in 2001, when Keane was sent off and banned for four matches for fouling Haaland. That may have been the end of the matter had it not been for the furore that greeted the following statement;

Another crap performance. They're up for it. We're not...I'd waited almost 180 minutes for Alfie, three years if you looked at it another way. Now he had the ball on the far touchline, Alfie was taking the piss. I'd waited long enough. Fucking hit him hard. The ball was there (I think). Take that you c\*\*\*. And don't ever stand over me again sneering about fake injuries (Keane, 2002, 231).

Following the publication of his autobiography *Keane*, Roy Keane was found guilty on two charges of bringing the game into disrepute, at a Football Association hearing and given a five-match ban and a record £150,000. Even apart from the newsworthy element to Keane's actions, the interesting aspect of this for our purposes is a consideration of how, *potentially*, the internal disciplinary mechanism of professional football and the general legal provisions might interact in such a case.

In a hypothetical sense, Roy Keane was potentially subject to a number of actions and punishments on the basis of his action(s).

### *Internal Regulation*

- a) The FA/PL. The first element of the punishment for the challenge would be the sending off for the challenge, triggering in this case a minimum of a three match ban. In addition, the later statement made about this opened up the possibility of a charge of bringing the game into disrepute – this resulted in the further five match ban and £150,000 fine
- b) The Club. His actions may also fall foul of the Club's own rules or the contract between the player and the club, leaving him open to a further internal punishment.

### *External Regulation*

- a) Criminal Law. The foul on the pitch in conjunction with the admission (later retracted) of premeditation potentially opens Keane up to a charge of criminal assault. This however may be difficult to prove (James, 2002)
- b) Civil Law. There is the potential claim from Haaland against Keane (tort of negligence, civil action in trespass) or against Manchester United (vicarious liability). This never transpired despite being threatened.

Mark James (2002) deals with these potential legal actions (and others, we have mentioned the key ones here) in depth elsewhere, but the crucial point of this for our purposes is the interaction and overlap between two systems of regulation – the internal (the sport itself) and the external (the Law). A similar debate was played out with Eric Cantona when he was punished by his Club (Manchester United), the Football Association (his Governing Body) and the State for his assault on a spectator in January 1995 (Greenfield and Osborn, 2001, 103), the issue being, is it right for the law to impose itself within an arena that has attempted to regulate itself?

## **2) What does Law Contribute to the Regulation of Sport?**

There are two distinct UK approaches to this question. The first perspective views sport as just another part of civil life. Accordingly, law applies to this area in exactly the same way as it would to any other area of civil life. On this approach, an injury on the sports field caused by carelessness can be equated to a similar injury in any other workplace. The best-known exponent of this view is Edward Grayson:

That rule of law, on and off the playing field, is essential for the future of sport in society, whatever sport may mean, as it is for society in general. For without the rule of law in society, anarchy reigns. Without the rule of law in sport chaos exists (Grayson in Greenfield and Osborn, 2000, p.11).

Further to this Grayson had previously argued:

all participants in sport are always at risk if they break the law of the land in the course of play. It also illuminates the developing reluctantly recognisable reality within sport that the law of the land does not stop at the touchline or boundary Grayson (1994, 145).

This might be termed the ‘might of law’ approach. One alternative approach to this is to work from the premise that we should seek to restrict the law from the playing field action wherever possible. This view is perhaps best articulated by Simon Gardiner, and there has been a long dialogue played out in academic sport law circles over this very point:

Only where clear acts of force are used ‘off the ball’, often by way of retaliation, should the criminal law intervene if internal measures are seen as ineffectual against persistent offenders (Gardiner, 1993, 629).

However, in one sense these two views are closer than it might initially be thought, as to whether the law should ‘cross the touchline’. Effectively, both accept that there is *some* role for law on the playing field. The following quotes further illustrate both the two traditional views and the common ground that they actually share:

The suggestion here seems to be that internal measures should be used first, and that the criminal law should only apply if such measures are not working for serial transgressors. This clearly seeks to strictly control and limit the role of law.... It is clearly problematic to work out how far the criminal law should intervene, but once the principle of intervention is conceded then the problem becomes one of *where* the line is to be drawn rather than whether or not it should be drawn at all. In a sense the starting point is the same as Grayson that there is no theoretical justification to exclude the use of the criminal law merely the practical application might be altered according to the circumstances (Greenfield and Osborn, 2001, 112).

In fact, a question that might be posited is whether the law can, or ought to enter the sporting arena *at all*:

However it is not clear that the law has to enter the field of play at all. Boxing provides a pertinent example of how the criminal law has been excluded completely despite its apparent direct conflict with the most fundamental principles that have been hardened post *Brown*. Even acts outside of the rules of boxing such as Tyson’s ear biting of Evander Holyfield will not necessarily lead to any criminal sanction. Boxers who butt and hit low, clearly outside of the laws, face nothing more than the docking of points. If the intentional infliction of even a fatal injury is excluded from the ambit of the criminal law then there is no theoretical justification to exclude more minor offences from contact sports. There are examples of where the law is abandoned either because of the magnitude of the offence or because of the motive. Drug offences within sport, even those that involve substances within the ambit of the

*Misuse of Drugs Act 1971* are dealt with internally (Greenfield and Osborn, 2001, 112-113).

Grayson on one level is clearly right; there is no specific theoretical sportsmen's immunity except with respect to boxing and possibly some of the other martial arts. In support, Grayson cites numerous examples of prosecutions for on field behaviour. This analysis does not, however, explain why boxers should enjoy immunity, historical anomalies do not sit easily with a strict interpretation of the rule of law. Indeed when the application of, as opposed to the theory, the law is considered a completely different picture emerges. On field 'offences' at the professional level are not generally prosecuted even with the repeated multi-angle 'slo mo' replays that highlight the offence. Those in the professional game do generally enjoy an immunity from prosecution albeit an ad hoc one. There may well be numerous judicial statements that point to a policy, that does not differentiate sport from any other area of civil society, but that is but a small part of the legal picture. The judicial blunderings, of the House of Lords and the Law Commission, around the legality of boxing demonstrate a distinct inability to articulate and understand the real relationship between sport and the criminal law. What is required is a theoretical perspective that understands the nature and practice of contemporary sport that can locate the appropriate place for the criminal law (Greenfield and Osborn, 2001).

So the argument can be reduced to the following theoretical propositions:

1. Can we make a case for restricting the role of law?
2. How does law operate?
3. Is law a positive or negative influence?

Can we make a case that sport is different or immune from the clutches of law? This is an argument that has been played out within the context of Jean Marc Bosman, and the arguments of the Governing Bodies: that football is more than a mere business, that football has particular cultural characteristics that mean it ought to be treated differently from other areas of everyday life; that Sport is special, and that sport is in need of protection from the law if it is to survive.

An interesting example of the approach of law can be seen in the area of physical contact sport and how the law deals with the technical legal transgressions that are commonplace within that. The situation in the UK is a confusing one, full of contradictions, and there are a number of distinct levels of regulation. On one perspective we have two levels that interact:

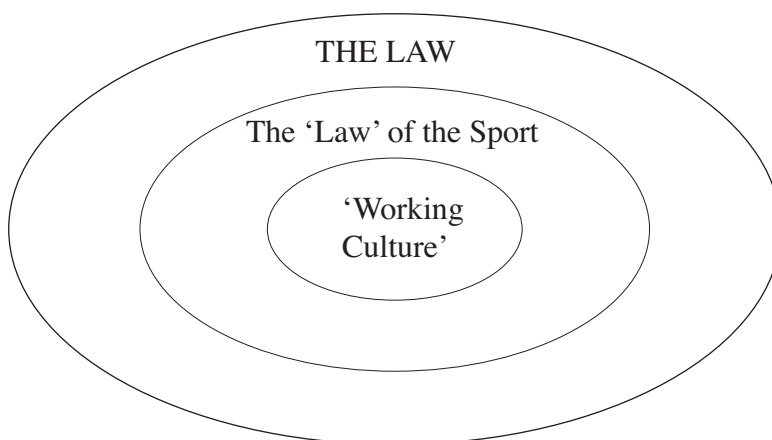
- (1) The Laws of the Game
- (2) The Criminal Law

An infringement of (1) may affect (2). However, the notion of consent has to be applied in some form, the question becomes one of what can someone consent to within these regulatory frameworks:

In a sport in which bodily contact is a commonplace part of the game, the players consent to such contact even if, through unfortunate accident, injury, perhaps of a serious nature, may result. However, such players do not consent to being deliberately punched or kicked and such actions constitute an assault for which the Board would award compensation (Criminal Injuries Compensation Board, 1987).

The best we can do, therefore, is to say that the present broad rules for sports and games appear to be: (i) the intentional infliction of injury enjoys no immunity; (ii) a decision as to whether the reckless infliction of injury is criminal is likely to be strongly influenced by whether the injury occurs during actual play, or in a moment of temper or over-excitement when play has ceased, or 'off the ball'; (iii) although there is little authority on the point, principle demands that even during play injury that results from risk-taking by a player that is unreasonable, in the light of the conduct necessary to play the game properly, should also be criminal (Law Commission, 1993, 27).

So we have a theoretical view supported by judges and academics that sport is no different from any other human activity and that it should be legally regulated and the argument should then switch to how does this regulation occur. However we would argue that this first premise is false, that sport *is* different and that the law ought to, and in many areas does, recognize this. Sport is based on a different set of values than other areas of civil life. The situation is further complicated by the norms that exist within the playing culture of the sport itself. We might see the threads of acceptable conduct falling within three concentric circles where each system exists within the framework of the outer ring:



Here we see that the ways in which sport is regulated is also effected by an inner working culture, a culture outside of the laws of the sport, and certainly outside of the criminal or civil law, but reflecting a normative structure that all participants are versed in and expect.

### **3) How does the law apply to sport?**

We can identify three levels to the law's interaction within sport

- The Criminal Law
- The Civil Law
- 'Higher' forms of Law

We have chosen select examples of these to illustrate the ways in which the law has become interrelated with football specifically, and sport generally.

#### **Criminal Actions**

##### *1) Policing Player Conduct*

An awkward area; there were suggestions that Roy Keane should be charged with a criminal offence but this was ignored. There are few examples of players being charged with criminal actions (some in Scotland). But an interesting example is provided by the Cantona incident alluded to above:

within a couple of days of the incident Manchester United decided to take action against the player, suspending him until the end of the 1994-5 season and fining him (the maximum) two weeks wages. Cantona subsequently faced an FA disciplinary committee, which extended the ban until 30th September the following season and fined him a further £10,000. This was not the end of Cantona's punishment, as he was charged with common assault, and at first instance he was sentenced to two weeks imprisonment by Croydon Magistrates Court. This was later substituted, on appeal to the Crown Court, with a sentence of 120 hours community service (Greenfield and Osborn, 2001, 103).

##### *2. Corruption*

Corruption, in terms of match fixing, has not been a major issue in the UK with respect to football aside from a few isolated incidents. Interestingly it is (international) cricket that has found itself at the centre of enquiries of this nature. In football, allegations have related to improper conduct with respect to player transfers and allegations of personal enrichment; this led to the adoption of the 'Bung Inquiry'.

### *3. Public Order and Spectators*

This is an area where the UK has legislated to address problems of hooliganism over the past 16 years. There is a real debate as to whether this is an effective way of dealing with the problem, or merely serves to shift the problem elsewhere or not even deal with it in practical terms in any event. For example, whilst the legislation available is now technically formidable, it is only of any use if it has any effect, as the example below shows.

#### *Swansea City v Millwall 10/02/01 – Nationwide League Division 2*

As the Millwall supporters were being escorted to the ground the escort came under a missile attack by a large group of Swansea fans, numbering in excess of three hundred. A marine flare was fired towards the direction of the escort. The Swansea group was forced back by police officers with batons. They were supported by mounted and dog units. The Millwall group under escort was placed inside the ground. At the same time four coaches containing around 200 Millwall supporters were stopped on the outskirts of the City and a search carried out. A number of weapons were recovered from one of the coaches including an axe, Stanley knife, knuckle duster, lock knife, wing knife, Chinese rice flails and pool balls together with a small amount of drugs.

Just after the game had re-started, an attempt was made by Swansea to get at the Millwall fans. By climbing up on to the trackside the Millwall supporters attempted to climb the 8ft high perimeter fence to attack the Swansea supporters. After the match the Swansea group again subjected the train escort to continued attacks. They were again kept apart by officers supported by mounted and dog units. Prior to the escort setting off, a search was made of the route and a cache of petrol and milk bottles with rags together with marine flares were discovered concealed in undergrowth near the foreshore.

### **Civil Actions**

#### *1) Transfer Regulations*

The issue of player registration and transfers, and the related issues of contract enforceability has undergone a period of marked change as both domestic and international law has begun to tackle the issue.

Undoubtedly the cases of *Eastham* and *Bosman* have radically changed the relationship between players and clubs. It must however be stressed that it is a small group of elite players who have benefited most. In particular clubs have been able to invest a greater part of the money available in player's wages to attract them rather than paying a fee to the selling club. This has led to an influx of experienced 'foreign' players such as Zola, Weah and Desailly at Chelsea who are towards the end of their careers. Players need to make calculated economic decisions with the possibility now of obtaining large signing-on fees. The only reason that clubs can pay



such large fees and wages is because the economics of the game have altered and the top clubs now generate sufficient income through television, sponsorship and merchandising in addition to the traditional gate money to fund these deals. Free movement will only work when there are buyers of services and with football in a boom situation some of this money is finding its way into the pockets of players and agents.

At present, players are undoubtedly in a very strong position when it comes to negotiating the terms of their contracts, and in situations where they wish to move clubs. Certainly, the ground rules have shifted since the days before *Eastham* and the maximum wage when players were seen as chattels and their ability to negotiate was heavily constrained. The next logical move is to consider the status and legality of transfer fees within the contractual period, potentially further strengthening the player's hand. However, as we make clear elsewhere, the players are only in a strong position whilst football is thriving and their position is to a large degree predicated on the continuing courtship between football and the broadcast media (Greenfield & Osborn 2001, 101).

We are now witnessing something of a downturn with attempts to restructure contracts and get rid of players either through buying up contracts or finding methods of dismissing players.

## *2) Negligence Actions*

This has been something of a growth area with an increase in the number of actions being brought between players, the law of tort and in particular the area of negligence has developed to allow a consideration of such an issue. In fact the idea that a player owes a duty of care to another player is not contentious, the key issue is whether that duty of care was breached and whether this act caused the damage.

The potential legal issue for an injured player is whether there is any claim for damages against the other player or club. This will centre upon the issue of finding someone to blame (legally at fault) for the injury. Pure accidents, without any fault, are not any different on the sports field as they are in the home or the workplace, and are not of themselves something that provides a means of compensation unless there is an element of fault that can be allocated (Greenfield and Osborn, 2001, 115).

Perhaps the most noteworthy recent English example of this involved Gordon Watson, formerly of Bradford City Football Club:

Watson, the club's record signing at the time, during only his third game for the club, suffered a double fracture of the leg as a consequence of a challenge by Kevin Gray (Huddersfield Town). After reviewing a video of the tackle, Bradford instructed

solicitors to institute both criminal and civil proceedings against both the player and the club. During the civil action against player and club in October 1998, expert witnesses from the game provided evidence as to the nature of the tackle. The tackle was described by ex professional player and TV pundit, Jimmy Hill as: 'at the top end of the scale of foul play and is clearly in the category of the worst challenge I have ever seen in my years in association football. It was late and high' (Greenfield and Osborn, 2001, 119).

In this case, Watson succeeded in his claim against both the club and player;

As an interim payment Watson was awarded £50,000 damages, and the final damages were assessed at a hearing in May 1999. In order to calculate the potential loss of earnings similar strikers were used as comparators, and the eventual figure arrived at was £959,000. The calculation of damages centred on two main issues; Watson's projected career path had the injury not occurred, and his career prospects in the light of the injury he had suffered (Moore, 1999, 42).

Both of these determinations are of course essentially speculative. In determining the damages, evidence was heard from a number of expert witnesses concerning Watson's future prospects. The judge found that he would have excelled in the First Division, moved back to a Premier League club within a year of his transfer to Bradford City and signed a four or a four and a half year contract with a Premier League club. Such actions are undoubtedly the precursors for more complex and innovative actions. Latterly for example, we have seen potential actions mooted including possible claims for brain damage caused by heading the heavier leather balls used in the 1950s and 1960s, and in other sports such as rugby we have seen referees sued for their failure to control a game where that failure has led to an injury being suffered. What once may have been seen as an accident on the sports field is now more and more likely to be seen in terms of compensatory possibilities and legal argument.

### *3) Spectators (civil)*

There have been sporadic attempts made by supporters to take civil actions against football clubs. Clearly, in the case of the supporter attending a live game, the relationship is contractual and there may be claims based upon the expectation of what that contract should entitle them to. There have been examples of more symbolic or frivolous attempted actions (often based around the issue of whether the product was satisfactory under consumer legislation or trading standards issues) that have been largely concerned with making a point about how the clubs are being managed. However an interesting example occurred in the 1990s of the possible limitations of contractual channels.

Over 7000 Newcastle United fans paid the club £500 each in 1994 as part of a bond scheme which they thought guaranteed them the right to buy a season ticket at their chosen seat for the next ten years. This strategy raised the club some £3.6 million

even before the supporters purchased their season tickets (the bond merely gave them the right to buy it). In October 1999 they received a letter from the club informing them that they would have to make way from their allotted seat to make way for 'corporate hospitality packaged' guests. In a test case brought by 6 of the 2000 fans affected by this move, it was argued that the issue of the guaranteed specific seat was explicit in the application form and the attendant publicity. Even Kevin Keegan, manager of Newcastle United at the time, gave evidence by affidavit that he believed the bonds guaranteed the fans the same seat for 10 years. At a time when there were over 15000 'ordinary' Newcastle fans on the waiting list for season tickets, and, arguably, a limited demand for corporate hospitality at the ground, the case could be seen as a microcosm of old and new, of culture and commerce, of flat cap and filofax (Greenfield and Osborn, 2001, 193).

The Court, somewhat reluctantly, found that the club had in fact drafted an exclusion clause to deal with exactly this type of situation, and the clause was held by the court to be a reasonable one. As fans become customers or consumers these types of action are sure to proliferate, and undoubtedly will look at all aspects of consumer relationships with the clubs, be it in terms of merchandising, TV channels, tickets etc..

### **Higher Levels of Law: The New Regulation: Company Law, Competition and Intellectual property**

Whilst the areas of criminal law and civil law have provided the historical areas for law's incursion into football, as football develops new areas for exploitation, so the law follows. As football has to deal with new problems, so the law is often called upon to deal with this. We have already seen the law move into areas of TV Rights and Club Ownership via competition law, and intellectual property via the areas of trademarks and image rights as clubs and players begin to see a wider commercial value outside of the playing field itself. At the same time the whole debate over how the game should be regulated, and who should be responsible is still a live issue, notwithstanding the recommendations of the Football Task Force and the creation of the Independent Football Commission:

If attempts at self regulation do not work then there will be increasing pressure for the Government to impose a system of regulation similar to that adopted in other industries. In some ways the parties themselves may be able to control the influence of the law. However, given the increasing commercial pressures that are building, disputes over revenue allocation appear inescapable and consequent legal involvement almost inevitable. Whether this will benefit the game of football, either in terms of participation or consumption, is a debatable matter (Greenfield and Osborn, 2001, 198-199).

What is clear from the current financial state of a number of Premier League and 1st Division clubs is that perhaps the stage we are now entering revolves more around insolvency law than any other.

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