Violence in Sports: Evidentiary Problems in Criminal Prosecutions

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The outcome of most Canadian criminal cases involving violence in sport must give Crown prosecutors a feeling of helplessness and frustration. Despite the good intentions of those responsible for enforcing the criminal law, the inherent nature of sport highlights the inefficiency of using classical legal procedures and concepts to curb violence in sport. Not only have there been many acquittals, but penalties for the rare conviction have been light. Several factors have contributed toward the inadequacy of the criminal law in this area.

In criminal proceedings, the Crown must prove all the constituent elements of an offence, except under certain circumstances prescribed by law. The offences most frequently occurring in sport are those related to assault and bodily harm. In these cases, the Crown must prove both the actus reus of the offence and the state of mind of the person who committed it at the exact moment he committed it. In assault cases, the Crown must prove that the accused acted intentionally with a "blameworthy state of mind." In cases of bodily harm, the accused must have acted intentionally or, at the very least, have shown a reckless and lawless disregard for the safety of another. Blows and injuries inflicted through ordinary lack of care or through negligence are not punishable in Canada as they are in other countries. Proving an offence is not an easy task for the Crown, especially with regard to certain

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sports. The speed of the action, the stress of the game, repeated physical contact, and the underlying aggressiveness of both participants and spectators make it very difficult to prove the constituent elements of an offence by conventional means, namely, the testimony of witnesses.

This study examines the possibility of the more frequent use of alternative forms of evidence: videotape evidence, proof of similar acts by the accused, the testimony of expert witnesses such as sports delegates, and the use of a "sport record." Finally, procedures to facilitate the Crown’s work in preventing and reducing violence in sport will be discussed.

I. THE WEAKNESS OF TESTIMONY

Testimonial evidence is most often used to prove cases in criminal proceedings. As already mentioned, however, the value of testimony where sports are involved is affected by the nature of the sport concerned. There are, in fact, two kinds of testimony: testimony from those who participated directly in the game and testimony from non-participants.

The first category includes testimony from the players who were involved in an incident of violence, the other players, and the referee or referees. The testimony of the persons involved in the incident is usually contradictory and widely divergent. In one criminal case involving ice hockey, although it was clear from the circumstances and from other testimony that there had been premeditated assault by one player, the judge noted the conflict between the testimony of the two players: "Watson says Lundrigan's stance indicated his readiness to fight. Lundrigan stated that he did not want to fight and merely tried to protect himself from Watson's attack." Considering the nature of sport, it is natural for each party to an incident to provide his own description of his acts and gestures or those of the other combatant. This kind of testimony, then, must be treated with great care. The same may be said about the testimony of the other players. Indeed, personal bias and team spirit may cause players to support their teammates' actions.

The testimony of the referees at a game could apparently be given more credibility, but its importance should not be exaggerated since various fac-

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3 The sports implied are those which have violence as their purpose and those which tolerate violence as a means to an end. For the basis of this distinction, see Létourneau and Manganas, supra note 1.

4 R. v. Watson, supra note 1, at 153. Contra, R. v. Green, supra note 1, and R. v. Maki, supra note 1, where the judges qualified the accused persons who took part in the same incident on opposite sides as trustworthy witnesses. In Maki, however, Carter J. recognized that, obviously, "dans des situations de mouvement rapide, comme le jeu de hockey, il peut y avoir une certaine inconstance dans la preuve." See also a recent report in the press regarding the acquittal of Glen Sharpley, a player in the National Hockey League charged with assault and battery: "En prononçant l'acquittement, le Juge Fitzpatrick a fait remarquer qu'il existait de substantielles différences dans les témoignages rendus depuis le début du procès." Le Soleil, June 10, 1977, at C-3.


6 Concerning the importance of the referee's testimony relative to that of the players, see J. Loup, supra note 5, at 246.
tors reduce the value of the referee’s appraisal. Indeed, he cannot see everything, and sometimes he is too close or too far from the spot, depending on the circumstances.7 As a general rule, however, the courts give preference to the testimony of referees, and rightly so.8

The second category of testimony, that given by non-participants, includes the testimony of spectators and of various sports experts. Obviously, the testimony of spectators must be considered with great caution. The majority of spectators are usually far from the scene of the action and their point of observation seldom gives them a good view. Their attention is often distracted by the movements of the game or by the actions of other players, so that they miss the start of an incident or the aggressor’s attack. In actual fact, spectators have unequal and often inadequate faculties of perception, judgment and recall. Some witnesses base their testimony on simple conjecture and their evidence is thus pure speculation. Others, with the utmost sincerity, describe facts as they would have liked them to be and not as they were.9 Memory fades with time, and a trial may take place more than a year after the incident due to a crowded roll or purely dilatory measures.

Moreover, many spectators are partial witnesses influenced by their preference for one of the teams. In one civil case, a judge of the Québec Superior Court discussed this aspect of the problem:

En face de ces témoignages rendus par les partisans des deux clubs respectifs qui, comme cela arrive à toutes les joutes et à tous les tournois, n’ont pas le même point de vue, la cour aurait peut-être été hésitante à déclarer . . . si le Coup a été porté accidentellement ou délibérément.10

In the same vein, one French writer has queried whether a court unqualified in sporting matters, which hands down a judgment months after the game, can convict a player on the basis of “des témoignages émanant des spectateurs souvent partiaux et peu aptes à apprécier s’il y a eu négligence, imprudence ou maladresse.”11 It is unwise, therefore, to give much weight to any spectator’s testimony.

Sports experts can be divided into three categories:

(i) The team’s coaches, technical assistants, etc. Comments regarding the teammates of a player involved apply mutatis mutandis to this group, although to a lesser degree.

(ii) Journalists, reporters, etc. Their testimony is often reliable. It may also be used to corroborate evidence submitted on videotape.

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7 For example, note the judge’s caution regarding the referee’s testimony in R. v. Watson, supra note 1, at 152-53, where he speaks of “overestimation of their capacity to apprehend unseen events, notwithstanding that their duties called for a heightened awareness of all that was happening on the ice surface.” See also R. v. Jodzio, supra note 1.


9 See R. v. Watson, supra note 4.

10 Gagné v. Hébert (1932), 70 Que. C.S. 454 at 455.

11 J. Loup, note under Bordeaux 14 April 1931 D.P. 2.45.49.
(iii) Various delegates and observers in a sports league. These are without doubt the best witnesses. When specifically assigned to follow a game objectively, they usually have an observation post that allows the most effective performance of their duties. Like referees, they can be very important as expert witnesses or even as sports judges.

The French writer J. Loup described the duties of the sports delegates assigned by the Fédération Française de Rugby to a game as follows:

Le délégué note avec soin tous les incidents qui se produisent, avant, pendant ou après la partie . . . . Le délégué sportif doit aussitôt après le match adresser au président de la F.F.R. un rapport très détaillé sur tous les incidents qui se sont produits, en s'efforçant de déterminer la cause de ces incidents. Il aura de plus les mêmes pouvoirs que les arbitres pour signaler les joueurs coupables de brutalités manifestes. Ces joueurs seront punis comme s'ils avaient été signalés par l'arbitre lui-même.12

Later in this article, the important role of sports delegates or observers will be discussed. Various proposals will be made regarding their compulsory attendance and the broadening of their powers.

We may conclude by emphasizing that the testimony of witnesses in the area of violence in sports is generally weak, with the exception of that given by certain types of witnesses; and even they have been known to provide differing or contradictory versions. Human emotions, such as loyalty to a side, sympathy, hatred, exaggeration, and the mental states of an individual participating in or attending a sports event, can greatly influence his testimony. Of course, such evidence cannot be excluded. There will always be elements which only a witness can detect. For example, during the trial of hockey player Dave Forbes, a witness was heard for the purpose of determining the accused's state of mind at the time. The witness testified that, while both players were in the penalty box, he heard Forbes say to his victim, Henry Boucha: “I'll get you, but it won't be with this. It'll be with my stick; I'll shove it down your throat.”13 Broader and more effective use of objective evidence could conceivably be achieved through the use of videotape evidence.

II. VIDEOTAPE

A. Advantages and Dangers

Videotape is “an extremely effective device for recording and transcribing events, as the broadcasting industry has demonstrated.”14 It consists of sounds and pictures recorded together. There is no doubt that pictures can describe objective reality with respect to time, place, persons, circumstances and other factors with more certainty and accuracy than most witnesses, no matter how disinterested they may be. Pictures usually capture a host of de-

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12 J. Loup, supra note 5, at 136.
tails which humans fail to notice. In addition, they permanently record those details.

From a strictly practical point of view, the equipment needed is not sophisticated and its cost is reasonable. Unlike ordinary photographic film, videotape does not require laboratory developing, and the material evidence obtained may be used as soon as the recording is finished.

In the area of criminal or civil justice, videotape is in many ways superior to testimony as a means of adducing evidence. For example, its advantages would be apparent in proceedings requiring the scientific illustration and demonstration of the operation of a supposedly defective piece of equipment which is too heavy to be moved or is permanently fixed in place. Examples might be an elevator in a public building, a garage hoist or a crane in a shipyard or on a construction site. Pictorial evidence has sufficient probative value in itself to refute contradictory testimony. A Canadian writer has even stated that a court could declare photographic evidence probative enough that verbal testimony could be excluded under the best evidence rule. Such a situation could arise with respect to the proof of points in dispute where a long time has passed between the event in question and the proceedings.

The use of videotape evidence is no longer limited to civil proceedings. This type of evidence has been admitted in criminal cases in the United States and various writers have made bold proposals for its possible future use. For example, in an American courtroom the prosecution may submit as evidence a recording of a confession made by the accused to the police. Besides the evidence which the declaration itself provides, the recording also establishes the voluntary nature of the confession and the legality of the methods used by the police. Of course, such a procedure requires that all contact with the accused be recorded, i.e., the entire interrogation, not just the admission. Otherwise, physical or psychological intimidation prior to the final stage would never be made known to the jury.

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16 See J. Stewart, Videotape: Use in Demonstrative Evidence (1972), 21 Defense L.J. 253. The writer describes how he recorded on videotape the operation of a hydraulic lift which was the object of a suit for damages. The recording was done before experts during the night, after the proceedings had been adjourned. When the hearing was resumed the next day, the defence was able to use this evidence to refute the plaintiff's allegations.

17 For interesting examples of the use of videotape, see Stewart, supra note 16.

18 B. MacFarlane, Photographic Evidence: Its Probative Value at Trial and the Judicial Discretion to Exclude it From Evidence (1973-74), 16 Crim. L.Q. 149 at 174. But see Report on Evidence (Ottawa: Information Canada, 1975) at 100, where the Law Reform Commission of Canada rightly states the best evidence rule is not a rule which excludes, but a rule which only expresses a preference.

19 Regarding the usefulness of videotape in civil court, see Stewart, supra note 16.

20 For example, see Barber and Bates, supra note 14, and Cunningham, supra note 15.

21 See Barber and Bates, supra note 14, at 1020 ff., concerning the constitutional problems raised by this practice.
A recording of an identification line-up and a film of the scene of a crime have been admitted as evidence. The defence has also used such evidence in a murder trial during which it entered a plea of insanity. The meetings between the accused and a psychiatrist had been recorded on videotape. The material evidence showed the interview techniques and procedures used by the psychiatrist to make a diagnosis. The psychiatrist's testimony conflicted with that of three psychiatrists for the Crown.22

The material reconstruction of a crime has even been recorded with the accused present.23 The recording was later placed in evidence to establish the material facts and the circumstances of the crime. Finally, testimony has been recorded and filmed on videotape and later submitted as evidence at trial, when the witness was no longer available, or simply because the witness was, for example, a medical expert who could not conveniently be present at the time of the hearing.24 In the same way, authorities have used videotape evidence to prove that a crime was committed in a place provided with proper recording equipment, as in cases of robbery or armed robbery of a bank.25

The Québec press recently described how videotape was used in a highly publicized case in England to prove that a crime had been committed.26 The accused desperately wanted to inherit her aged mother's estate in order to meet financial difficulties. She tried to persuade her mother to commit suicide by taking barbiturates which the daughter put in a bag of candy for her. The police had been informed of the intentions of the prospective heiress. With the permission of the authorities of the rest home where the mother lived, they installed a camera the size of a ball-point pen in the wall of the room. The gestures and conversations of the accused with her mother were recorded on videotape. At trial, the videotape was used to prove the woman's guilt, since the mother's health did not allow her to give evidence.

It is clear that videotape must be used more cautiously in criminal cases than in civil matters because the rights of the accused, especially the precious right to liberty, are at stake. Film, particularly videotape, can easily be altered. The importance of this point should not be exaggerated since oral testimony is equally susceptible to fabrication and manipulation, but it

24 See the objections of Cunningham, supra note 15, at 242-43, based on the accused's right to confront the witness.
26 Le Soleil, August 26, 1977, at D-4.
27 It could be objected that it is easier to detect false testimony than to discover alterations in material evidence such as videotape, and therefore special care must be used for material evidence. This objection must be treated with reservation, since electronic experts can easily detect the results of tampering in a tape. Indeed, care must be exercised with any evidence, whatever its form. Moreover, the possibility of alteration of videotape evidence is so obvious that the party against whom it is used will not fail to check it properly or to have it checked.
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should be noted that it is easy to erase, in good faith, parts considered irrelevant, or to erase *mala fide* portions of the film considered too relevant, or to alter the speed of the action.\(^28\) Nevertheless, we believe that in general the advantages of videotape evidence far outweigh its drawbacks. Aside from saving time, videotape contributes to the improved administration of justice by allowing better presentation of the facts under dispute and, particularly, by allowing the trier of facts to view the incident in person. As Barber and Bates put it, “Our concern here is that the many benefits available through video technology not be lost due to resistance based on nebulous fears. The criminal law is not frozen . . . . Video technology, we believe, offers benefits without jeopardy to the criminal process.”\(^29\)

In the field of violence in sports, videotape evidence is unquestionably of great interest, since it constitutes an objective witness to reality and because it allows proof and analysis of the commission of an offence. It is material evidence from which the person judging the facts may draw the conclusions he feels are reasonable.\(^30\) For this to be possible, however, the evidence must pass the legal test of admissibility.

B. Conditions of Admissibility

In Canada, few criminal cases have allowed film or videotape evidence or have dealt with its admissibility.\(^31\) Quite recently, the court of general sessions of the peace of Ontario admitted videotape evidence, although with limitations, during the trial of hockey player Dan Maloney for assault with bodily harm.\(^32\)

As already mentioned, videotape evidence is obtained by the recording of sounds and images. In their discussion of American law, Barber and Bates state that because of the ease of manipulation, the conditions of admissibility established for the recording of sounds must be stricter than those for images.\(^33\) However, it seems that in Canada and in the United States, only the


\(^{29}\) Barber and Bates, *supra* note 14, at 1042.

\(^{30}\) See *R. v. Evidence*, *supra* note 18, at 42. This is a proposal by the Reform Commission. However, see the discussion *infra* on probative value.

\(^{31}\) See *R. v. Dilabio*, [1965] 2 O.R. 537, [1965] 4 C.C.C. 295 (Ont. C.A.). See also an English case, *R. v. Quinn; R. v. Bloom*, [1962] 2 Q.B. 245, [1961] 3 W.L.R. 611, [1961] 3 All E.R. 88, 45 Cr. App. R. 279 (C.C.A.), in which the Court of Appeal of England refused to allow as evidence a film of the reconstruction of a crime. Quinn and Bloom were charged with keeping a common bawdy-house, following a striptease containing certain allegedly offensive acts. Three months later, the defendants made a film of another striptease involving the same facts and motions. The Court of Appeal acknowledged that the film was a reconstruction of the crime in its essential elements, but decided that, irrespective of the three-month interval, this kind of evidence was inadmissible. More recently, however, see *Le Soleil*, *supra* note 26.

\(^{32}\) *R. v. Maloney (No. 2)*, *supra* note 28.

\(^{33}\) Barber and Bates, *supra* note 14, at 1020: "A proper foundation is laid for sound recordings if it is shown that (1) the recording device was capable of taking testimony, (2) the operator was competent, (3) the recording was authentic and correct, (4) no
conditions required for images need be applied to videotape evidence.\textsuperscript{34} To be admissible, videotape evidence, like photographic evidence, must be relevant, authentic and accurate, and its prejudicial effect must not exceed its probative value.\textsuperscript{35} We submit, with Wigmore,\textsuperscript{36} that authenticity and accuracy should relate to the credibility of a piece of evidence rather than to its admissibility.

In fact, if a film does not record the true facts with accuracy and precision, it would not be appropriate to give it any more credence than would be given testimony that was imprecise on the same point. In other words, a witness's lack of precision, his hesitation, and the inaccuracy of his statements will make his testimony doubtful, just as the imprecision and inaccuracies of a film will affect the probative value of that kind of material evidence. Besides, there is no more reason to give credence to a picture which has been shown to be falsified than there is to believe false testimony.

Moreover, in \textit{Colpitts v. The Queen}, the Court of Appeal of New Brunswick, in a decision reversed on another point by the Supreme Court of Canada,\textsuperscript{37} set forth the principle that, when there is a conflict of testimony regarding the accuracy and the authenticity of a taped recording, the tape must be allowed, leaving it to the jury to decide its probative value. Why would it be otherwise when the evidence shows beyond a doubt that the tape has been tampered with? Would the jury in this case be less trustworthy, when in fact, contrary to the preceding situation, the evidence cannot even be interpreted?

Subject to the discretionary power to exclude any evidence obtained illegally, the only condition of admissibility of any piece of pictorial evidence

\begin{itemize}
\item alterations had been made,
\item the recording was properly preserved,
\item the speakers are identified,
\item the testimony was given voluntarily.
\end{itemize}

In contrast, motion pictures need only satisfy item (3) above.\textsuperscript{38} For conditions of admissibility in Canada, see \textit{R. v. Miller and Thomas (No. 1)} (1976), 28 C.C.C. (2d) 94 (B.C. Co. Ct.); \textit{R. v. Kalo, Kalo and Vonschober} (1976), 28 C.C.C. (2d) 1 (Ont. Co. Ct.); \textit{R. v. Demeter} (1975), 6 O.R. (2d) 83, 19 C.C.C. (2d) 321 (Ont. H.C.); and F. McWilliams, \textit{Canadian Criminal Evidence} (Agincourt: Canada Law Book, 1974) at 82 ff. According to \textit{Demeter} and \textit{Kalo}, imperfections which reduce the quality of the sound or which make certain portions incomprehensible do not affect the admissibility as evidence of a tape recording; they only affect its credibility. Similarly, there is no reason to refuse a tape simply because parts which are not relevant to the case, or which could be prejudicial, have been erased. Concerning English law, see \textit{R. v. Maqsud Ali}, [1965] 2 All E.R. 464, 49 Cr. App. R. 230 (C.C.A.) at 238, where Marshall J. writes: "We can see no difference in principle between a tape recording and a photograph."

\textsuperscript{34} See \textit{R. v. Maloney (No. 2)}, supra note 28, where the judge, referring to \textit{R. v. Creemmer and Cormier}, [1965-69] 4 N.S.R. 546, [1968] 1 C.C.C. 14 (N.S.S.C., App. Div.) states that the principles established in this case for admissibility of photographs apply to videotape evidence. See also McWilliams, supra note 33, at 81; and \textit{Mikus v. United States of America}, supra note 25.

\textsuperscript{35} Id.


should ideally be its relevance, and the court, in accordance with the best evidence rule, should prefer in each case the evidence which has the greatest probative value.\textsuperscript{38} However, the courts have attached importance to the argument that photographic evidence, despite its relevancy, must be rejected because of the unfair prejudicial effect which it might have on the jury—so much so that we should examine this idea, which has for all practical purposes been put forth as a condition of admissibility. This argument becomes even more important if one considers that cases relating to sports incidents involving violence are often heard before a jury.

1. The Prejudicial Effect

Any incriminating evidence, whether material or verbal, is obviously prejudicial to the accused. The greater the probative value of the evidence submitted, the greater difficulty the accused will have in presenting a credible defence and in refuting the allegations against him. In this sense, the evidence causes him irreparable harm, but rightly so. Clearly, this is not the kind of evidence which the court may or must reject in using its discretionary powers to admit or refuse evidence. Any evidence to which the accused objects must in fact be unfairly prejudicial to him\textsuperscript{39} in order for the objection to be upheld.

Evidence is unfairly prejudicial when, because it is of a prejudicial nature and of little probative value, it tends to prevent a just and fair trial even though it is relevant to the case and therefore admissible. In this vein, Martland J. wrote as follows:

\begin{quote}
The exercise of a discretion of that kind [that of excluding pertinent evidence] is a part of the function of the court to ensure that the accused has a fair trial . . . The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.\textsuperscript{40}
\end{quote}

Such objections on the basis of prejudicial effect were first raised in homicide trials when the prosecution wanted to submit photographs of the victim as evidence. It seems that these photographs, often taken at the scene of the crime in colour or black and white, showed the victim under conditions which could arouse the jury's emotions and thereby have an unfairly prejudicial effect on the accused.

Basically, the problem of prejudicial effect raises doubts as to the efficacy of the jury system. Those who would reject photographic or film evidence fear the psychological effects such evidence might have. They are afraid that human emotions, such as horror and indignation, will too easily, even inevitably, cause the jury to make a connection between the photograph

\textsuperscript{38} Report on Evidence, supra note 18.


\textsuperscript{40} Id. at 288, 293. In the Court of Appeal, [1970] 2 O.R. 3, [1970] 3 C.C.C. 122, 9 C.R.N.S. 131, the Court, consisting of five judges, accepted the principle that a court may refuse any evidence, even if it has considerable probative value, if it tends to cause unfair prejudice to the accused or to discredit the administration of justice.
and the guilt of the accused. On the other hand, those who favour allowing such evidence show great confidence in the system.

Men and women of standing to be jurors... are not so weak and untutored that they would be influenced to return a verdict of guilty by reason of the photographs. Surely the average man or woman is not so far removed from pain and sorrow, from gruesomeness, from scenes of death and violence and the like, that photographs such as these would turn the reasoning mind into dislike or prejudice against a respondent defending himself in the halls of Justice.41

B. A. MacFarlane adds:

To make such an assumption of the juror's state of mind runs contrary to the basic philosophy of our criminal law. If one is to accept the jury system as we know it, we must have faith that the juror honestly believes the accused innocent until proven guilty. Given such a state of affairs, it would appear illogical to presume that the accused would be denied a fair trial merely as a result of the introduction of somewhat gruesome photographs.42

The wisdom of such reasoning is apparent. Fair J. of New Zealand seemed to agree with it in *The King v. Cartman*.43 In this case, the prosecution wanted to submit photographs illustrating the grisly circumstances in which the woman's body had been found. After declaring that, in any case, the probative value of the photographs appeared to outweigh the prejudicial effect, if indeed any prejudicial effect existed—a point Fair J. was not ready to confirm—he wrote:

... but I think that the jury themselves would separate the purposes for which the photographs are put in evidence from any impression that they may have on first seeing them. As the case proceeds, the photographs will be regarded by them in the ordinary and proper way as matters of evidence, to be considered in relation only to the matters which they prove.44

In the application of the existing law to violence in sports, a prejudicial effect could arise from a distortion of objective reality such that the accused would be deprived of his right to a fair trial. A Canadian example is found in *R. v. Maloney (No. 2)*,46 in which one of the two videotapes submitted to the Court showed the victim, Brian Glennie, partly in slow motion and partly at normal speed, body-checking one of the accused's teammates. The incident occurred some time before Maloney assaulted his victim. After having been edited for use on American television, however, the tape showed Maloney's attack on Glennie as immediately following the body-check. During a *voir dire*, the presiding judge refused to allow this tape as evidence because it had been altered, because it contained sequences separated in time, and because it showed part of the incident at different speeds. Moreover, in the second tape, which was allowed as evidence, he rejected that part of the incident shown in slow motion. In justifying his rejection, he wrote:

The slow-motion scene of the altercation is consistent and in conformity with many of the realities, such as colour, sounds, identities, persons depicted, but it is

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41 *State v. Duguay*, 158 Me. 61, 178 A. 2d 129 (Maine Sup. Ct. 1962) at 131.
42 *MacFarlane*, supra note 18, at 174.
44 *Id.* at 728.
45 *Supra* note 28.
neither consistent with nor in conformity with the reality of time and since time is one of the significant and relevant factors here, both in relation to the body check and spontaneity of the movements of the accused and the lack of deliberateness, to show the jury a movie which grossly distorts the reality of time would be to introduce an element that is neither accurate nor true.46

In short, the Court emphasized the criterion of accuracy, rejecting the evidence because it was not exact and consistent with reality, and thereby avoided having to decide the issue of prejudicial effect.

Under existing law, in fact, it is possible to argue for the rejection of material evidence on the grounds that it is unfairly prejudicial if it alters in some way this aspect of reality. For example, when a worker claimed compensation for a disability suffered after an accident at work, the former employer introduced as evidence before the arbitrator a film showing the plaintiff at his new job, but speeded up.47 The plaintiff appealed the arbitrator's decision through evocation. The Court of Appeal of Arizona rejected this evidence, concluding that it was "difficult to imagine any evidence more damaging to a compensation claimant than the motion pictures as shown, which were taken or projected so as to show the claimant working at a rate of speed different from the speed under which he actually worked when the picture was taken."48

Moreover, in a suit for damages suffered in an automobile accident, film or videotape evidence must be rejected if it shows the victim walking on crutches faster than he actually was moving.49 During injunction proceedings, a speeded-up film of a picket line may give the impression of violence, even though the picketing is actually within legal limits.50 One can imagine a film of an accident between an automobile and a pedestrian being projected at an accelerated speed to show the pedestrian crossing the intersection carelessly at a run, whereas in reality he started out slowly and carefully.

As Barclay J. of the Québec Court of Appeal emphasized in Montréal Tramways Co. v. Beauregard,51 the speed at which a film is shown "may make all the difference in the world."52 This is usually the case whenever any representation of reality is accelerated; the acceleration is a serious distortion which, moreover, serves no purpose in the proceedings and generally does not further justice. Indeed, the use of such tactic by one of the parties to a dispute tends to misrepresent the facts, thereby thwarting the administration of justice, which is essentially concerned with the search for truth within the fundamental and procedural guarantees and limits established by positive law

46 Id. at 437.
48 Id. at 610.
49 Utley v. Heckinger, supra note 28.
51 (1939), 67 Que. K.B. 578.
52 Id. at 591.
and natural law. But does the same necessarily apply to films shown in slow motion?

In certain cases, slow motion may serve no purpose in the administration of justice, and, like acceleration of the film, could constitute a serious distortion the prejudicial effect of which could be said to exceed its probative value. For example, consider a company which dismisses one of its employees for showing too casual an attitude towards his work. In support of its decision, the company wishes to submit in evidence a slowed-down film which misrepresents the employee’s pace of work. Similarly, in a case involving prosecution for impaired faculties, the defence might object to the submission of a film projected by the police at reduced speed and tending to establish delayed reflexes on the part of the accused.

In most cases, however, slow motion will serve a purpose in the proceedings without necessarily being unfairly prejudicial to the accused. Where the time factor is unimportant, a film in slow motion should be admissable as long as it meets the other requirements. The time factor is usually important only when the element of intention is in dispute. An American case, State of New Mexico v. Orzen, concerned spectators who, during the national anthem, threw all kinds of objects onto the court where a basket ball game was to be played. The game was delayed by thirty-five to forty minutes. Two spectators, among others, were prosecuted for disrupting a legal assembly. Their identity and their actions were proven by means of film sequences. During the trial, the prosecuting attorney slowed up the film, stopped it several times, and reversed it, accompanying each action with comments on what was appearing on the screen. The defence objected, arguing prejudice. When the case was appealed, the New Mexico Court of Appeal upheld the trial judge’s decision to allow the evidence:

The method in which the film was shown was also a comment on the evidence by the prosecutor. Counsel are allowed a reasonable amount of latitude in their closing remarks to the jury . . . The trial court has wide discretion in dealing with and controlling counsel's jury arguments. If no abuse of discretion or prejudice is shown, then there is no error . . . Here, there is no showing of an abuse of discretion of [sic] prejudice to defendants.

Where there is dispute about the intention of an act, as in R. v. Maloney, the question arises as to whether a film in slow motion is necessarily a serious distortion of reality. Slow motion has become possible because of technical and scientific advances which have improved the quality of the sound and the picture and contributed to a more faithful and complete representation of concrete reality. In this respect, it is obvious that verbal testimony is much less useful than a photograph, and a photograph less useful than a film. Because it constitutes a dynamic representation of reality, a film of a violent

53 Moreover, the court allowed this possibility in R. v. Maloney (No. 2), supra note 28, at 437.
54 Supra note 28.
55 Id. at 773.
56 Supra note 1.
act will undoubtedly have more effect on the viewer than an ordinary photograph. Clearly, slow motion will tend to increase this effect.

Slow motion allows better examination of the facts. The viewer can see all the details and all the horror of the act committed. In a boxing match shown at normal speed, for example, the punches are hardly visible and the boxers' winces cannot be seen at all. A knockout appears quite normal as the logical and desirable outcome of a match. But a slow-motion film reveals the severity of the punches thrown, as well as the danger they pose, and shows the suffering of the knockout victim. In short, slow motion uncovers the true violence of this sport. Nothing is added. It shows exactly what happened before the eyes of the spectators. The human eye perceives between twenty and thirty percent of reality shown at normal speed, but eighty to ninety percent of the action projected in slow motion. Should we reject a form of evidence which will better lay the facts before us because the reality shown offends us and we find it too psychologically repugnant to allow? Of course not; this is why objections of a juridical nature have been refined to the point where they revolve around the prejudicial effect that a slow-motion film may have on a jury. It should be recognized, however, that such a prejudicial effect, if there is one, may be lessened by proper instructions from the judge to the jury or, if physically possible, by showing both the normal and slow-motion versions of a film.

Watching the normal version, the jury can decide on the merit of the accused's defence (spontaneity, accidental nature, absence of intention, and so on), while the slow-motion version will let the jury assess the value of the defence's argument that the act was accidental by enabling a more complete analysis of the concrete facts. Slow motion will also have unquestionable value in the assessment of an argument of self-defence or provocation. It will let the jury see for themselves the general activity and the particular relevant movements of the accused and the victim, rather than hear them described. It will allow identification of the real aggressor or author of the provocation, and evaluation of the force and frequency of the blows for the purpose of deciding whether excessive force was used and consequently whether the argument of self defence should be disallowed under the law. Juries are certainly capable of this type of discernment; if not, it is high time the system was reconsidered. Moreover, nothing prevents the judge instructing the jury on how it should use the two versions of the film.

Apart from the element of intention in the act, the fact remains that the speed of action in sports often makes it impossible to prove, by traditional forms of evidence, that an offence was even committed. The slow-motion film provides proof of the material aspect, the actus reus of the offence, the causal relation between the act and its consequences, and in some cases the identity of its perpetrator. Should we reject such evidence because the slow-motion film might suggest an element of intention which the evidence as a whole or the showing of the film at normal speed would confirm or refute?

First, then, we submit that, used as evidence, film projected in slow motion accurately represents concrete reality. Secondly, under existing law,
and with the exception of a few cases where there could be distortion and where justice would not be served in any way, it should be allowed. Moreover, even in cases such as these it is probably preferable to allow this evidence and have its deficiencies, weaknesses and especially its irregularities with respect to its probative value, explained by experts. If distortion is the result of bad faith by one of the parties, a well-informed jury will have no hesitation in drawing unfavourable conclusions about the party who placed the film in evidence. In this sense, the presentation of this evidence will actually serve the purposes of justice. On the other hand, if the distortion does not involve bad faith, the jury's attention need only be brought to the uncertain nature of the evidence, as is often done with respect to testimony. Needless to say, all this manoeuvring over the conditions of admissibility of videotape evidence loses its raison d'être, if indeed it ever had one, when the trial is held before a judge alone.

Obviously, the accused in a criminal trial may agree to the videotape evidence being submitted, thereby waiving the objection of prejudicial effect, as he may any other condition of admissibility. However, there is also the question of whether an accused may admit certain facts and in this way deprive the prosecution of the opportunity of offering proof of those facts by photographs or videotape. In other words, can the accused use his admissions to preclude the presentation of material evidence which could be still more damaging to him?

In Castellani v. The Queen, the accused invoked section 582 of the Criminal Code for the purpose of admitting certain facts under dispute, claiming that his admission made proof of those same facts by photographs inadmissible and superfluous. The Supreme Court of Canada rejected this argument, declaring that it was up to the Crown to accept or refuse any admission of the facts by the defence. If the Crown preferred, therefore, it could present detailed proof of the facts which the defence wished to admit.

2. Probative Value

The probative value of any piece of evidence is an important factor in the selection of evidence. In fact, a party to a dispute will prefer one kind to another, or will object to the one chosen, according to its persuasive power and to whether it will help or hinder his case. On this point, there are two conflicting theories regarding material evidence by videotape: the illustrative rule and the demonstrative rule.

According to the first theory, which has prevailed in the United States, Canada and England, a film or photograph serves only to illustrate testimony. According to an American court, in International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O. et al. v. Russell: The motion picture [which was taken to show action taking place on a picket line] does not of itself prove an actual occurrence, but the thing

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reproduced must be established by the testimony of witnesses.\textsuperscript{60} The basis of this rule, therefore, is the supremacy of testimony. In such cases, the material evidence may have a cumulative effect upon the jury, but this should not be a reason for the courts to reject it. The allowance of photographs in evidence to support testimony can no more compromise the right to a fair and just trial than can the testimony of several other witnesses on the same point. In either case, the additional evidence, whether material or verbal, tends to corroborate, or at least to render more credible, the arguments of the party submitting it.

The second theory, the \textit{demonstrative rule}, has gained acceptance as technology has advanced. Its premise is that videotape evidence, like photographic evidence, has probative value in itself, regardless of any link to testimony. In other words, any piece of material evidence, whether a videotape, a film or a photograph, is sufficient in itself to prove the facts it shows: "... the demonstrative rule would seem to indicate that a photograph can 'tell its own story.'\textsuperscript{60}

For example, in \textit{R. v. Lambert},\textsuperscript{61} the Court of Appeal of England convicted the accused of indecent assault solely on the basis of films found in his possession at the time of his arrest. The films had been taken at the time the accused was committing the alleged acts. Although the person who had taken the films, and the victims, were not present at the trial, the films were held to be sufficient proof that the accused had committed the offence.

Judging by the language used in their decisions,\textsuperscript{62} Canadian courts seem to prefer the \textit{illustrative rule}. In some decisions,\textsuperscript{63} however, including \textit{R. v. Maloney} in the area of violence in sports,\textsuperscript{64} they have adopted a slightly more progressive interpretation of this approach. According to this view, testimony only serves to confirm and to establish that the photograph or film is a faithful representation of what the witness saw. From then on, the piece of evidence has probative value and the court may use it to draw whatever conclusions it considers reasonable. In American law, the authenticity and the accuracy of a film may be established by someone who was at the scene, even if he did not take the film. In \textit{Mikus v. United States},\textsuperscript{65} a person was accused of robbing a bank. As the crime was being committed, the teller had pushed a button to start an automatic camera. During the trial, the teller described the premises and the events, and established that the film showed what had happened during the robbery. The film was then allowed in as evidence of the facts it represented.

\textsuperscript{60} \textit{Id.} at 186.

\textsuperscript{61} MacFarlane, \textit{supra} note 18, at 153.


\textsuperscript{63} Draper \textit{v. Jacklyn} et al., \textit{supra} note 43; and \textit{Army and Navy Department Store (Western) Ltd. v. Retail, Wholesale and Department Store Union, Local No. 535} et al., \textit{supra} note 50, at 261.

\textsuperscript{64} \textit{R. v. Creemer and Cormier}, \textit{supra} note 34; and \textit{Chayne v. Schwartz}, 1954 C.S. 123.

\textsuperscript{65} \textit{Supra} note 1.

\textsuperscript{66} \textit{Supra} note 25.
Obviously, the rule that where “a photograph is a ‘witness’ pictured expression of the data observed by him’ . . . it must be a part of some witness’ testimony,” can cause problems when there are no witnesses. We need only imagine a theft by breaking and entering into a bank or a business establishment protected by an automatic camera system. It would be absurd to require that a witness confirm the accuracy of the film as long as a technician could testify to the proper functioning of the camera. “The law is bound these days to take cognisance of the fact that mechanical means replace human effort.”

Moreover, in *R. v. Davis*, the Supreme Court of Alberta, Appeal Side, basing itself on the decision in *R. v. Lambert*, attributed probative value to material evidence alone. In this case, the accused was tried jointly with another male person for gross indecency and was convicted. A sixteen-year-old girl, a friend of one of the accused persons, had taken photographs of the two participants during their amorous activities. At that time, however, she was very much under the influence of L.S.D., and her testimony at the trial was so confused that she could in no way be considered a credible witness. In the trial court, the Crown submitted in evidence the photographs which the police had found in a hotel room registered in the name of Davis, the accused. The defence, claiming that the photographs had not been attested to by any person capable of doing so, objected.

The Court of Appeal also refused to endorse this condition of admissibility, an expression of which can be found in Popple’s *Canadian Criminal Evidence*. McDermid J. wrote as follows for the Court: “In my opinion, the learned author was not dealing with photographs found in possession of an accused. In such a case photographs may be tendered by the person who has found them in such possession and are *prima facie* admissible.”

Thus, this Canadian court acknowledged the probative value of a photograph, regardless of whether verbal testimony existed. In doing so, it fulfilled the prediction made in 1950 by Farris C.J., Supreme Court of British Columbia, with respect to another form of material evidence involving pictures:

> With the scientific development of moving pictures, there might arise, in the future, an action when the pictures themselves, properly proved, would be the very best evidence of what occurred.

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67 *Sapporo Maru (Owners) v. Statue of Liberty (Owners)*, 1968 1 W.L.R. 739, 1968 2 All E.R. 195 (P.D.A.) at 196. Proof of liability in a collision between two ships was provided by means of a mechanical radar which operated automatically. See also *Report on Evidence*, *supra* note 18, at 100, where the Commission proposes that the distinction between the “illustrative rule” and “demonstrative evidence” be abolished.


70 *R. v. Davis*, *supra* note 68, at 262.

71 *Army and Navy Department Store (Western) Ltd. v. Retail, Wholesale and Department Store Union, Local No. 535 et al.*, *supra* note 50, at 262. It is clear from the case as a whole that the expression “properly proved” referred to the technical accuracy of this type of evidence, to be confirmed by an expert.
III. THE USE OF CHARACTER AND OF SIMILAR FACT EVIDENCE

Professional hockey has witnessed the hiring during recent years of strong, rough players whose main role on the team is the intimidation of their opponents. These players have often deliberately provoked good players, drawing them into fistfights leading to penalties. At times they have even gone so far as to purposely injure a member of the opposing team. A Canadian judge writes: “Watson’s reputation as a hockey player is that of a rough and aggressive hockey player, more so than others, who likes to use his body, and received quite a few penalties. [He] appears to have had some reputation as a so-called ‘policeman’ for his team.” To what extent can a court, required to decide the guilt of an accused person, take into account that person’s reputation or past acts of a similar nature?

A. Evidence Respecting Character

As a general rule, the prosecution in a criminal case may not adduce evidence of the accused’s bad reputation. Because of the potential prejudicial effect, the prosecution may not present evidence establishing the propensity of the defendant to commit the type of crime with which he is charged. On the other hand, the accused may wish to give evidence of his good character. When this happens, existing law allows a prosecutor to refute the defendant’s allegations by presenting expert testimony or by providing the court with proof of previous convictions. Where violence in sports is involved, it would perhaps be appropriate to extend the notion of previous convictions to include, in addition to convictions in criminal court, instances of censure by a sports organization for certain serious offences.

Sports authorities which claim to be opposed to violence and to be capable of keeping it in check could initiate the creation and use of a “sport record.” In every organized league, especially at the professional level, they could keep a personal file for each player, entering every game rule violation considered serious. They could even set up a system of demerit points similar to the provincial system used for motorists. They would merely have to decide which improper and dangerous acts they would like to eliminate and assign each one a number of points determined by the relative seriousness of the offence.

For example, a fight could draw five points for each participant and ten additional points for the player who, in the judgment of the game officials, started the fight. Any player found guilty of breaking a rule for which demerit points are prescribed would have them noted in his personal file. The points

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72 R. v. Watson, supra note 1, at 154.

73 McWilliams, supra note 33, at 170. See also Report on Evidence, supra note 18, s. 17(1) at 23: “In criminal proceedings, evidence tendered by the prosecution of a trait of character of the accused that is relevant solely to the disposition of the accused to act in a particular manner is inadmissible, unless the accused has offered evidence relevant to a trait of the character of the victim of the offence.”

74 Report on Evidence, supra note 18, at 66.

75 Règlement 5 sur le système de points, (1975) Gazette Officielle du Québec, 5355 (no 34, 27/12/1974).
could be cancelled at the end of a given period, say two years. Before this period is up, the player who has received a certain number of points could first be given a warning and required to appear before the league's administrators. He might then be suspended if his total points exceeded an established limit. Once ended, the suspension would result in the cancellation of a certain number of points from the player's sport record, although the points left over would have to remain until two years after their date of entry. Any new suspension within this period would inevitably be a longer one.

In sports matters, especially during criminal proceedings for assault or bodily harm, it is obvious that the player's reputation, like that of the victim, can constitute important evidence. An aggressive player is more likely to have started a fight than a player who is known for his peaceful nature. Coaches and referees are especially suitable as expert witnesses in this area. However, aside from having unquestionable usefulness regarding internal disciplinary measures, a sports file would provide both the defence and the prosecution in criminal cases with a better basis for presenting evidence of a person's character.

B. Similar Fact Evidence

While evidence involving the reputation of a person is general in nature, giving a broad impression of the accused's character, evidence of similar facts refers to particular acts of the defendant which are of the same nature as those with which he is charged. This involves evidence of certain circumstances or facts occurring before, during, or even after the criminal act attributed to the defendant.

In criminal proceedings, the accused need not answer for any acts other than those which are the basis of his trial. Anything else would be unjust because of the element of surprise resulting from such evidence and because it is practically impossible for the accused to refute it or prove its falsity. For this reason, and because an atmosphere of guilt may be established by such evidence at the trial, evidence regarding similar acts is usually not allowed. It gives the impression that the accused has a tendency to commit acts similar to the ones of which he stands accused, and that he has therefore probably committed the acts he is denying. Such evidence also presents the danger that the defendant will be convicted because he has escaped justice for other crimes, and not because he is thought to be guilty of the crime of which he is accused.

However, in exceptional cases the prosecution may use this form of evidence. Depending upon the circumstances of the case, the prosecutor is

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77 McWilliams, supra note 33, at 181. In Leblanc v. The Queen, 68 D.L.R. (3d) 243, (1976), 29 C.C.C. (2d) 97 at 105, Dickson J., of the Supreme Court of Canada, speaks of an “aura of guilt.”
generally allowed to use such evidence to prove the identity of the accused, as well as his blameworthy intentions, and thus to refute defence arguments claiming error, good faith, accident, and other things. Often, evidence regarding similar acts brings out an element of the defendant's character. For example, evidence of previous violent acts of a similar nature will reveal the aggressive aspect of the accused's character. However, this is a specific character trait relating to the particular charge in question. Since its purpose is not solely to establish an aspect of character, but rather to accomplish the ends stated above, its probative value usually carries more weight than the risk of prejudice it involves.

Since the Crown must prove the constituent elements of an offence, as well as the identity and blameworthy intentions of the accused, it seemingly does not have to wait until the accused raises a specific defence. The Crown may anticipate by presenting evidence of similar acts, except on preliminary inquiry, at which stage in the proceedings this evidence would seem to be inadmissible. It is difficult to find a valid reason for this exception to the general rule. At this time, the defendant, through his own evidence or through the testimony of witnesses for the prosecution, may plead accident, alibi or something else. The Crown may wish to refute such a defence in order to obtain a committal for trial. Moreover, similar acts may be mentioned or described in a confession by the accused, and this evidence is undoubtedly admissible at this stage of the proceedings.

In the recent case of Leblanc v. The Queen, the majority of the Supreme Court of Canada broadened the application of evidence respecting similar acts by authorizing this form of evidence during a trial where the accused was charged with having caused death by criminal negligence, in violation of section 203 of the Criminal Code. The accused was piloting an aeroplane in northern Quebec when the tragedy occurred. He was getting ready to land to pick up two passengers whom he had left at the same spot some time earlier. He descended and flew over them merely to frighten them. Unfortunately, one of the two passengers did not have time to get down and was struck and killed. The accused had acted similarly in the past. The prosecution introduced evidence to this effect in order to refute a possible defence

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79 McWilliams, supra note 33, at 188. See also G. Killeen, Recent Developments in the Law of Evidence (1975), 18 Crim. L.Q. 103 at 119; Leblanc v. The Queen, supra note 77, at 102; and Report on Evidence, supra note 18, at 24 (s. 20).
80 Report on Evidence, supra note 18, at 66.
81 McWilliams, supra note 33, at 210. But see the test of admissibility proposed by the dissenting judges of the Supreme Court of Canada in Leblanc v. The Queen, supra note 77, at 104: “There is no hard and fast rule . . . Much will depend upon the course which the proceedings take. It would seem to me, however, that the Crown should not adduce evidence of other similar acts unless it appears from what was said at the time of arrest or from evidence presented by the Crown at trial or from the cross-examination of Crown witnesses that the defence which the evidence of similar acts is intended to refute is really in issue.”
82 R. v. Williams (1977), 35 C.C.C. (2d) 103 (Ont. Co. Ct.).
83 Criminal Code, R.S.C. 1970, c. C-34, s. 470.
84 Supra note 77.
argument of mechanical failure or accident over which the pilot had no control.

C. Degree of Similarity in the Facts

Similar facts to be used in evidence must, by their relevance, be related to the accused and to his part in the crime. Naturally, these facts do not have to be similar in all respects to the act with which the accused is charged with. Furthermore, a similar act need not involve methods similar or identical to those used in the alleged criminal act. It is sufficient that the similar act be of the same nature and that the circumstances be comparable. Moreover, there should be a certain proximity in time between a similar act and the act of which the defendant is accused. No limit is established; everything depends upon the circumstances, so that a time gap of one or even several years is possible. The fact that a prosecution is subject to a time limitation does not prevent the allowance of evidence of similar acts committed outside the limitation period.

It is up to the court to decide whether a fact is "similar." As we have already stated, the court may reject this kind of evidence, despite its relevance, if its prejudicial effect substantially exceeds its probative value. "... [A] single act may be sufficient to rebut the defence of accident or mistake ... but where the purpose is to prove system or design opinions are conflicting as to whether one act is sufficient ..." Moreover, the party wishing to prove the identity of the person who committed an offence must satisfy stricter norms of similarity between the acts which are the subject of a trial and those allegedly similar in nature. The method of perpetration, the number of acts, and their frequency will serve to prove their similarity.

86 I. Lagarde, Droit Pénal Canadien (Montreal: Wilson et Lafleur, 1974) at 2550. See also McWilliams, supra note 33, at 186.
87 Lagarde, supra note 85, at 2551. See also, Herbert, supra note 76, at 335: "There must be some relation between the other act and the current act with respect to nature of the act, methodology in carrying out the act, time at which the acts occurred, and location of the acts."
88 McWilliams, supra note 33, at 182.
89 Lagarde, supra note 85, at 2552.
90 R. v. Wray, supra note 39. The principle was applied to similar fact evidence in R. v. McDonald, supra note 78.
91 In R. v. MacDonald, supra note 78, at 154, the learned justice speaks of the principle of the "'hallmark' cases." In that case, the accused had assaulted his wife over a hundred times in the past. In R. v. Willett (1973), 10 C.C.C. (2d) 36 (Ont. C.A.), the court refers to common characteristics which are so unusual that it is likely that the perpetrator of the offence and the author of the previous similar acts are one and the same man. D. Mount, Ohio's "Similar Acts Statute": Another Interpretation (1975), 9 Akron L. Rev. 316 at 319, speaks of "such peculiar distinguishing factors making them as the handiwork of one person." At 336, he adds: "The standard of admissibility for other acts which show identity of the defendant must be strict and other acts of evidence, to be admissible for purposes of showing such identity, must be such that proof of the other act will naturally tend to show that the defendant committed the act for which he is accused ... Other acts which tend to show defendant's identity must not be merely similar to the act with which the defendant is accused, they must, in practicality, be identical to such act."
In sports, evidence respecting similar acts, which a player's sports file would record, could be a useful means of revealing the accused's intentions and of refuting defence arguments of error, accident, self defence, or possibly consent by the victim. To a lesser extent, it could serve to establish the identity of the aggressor in sports such as football.

Those players most inclined to violence may be deterred by the possibility of the prosecution proceeding to trial or to sentencing armed with this type of evidence, which would be rendered more effective by the maintenance of a personal file for each participant in the sport.

IV. EXPERT WITNESS EVIDENCE

An expert is one "who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by the study of scientific works or by practical observation." In sports, especially ice hockey, the referee acts as a judge. He witnesses violations of the rules of the game and has the duty "to report on the Official Game Report all match penalties immediately following the game involved, giving full details to the President." Because of his training and experience, he is without doubt an expert witness.

Other officials are also present at a game. The Official Scorer must "enter on the Official Game Report a correct record of the goals scored . . . He shall also keep a correct record of all the penalties assessed, stating the names and numbers of the penalized players, the duration of each penalty, the infraction, and the time the penalty was assessed." However it is not the function of the scorer or of those various officials to detect violations of the rules or in any way to command fair play. For this reason it would be desirable in organized sport, especially at the professional level, to assign to a game at least one delegate or observer from an athletic association or league. It would be his duty to assist the referee in noting and describing the various violations of the rules committed by the participants at any time. His functions would be complementary to those of the referee. He should have the authority and the obligation to report violations of the rules, acts of unwarranted aggression or behavior of a particularly ignominious nature to a disciplinary committee for appropriate measures, whether the acts or violations are committed by players or coaches.

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92 R. v. Malouf (1975), 31 C.R.N.S. 194 (Ont. Co. Ct.).
93 State v. Davis, 55 So.C. 339, 33 S.E. 449 (So.C.S.C. 1899) at 450, cited in Rice v. Sockett (1912), 8 D.L.R. 84 (Ont. Div. Ct.) at 85, found in McWilliams, supra note 33, at 150.
94 Canadian Amateur Hockey Association, 1975-76, rule 39(d) and 40(g).
95 Id., rule 40(4).
96 Id., rule 44(a).
97 Id., rule 39(d). See also The Official Playing Rules for Canadian Football (Toronto: Canadian Football League, 1972) at rule 2, s. 2, art. 2.
There is no doubt that the presence at a game of observers invested with wide powers would have a deterrent effect on players and coaches willing to resort to violence. Should civil or criminal proceedings be taken pursuant to an illegal act, their testimony could obviate to a certain extent some of the weaknesses inherent in this type of evidence. In fact, a trained observer, especially appointed for that purpose would, in the same way as the referee but perhaps with even more credibility, be an important expert witness as to the facts in dispute and as to the rules of the game and their limits.98

V. CONCLUSION

An effective curb on violence in sports may only be achieved through joint action; education of both the public and the participants is without doubt the best means to achieve that end. Yet sport law and the criminal law must be retained, if only for short-term benefits not possible through education. Sport law and criminal law should, however, complement each other. They both should, in addition to their denunciatory function, act as a regulatory process. They can regulate and control behaviour through the expression of community disapproval, punishment, deterrence and rehabilitation whenever appropriate and possible. The criminal law has failed to fulfill its regulatory function with respect to sport, and evidentiary problems have contributed to the difficulty. A few leaders in professional sport still claim that there is no violence, only disgraceful acts.99 Others acknowledge its existence but hasten to add that they can control it. Clearly, however, they have not chosen to do so.

At the professional level, every game in sports involving physical contact and lending themselves to violence or illegal behaviour should be filmed. This is the existing practice in the National Hockey League, and could readily be extended to leagues meeting a respectable standard of play for at least play-off games or whenever it is deemed necessary on account of previous incidents.

The film of a game could be used as evidence to sustain internal disciplinary sanctions or, where the intervention of the criminal law is justified, it could serve to establish the material elements of the crime and the intent of the wrongdoer.

Today, with a much better informed public, and also better trained and more competent judges in whom one can have considerably more confidence than in

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98 For an interesting use of an expert witness in a civil suit for damages, see A. Hofeld, Athletes—Their Rights and Correlative Duties (1976), 19 Trial Lawyer's Guide 383. The learned author refers to a case, Nabozny v. Barnhill, 31 Ill. App. 3d 212, 334 N.E. 2d 238 (Ill. C.A. 1975), in which a goaltender of a soccer team suffered serious injuries at the hands of an opposing forward. The plaintiff brought into court as an expert witness a former player and coach of world-wide reputation in order to explain the rules of the game and their limits.

Violence in Sports

In the past, it becomes extremely important to distinguish admissibility of evidence from the weight to be given to such evidence.100

The accuracy of a film record should pertain to the weight of evidence. The use of a slow-motion version of a film should not be unnecessarily restricted on the basis of nebulous fears.

Similar fact evidence could be used to prove the identity, the intent, or the lack of justification of an aggressor. A “sport record” that faithfully pictured the career of a player facing disciplinary or criminal law sanctions would enhance the probative value of similar fact evidence. Such individual records might contain the details of any offences committed, the circumstances surrounding their commission and the penalties imposed, recorded on a monthly basis. The presence at sports events of trained observers, with the authority to note and report unobserved violations of the rules, would also increase the accuracy and the probative value of the record. In addition, trained observers are expert witnesses; their value as such should not be overlooked given that prosecutors must often struggle with contradictory or unreliable testimony from supporters. One can easily see the importance of the various means of adducing evidence, and their deterrent effect on participants. It is unlikely that a player will systematically resort to violence if he knows that his actions are being filmed and/or witnessed by trained observers, that the film may be used as evidence, that the testimony of these observers will be given considerable weight, and that his individual career record may also be used to prove his mental state or his identity.

The difficulty of proving the complicity of leaders, owners and coaches is the greatest facing the Crown in the prosecution of violence in sports. A conspiracy to use violence is accompanied by a conspiracy to remain silent. Coaches are often parties to the violence committed by one of their players. It is by no means easy, however, to prove that a player acted at the request or on the orders of his coach.101 More often than not, what the police and the public witness is a coach’s failure to even attempt to control his players. It is true that in law passivity can amount to complicity. But in order to do so, the passive behaviour must be deliberate and have the purpose of aiding and abetting a crime. In the context of sport, these two components are almost impossible to prove.

Perhaps Parliament should consider the use in this field of statutory presumptions which would help the Crown to prove the intent of coaches, leaders, owners and players. “A presumption against the accused is sometimes an appropriate procedural device for narrowing the issues that the prosecution must initially prove in a criminal trial.”102

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101 Kuhlmann, supra note 13, at 777: “Although there may be serious problems of proof, at least those in the game recognize that actual if not yet legal responsibility for player misconduct in the arena is properly placed in part on coaches, managers and owners.”
102 Report on Evidence, supra note 18, at 61.
For instance, proof that a team repeatedly makes use of violence could, in the absence of evidence to the contrary, raise a presumption that the team acts at the request or under the instructions of its coach. The coach would then have to establish that the blame lay with the individual players. It is far from certain that the players would be willing to be the scapegoats while their coach went unpunished. This would be all the more true if penalties were increased for subsequent offences, the proof of which would be facilitated by the use of the “sport record” or of the “criminal record” as the case may be.