

## Sports Aggression and Injury: Incorporating the Criminal Justice System into the Sports Industry

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### ABSTRACT

*Current trends suggest that playing professional sports poses a considerable risk of injury, especially if driven by aggressive tactical advances. The lack of definite game rules that penalise athletes who inflict harm and cause severe injuries to their opponents suggests the need for harmonisation with the national criminal justice system. It is timely for sports policymakers to look at this issue through the lens of economics (sports industry) as well as law—a process that requires them devise penalty designs for specific acts of sports aggression. This article examines the Malaysian criminal law standards in protecting the interest of the sports industry. Through a qualitative method and doctrinal content analysis, the issues of criminalisation of acts in sports and the qualification of sports violence as a crime are analysed. The approach is to evaluate the specific role of criminal law provision (on criminals and victims in sports) in professional sports and at all levels of sports activities involving aggression and injury. Given that the Malaysian sports industry is continuously evolving and associated with many aggressive sports, it is in the best interest of the relevant sports organisations and organisers to minimise injury rates and overly violent play. This article considers the characteristics of the generic and specific objects of criminal legal justice in the context of the Penal Code, which must correspond to the degree of encroachment danger in the sporting setting, based on the conceptual rules relating to the sports industry's significant activities.*

*Keywords: Sports industry; violence; injury; criminal justice system*

### INTRODUCTION

Most of the time, athletes use extreme physical aggression and force in sporting activities, especially body contact. This means that there is an inherent injury risk and may involve more severe injuries.<sup>1</sup> Aggression is the behaviour that is performed with the intent to injure another person, either physical or verbal.<sup>2</sup> In sports such a violent act may be planned to achieve some personal goal or revenge, with the *mens reas* to injure other athletes. As a result, the victims of this behaviour may suffer from career-ending, disabling, and potentially life-changing injuries, for example injuries with spinal and cerebral involvement often termed ‘catastrophic injuries’<sup>3</sup> and even fatalities.<sup>4</sup> This issue may negatively affect the Malaysian National Sports Vision 2030 to achieve the sports industry development plan. It is timely for sports policymakers to approach the issue of violence and aggression in sports from an economic standpoint and devise practical solutions. The sports industry must be calculated in terms of costs and benefits. These factors drive the behaviour of athletes and teams within the sporting

competition. The incentives from the sports industry influence whether a league encourages, punishes, or bans aggressive and violent play.

At the same time, sports law in Malaysia is a new branch of legal jurisdiction. There are no specific sections in the Sports Development Act 1997 or other sports acts that discuss and govern the issue of force and violence, despite the many reported injuries and deaths that tarnish the image of the sports industry.<sup>5</sup> However, athletes are penalised if they commit a foul that is deemed to have violated the game’s rules. These laws of the game bind athletes to the rules and regulations or formality of the sport, both at the national and international levels.

Acts of violence in sports can be brought to the ordinary court. The basic principle of criminal law allows the injured victim to take legal action against the perpetrator, which may also apply to sporting activities. This is illustrated in the case of *R v Blissett*<sup>6</sup> where the victim suffered a fracture in his eye socket and cheekbones when colliding with the accused in the air to grab the ball. Due to the injuries, the victim had to retire. The court acquitted Blissett of charges under section 47 of the Offense against

the Person Act 1861 after assessing the opinion of expert witnesses who stated that the incident was common in football matches and was something the athlete had indirectly tolerated.

This kind of violence inside the sporting competition may affect the games themselves and influence the future development of the sports industry. It is argued that violent acts in sporting activities should be adjudicated separate from ordinary violence and outside the boundary of the criminal justice and criminal charges. If a violent act is still in accordance with the game's rules, it justifies the 'fun and entertainment' elements where roughness or violent acts such as collisions in a sport are part of the attraction it holds for its fans and spectators.

This article examines the current criminal legislation of Malaysian criminal law standards in protecting the interests of the sports industry. It discusses the issue of criminalisation of acts in sports and the qualification of sports violence as a crime. The approach of this article is doctrinal and involves the analysing process of the existing statutory provisions and legal principles from various sources like cases, precedents, and others. The approach considers the characteristics of the generic and specific objects of criminal legal justice in the context of the Penal Code and the degree of encroachment danger in the sporting setting. This article also evaluates the specific role of criminal law provision (on criminals and victims in sports), not only in professional sports but also at all levels of sports activities. Both levels are important segmentations in the Malaysian sports industry ecosystem.

#### THE CONCEPTUAL RULES OF GOVERNING SANCTIONS (PUNISHMENTS AND PENALTIES) UNDER SPORTS JURISDICTION

There are several purposes of punishment and penalties imposed on athletes through internal sports regulation.<sup>7</sup> The imposition of the punishment and penalties is not intended to punish the athletes but to educate them.<sup>8</sup> Japan, for example, prohibits corporal punishments in sports, as it has a negative impact on the societal development of the sports industry.<sup>9</sup> Therefore, before this article discusses the ordinary punishment that would be imposed on criminals in the context of the criminal justice system and examines the rationale of punishment in sports settings, the concept and jurisdiction of

the sport governing bodies need to be taken into consideration.

There are many reasons why sports should be adjudicated through its own jurisdiction. First, it is argued that aggressive play by athletes, especially in football and rugby, has a significant effect on attendance and ticket sales. On the other hand, normal fouls such as an increase in on-field sanctions of yellow-card fouls have the opposite effect on attendance.<sup>10</sup> Sports competitions should not focus solely on winning; it involves exemptional physical power, tactical abilities, and specialised skills. To guarantee success in sports, mental and physical preparedness to confront other competitors in a stressful situation or emotional reaction are equally required.<sup>11</sup> Thus, to ensure a fair result, the referee plays an important role in finalising decisions that may occur if violent acts have been committed by any of the competitors. For example, in football, when a player is roughed up in the penalty box, the other player may face dangers, including injury, and severe harm to score a goal. As a result, the referee will stop the game and award a penalty kick to the other team. The penalty may also be imposed on the perpetrator by showing a yellow card or a red card depending on the level of rudeness committed. The on-field sanctions are to ensure the safety and fair play of the game.

The second reason is to deny the advantages gained by some athletes who utilize violent acts as a mean to win. Once a penalty kick is awarded to another team (or where the penalty was imposed), this can stop the action of a player who commits violence on another player to prevent the latter from scoring a goal. If such violent actions are allowed by the referee, the proprietor player may gain more advantages and will continue to commit illegal actions to prevent his opponent from scoring a goal. Likewise, the tendencies of the other players towards physical, verbal, and emotional violence will deteriorate, thus negatively affecting the nature of the entire sports industry. Universal values such as love, peace, and brotherhood are unifying and integrative properties that will be undermined if foul play and violence are tolerated in sports. Any form of violent behaviour must not be accepted in the sports community<sup>12</sup> and has to be brought under the specific control of the sports jurisdiction. The best way to adjudicate sports violence is by empowering game officials and sports administrators to control athletes, by handling and managing negative behaviours that can cause inherent injury risk and cause severe

injury. This may also include psychiatric injury.<sup>13</sup> This control should not be limited to athletes and should also extend to the coaching staff who cannot be allowed to commit acts of physical and verbal aggression, intimidation, abuse, or provocation.

The third reason is to maintain the good name and reputation of the sports industry. If the athlete and the coach violated the rules of the game, the name and credibility of the sport will be in disrepute. It is common practice in Malaysia that the sports industry shall not be highlighted for violent conduct on the field, as the bad publicity would be damaging to the reputation of the athletes, the sport, and the country.<sup>14</sup> Indirectly, the quality of the organisation and management would also be questioned by sports observers and stakeholders. Thus, in ensuring that the sportsmanship spirit of sports continues, most of the punishments and penalties are imposed in accordance with internal sports regulation, and not the criminal justice system. There are several forms of punishment commonly imposed on athletes and participants involved in sports which will be detailed below.

#### FINES AND FINANCIAL PENALTY

Imposing monetary fines is a common form of punishment in the sporting world.<sup>15</sup> For example, the French sensation Kylian Mbappe and his teammate Andrien Rabiot were fined €180,000 each for violating the rules set by their club, Paris Saint-Germain (PSG).<sup>16</sup> The imposition of financial penalty to discipline athletes is valid due to the contractual relationship between clubs and athletes as currently regulated by labour law;<sup>17</sup> the parties themselves conclude an employment contract.<sup>18</sup> Besides individual athletes, the sports body may also receive fines and disciplinary sanctions against a club for the violent behaviour of its supporters. In *Al Hilal Club v. Confédération Africaine de Football (CAF)*,<sup>19</sup> the International Court Arbitration for Sports (CAS) decided the clubs are liable “for incidents of any kind” based on the conduct of their supporters and imposed a financial sanction of \$60,000 to the club. However, there are no rules regulating serious injury and death occurring in the course of a sporting competition. The employment relationship and contract terms have no specific provision on the imposition of punishment in the form of a financial penalty if it involves serious injury. Furthermore, the Disciplinary Committees of the sports body has no jurisdiction to hear criminal

matters; thus, they cannot impose a fine or financial sanction on the athlete, either to ask the proprietor to pay the victim involved or to cover the medical costs that the victim must bear due to severe injuries.

#### SUSPENSION

Apart from fines and financial penalties, the suspension is a popular alternative often imposed by the sports body and its international federation on their affiliates and member associations. In a professional sport, the suspension is a heavier punishment than monetary compensation.<sup>20</sup> This can be seen in the case of the English football giant Manchester City F.C. (MCFC). The club was relieved when it was suspended from participating in the European Championship for two seasons by the European Football Association (UEFA). MCFC was banned from European competition for two years (2020/21 and 2021/22) and fined €30 million for a serious breach of UEFA’s financial fair play rules. The International Court Arbitration for Sports (CAS) has overturned the suspension and reduced the club’s fine to €10m (£9m). In *AC Milan v. Union des Associations Européennes de Football (UEFA)*<sup>21</sup> the Adjudicatory Chamber stated that:

“A suspension [of an exclusion of UEFA competitions] might be appropriate in a case in which the divergence from the acceptable deviation is such that it can be corrected within a defined timescale, under a business plan which is both credible and reasonable, and where the management of the club has demonstrated by its action a clear commitment to bring the club into compliance with the Break-even requirement.”<sup>22</sup>

Suspension can be considered as severe punishment of the athletes as it can affect their freedom, livelihood, physical fitness, and skills.<sup>23</sup> In addition to affecting the performance of the athletes, suspension can also affect the success of the club, especially in team sports such as football and basketball. If the athlete is a professional, his/her status will be devalued, and his/her livelihood and source of income will be diminished. For young athletes and those who compete at the amateur level, they cannot develop their potential at the best level. Therefore, the suspension is the usual form of punishment that is imposed on athletes who cause serious injury and death during sports competitions, because this punishment can mean the end of their career.

## LIFE BAN OR BLACKLISTING

A life ban is the most severe punishment imposed on athletes. When an athlete has been blacklisted, it means that his/her career as an athlete has come to an untimely end. This sentence was once handed down to a world-renowned cycling legend, Lance Armstrong. Lance Armstrong was blacklisted and banned from participating in any cycling competition by the United States Anti-Doping Agency (USADA) in 2012. In addition, Armstrong was also stripped of all the victories he has ever had, including becoming the Le Tour de France Champion seven times in a row since 1998.

There are many reasons for being sentenced to a life ban. In *Yücel Kop v. International Association of Athletics Federations (IAAF) & Turkish Athletics Federation (TAF)* and *Süreyya Ayhan Kop v. IAAF & TAF*,<sup>24</sup> the panel found that the athletes had committed, at the very least, two standard sanctions, which under the rule require an ineligibility sanction of between eight years and a life ban. Both doping violations were serious in nature, while there were no tangible elements of proof for considering they had not intentionally committed these violations. Another example is the Singaporean rugby player Song Koon Poh who received a life ban due to his involvement in a rebel tour to apartheid South Africa in 1982 in contravention of the Gleneagles Agreement.<sup>25</sup> In *FK Pobeda et al. v. UEFA*,<sup>26</sup> Mr. Zabrcanec was personally involved in match-fixing and his involvement was considered adequate to impose a life ban on him based on the seriousness of his actions and consequences for football.

The concept of punishment imposed in sports is based on the principle of *nullum crimen, nulla poena sine lege scripta et certano*.<sup>27</sup> The Disciplinary Committee or panel (CAS) must resolve the fundamental issue before justifying the merits of the punishment. Moreover, the punishment must be accepted as a disciplinary, administrative, or civil matter as it involves the principle of *ne bis in idem*, where no athlete should be adjudicated twice (disciplinary and court) for the same offence. Therefore, punishment in the form of a life ban can be used to punish athletes who cause serious injury and death during sports competitions. Due to the nature of this punishment being so severe, it can be equated with the life-long sentence<sup>28</sup> although it is not legally custodial in nature.<sup>29</sup>

## SPORTS INDUSTRY, ORGANISED CRIME, AND CRIMINAL JUSTICE SYSTEM

The sports industry is frequently cited as a contemporary manifestation of organised crime. Most organised crime involvement in sports is through doping, match-fixing, and sexual harassment, or by way of exploiting various interactions with professional athletes. The Australian Crime Commission reported:

“Drugs readily available through social networks of like-minded individuals, individuals within legitimate business such as gyms, sporting clubs and fitness centres, forged prescriptions, compliant doctors and pharmacists, thefts from medical sources (such as hospitals), the veterinary industry and Internet sales...Because of inconsistencies in the legal status of PIEDs internationally, these substances are readily available overseas and are relatively cheap compared with the illicit market price in Australia.”<sup>30</sup>

The Financial Action Task Force (FATF)<sup>31</sup> also recognises that the sporting industry is one of the many sectors that facilitate money laundering.<sup>32</sup> The increasing commercialisation of the sports industry has seen the emergence of this new ‘business’ phenomenon:

“Sport is confronted with new threats and challenges such as commercial pressure, exploitation of young players, doping, corruption, racism, illegal gambling, violence, money laundering and other activities detrimental to the sport.”<sup>33</sup>

Regarding the positive aspects, sports participation is first and foremost to assist in the development of society, especially the youth, as it fosters pro-social development and keeps them away from crime. For instance, ‘diversionary activities’ in sports are aimed to prevent participants from engaging in criminal or antisocial behaviour for the duration of the activity.<sup>34</sup> Developmental programmes in sports<sup>35</sup> are meant to attract participants to engage in various levels of sports programmes that address health, welfare, and educational issues as well as offending behaviour among the youth in the community.<sup>36</sup>

Therefore, blaming the sports industry for its negative impact and its organised crime network in total does not seem justified. An important segmentation for the sports industry is professional sports. This market segmentation is vital to business success which provides significant revenue, drives indirect revenue from parking, merchandise sales,



concessions, and other ancillary services, and enables sponsorship sales and television benefit in many fields and contexts.<sup>37</sup> At the same time, professional athletes are held to higher expectation standards due to the public nature of their profession as well as high salary, public exposure, and fan adoration.<sup>38</sup> It is suggested that a different set of the criminal justice system should be adopted; any violent act that occurs in connection with the industry or competition participated by them must not be treated as a crime. There are many other rational justifications of the aggressive and violent acts committed by athletes during sports events. The following are several factors that are responsible for making sports violent:

First, violence is part of sports nature and sporting behaviour. Sports involving body contact are usually very exciting, to the athletes who perform them as well as the spectators who watch them. For anyone who has ever been involved in sports, it is hard to forget the fun and excitement they feel while playing. For example, when two boxers enter the ring, both enter the arena with the main intention to inflict physical pain on their opponents and, if possible, to 'take them out'. According to John,<sup>39</sup> aggression performed in the ring is an attraction to the fans and the spectators. Martial arts sports are also oppressive in nature where both fighters engage in 'rough behaviour' in the form of punches, kicks, locks, and various other painful techniques. When athletes manage to punch their opponent and get points, they will certainly feel excited and will keep trying to collect more points. It is at this high level of excitement that their aggression becomes uncontrollable and can cause severe injury.

The second factor is referring to mastering the aspects of certain sporting skills. Athletes are required to learn, master, and adapt what they learned during sporting competitions with full confidence. The measure of their success is satisfaction and high appreciation of the acquired skills in itself. Usually, successful athletes will take pride in their performance, thus causing them to have high expectations of themselves, indirectly putting themselves under more pressure. In every single action they place a higher playing expectation. An American football legend commented on his performances while playing:

"As a defensive player I had resigned myself to the fact that I was never going to rush for 1,000 yards during a season and I would never score many touch

downs. But at the same time, I vowed to earn my reputation in professional football with aggressive tackling ... I never make a tackle just to bring someone down. I want to punish the man I'm going after, and I want him to know that it's going to hurt every time he comes my way."<sup>40</sup>

Once athletes successfully master a skill, they may show and use it to the fullest while expecting the same level from their opponents. One of the strategies practised in sports, regardless of whether it is a team or individual game, is to strategically learn the weaknesses of their opponents. After being identified, athletes will try to exploit the weaknesses of their opponents and as much as possible dominate them. During these attempts of exploitation, athletes may not only use non-aggressive skills that focus on strategy and tactics but also brutal and violent behaviours. All weaknesses, whether lack of physical strength, lack of skills, or inability to commit undetectable violent acts on the opponent will be applied as best as possible throughout the match. John quotes Barnes as saying:

"Players and coaches think up acts in the night and practice them during the day. Come the match, they seek to inflict their cruelties before cruelties are inflicted on them. That what sport means. Weakness does not excite compassion. Weakness is opportunity: the road to victory leads through another's weakness. Mercy can lead only to defeat."<sup>41</sup>

All athletes participating in a competition want nothing more but to win. Their devotion towards victory is sometimes overwhelming. The word "winning isn't everything; it's the only thing"<sup>42</sup> is a famous phrase in sports. However, when the focus is on winning, the athletes tend to disregard ethics and sportsmanship in sports and decide to do whatever is possible to win. As a result, some professional athletes are eventually arrested or indicted on criminal or civil charges, but in most cases, this is reduced to fines for criminal conduct due to the millions of dollars they receive in compensation. This not only corrupts sports but also distorts the criminal justice system.

The third reason is personal. Retaliation is usually committed by the victim of intentional violence as opposed to consensual violence. When this happens, it will cause more violence due to its determination or exchange of aggression. Retaliation itself is an act outside the rules of the game and is considered as unacceptable, with or without justification. An

athlete may retaliate against his/her opponent in the same competition or a later competition. For example, Roy Keane, a professional footballer, admitted that the violence he committed against Alf Inge Haaland, causing the latter to suffer a severe injury during the match between MUFC and MCFC in 2001, was a deliberate act. Keane said that the actions he took were in retaliation to the actions that Haaland had taken against him previously.<sup>43</sup>

The implications for violence of this kind requires legal intervention and the involvement of the criminal justice system. The incident is used as a reference point for the application of the criminal law to disputes arising out of sports competition and to highlight the public policy arguments for and against bringing the various causes of legal action. Further, it is argued that the lack of legal intervention in this dispute means that these limits have yet to be defined.

#### MALAYSIAN CRIMINAL JUSTICE SYSTEM AND ITS APPLICATION IN THE SPORTS INDUSTRY

Kerr<sup>44</sup> and Hartley<sup>45</sup> believed the criminal justice system should be applied differently when violence causes serious injuries and deaths in sports. The main question is whether violence in sports can be considered a crime. Ian Marsh et al.<sup>46</sup> stated that the definition of what constitutes a deviant act or wrongdoing differs from group to group. A deviant act is commonly understood as the result of an act committed in that group whose members consider that someone who did such a thing has violated 'the rules'. Whether an act can be considered as deviant depends on how society perceives and reacts to the matter, and this reaction may be different in other groups. Deviant acts will also change over time. Certain acts that were considered wrong in the past are accepted today and vice versa. For example, Japanese society today may regard prostitution as immoral but not a criminal offence. Sodomy is also no longer a crime under section 1 of the *Sexual Offense Act* (UK) if the perpetrator is a consensual adult. Thus, for sodomy to be a criminal offence, the act must fulfil the first maxim of '*actus non facit reum, nisi men sit rea*'.

"Now what is the test of criminality or criminal liability? The true test of criminal liability has had a gradual development... the first was that nobody should be held liable unless he had the evil intent to commit it, and the second was that the accused was to be innocent unless he

was proved to be guilty. The former principle assumed a Latin garb and became known as *actus non facit reum, nisi men sit rea* and was first cited as a principle by Lord Kenyon CJ in *Flower v Pedge* (1789) 7 T.R. 509, thus: 'It is a principle of natural justice and of our law, *actus non facit reum, nisi men sit rea*.'"<sup>47</sup>

Another important principle in criminal liability is the maxim *acta exteriora indicant interiora secreta* which means "outward acts indicate the thoughts hidden within." Each person is presumed to have an intention which is reflected in the action. Thus, the court is frequently required to infer intent from the defendant's actions. In the context of criminal justice, all sports behaviours that cause injury, grievous bodily harm, or death can be considered a criminal offence. However, an athlete may argue that he/she had no absolute intention to inflict injury, grievous bodily harm, or death on the victim. However, the athlete has indeed knowledge that his/her negligence and reckless action will cause severe injury. For example, martial arts athletes have full knowledge that their punches and kicks have the potential risk of causing serious injury to the victim, especially if extreme force is used or an important part of the body is hit. They know that their violent acts can result in serious injury and even death. If they are ignorant of this fact, the aggression and violence they commit may be considered reckless or negligent. Therefore, the laws to regulate such acts of sports violence need to be known to be considered a crime.

The involvement of the criminal justice system is justified, as nobody should be above the law. Bramwell J. in *R v. Bradshaw*<sup>48</sup> said:

"No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land ... If a man is playing according to the rules and practices of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention [and therefore not acting criminally] ... But, independent of the rules, if the prisoner intended to cause serious hurt ... or if he knew that, in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful."

Thus, the law seeks to intervene when the degree of violent behaviour becomes unacceptable and dangerous or becomes an inherent risk of the sport. The Malaysian law considers criminal violence as an offence under the Penal Code. Section 350 states that if a person uses violence against a person

without that person's consent, with intent to cause an offence to be committed, or knowing that such violence would be unlawful, disastrous, frightening, or annoying to that person, then he/she is presumed to have committed criminal violence against the person.<sup>49</sup> The violence referred to in section 350 is an act of a person using own physical force, or using any medium or equipment, or inducing any animal moving to cause movement, change of motion, or cessation of a person's movement or to cause the other person to collide with an object where this act has disturbed his/her feelings.<sup>50</sup>

If this offence is applied to a sports activity, it follows that acts of certain aggression fulfil the meaning of violence under section 349. However, section 350 states that the violence must be without the victim's consent, and that the violence is intended to be committed in an offence and causes it to be unlawful. Hartley<sup>51</sup> argued that a person who participates in a sport has indirectly given his/her consent to all the rudeness and violent behaviour that occurs to themselves as well as the risk of injury that exists in the sport. In addition, playing a sport is not an act that is illegal and against the law. Therefore, it is quite difficult to claim that a person has committed criminal violence against a victim in sport unless the victim is forced to compete. If a person is found guilty of committing a violent crime, he/she can be sentenced to imprisonment for up to three months or fined up to one thousand ringgit or both.<sup>52</sup>

The Malaysian Penal Code also states that causing injury and grievous bodily harm is an offence under section 321 and section 322. Injury under the Penal Code refers to pain, illness, and weakness of the body<sup>53</sup> while grievous bodily injury refers to some form of injury including permanent loss of sight of one eye and permanent loss of hearing of one ear, perishable or permanently weakened by the power of a limb or joint, deformed forever of the head or face, fractures or fractures of bones or joints, and any injury which endangers the life or causes the victim severe bodily pain, or is unable to carry out his normal work for twenty days.<sup>54</sup>

These injuries are common injuries suffered by athletes, especially in Karate, Judo, and Taekwondo. The athletes not only suffer these injuries while in competition or tournament, but these injuries can also occur during training. Athletes may not commit an offence under sections 321 and 322 as these two sections only state "intentionally causing injury". The rudeness committed is not intended to injure an opponent but is intended to collect game points.

However, both sections also include "knowing that may cause it is a serious injury" causing athletes to be convicted under these sections because of course they know every punch and kick they apply to the opponent's body will cause their opponent suffering from pain, injury, and even severe injury, especially in high-risk combat sports. If found guilty, an athlete can be sentenced to imprisonment for up to one year, or a fine of up to two thousand ringgits, or both for the offence of causing injury.<sup>55</sup> For the offence of causing grievous bodily harm he/she can be sentenced to imprisonment for up to seven years and a fine.<sup>56</sup>

Finally, the offence of causing death in the Penal Code is divided into the offence of wrongfully killing a person<sup>57</sup> and the offence of killing a person.<sup>58</sup> Section 299 states that whoever causes death by committing an act with intent to cause death or with intent to cause a bodily injury which may cause death, or by knowing that by the act of causing death, is guilty of wrongfully killing a person. Section 300 states that wrongfully killing a person may be considered murder (a) if the act causing the death was done with intent to cause death; (b) if the act is done with intent to cause a bodily injury which the offender knows may cause the death of the victim; (c) if the act is done with intent to cause bodily harm to a person, and the injury inflicted is sufficient to cause death, or (d) if the person committing the act knows that the act is potentially lethal, and he/she commits the act without any reason.

If a person is found guilty of wrongfully killing a person under section 299, he/she may be liable to imprisonment not exceeding thirty years and a fine if the death was caused with intent to cause death, or caused bodily harm which normally results in death.<sup>59</sup> A person may also be sentenced to imprisonment not exceeding ten years and a fine for the offence of wrongfully killing a person if the death was caused by an act known to cause death but having no intention of causing death or causing bodily harm which could normally result in death.<sup>60</sup> Further, the offence of manslaughter under section 300 can cause an athlete to be sentenced to death if found guilty under this section.<sup>61</sup>

#### DESIGNING A SPECIFIC CRIMINAL JUSTICE SYSTEM FOR SPORTS INDUSTRY SUSTAINABILITY

Violent acts can be an integral part of the playing culture of a sport. Therefore, when determining a basic criminal offense, the victim's consent must be



considered because the maxim *volenti non fit injuria* is the main basis in the concept of willingness. From this maxim, two main points in using voluntariness as a defence are (a) a person is the best judge in his/her own interest; (b) no one will give his/her will or consent to things that may cause harm to one's own person.<sup>62</sup> However, this maxim normally falls under the law of negligence and not the criminal justice system. In *McCord v Cornforth and Swansea City Football Club*,<sup>63</sup> a professional footballer succeeded with his action and received damages for a career-ending injury that resulted from a foul tackle by the defendant. A plea of *volenti* is only applicable where the injury-causing act is part of the sports playing culture and will not be accepted if the risk of injury is caused by an act that is unconnected to the playing of the game, including any violent acts that were either too dangerous or motivated by non-sporting considerations such as retaliation.

In designing a specific criminal justice system for the sports industry, Part IV General Exceptions of the Penal Code provides a resolution for athletes if they have committed any of the offences specified in the Penal Code including death. Among the General Exceptions is voluntariness, which is an exception that can also be applied in sports. As stated by Hartley,<sup>64</sup> a person who participates in a sport has given his/her consent indirectly and is ready for all kinds of risk or possible injury, or even death. In the Canadian case of *R v, Cey*<sup>65</sup> the concept of 'implied consent' in the event of any injury or serious injury in a sporting event has been adopted by the court. If the violent acts that cause injury, grievous bodily harm, or death in sports is a crime, the court must first refer to the concept of consent in the Penal Code before adopting the concept of implied consent. The concept of consent is found in sections 87, 88, 89, and 92 as well as the 5th exemption of section 300 for exemption in murder cases. The word 'consent' is not construed in the Penal Code, but section 90 considers situations where the consent given is not the 'consent' meant by any section of the Penal Code. The content of section 90 states that willingness can be proved if the victim is in a conscious and sane state and is a person over the age of twelve years who has voluntarily given his/her consent based on the facts available to his/her knowledge when making the decision. If the content of this consent cannot be fulfilled, a person cannot be said to have given his/her consent. However, in *Ferguson v. Normand*,<sup>66</sup> athletes may in fact consent to an act that the courts hold cannot in law be consented to,

and violence becomes an issue only when serious injuries are caused.

To convict the perpetrator of criminal liability, the perpetrator must, when inflicting injury on the victim, be aware that the victim did not voluntarily give his/her consent or has given his/her consent on the basis of a misunderstanding of facts.<sup>67</sup> Consent generally means consent given openly by a sane person, to enable him/her to form a rational view of a matter for which he/she has given their consent, whether the damage is done to their own person or property. In other words, the person was originally free to do the damage but allowed others to do it. The act done must be a lawful act, otherwise it cannot be a defence. Willingness seems to refer to submission but in fact they are two different matters. Willingness is usually presented with the surrender of will but will not necessarily exist despite the surrender.<sup>68</sup>

#### SECTION 87 PENAL CODE

Among the provisions that can be applied to sports is section 87. It states that if the consent is given by a person above eighteen years of age, the perpetrator is deemed not to have committed an offence on the injury that has been tolerated, where the perpetrator did intend to injure or know it would inflict injury on the voluntary giver. However, this section limits the concept of consent, where the perpetrator must have no intention or knowledge that death or serious injury may occur because of his/her actions. Mohammad Shariff<sup>69</sup> stated that the scope of section 87 covers the following three situations:

- (1) If the person doing so intended or knew that death or serious injury would occur, then voluntariness is not a defence.
- (2) If the person intends or knows that the action will cause little less damage than grievous injury, then voluntariness will be a defence.
- (3) Where death or serious injury was not intended or known by the person who did it to cause, the facts resulting from the damage are no longer material if done with the person's willingness to take the risk of the damage. The action is not to cause death.

Stanley Yeo, on the other hand, stated that there must be a reciprocal nature in the concept of voluntariness when determining a criminal offence. In essence, voluntariness must be accompanied by an agreement or meeting between the two minds



of the perpetrator and the victim. The victim must give consent to the danger that the perpetrator inflicted, and both must have come to a common understanding. There are three main points for the concept of reciprocity involuntariness, namely:

1. the victim's knowledge of the material facts that led him/her to decide to consent.
2. such willingness must be given willingly, and
3. the perpetrator's knowledge of items (1) and (2).

Item (3) is particularly important in determining the existence of reciprocity in the willingness and determining the actual intention of the perpetrator. When items (1) and (2) are not met, it is indisputable that there is no consent from the victim, while this matter is not known by the perpetrator. It would be unfair if the perpetrator in this situation was punished. However, if the perpetrator knew that items (i) and (ii) do not exist, but still inflicts danger to the victim, he/she is said to have committed a criminal offence and cannot use voluntariness as defence.

Siti Zaharah and Nor Aini<sup>70</sup> stated that consent is not given voluntarily if there is a misunderstanding of the facts due to fraud or deception. In the Indian case of *Queen v Poonai Fattmah Queen v Poonai Fattmah*,<sup>71</sup> the accused was a group of snake-charmer who persuaded the deceased to believe that he had the power to cure him. The victim was bitten and died, and the accused was held to be guilty under section 299. The court ruled that the consent was granted based on a manifest misunderstanding which the victim thought would be covered by the accused. The court ruled that:

“The reason on which the general rule which we have mentioned rests is this, that it is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health, their own comfort, without restraining them from an infinite number of salutary or innocent actions.”

Application to sports – In sports, athletes are usually aware and know that their violent actions can cause serious injury and may result in death. Stanley Yeo argued that there is a difference in applying the concept of voluntariness under section 87 and the English common law, especially in injuries involving sports activities. In English law the sport played must be a legal sport, whereas if the sport is not a legal sport, voluntariness is not considered a defence. Mohammad Shariff stated as an example of

‘voluntariness is not a defence’ in the case of two people playing Russian Roulette, a game of chance which will result in one of them being shot dead. He also stated that the defence is also not a defence if there is an illegal element involved. For example, two people agree to box, where boxing is a legal sport, but they stipulate that they will fight until one of them dies, which is a violation of the law, thus making the voluntary invalid. The difference between section 87 and the common law is that the latter does not lay down any objective conditions for the type of danger or damage inflicted, where it is determined entirely by the victim and the perpetrator. Therefore, it would be inaccurate if the interpretation of section 87 refers to “an act which in principle cannot cause grievous bodily injury or death” to enable a person to apply for this exemption. Section 87 only states that it does not apply if the perpetrator intends or knows that death or serious injury may occur, thus indicating that the consequences of his/her actions are tied to the subjective state of mind of the perpetrator.

Similarly, section 87 cannot be applied because the perpetrator's act “is an act that violates the law on the grounds that the act is considered a criminal act”. The question of whether a sport is illegal or not is not material to make voluntariness a defence if the conditions with respect to age and type of injury have been met. For example, when two people want to resolve a dispute between them by way of a wrestling match, wherein this situation it is not a question of whether wrestling is part of the sport of boxing that is allowed by law or not. In the Indian case of *Tunda v R*,<sup>72</sup> D and V had agreed to wrestle where V had died when his head accidentally hit a hard surface. The court accepted the consent under section 87 as a defence, read in conjunction with the accident under section 80, regardless of whether their act of wrestling was unlawful or not. Section 87 illustrated that:

“A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, during such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.”

It is obvious that in this situation the perpetrator is said not to have committed any criminal offence against the victim if he did not violate any of the game's rules.

## SECTION 88 PENAL CODE

This section does not indicate a special age limit for a person to give consent. However, it is still bound by the generality contained in section 90 where consent cannot be given by a person under the age of twelve years. This section also allows the perpetrator to do actions that may cause death or serious injury in circumstances he/she so desires or knows the danger he/she commits may cause death or serious injury. This section requires that those who have given consent must receive certain benefits. However, the Penal Code does not explain what is meant by 'benefits' in sections 88, 89 and 92 where the description in section 92 only states that the benefits intended do not merely mean financial benefits.

The benefits referred to in section 88 can also mean benefits in the form of mental or physical health. The question is whether the danger committed is for the personal benefit of the victim. Some argue that the decision as to whether the danger is beneficial or not rests with the victim who gives their consent as well as the perpetrator. It is not the court to determine whether the danger benefits the victim or not, such as involving in dangerous sports. As long as the victims and perpetrators assume that the benefits they receive are economic, they have also met the benefits referred to under section 88. Section 52 explains that good faith means anything done or believed to be prudent. In this context, the act done in good faith refers to the act of the perpetrator who in good faith intends for the person giving the consent to benefit from his/her actions rather than referring to the beneficial danger that is done in good faith. This is because the state of good faith must be considered when the perpetrator and the victim are still considering whether the danger imposed will benefit the victim or not. It should not consider when the perpetrator has committed the dangerous act, where the victim is indirectly forced to condone the perpetrator's behaviour done with care. Also, the personal attitude of the perpetrator as well as his/her circumstances should be considered when determining whether the perpetrator committed the dangerous act in good faith for the benefit of the victim.

Application to sports – If section 88 is to be applied, the benefits of the sport must be equally advantageous to both competing athletes. When athletes wish to compete in the ring, they can be considered to 'enter the court in good faith' when

they ensure that they have used the permitted sports equipment and tools without any fraud or modification to the equipment.

## CONCLUSION

This article proposes some improvements in designing the new context of the criminal justice system for the sports industry. For early prevention, the organisation involved in the industry is given the mandate to have the Participant Information and Consent Form before any sporting events and competition. This form ensures that the consent is given by participating athletes in the form of informed consent. The granted consent is more explicit and prima facie evidence when compared to the implicit habits and norms. This helps users to adopt and validate the concept of informed willingness in every sports tournament and competition. It is not necessary to have a uniform format and content, but some elements must be incorporated to ensure the acceptability of the sports criminal justice system. Among the suggestions are as follows:

1. The incorporation of accepted aggression in the game's rules that need to specify all types of accepted violence as a guideline to all athletes.
2. The injury risk needs to be clearly stated in this consent form. The risk may be the actual risk or the possible risk. The example of real risks such as bruises on the face, broken noses, and other injuries, while the possible injuries include blindness, brain haemorrhage and even death.
3. The consent form must include a clear statement that each athlete has given consent when they participate in a competition.

Besides early prevention, the concept of voluntariness under sections 87 and 88 can be used as a defence in the case where the athlete inflicted serious injury and death against the opponent during the sporting competition. To incorporate voluntariness under section 87, an element of breaches of the game rules or foul must exist. The perpetrator does not intend to cause death or grievous bodily harm and is unaware that the grievous bodily harm may result in death or grievous bodily harm or, the grievous bodily harm will not cause grievous bodily harm or death. Furthermore, it is very difficult to claim that an athlete has no knowledge or is unaware that violent acts to a person's body will not cause serious injury or even death. This is because such incidents often indicate the existence of risk; if there is no real risk, there is still a possible

risk for the occurrence of serious injuries and deaths in sports. Therefore, if an athlete is deemed to have known that the aggression committed may result in serious injury or death, the consent under section 87 may not be used as a defence or exception.

On the other hand, to incorporate section 88, even if an athlete knows that his/her violent acts may cause serious injury and death, he must make sure that the aggression is done in good faith for the benefit of the victim. In sports competitions, both athletes are deemed to benefit each other, despite all the risks and injuries inflicted in winning the match. However, both sections have yet to describe the concept of voluntariness. This is because mistakes in decision making and lack of skill in performing an action that result in serious injury and unintentional death during a sporting event cannot be taken as proof of the athlete's negligence. During such a sporting event the athlete is trying to win the match and needs to decide quickly how to apply his/her available skills and strength to achieve the best possible outcome.

Finally, this article also proposes a separate section or subsection to state that aggression which may cause serious injury and death in sports activities is accepted if it is within the rules of the game. This special section or subsection should depend on several elements to be approved as a voluntary act, such as type of sport, playing levels (amateur, professional), existence of the game's rules, aggressive nature of the sport, possibility of force used, level of risk and possibility of serious injury, and finally, the defendant's state of mind. A special proceeding involving serious injuries and deaths during sports competitions should be introduced, so that these offences can be heard and tried in accordance with the moral law without denying the existence of the element of voluntariness.

#### ACKNOWLEDGMENT

The authors thank and appreciate the Ministry of Higher Education (Malaysia) and Universiti Kebangsaan Malaysia for funding the research under GUP-2020-101.

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