

**BOXING, THE COMMON LAW AND THE NON-FATAL OFFENCES AGAINST THE PERSON
ACT, 1997**

BRIAN FOLEY

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1. Introduction

In considering the legality of boxing in criminal law, the principal question is whether the punches inflicted should be regarded as assaults which would normally be criminal, but which the consent of both participants has rendered lawful.¹ In order to answer this fundamental question, it is necessary to examine the law on consent to assault. Of course, the law on assault has undergone a (relatively) recent change in the Non-Fatal Offences Against the Person Act 1997. So, how is boxing to be considered within this new framework?

2. The Common Law on Assault

Under the Offences Against the Person Act 1861, the relevant provisions of which were replaced by those in the 1997 Act, “assault” was effectively divided into the offences of common assault, actual bodily harm (ABH), and grievous bodily harm (GBH).² It has been argued that the *actus reus* of ABH would probably be satisfied in

¹ See Hughes “Two Views of consent in the Criminal Law” (1963) 26 *MLR* 233, at 243: “[T]he usual Anglo-American position will be to base the legality of any batteries on the consent of the parties.” Hughes also draws attention to the approaches adopted by *inter alia*, the French courts citing a decision of the Douai Court in 1912 he arguing that emphasis was instead placed on the motive of assault. In that case the court had to pronounce on the validity of a contract to promote a boxing match. It was affirmed on the basis that there was no unlawful element to it as the degree of malevolence in assault required by the *Code Civile* could not be present. The position has been doubted. See Garraud “Les Sports et le Droit Pénal” (1924) *Rev. Internationale de Droit Pénal* 212 presenting an argument that the legality of boxing to be found in custom. The motive methodology has also been considered in Australia in *Pallante v Stadiums Party Ltd (No 1)* [1976] VR 331.

² This Act in sections 42 and 46 continued the application of sections 27 and 29 of 1828 legislation (9 Geo. 4, c.31) that rendered the common law offence of common assault triable summarily. This created no new offence; *R v Harrow JJ ex parte Osaseri* [1985] 3 All ER at 188. The offence of assault occasioning actual bodily harm was governed by section 47, and the offence of inflicting or causing grievous bodily harm, among other offences, by sections 18 and 20.

every boxing match, as would the least serious offence of common assault.³ It would be reasonable to suggest that not every fight would involve the infliction of GBH or ‘really serious harm’, but some might.⁴

It has been established at common law that consent is a defence⁵ to assault, but not to assault occasioning ABH or anything above that.⁶ The potentially drastic consequences for sports were mitigated by an exemption from this rule, allowing consent to be a defence even where serious harm was inflicted during a sporting contest.⁷ However, even in sports, it appears that consent may not operate as a defence where a blow is struck deliberately or intentionally.⁸ It is assumed in this article that the infliction of harm in boxing is always intentional, since that is the nature of the sport; and thus that boxing should never have been covered by the general sporting consent exemption.

Despite this, boxing has been considered legal in several English court decisions, considered below, which appear to place boxing in a “special position,” without offering a reasoned understanding of its legality or otherwise within the framework of the law of assault.

³ Gunn and Ormerod, “The Legality of Boxing”, (1995) 15 LS 181, at 186, footnote 30: “Boxing matches cannot be won without punching the other combatant. The nature of a punch must inflict the necessary bodily harm, even if the boxer in question does not have a particularly hard punch”.

⁴ The formulation of ‘really serious harm’ was favoured in *DPP v Smith* [1960] 3 All ER 161, and *R v Metharam* [1961] 3 All ER 200 as opposed to the standard favoured in *R v Ashman* (1858) 1 F & F 88. There it was defined as harm which seriously interferes with health or comfort.

⁵ “Defence” here is used in the loosest sense for the sake of economy of language. Obviously consent goes to *actus reus* and thus the existence of a crime, and does not operate as a defence in the strict sense.

⁶ *Coward v Baddeley* (1859) 4 H & N 478, *R v Coney* (1882) 8 QBD 534, *R v Donovan* [1934] 2 KB 498, *R v May* [1912] 3 KB 572, *Attorney Generals Reference No.6 of 1980* [1981] QB 715, *R v Brown* [1993] 2 All ER 75.

⁷ *R v Bradshaw* (1878) 14 Cox CC 83, *R v Moore* (1898) 14 TLR 229, *R v Donovan* [1934] 2 KB 498 *Attorney Generals Reference No.6 of 1980* [1981] QB 715. See also, Anderson, “International Sports Law Perspective: Citius, Altius, Fortius? A Study of Criminal Violence in Sport” (2000) 11 *Marq. Sports L. Rev.* 87, McCutcheon, “Sports Violence, Consent and The Criminal Law” (1994) 45 *NILQ* 267. Charleton in *Criminal Law* (3rd edn, Butterworths, 1999) rests his consideration of the sporting exemption on the Australian decision of *Pallante v Stadiums Party Ltd (No 1)* [1976] VR 331 which would seem hold that consent may operate even where intentional serious harm has been inflicted. The decision has been criticised in *R v Brown* [1993] 2 All ER 75, and may be further said to suffer from the deficiency of a misunderstanding of the early common law authority of *R v Coney* (1882) 8 QBD 534, considered in more detail below.

⁸ *Ibid.*

3. The 1997 Act⁹

3.1 Section 2: Assault

Section 2 deals with the basic definition of assault. Arguably declarative of the old concept of common assault,¹⁰ it states:

‘A person shall be guilty of the offence of assault who, without lawful excuse, intentionally or recklessly-

- (a) directly or indirectly applies force or causes an impact on the body of another, or
- (b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact, without the consent of the other.’

So, where consent is present, no offence of assault *per se* is made out. In looser terms - consent is a defence to a section 2 assault.¹¹

3.2 Section 3: Assault Causing Harm

Section 3(1) creates a new offence of assault causing harm, providing that:

‘A person who assaults another causing him or her harm shall be guilty of an offence.’

‘Harm’ itself is defined in section 1; it means ‘harm to body or mind and includes pain and unconsciousness’.

⁹ See Generally, Bacik, “Striking a Blow for Reform” (1997) 7 *ICLJ* 48; Byrne “Non-Fatal Offences Against the Person Act 1997” (1998) 16 *ILT* 245; Charleton, *Criminal Law op. cit.*, at Chapter 9, McAuley & McCutcheon *Criminal Liability*, Dublin: Round Hall, 2000, at 531-532.

¹⁰ Charleton, *op. cit.*, at 713

¹¹ Sub-section 3 goes on to replace the theory of implied consent for ‘acceptable assault’ with a statutory exemption for the infliction of force or impact where such behaviour is ‘as is generally accepted in the ordinary conduct of daily life.’ Obviously this is intended to address the absurdities of a literal interpretation of assault as a concept, and further to remove any abstract debate over the concept of implied consent as a justification for the legality of hustle and bustle of Grafton Street. In *Collins v Wilcock*, Goff LJ had preferred to group socially acceptable assaults as falling within a general exception embracing all such conduct; [1984] 3 All ER 374 at 377-378. However in *Wilson v Pringle* [1986] 2 All ER 440 the court preferred the concept of implied consent. Then again, the use of a general exception has found favour in *T v T* [1988] 1 All ER 440 and again by Lord Goff, as he

By using the term ‘assault,’ the section refers back to the basic definition of assault, which must be taken to refer to section 2.¹² With the inserted text in italics, section 3 would then read:

‘A person who *without lawful excuse, intentionally or recklessly*
(a) *directly or indirectly applies force or causes an impact on the body of another, or*
(b) *causes another to believe on reasonable grounds that he or she is likely to be subjected to any such force or impact,*
without the consent of the other,
causing him or her harm shall be guilty of an offence.’

The importance of this cannot be understated for the purposes of this article. On this interpretation of the Act, lack of consent is a vital element to make out a charge of assault causing harm; once again, consent may be a defence to this level of assault.

3.3 Section 4: Causing Serious Harm

This view of section 3 is strengthened on consideration of section 4. The new offence of causing serious harm thereby created does not refer to the term ‘assault’. Section 4(1) reads as follows:

‘A person who intentionally or recklessly causes serious harm to another shall be guilty of an offence.’

Consequently, the presence of consent will not afford a defence. For the sake of completeness, ‘serious harm’ is defined in section 1 as ‘injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ.’

became, in *F v West Berkshire Health Authority* [1989] 2 All ER 545. Obviously the legislation determines this conceptual dispute in Ireland.

¹² A similar conclusion is reached by McAuley & McCutcheon, *op. cit.*, at 532; “Section 2 expressly makes lack of consent part of the actus reus of assault and this definition must be carried into section 3 which provides the offence of assault causing harm”.

4. Section 3 and Actual Bodily Harm

It has been argued that section 3 amounts to a replacement of the previous concept of ABH.¹³ However, it is arguable that section 3 embraces far milder assaults than the level required by ABH. While the rule at common law was that more than a transient or trifling hurt would be needed for ABH,¹⁴ it is not *prima facie* clear from the definition of ‘harm’ that section 3 excludes transient or trifling hurt.

Debate over these *contactes petite* may be to obscure the point, however. Under the 1861 Act, one could consent to a level of harm below that of actual bodily harm. Under the 1997 Act, consent can operate as a defence to assault causing harm, but not to the causing of ‘serious harm’. The key area of concern under the new Act then is the scale of violence *between* a section 3 assault causing harm, and the causing of serious harm under section 4. If a boxer inflicts only those assaults that fall below the threshold of serious harm, boxing is clearly legal. Once serious harm is caused, the status of this sport becomes more doubtful, unless it is covered by the general sport exemption.

Despite the fact that the majority of blows struck in boxing will be within the realms of consent, it is likely that some blows will go outside this threshold. The fact that boxing may cross over into the region of serious harm prevents any broad statement that boxing is legal or illegal. If the 1997 Act rules on consent were to apply to boxing *simpliciter*, without any sport exemption, some boxing matches would be legal, some would contain illegal elements, and some, the minority of boxing matches, would be entirely illegal.¹⁵

5. The Problem of Section 22 - Has the Law Changed?¹⁶

¹³ Bacik, “Striking a Blow for Reform” *loc. cit.*, at 57; McAuley & McCutcheon *Criminal Liability op. cit.*, at 532.

¹⁴ *R v Scatchard* (1987) 27 A Crim R 136; Williams, *Textbook on Criminal Law*, (2nd Ed., 1983) at 187.

¹⁵ Where, for instance, the bout ends after several seconds, the only blows inflicted being those that cross the boundary into serious harm. The relatively recent bout between Lennox Lewis and Frans Botha was characterised by a ferocious onslaught by Lewis, arguably rendering the vast majority of the bout within the realm of serious harm.

¹⁶ For a more detailed analysis see the present author’s comments in “Consensual Assault - Just What is the Law?” (2002) 5 *TCLR* 266

The conclusions reached above may be clouded by the terms of section 22 of the 1997 Act: ‘The provisions of this Act have effect subject to any enactment or rule of law providing a defence, or providing lawful authority, justification or excuse for an act or omission.’

The explanatory memorandum that accompanied the Bill explains that under this section, “the common law rules under which bodily harm caused with consent in the course of sports, dangerous exhibitions or medical treatments will apply to exempt the actor from criminal liability.” Thus, the section appears to preserve the sporting consent exemption which renders consent a defence even to the infliction of serious harm within a sporting context. This obviously also assumes that the old common law threshold of consent still exists. If this is the case position remains under the 1997 Act that only those blows struck in boxing without causing serious harm would be lawful, since one cannot consent to the s.4 offence, so the legality of boxing would have to be treated under the sporting exemption. As has been argued already, boxing itself should fall outside the sporting exemption, if it is seen as an intentional infliction of harm and consequently be illegal. However, it is relatively clear that the common law does not follow this analysis as boxing has repeatedly been upheld as legal.

6. Boxing and the Common Law¹⁷

Despite occasional mention of ‘prize fights’ in the reports and in the work of distinguished commentators,¹⁸ consideration of the legality of boxing began in earnest

¹⁷ See Generally Grayson, *Sport and the Law*, 3rd Edn. (Butterworths, 2000) at 268-273 for a useful discussion and summary table of relevant case law. See also, Grayson, “Boxing Clever”, (1992) 142 *NLJ* 48, Papworth, “Boxing and Prize Fighting: The Indistinguishable Distinguished?” (1994) 2 *Sport & LJ* 5, Papworth, “Parliament and the Boxing Bill”, (1996) 4 *Sport and LJ* 24.

¹⁸ Prize fights have always been considered illegal. For reported cases see *R v Billingham* (1825) 2 C & P 234, *R v Hargrave* (1831) 5 C & P 170, *R v Perkins* (1831) 4 C & P 537, *R v Lewis* (1844) 1 C & K 419. For commentary see Foster, *Crown Law* 3rd Edn. (1809) Discourse 2, Chapter 1 at 360, East, *Pleas of the Crown*, (1803) Vol 1, Ch. 5, s42 at 270, *Russell on Crimes* 3rd Edn. (1843) Vol 1 at 273-274. Although the definition of ‘prize fight’ as a fight in the expectation of reward per *Bouvier’s Law Dictionary* 3rd Rev. 8th Edn. Vol 2 at 2726 as considered in *Pallante v Stadiums Pty Ltd* [1976] VR 331 per McInerney J might tend to cause problems when one considers the purses that Mike Tyson can earn. There is authority to suggest that even public boxing matches, as opposed to prize fights, have been considered unlawful on either a breach of the peace basis, or due to a concern that the parties involved may be indifferent as to the hurt involved, so long as they received crowd gratification or the

in *R v Coney*¹⁹. Charges of common assault were made against several persons participating in and watching a prize fight. It was argued that the presence of consent negated the offence. The eleven member Court of Criminal Appeal was unanimous in holding prize fighting, but not necessarily boxing, illegal.

Hawkins J initially held that although a person can consent to assault, he or she cannot give an effectual consent to that which amounts to a breach of the peace. He then stated:

[E]very fight in which the object and intent of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such fight be a hostile fight begun and continued in anger, or a prize-fight for money for other advantage.²⁰

And later;

[T]he cases in which it has been held that persons may lawfully engage in friendly encounters not calculated to produce real injury or to rouse angry passions in either, do not in the least mitigate against the view I have expressed.²¹

Anderson commented in relation to this point;

‘On this dubious thread of policy does the legality of boxing hang...[I]t is not prize fighting which is illegal because it disturbs the peace and may incite rioting and social disorder.’²²

It is arguable that this view obscures one critical reason why prize fighting was held illegal. According to *Coney*, the only fights that are acceptable are (a) those that are not calculated to produce real injury and (b) those where the object is not the

reward promised. *Wards Case* (1789) OB 1789, Fost. 260, 1 East PC 270. *R v Young* (1886) 10 Cox CC 371 saw the Court confronted with a case where death had occurred during a boxing match in private. On medical evidence available to him, Bramwell B held that no fight had taken place as boxing with gloves was not dangerous. He stated *obiter dictum* ‘supposing there was no danger in the original encounter, the men fought on until they were in such a state of exhaustion that it was probable they would fall and fall dangerously, and if death ensued from that it might amount to manslaughter’.

¹⁹ (1882) 8 QBD 534

²⁰ *Ibid.*, at 553

²¹ *Ibid.*, at 554

²² Anderson “International Sports Law Perspective: Citius, Altius, Fortius? A Study of Criminal Violence in Sport” *loc. cit.*

intentional subduction of the opponent by violent blows. Other types of fight cause, by definition, a breach of the peace. To simply state, as Anderson has done, that prize fighting is illegal because it results in a breach of the peace ignores the vital reason of why it *can* so result, i.e. because the blows inflicted are calculated to produce real injury.

Cave J found similarly, holding that a boxing match is legal because blows struck are not struck in anger.²³ Nor are the blows struck likely or intended to cause bodily harm.²⁴ Thus, he does not see boxing itself as dangerous. This latter view is echoed by Stephen J, since in his view boxing does not expose life and limb to serious danger.²⁵

On the precedent set in *Coney*, boxing may be legal because, in contrast to prize fights:

1. There is no intentional infliction of harm;
2. There is no danger to life or limb;
3. When conducted properly, boxing does not amount to a breach of the peace.

However, there are problems with the reasoning on each of these three grounds. The first *ratione* may apply to sparring, but in contrast, the ultimate objective of every fighter in a boxing match is to knock the opponent out.²⁶ At best, one may argue that the motive, as opposed to intention of the boxer is simply to win, not to injure. As is well known, motive is generally irrelevant to criminal liability.²⁷

On the second ground, to say that there is no danger to life or limb in boxing is simply not true. Although it may be argued above that the majority of blows struck in the ring do not carry a substantial risk of death²⁸, it is of course true that very serious

²³ *R v Coney* (1882) 8 QBD 534, at 539.

²⁴ *Ibid.*

²⁵ *R v Coney* (1882) 8 QBD 534, at 549

²⁶ Gunn and Ormerod, *loc. cit.*, at 193. Former world champion, George Foreman, being interviewed on *The Late Late Show* (15th November 2002) stated that his intention when fighting was to kill, not merely injure, his opponent.

²⁷ Horder, "On the Irrelevance of Motive in Criminal Law" in Horder ed., *Oxford Essays in Jurisprudence*, 4th Series (Oxford, Oxford University Press, 2000).

²⁸ If the contrary could be established, then boxing may fall within the offence of causing serious harm. Whatever may be said about the impact and force behind such a blow, (Atha et al, "The Damaging Punch" (1985) 291 *British Medical Journal* 1756, measured the force of Frank Bruno's punch as

harm can result. Boxing is dangerous.²⁹ Injuries which participants may suffer include liver and spleen damage³⁰, fractured bones³¹, eye injuries³² and of course, brain damage.³³

The decision in *Coney* may be explained by the perception of boxing at the time. It is clear that the court felt that boxing of the “ordinary kind” or “sparring with gloves” was a perfectly legal pursuit, because they regarded boxing as a pursuit not incorporating constituent elements of intentional harm and danger. Given that the extra protection of gloves had only recently been added, it seems reasonable to assume that around the time of *Coney*, the classic bout was not characterised by vicious knock out blows or blistering barrages, but rather amounted to an exhibition in endurance.³⁴ This explanation is re-enforced by the finding of Bramwell B in *R v Young*³⁵, that on medical evidence available to him, boxing with gloves was not dangerous. This perception is alive in the *Coney* decision; but whether it was true or not at the time, it cannot be said to be true now.³⁶ It is submitted that nothing in *Coney* can be seen to provide boxing as we now know it with a legal basis.

equivalent to a 13lb wooden mallet being swung at 20mph) it is equally arguable that the fatality rate in boxing is low enough to see that the vast majority of blows struck do not carry with them a substantial risk of death, for if they did, such risk would be realised in a far greater instance than it already is. (An Australian estimate puts boxing deaths as 1 in 10,000 bouts; Burns “Boxing and the Brain” (1986) 16 *Australia and New Zealand Journal of Medicine* 439.)

²⁹ See Gunn and Ormerod, *loc. cit.*, at 193 drawing attention to the debate over the proposed Boxing Bill in the House of Lords, Hansard 4 December 1991 especially at cols 291, 294-296 and 304-307. For a detailed history see Ryan, “Intracranial Injuries Resulting from Boxing: a Review (1918-1985)” (1987) 6 *Clinics in Sports Medicine* 31. See also, Ross et al, “Boxing Injuries: Neurologic, Radiologic, and Neuropsychologic Evaluation” (1987) 6 *Clinics in Sports Medicine* 41.

³⁰ Gunn and Ormerod, *loc. cit.*, at 193 n88.

³¹ *Ibid.*

³² See for example; Leach et al “Ocular Injuries from Boxing” (1992) 304 *BMJ* 839; McLeod, “Ocular Injuries from Boxing. Reply” (1992) 304 *BMJ* 849; Wedrich et al, “Ocular Findings in Asymptomatic Amateur Boxers” (1993) *Retina* 13(2) 114.

³³ Millsbaugh, “Dementia Pugilistica” (1937) 35 *United States Naval Bulletin* 297; Corsellis et al, “The Aftermath of Boxing” (1973) 3 *Psychological Medicine* 27; Casson et al, “Brain Damage in Modern Boxers” (1984) 252 *Journal of the American Medical Association* 2663.

³⁴ The Marquis of Queensbury rules were introduced in 1867 succeeding the 1839 London Prize Ring Rules; *Encyclopaedia Britannica*, 15th Edn. Vol 2 at 443. As to the lengthy nature of prize fights in general see Le Marchant-Minty, “Unlawful Wounding; Will Consent Make it Legal?” (1956) 24 *Medico-Legal Journal* 54, at 56.

³⁵ (1886) 10 Cox CC 371

³⁶ This argument is strengthened by Cave J’s citation of *R v Orton* (1878) 39 LT 293, where the “ferocity and severe punishment” endured in the bout took it outside what Cave J would call “boxing with gloves in the ordinary way”: *R v Coney* (1882) 8 QBD 534, at 539. See also *supra* at n15.

The Court of Appeal in England revisited the general topic in *Attorney General's Reference (No. 6 of 1980)*.³⁷ Here two quarrelling young men had decided to settle their differences by fighting. Lord Lane CJ delivered the opinion of the Court:

‘It is not in the public interest that people should try to cause, or should cause, each other bodily harm for no good reason...This means that most fights will be unlawful regardless of consent. Nothing we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.’³⁸

Thus, if boxing is in the public interest, it is legal. Nevertheless, the decision does not say that boxing is in the public interest. It only posits the test of the public interest and offers no detailed analysis as to whether boxing would meet it, but arguably assumes that boxing passes it.³⁹ This reasoning is unsatisfactory for three reasons. First, it is not clear that boxing is in the public interest.⁴⁰ Second, even if it is, the fact that something is in the public interest does not mean it is therefore automatically legal; the public interest is not an established test of legality.

Third, the decision purports to *explain as opposed to justify* the current position of boxing. It reads: “in our opinion boxing has always been legal on the public interest ground”. That is not true. *Coney*, as has been shown here, is founded on different reasons. Indeed the citation of *Coney* by the Court of Appeal seems almost perverse. Lane LCJ cites it as authority for recognition of a public interest exception, and then proceeds to cite passages from each of the judges which, as I have argued here, focuses on the level of harm inflicted.

³⁷ *Attorney Generals Reference No.6 of 1980* [1981] QB 715.

³⁸ *Attorney Generals Reference No.6 of 1980* [1981] QB 715, at 719.

³⁹ It may be assumed to have passed it on the strength of the line “Nothing we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports”; *Attorney Generals Reference No.6 of 1980* [1981] QB 715, at 719.

⁴⁰ *Gunn and Ormerod loc. cit.*, put forward cogent arguments that boxing is not in the public interest. On the other hand, they present a balanced view and also argue the converse point. It is not proposed to re-hash the arguments here, but it is submitted that when the legal test as to whether boxing is lawful is based on the presence or absence of a factor (the public interest), that factor must be clearly proven.

In any event, it is clear that the Court of Appeal's decision did not bring closure. In the later case of *R v Brown*,⁴¹ concerning sado-masochistic sexual practices, in which further comment was made about boxing, it was said to be a lawful practice in relation to which consent was a defence; but the reasoning is unsatisfactory since the legality of boxing was not explored in any depth.⁴²

In *Brown*, Lord Jauncey said that *Coney* was authority for the proposition that:

'The public interest limits the extent to which an individual may consent to infliction upon himself by another of bodily harm and that such public interest does not intervene in the case of sports where any infliction of injury is merely incidental to the purpose of the main activity.'⁴³

He appears to adopt this reasoning from a passage of Stephen J in *Coney*:

'In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even where considerable force is used...in cases of wrestling, single-stick, sparring with gloves...'⁴⁴

However, he seems to have misunderstood this passage. Lord Jauncey describes Stephen J's comments as considering "organised sports where danger to life and limb is merely incidental to the main purpose of the activity". However, Stephen J was specifically referring to instances of "no serious danger". Stephen J, as argued above, was taking the view that boxing itself does not involve danger, or that the only legal type of boxing is sparring, as opposed to competition fights.

In his judgment in *Brown*, Lord Templeman, accepting that *Coney* outlawed the prize fight, resolves that 'rightly or wrongly the courts accepted that boxing is a lawful activity'.⁴⁵ Again, he did not consider the arguments raised herein that *Coney* is an unsuitable authority upon which to rest the legality of boxing.

⁴¹ *R v Brown* [1993] 2 All ER 75

⁴² *R v Brown* [1993] 2 All ER 75, per Lord Templeman, at 79F-G and per Lord Mustill, at 109A.

⁴³ *R v Brown* [1993] 2 All ER 75, per Lord Jauncey, at 88A-B.

⁴⁴ *R v Coney* (1882) 8 QBD 534, at 549

⁴⁵ *R v Brown* [1993] 2 All ER 75, per Lord Templeman, at 79F-G

That *Coney* - and by necessary deduction the *Attorney General's Reference* case - are inadequate foundations for the legality of boxing seems to be implied in Lord Mustill's speech, which was the most detailed in respect of boxing. Despite the depth of his analysis, the conclusion is abrupt. He resolves that boxing is a 'special situation which for the time being stands outside the ordinary law of violence because society chose to tolerate it.'⁴⁶ In short, *Brown* says that boxing is merely legal because it is. The decision in *Brown* is also notable for its lack of explicit affirmation of the public interest test.⁴⁷

Some attention should also be paid to the analysis of McInerney J in the Australian decision of *Pallante v Stadiums Party Ltd (No 1)*⁴⁸. The decision stands as the only judicial attempt to reach a principled legal base for boxing. Despite this, there are several problems with the decision. Most importantly, the analysis is fundamentally flawed by the judge's reliance on the concept of hostility as intrinsic to the legality of boxing. Put basically, when boxing is not hostile, it is legal. Against this, and as McInerney J himself acknowledges, boxing matches can begin as a friendly encounter and then at some 'instinctive point' turn hostile. Second, it is clear that many top level fights begin with a spirit of hostility. Third, hostility surely is a synonym for motive, and as noted above, motive is generally irrelevant to liability in the criminal law.⁴⁹

So, it does not seem that boxing can legitimately claim a legal base on any principled approach in the common law. This conclusion brings the discussion back to the problem of section 22. That section is apparently intended to preserve the pre-existing common law on consent, but it has been shown that the common law on consent may not provide a legal base for boxing. However, one may argue that participation in a boxing match could be a specific defence, independent of the general law on consent, to a charge of assault. Then, this defence would be carried over by virtue of section 22. One could similarly argue that a rule of law exists at

⁴⁶ *R v Brown* [1993] 2 All ER 75, per Lord Mustill, at 109A

⁴⁷ Silence in the highest tribunal of the land on a controversial point can be seen as fatal for the point's survival. See the consideration of the lack of affirmation of *Percival v Wright* (1902) 2 Ch 421 in *Allen v Hyatt* (1914) 30 TLR 444 by Mahon J in *Coleman v Myers* [1977] 2 NZLR 225, ultimately rejecting *Percival*. His decision was reversed on appeal.

⁴⁸ [1976] VR 331.

⁴⁹ However, it is arguable that motive played a role in *R v Brown* [1993] 2 All ER 75. Suppose the people there decided to find their sado-masochistic thrills within the boxing ring, and gained sexual gratification from the punishment they received. Would this have been found acceptable?

common law bestowing legal authority upon the participants in a boxing match to commit what would otherwise be assaults. Thus section 22, by carrying this over, would provide for the legality of boxing by using the vague standard of lawfulness previously ascribed to the sport.

7. Summary and Conclusion

Under the 1997 Act, it is clear that a person may consent to assaults causing harm, short of serious harm. However, since boxing may involve the infliction of serious harm, it seems impossible to conclude on the basis of the 1997 Act whether boxing as a sport is legal or illegal.

Since section 22 purports to preserve pre-existing common law defences and rules, it seems that the general sports exemption whereby consent may be a defence even where serious harm is caused must remain in force. But it remains arguable as to whether blows inflicted in the course of a boxing match are protected by this exemption. It would seem that the general sports exemption cannot protect them since they are probably inflicted with intention to cause harm. Instead, it appears that there may be some rule at common law, specific to boxing, that protects boxing punches from criminal liability. Therefore, one must ultimately conclude, in accordance with the holding in *Brown*, that boxing is simply seen to be legal and is tolerated as such, without any clear legal basis.⁵⁰ It may be that in future a court will be confronted with a case where the lack of such a clear legal basis will become apparent, and where the status of boxing within the framework of the 1997 Act will

⁵⁰ Although boxing is in a unique position it is not a unique sport. There are many other high impact contact activities that suffer the uncertainty of their legal position. Whether they are recognised sports is irrelevant, for the sporting exemption does not cover intentional infliction of harm. What is relevant is that it is impossible to extend by analogy the legality of boxing to other activities. Therefore Full Contact Karate, Ultimate Fighting etc must stay within the bounds of the 1997 Act to constitute legal activities. They cannot claim legality by analogy with boxing. This obviously has serious consequences for the nature of these activities, for if the common law threshold remains, then these activities, are prima facie illegal as not having being analogous with boxing, and if the 1997 Act contains the law, then competitors have to theoretically guard closely their actions so as not to fall foul of the law. It is worthy to note that the Law Commission in its consultation paper *Consent in the Criminal Law*, (No. 139, HMSO) dedicates some space to a consideration of a scheme of legal recognition for martial arts as sports which would come under the special treatment recommendation for sport in general. (Para 12.68). The Commission basically deferred the definition of sport within this recommendation to the Sports Council, so that an activity, to be protected by the law, would have to conform with the Sports Council guidelines and requirements for a 'sport'. (Para 13.20.)

have to be determined with finality. But whether such a case will ever come before the courts is another question.