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The law(s) of the rings: Boxing and the law

RG Beran and JR Beran*

To threaten harm is to assault and to realise that threat is to batter. To do so intentionally for the purpose of producing injury amounts to causing harm with intent and one cannot consent to be the victim of such violence. Despite these clearly enunciated legal principles, such conduct is routinely practised in the name of sport. Boxing is widely accepted as a highly paid professional sporting activity in which the ultimate goal is to inflict a concussive head injury upon an opponent or at least cause sufficient damage to render an opponent incapable of further self-defence. Spectators pay to watch the anticipated systematic abuse of one human being by another in much the same way they delighted in gladiators who were forced to fight for the pleasure of others. This article reviews these concepts and challenges the legal ethics of authorised violence associated with these activities undertaken in the name of sport.

INTRODUCTION

To plausibly threaten to harm someone is called assault¹ and to realise that threat and to inflict the harm is termed battery.² To harm someone with the full knowledge of what one is doing with the specific intention of causing harm to the other person is to cause harm with intent.³ All these forms of behaviour are illegal acts and can be found, in one form or another, in various Acts,⁴ as well as representing civil wrongs in tort law.⁵ One cannot wilfully consent to be the victim of assault.⁶ It follows that the act of trying to beat someone senseless, irrespective of whether that person is a willing participant, is a criminal act that cannot be condoned by so-called “civilised” society.

Does this description not cover the sport of boxing? If the answer to this question is in the affirmative, then the next question must be: Why is such an “illegal” act not illegal if its very basis of existence can be interpreted as being illegal? At least in the Australian State of New South Wales the answer can be found in the *Boxing and Wrestling Control Act 1986* (NSW), which sets out the requirements for industry participants, being competitors, promoters and officials involved in combat sports such as boxing, kick boxing or wrestling at both amateur and professional levels.⁷ The legislation stipulates requirements covering:

- professional participant registration;
- conduct requirements for professional events;
- professional and amateur event permits;

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¹ Brown D, Farrier D, Egger S and McNamara L, *Criminal Laws* (3rd ed, Federation Press, Sydney, 2001) p 809.

² Brown et al, n 1, p 809.

³ *Crimes Act 1900* (NSW), s 33.

⁴ For example, *Crimes Act 1900* (NSW), ss 33, 54, 59.

⁵ Brown et al, n 1, p 809.

⁶ *R v Brown* [1993] 2 All ER 75.

⁷ New South Wales Department of Sport and Recreation, *Issue Paper – Review of the NSW Boxing and Wrestling Control Act 1986* (NSW Government, June 2001).

- prohibition of female participation; and
- age limitations for participants.⁸

Superficial scrutiny of these domains should offend feminists and those seeking equal opportunity since there is a tacit acceptance that assault and battery with the specific intent to cause harm is acceptable for men but not for women.

The Act stipulates what “combat sports” are covered therein but the Department of Sport and Recreation has extended its interpretation beyond boxing, kick boxing, wrestling, kyokushin karate, tough man competitions and the ultimate fight challenge to include ju-jitsu, karate, kung fu, kendo, judo, aikido, tae kwando, thai boxing, tai chie chuan, silar, tang soo do, ninjitsu, and savate – to name a few of the combat sports.⁹

When the New South Wales Government, through its Department of Sport and Recreation, reviewed its legislation governing boxing, as one the combat sports, its purpose was not to show a civilised concern for human beings engaged in otherwise illegal brutality. Rather, the review was to meet its commitments under the National Competition Policy agreed to at the 1995 Council of Australian Governments (including Commonwealth, State and Territory governments) meeting. Its purpose was not to restrict behaviour that might be to the detriment of its citizens but rather to reform legislation that might contain restrictions on competition.¹⁰

At the time of this review, in 2001, there was general agreement that the review would “enhance the safety of participants and minimise the incidence of malpractice in professional bouts”.¹¹ In its review, the Department of Sport and Recreation acknowledged that in 1994 the Association Internationale de Boxe Amateur (AIBA) changed its articles and bylaws to allow member countries to include female participants in boxing. The first sanctioned AIBA Women’s Amateur Boxing Championship was held in the United States of America in 2001.¹²

When considering the involvement of women in boxing, the Department of Sport and Recreation wrote:

[C]onsideration of the appropriateness of female participation in boxing bouts involves a wide range of issues including that of prevailing community standards and relevant medical research.¹³

Does not the same apply to men, or is the inherent concept of boxing a blatant degradation of the males of the species?

It is apparent that while activities undertaken in the name of combat sports (particularly boxing) are of themselves illegal in civilised society, they are nevertheless condoned and enshrined in government policy.

This article explores some of these concepts and offers some challenges to the current “state of play”, a concept inherent to sport but foreign to boxing and related activities.

WHAT IS BOXING?

In their review of boxing, Adams and Wren¹⁴ stated that its objective, “the landing of legal blows with force upon the opponent”, was fundamental to the sport. They added:

[T]he boxer must demonstrate his ability to deliver blows to the front and side of his opponent’s head, chest and abdomen above the umbilicus. To score points, these blows must be delivered “with force” with the knuckle part of the gloved hand.

⁸ New South Wales Department of Sport and Recreation, n 7.

⁹ New South Wales Department of Sport and Recreation, n 7.

¹⁰ New South Wales Department of Sport and Recreation, n 7.

¹¹ New South Wales Department of Sport and Recreation, n 7.

¹² New South Wales Department of Sport and Recreation, n 7.

¹³ New South Wales Department of Sport and Recreation, n 7.

¹⁴ Adams LM and Wren PJ, “The Doctor at the Boxing Ring: Amateur Boxing” in Payne SW (ed), *Medicine, Sport and the Law* (Blackwell Scientific Publications, Oxford, 1990) pp 230-277.

Boxing, or fist fighting, was depicted on ancient Greek and Mesopotamian pottery from 1500 BC.¹⁵ It was introduced as a competitive sport at the 23rd Games of Olympia in 668 BC with competitors selected on the basis of age (above or below the age of 18) on the basis of a lottery devoid of weight considerations.¹⁶ The Romans added metal spikes over the knuckles to enhance its spectator value.¹⁷

During the Middle Ages, boxing was without a following until renewed in the 18th century in Great Britain, with opponents fighting with bare knuckles and without time limits and the fight ending when the result was obvious. The first control of professional boxing was instituted in Britain (upon which the Australian legal system is based) in the 19th century.

The first rules to be introduced to boxing are known as Broughton's Rules, named after the London longshoreman (stevedore) John Broughton. These rules, introduced in 1743, protected a boxer once knocked down, or on his knees, and excluded wrestling holds from boxing.¹⁸ In 1838 the new rules of the London Prize Ring placed the testicles "out of bounds"; bouts ended if a boxer would not "come to scratch" in eight seconds of calling a new round; seconds and attendants could not injure their fighter's opponent; and biting, gouging or tearing the flesh with fingers or nails was banned.¹⁹ Codes and regulations to govern the sport were implemented by the Marquis of Queensberry and the National Sporting Club.²⁰

In the 1860s the boxing regulations proposed by the Marquis of Queensbury were accepted by students at Cambridge University, suggesting an academic acceptance of boxing as a regulated sport. The rules included padded boxing gloves; three-minute time limited rounds; one-minute rest between rounds; a 10-second limit for an impaired contestant to rise from the floor before being deemed to have lost the bout;²¹ seconds and attendants could not hold the contestant up; each boxer had to rise within the time limit unassisted; and a man hanging on the ropes, with toes off the ground, was thence excluded from the fight.²²

The last officially sanctioned bare-knuckle fight occurred in America in 1889 when Sullivan defeated Kilrain²³ and between 1891 and 1909 weight classes were gradually introduced. In 1909, the National Sporting Club (in London) established eight primary weight divisions (flyweight through to heavyweight).²⁴

A century later, in the 21st century, boxing is widely accepted as a highly paid and professional sporting activity in which the ultimate goal remains the same. It would appear, from the above descriptions, that the aim of the sport remains to land blows upon the opponent with the expressed purpose of inflicting a concussive head injury or at least causing sufficient damage to render an opponent incapable of further self-defence.

In an editorial in the *Journal of the American Medical Association* in 1983, Lundberg wrote:

In contrast to boxing, in all other recognised sport, injury is an undesired by-product of the activity. Boxing seems ... to be less sport than is cock-fighting ... Boxing, as a throwback to uncivilised man, should not be sanctioned by any civilised society.²⁵

¹⁵ Pearn J, "Boxing, Brains and Balls" (2000) 1 *Medicine Today* 146.

¹⁶ Haglund Y and Erickson E, "Does Amateur Boxing Lead to Chronic Brain Damage?" (1993) 21 *Am J Sports Med* 97.

¹⁷ Masterson DW, "The Ancient Greek Origins of Sports Medicine" (1976) 10 *Br J Sports Med* 196; Unterharnscheidt F, "About Boxing: Review of Historical and Medical Aspects" (1970) 28 *Tex Rep Biol Med* 421.

¹⁸ Pearn, n 15.

¹⁹ Pearn, n 15.

²⁰ Whiteson AL, "The Doctor at the Boxing Ring: Professional Boxing" in Payne, n 14, pp 278-284.

²¹ Haglund and Erickson, n 16.

²² Pearn, n 15.

²³ Pearn, n 15.

²⁴ Pearn, n 15.

²⁵ Lundberg GD, "Boxing Should be Banned in Civilised Countries" (1983) 249(2) *JAMA* 250 at 250.

This comment was countered by Adams and Wren:²⁶

Too many doctors are all too ready to assume a position of moral superiority, and with a confidence born of ignorance condemn out of hand a sport in which the only benefit they can see is inevitable brain injury for each and every participant.

They considered that the real benefits of boxing go beyond the confrontation in the “square ring”.²⁷ They claimed that boxing, especially amateur boxing, was a service industry which provides a service by uniting local communities with local boxing clubs. They suggested that boxing gives club members stability and purpose and provides a sense of achievement for those lacking in other skills. It is a forum in which club members can display their skill in a stimulating environment which demands both discipline and respect for “the sport” and a renewed level of self-acceptance and personal pride. They considered boxing to be goal-orientated behaviour within a close-knit and mutually supportive community based upon camaraderie and fair play.²⁸ What they failed to acknowledge was that the goal is to cause damage to an opponent with sufficient force to render that opponent incapable of self-defence. Nor did they acknowledge that alternative activities could equally support the local club environment without the expressed purpose of wilfully injuring other people.

DOES BOXING CAUSE HARM?

Despite enhanced prophylactic measures, with increased hand-padding, voluntary use of boxing helmets and heavier gloves, there was no diminution in the frequency with which boxing matches were being stopped due to knock-outs or blows to the head.²⁹

While Adams and Wren provided strident support for pugilism, their analysis still offered almost 30 references which attested to the damage caused to boxers consequent to the traumas being inflicted.³⁰ They criticised these as being biased and methodologically flawed and espoused the social good that emanates from boxing and boxing clubs.

Clausen et al³¹ have determined that, since the 1930s, the average duration of a professional boxer's career has decreased from 19 years to five years, and the mean number of career bouts has declined from 336 to 13, despite significant decline in participation rates from 1931 to 2002. Consequent to this, they suggested that there is decreased exposure to trauma and hence there should be less damage.

Combining a community medicine and legal approach in their assessment of boxing, Sargent et al³² adopted a meta-analytic methodology to conclude that the majority of studies were methodologically flawed. They reported that those studies with the weakest design, and also considered the most biased, showed the most damage to ensue from boxing. They also acknowledged that studies with the stronger design revealed less damage but determined that “there is no group of studies that does not reveal abnormalities”. Their conclusion was that the weight of evidence favoured the hypothesis that boxing was associated with damage to the brain. They also removed the potential, within a civil or even criminal case, to realistically rely on a defence that boxing was not dangerous even if it was conducted according to the rules.

²⁶ Adams and Wren, n 14, p 265.

²⁷ Adams and Wren, n 14.

²⁸ Adams and Wren, n 14.

²⁹ Schmidt-Olsen S, Jensen SK and Mortensen V, “Amateur Boxing in Denmark – The Effect of Some Preventative Measures” (1990) 18 Am J Sports Med 98.

³⁰ Adams and Wren, n 14.

³¹ Clausen H, McCrory P and Anderson V, “The Risk of Chronic Traumatic Brain Injury in Professional Boxing: Change in Exposure Variables Over the Past Century” (2005) 39 Br J Sports Med 661.

³² Brayne H, Sargent L and Brayne C, “Could Boxing be Banned? A Legal and Epidemiological Perspective” (1998) 316(7147) BMJ 1813; Sargent L, Brayne H and Brayne C, “Could Boxing be Banned? The Scientific and Epidemiological Evidence”, <http://www.bmj.com/content/vol316/issue7147/fulltext/supplemental/1813/index.shtml> viewed 12 February 2008.

A submission to the Dutch Parliament has suggested that professional boxing should be banned unless its rules can be tightened quickly to reduce the risk of brain injuries.³³ The report cited chronic brain damage occurring in 40% to 80% of professional boxers and further that one in eight amateur boxing matches ended with concussion, providing further evidence of potential for head injury.

Loosemore et al³⁴ conducted a meta-analysis of boxing and the risk of chronic brain injury. Following a detailed analysis of 93 studies, culled from an initial 943, they identified 36 which had relevant extractable data. They concluded that the quality of evidence was poor and that only four of 17 better-quality studies demonstrated any indication of chronic brain injury in a minority of boxing studies. Consequently, they reported an absence of strong evidence to associate chronic brain injury with amateur boxing. They used rigorous scientific methods to ensure they were analysing only studies referable to amateur boxing which provided comparable data and offered a comprehensive critique of their methodology, including its limitations.³⁵ Based on these results, somewhere between one-fifth to one-quarter of studies indicated findings which supported the link between boxing and brain injury of a chronic type.

There has been little basic science undertaken to establish a potential neuro-chemical basis for possible brain damage consequent to boxing. Zetterberg et al have done just this.³⁶ They sampled 14 amateur boxers (11 men and three women) and compared them with 10 healthy male non-athletic controls. The boxers underwent a lumbar puncture seven to 10 days after a bout and three months post-bout while controls underwent a single spinal tap. They found increased levels of neurofilament light protein and total tau (markers for neuronal and axonal injury) post-bout, as compared to three months later. Evidence was also found for astroglial injury with elevated glial fibrillary acidic protein. These increases were significantly higher for boxers who sustained many hits (more than 15) or high-impact hits to the head, as compared to boxers reporting fewer hits. Concentrations of neurofilament light protein and glial fibrillary acidic protein, but not total tau, were significantly elevated after a bout when compared with the non-athletic control subjects although, with the exception of neurofilament light protein, they were not different between boxers and controls at three months post-bout. Zetterberg et al concluded that boxing was associated with acute neuronal and astroglial injury but they could not comment on long-term consequences. They cited the need for longitudinal studies with extensive follow-up on clinical outcome, cerebro-spinal fluid analysis and possible assessment of the role of intervention.³⁷

In addition to the above evidence, there is an identified risk for boxers who experience repeated blows to the head to develop pathology similar to that identified in Alzheimer's disease.³⁸ This includes hyperphosphorylation of tau protein fibrillary tangles and deposits of beta-amyloid protein into plaques.³⁹ It is recognised that the abnormal tau proteins, which form fibrous tangles in Alzheimer-affected patients' brains, are identical to the abnormal tau proteins found in boxers with dementia pugilistica (also called chronic traumatic encephalopathy or boxers' syndrome) which develops over a period of years and is found at autopsy.⁴⁰

Some doubt has been expressed as to the cause of chronic traumatic encephalopathy. It has been assumed that its cause is consequent to recurrent blows to the head but the suggestion is that this may

³³ Sheldon T, "Boxing Should be Banned Unless Rules are Tightened, Advises Dutch Body" (2003) 327 *BMJ* 1186.

³⁴ Loosemore M, Knowles CH and Whyte GP, "Amateur Boxing and the Risk of Chronic Traumatic Brain Injury: Systematic Review of Observational Studies" (2007) 335 *BMJ* 809.

³⁵ Loosemore, Knowles and Whyte, n 34.

³⁶ Zetterberg H, Hietala MA, Jonsson M, Andreassen N, Styrd E, Karlsson I, Edman A, Popa C, Rasulzada A, Wahlund LO, Mehta PD, Rosengren L, Blennow K and Wallin A, "Neurochemical Aftermath of Amateur Boxing" (2006) 63 *Arch Neurol* 1277.

³⁷ Samson K, "Biomarkers of Neural Injury Documented in Amateur Boxers for the First Time" (2007) 6 *Neurology Today* 20.

³⁸ Samson, n 37.

³⁹ Samson, n 37.

⁴⁰ Samson, n 37.

be an oversimplification.⁴¹ It is now believed that the apolipoprotein Eε4 gene (ApoE4), the susceptible gene for late-onset familial and sporadic Alzheimer's disease, is associated with an increased risk of chronic traumatic encephalopathy in boxers.⁴²

Jordan concluded that male boxers, with more than 12 professional fights, who carry the ApoE4 allele have double the risk of severe deficits when compared to men without the ApoE4 allele.⁴³ This issue has opened a Pandora's box regarding ethical issues concerning head injury per se, namely the possible mandatory testing for the ApoE4 allele, the question of what advice to give regarding material risks and the possible exclusion of those with increased risk of brain damage consequent to the discovery of the genetic predisposition.⁴⁴

SHOULD BOXING BE BANNED?

Adams and Wren⁴⁵ confirmed that one in every 24 bouts ended with a "knock out" although these data may now require updating. They also acknowledged that

In 1962, the Committee on Medical Aspects of Sport of the American Medical Association recommended "that boxing be banned at all times and places where optimum protection for participants cannot be provided".

Professional boxing was banned in Sweden in 1969 and in Norway in 1982.⁴⁶ Adams and Wren further accepted that in 1984 the British Medical Association adopted a policy of promoting a campaign to ban all forms of boxing and that the Canadian Medical Association recommended that its government ban boxing in Canada.⁴⁷ Adams and Wren also criticised those doctors too eager to ban the sport, based on moral issues, and listed the virtue of boxing and its social consequence to the local community.⁴⁸

According to Whiteson:⁴⁹

The moral aspects of boxing are controversial but it is the view of the board and the medical panel that, providing a boxer's family are fully aware of the dangers of the sport and providing he is prepared to keep himself in good physical condition, then he must make a conscious decision as to whether he does or does not wish to box.

He concluded:⁵⁰

[T]o ban the sport, as some advocate, would be counter-productive. The sport would be driven underground where unlicensed shows would occur, as some do already, with no control of any type (let alone medical) and that can surely do no good whatsoever.

The same could be said for "dog fights", antisocial sexual activity, or even slavery.

⁴¹ McCrory P, "Punch Drunk – Too Many Hits or Bad Genes" (2002) 20 (1) *Sport Health* 2.

⁴² Nicholl J, Roberts G and Graham D, "Apolipoprotein E4 Allele is Associated with Disposition of Amyloid Beta Protein Following Head Injury" (1995) 1 *Nature Medicine* 135; Jordan B, "Genetic Susceptibility to Brain Injury in Sports: A Role for Genetic Testing in Athletes" (1998) 26 *Phys Sports Med* 25; Teasdale GM, Nicoll JAR, Murray G and Fiddes M, "Association of Apolipoprotein E Polymorphism with Outcome After Head Injury" (1997) 350 *Lancet* 1069.

⁴³ Jordan, n 42.

⁴⁴ McCrory, n 41.

⁴⁵ Adams and Wren, n 14.

⁴⁶ Adams and Wren, n 14.

⁴⁷ Adams and Wren, n 14.

⁴⁸ Adams and Wren, n 14.

⁴⁹ Whiteson, n 20, p 283.

⁵⁰ Whiteson, n 20, p 284.

The evidence cited above is obviously somewhat conflicting regarding the potential for harm from boxing. The materials reviewed were not exhaustive, as evidenced by the study by Moriarity et al which concluded that there was no evidence of cognitive changes immediately after bouts in amateur boxers participating in a seven-day tournament.⁵¹

As Pearn⁵² pointed out:

The testicles of pugilists were placed “out of scoring range” in 1838, yet all attempts to raise the central nervous system to equal status have, to date, proven unsuccessful.

This telling quotation, from an academic paediatrician who was a long-serving soldier who rose to the rank of Surgeon General for Australia, says it all. He went on to say:

Progressive evolution towards a more enlightened society has come to deem as unacceptable the deliberate infliction of brain damage in any publicly sanctioned sport. Most responsible medical bodies have policies in place to ban boxing.⁵³

It must be emphasised that boxing remains an activity in which the ultimate goal appears to be to cause a concussive head injury or inability for the opponent to offer self-defence. Nevertheless, support from individual doctors and politicians, especially those in the United States and United Kingdom, have defeated the push to ban the sport in other than a few Scandinavian countries. In an even greater insult to our standards of humanity, others advocate legalisation of so-called sports like “cage-fighting”, as a spectator sport, which makes continued support for boxing pale into insignificance. The fact that millions of people watch boxing in world-televised bouts and that the popularity of women’s boxing is steadily increasing⁵⁴ is testimony to the lack of popular support to have boxing banned. Pearn has suggested a simple solution, namely the addition of an extra rule which would make it unacceptable to hit the head or neck in any bout of boxing.⁵⁵

Spectators pay to watch the anticipated systematic abuse of one human being by another in much the same way they delighted in observing gladiators who were forced to fight, often to the death, for the pleasure of others. One need look no further than Cassius Clay/Mohammed Ali to appreciate the potential destruction of a supreme athlete for the gratification of the crowd. Would these same spectators watch the sport if there was no expectation of one person damaging another, as suggested by the protection of head and neck? Pearn felt that they would, stating:

The skill of boxing, from the point of view of preserving the ethos of awarding aggression, would thus increase (by reducing the target area to above the waist and excluding the head and neck). The spectacle of boxing – the movement, ringcraft, strategy and the sound of pummelling of leather ... The qualities of courage, self-discipline and stamina would still be required.⁵⁶

THE LEGALITY OF BOXING

The issue of assault

What this suggestion, even with its enhanced protection for participants, does not address is the concept encapsulated in the introduction, namely the legality of a sport which rests completely on the notions of assault and battery with the unequivocal intent of causing harm. Surely any activity whose very basis is illegal should itself be illegal, yet it has been legalised by statute.⁵⁷

⁵¹ Moriarity J, Collie A, Olson D, Buchanan J, Leary P, McStephen M and McCrory PA, “Prospective Controlled Study of Cognitive Function During an Amateur Boxing Tournament” (2004) 62 *Neurology* 1497.

⁵² Pearn, n 15 at 146.

⁵³ Pearn, n 15 at 146.

⁵⁴ Pearn, n 15.

⁵⁵ Pearn, n 15.

⁵⁶ Pearn, n 15 at 148.

⁵⁷ For example, *Boxing and Wrestling Control Act 1986* (NSW).

In historical terms the common law originally contained separate offences of “assault” and “battery”.⁵⁸ In essence, assault is the crime of putting another person in fear or apprehension of an unlawful contact, that is, unwanted physical contact.⁵⁹ Battery is the actual application of force without consent, lawful excuse or justification.⁶⁰ Assault is both a crime and a tort.

The best place to examine the legality of boxing is the current statute against the threat or use of force upon another. The following provisions in the *Crimes Act 1900* (NSW) expressly outlaw the use of force:

Section 61 Common assault prosecuted by indictment

Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.

Section 59 Assault occasioning actual bodily harm

(1) Whosoever assaults any person, and thereby occasions actual bodily harm, shall be liable to imprisonment for five years.

Section 54 Causing grievous bodily harm

Whosoever by any unlawful or negligent act, or omission, causes grievous bodily harm to any person, shall be liable to imprisonment for two years.

Section 33 Wounding or grievous bodily harm with intent

(1) Intent to cause grievous bodily harm A person who:

- (a) wounds any person, or
- (b) causes grievous bodily harm to any person,

with intent to cause grievous bodily harm to that or any other person is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

Even prior to a boxer entering the ring, one could argue that the law has been broken. When one considers the pre-bout media “circus” and the threats of harm made by contenders prior to the actual event, one must think about the legal principles encapsulated in the common law definition of assault. In the words of Barwick CJ in *R v Phillips* (1971) 45 ALJR 467 at 472:

[A]n assault necessarily involves the apprehension of injury or the instillation of fear or fright. It does not necessarily involve physical contact with the person assaulted: nor is such physical contact, if it occurs, an element of the assault.

Moreover in *Zanker v Vartzokas* (1988) 34 A Crim R 11, White J added to the above definition of assault by quoting Taylor J in *Barton v Armstrong* [1969] 2 NSW 451 at 454 and affirming (at 16, emphasis in original):

The *essence* of assault is the expectation raised in the mind of the victim of physical contact from the threat of the defendant. “An assault is the threat by one man to inflict unlawful force upon another. It is a civil wrong and a crime where the threat by some physical act has intentionally caused the other to believe that such force is *about* to be inflicted. The actus reus of assault thus consists in the expectation of physical contact.”

It could be argued that a professional boxer would not be intimidated by the idle threats of an over-boisterous opponent. Surely the offence of assault could not be sustained if the victim was not fearful of the perpetrator. As the Supreme Court of Queensland stated in *Brady v Schatzel* [1911] St R Qd 206 at 208:

[I]t is not material that the person assaulted should be put in fear ... If that were so, it would make an assault not dependant upon the intention of the assailant, but upon the question whether the party assaulted was a courageous or timid person.

While the above comments indicate that the threat of force must be imminent, the closer to the bout that the threat of force is made by the contender, the closer these threats resemble the commission of an offence.

⁵⁸ Brown et al, n 1, p 809.

⁵⁹ Brown et al, n 1, p 809.

⁶⁰ Brown et al, n 1, p 809.

Regardless of how tenuous the connection between the pre-bout “circus”, boxing and assault may be, there can be no doubt that the physical act of punching another person with the intent of causing harm is a battery:

The offence of battery ... involves the actual infliction of unlawful force on another, “be it ever so small”. Force is not unlawful if it falls within what may be regarded as an incident of ordinary social intercourse such as patting another on the shoulder to attract attention or pushing between others to alight from a crowded bus.⁶¹

As stated above, while the common law has separate offences of assault and battery, modern statute has amalgamated these offences in the overall heading of “assault”. Assaults are classified as “simple”, or common, assaults and “aggravated” assaults.⁶² Common assault deals with unlawful contact, which may be of a slight nature. With regard to boxing, the act of forcefully hitting another with the intent of causing harm would fall under the heading “aggravated assault”. Moreover, the common law divides injuries short of death into three categories for the purposes of aggravated assault:⁶³

- “assault occasioning actual bodily harm is simply an assault that results in any hurt or injury calculated to interfere with the health or comfort of the prosecutor”. In addition, “such hurt or injury need not be permanent”,⁶⁴
- assault occasioning grievous bodily harm, previously defined under common law as “maim” or “mayhem”, is defined by s 4 of the *Crimes Act 1900* (NSW) as “including any permanent or serious disfiguring of the person”; and
- assaults occasioning wounding require an incision or puncture of the skin.

All of the above assaults are proscribed by statute, eg the *Crimes Act 1900* (NSW), and carry maximum jail terms of up to 25 years.

The question of malice

Prior to 2007, the *Crimes Act 1900* (NSW), s 5, defined “maliciously”, an ingredient to many assaults, in the following terms:

Every act done with malice ... or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons ... and in any case without lawful cause or excuse ... shall be taken to have been done maliciously.

In the context of assault, for the prosecution to be successful in trying grievous bodily harm under the old s 35 of the *Crimes Act*, all that was needed to be shown was that when inflicting the harm, the actus reus, the accused was aware of the possibility that some harm would be inflicted.⁶⁵ As a result of the *Crimes Amendment Act 2007* (NSW), the definition of malice was intentionally omitted from s 5 with all corresponding sections of the Act replacing the word “maliciously” with “recklessly” or “intentionally”. It is indisputable that the intent of the boxer is to cause harm to an opponent.

REVIEW OF COMMON LAW

On this basis, boxing is a “sport” that is comprised of illegal acts that have evaded the criminal law. How can this be so and why has the law allowed the sport to continue? A detailed examination of over 100 years of common law is required to answer this question.

The earliest case of note is that of *R v Young* (1866) 31 JP 215; 10 Cox CC 371 in which the participant in a bout, conducted in a private room, died from his injuries after falling against a post. Both boxers were wearing gloves but the surviving participant was charged with manslaughter. At trial, medical evidence was produced to state that boxing with gloves was not inherently dangerous

⁶¹ *Director of Public Prosecutions v JWH* (unrep, NSWSC, Hume J, 17 October 1997).

⁶² Brown et al, n 1, p 809.

⁶³ Brown et al, n 1, p 822.

⁶⁴ *R v Donovan* [1934] 2 KB 498.

⁶⁵ *R v Kurtic* (1996) 85 A Crim R 57.

and, as the bout had occurred in private, the judge directed the jury to find that there was no breach of the peace. It was accepted that sparring in itself was not illegal but rather a display of skill.

In contrast, in *R v Orton* (1878) 14 Cox CC 226 the distinction between sparring and prize fighting was discussed. The participants wore gloves but the jury found that the protagonists were involved in a “prize fight”, as they severely damaged each other to the point that it was considered no longer to be plain sparring.

Historically, the leading case on unlawful fights was considered to be *R v Coney* (1882) 8 QBD 534, in which the majority of the House of Lords viewed unregulated prize fights as threatening the public interest in the maintenance of good order. A similar view of sparring was also taken. The facts involved a “knuckle fight” in public, before spectators, who bet on the outcome. Even though the protagonists consented, they were still found guilty of assault. It is necessary to review their Honours’ opinions of this matter to fully understand where boxing sits within the law.

According to Lord Coleridge CJ (at 567):

I conceive it to be established ... that as the combatants in a duel cannot give consent to one another to take away life, so neither can the combatants in a prize-fight give consent to one another to commit that which the law has repeatedly held to be a breach of the peace. An individual cannot by such consent destroy the right of the Crown to protect the public and keep the peace.

According to Stephen J (at 549):

[T]he injuries given and received in prize fights are injurious to the public, ... because it is against the public interest that the lives and the health of the combatants should be endangered by blows.

According to Hawkins J (at 553):

Nothing can be clearer to my mind than that every 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 or other advantage.

Hence the decision of *R v Coney* made it quite clear that consent could not make legal something that, on public policy grounds, should not be occurring at all. With the introduction of the Marquis of Queensbury Rules, coupled with the general intention of improving safety in boxing, there was a distinct push for boxing to again become legal.⁶⁶ The sport continued and in 1901 the view that boxing was a safe sport was again challenged in the unreported case of *R v Roberts*.⁶⁷ The judges in this matter rejected the view that the evils of prize fighting remained. They held that, under the new rules, boxing was merely an amicable demonstration of the skill of sparring and, accordingly, was legal. This is how the sport of boxing entered the common law world of the 20th century. The matter was not really contested until the Australian case of *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331. Here the issue as to whether a boxing contest conducted under official Australian rules was a prize fight and hence illegal was determined.

In *Pallante* the plaintiff had received severe injuries to his eyes and brought a claim for damages against the promoter, the organisers, the referee and his trainer. The defence argued that the contest was a prize fight, and as all prize fights were illegal, the plaintiff was precluded from maintaining proceedings as they would be based upon an unlawful action. McInerney J rejected the arguments of counsel for the plaintiff that boxing involved the complete subduing of an opponent with little regard for the effects. He stated that the correct test as to whether a boxing contest was illegal was the need to show that the infliction of blows was intended to do grievous bodily harm. In essence, he suggested that if a fight goes beyond a test of skill and blows are intended to cause injury, it becomes illegal. Intent thus becomes the issue in question. He concluded that boxing “predominately is an exercise in boxing skill and physical condition in accordance with the rules” and was not unlawful and should not be seen as a criminal act (at 332). In contrast, the English Court of Criminal Appeal had already stated in *R v Donovan* [1934] 2 KB 498 that consent could not be a defence to a criminal charge where the

⁶⁶ Gendall D, “The Sport of Boxing: Freedom Versus Social Constraint” (1997) 5 *Waikato Law Review* 5 at 8.

⁶⁷ See *The Sporting Life*, 20 June 1901.

injury caused was more than transient or trifling. It is thus open to argument that the distinction of intent is different inside the ring when compared to assaults outside the ring, whereby the injuries sustained must be different to qualify as an assault. That is, inside the ring one must intend to cause grievous bodily harm whereas outside the ring one must only intend to cause a more than trifling injury.

REVIEW OF CONSENT

The law has stated on numerous occasions that an action which would otherwise be assault is acceptable within the context of organised sport.⁶⁸ Central to justifying the legality of boxing is the consent of the boxers to enter the ring.⁶⁹ While it is not the purpose of this article to argue whether a particular person should or should not box, factors such as age, competence and mental capacity should be considered in assessing whether consent can actually be given. As the boxer sustains blows to the head during the bout, capacity to consent may be seriously impaired. Once consent is given and a fight commences, the question arises as to whether there is any real possibility of a participant withdrawing from the agreement to fight. It has been argued that for an inherently dangerous sport such as boxing, for consent to be truly free and effective, it needs to be renewed by each participant at the end of each round, or even after each major blow.⁷⁰ In addition, the question remains, can a person actually consent to being forcefully hit? It has been held that consensual fights outside the boxing ring are generally unlawful.⁷¹ Why is there any difference if the assault occurs within the ring? Supporters quote the Marquis of Queensbury Rules, whereas opponents point to the severe injuries caused even while wearing gloves.⁷²

In relation to consent and boxing, it has been argued that there is a perceived social benefit in sport,⁷³ that boxing is a “manly diversion”, a competition of “strength and dexterity” and “in the public interest” or “having significant social value”.⁷⁴ Moreover, the fact that a boxer consents to the risk of injury, coupled with the presence of the referee who controls the bout,⁷⁵ has been seen as preventing the boxer being charged with assault.

In light of the medical evidence, the consent argument becomes less plausible. In addition, the fact that it is now common knowledge that boxing is inherently dangerous to long-term health, the intent of the boxer throwing the punch must be to cause harm. There is simply no rational scientific or legal justification for boxing to remain legal. Lord Mustill, in the landmark House of Lords decision on consent to assault, *R v Brown* [1993] 2 All ER 75, stated (at 109) that boxing was a special case that “for the time being stands outside the ordinary law of violence because society chooses to tolerate it”.

The tide is turning, with scientific literature identifying the adverse effects of boxing. More than a decade ago, in September 1995, the New South Wales Legislative Council’s Standing Committee on Social Issues released a report on youth violence. Among other things, the report recommended that the sport of boxing be phased out.⁷⁶

CONCLUSIONS

This article has examined the broad legal concepts with respect to interfering with another person, from which it has been inferred that boxing should be illegal, were it not for statutory protection. It

⁶⁸ Watkins AJ, “Score and Pierce: Crimes of Fashion? Alteration and Consent to Assault” (1998) 28 VUW L Rev 17.

⁶⁹ Gendall, n 66 at 10.

⁷⁰ Gendall, n 66 at 11.

⁷¹ *R v Jobidon* (1991) 66 CCC (3d) 454.

⁷² Gendall, n 66 at 11.

⁷³ Whiteson, n 20; Watkins, n 68.

⁷⁴ Whiteson, n 20; Watkins, n 68.

⁷⁵ *R v Brown* [1993] 2 All ER 75 at 85 (Lord Jauncey).

⁷⁶ Brown et al, n 1, p 849.

traced the history of boxing including the 19th century introduction of the rules which subsequently have been reinforced. It also highlighted the social conflict between the perceived benefits of boxing and the demonstrated harm inflicted upon the pugilist protagonist, with the balance of evidence favouring the harm caused.

The article supports the suggestion of excluding the head and neck from point-scoring targets which would greatly reduce the potential for harm. Failing the introduction of this modification to the boxing code of conduct, the article concludes that boxing should be illegal and a civilised society should make it so.