

Decision of the Independent Judicial Officer

ERC

Held at Huguenot House, Dublin on 18th December 2009

And at The Park Inn Heathrow on 13th January 2010

And at HMS NELSON in Portsmouth with all parties attending by video link on 18 January 2010

In respect of

David Attoub of Stade Francais, Paris (“The Player”)

And

A citing in respect of contact with the eyes of an opponent

Judicial Officer appointed to hear the case:

HHJ Jeff Blackett (England) (“The Judicial Officer”)

Decision of the Judicial Officer:

- (i) The Judicial Officer found that the Player had committed an act of Illegal and/or Foul Play as alleged in the citing complaint
- (ii) The Judicial Officer was satisfied that the act of Illegal and/or Foul Play merited a “red card” and that the Player should have been Ordered Off for the offence.
- (iii) The Player is suspended from taking part in the game of rugby up to and including 22 April 2011. This represents a 70 week suspension commencing on 18 December 2009.
- (iv) The Judicial Officer will decide the level of costs to be paid by the Player once he has received written submissions in 14 days time.

Introduction

1. This judgment covers three separate hearings to determine the Player's culpability and sanction. The first two parts have already been published but are included so that there is one consolidated judgment in this case. This judgment is set out as follows:

Paragraphs 6 to 11 relate to the hearing held on 18 December 2009

Paragraphs 12 to 36 relate to the hearing held on 13 January

Paragraphs 38 to 54 relate to the sanctioning hearing on 18 January

2. The Judicial Officer was appointed by Professor Lorne D Crerar, Chairman of the ERC's independent Disciplinary Panel pursuant to the Disciplinary Rules found in the Participation Agreement of the Heineken Cup 2009/2010. The Judicial Officer was appointed to consider the citing complaint ("the Complaint") against the Player in the match played between Ulster and Stade Francais on 12 December 2009 in the Heineken Cup 2009/2010. Mr Tony Lanaway was appointed as citing commissioner to this match and had cited the Player for contact with the eye or eye area contrary to Law 10.4(l).

3. The case against Attoub was joined with the case against Dupuy because, although completely separate citings, the alleged acts of foul play took place at or around the same breakdown in play in the same match. The joined hearing commenced on 18 December 2009 but the case against Attoub was severed and adjourned until 13 January 2010. The Judicial Officer determined that an act of foul play had been committed, and adjourned until 18 January 2010 to consider sanction.

4. Present at the hearings in addition to the Judicial Officer were the following persons:-

- Mr Roger O'Connor, Disciplinary Officer, ERC
- Mr Max Duthie, Counsel for ERC
- Mr Jamie Herbert (assisting Mr Duthie – 13 and 18 January hearings)
- The Player
- Madame Patricia Moyersoen, Counsel for the Player

- Mr Olivier Terryn, Administrative Director Stade Francais (18 December and 13 January hearings)

5. Oral testimony was received from:

- Mr Stephen Ferris, Ulster
- The Player
- Mr Roger Cozien, photographic expert (13 January hearing)

Preliminary matters & procedure – the initial hearing on 18 December 2009

6. At the commencement of the initial hearing the Judicial Officer noted the identities of all present and narrated the Complaint reminding the Player that the Complaint was in respect of allegation that the Player had made contact with the eye or eye area of Stephen Ferris contrary to Law 10.4(l). The Judicial Officer reminded all parties that the ERC Disciplinary Rules found in the Participation Agreement for the Heineken Cup 2009/2010 would apply and outlined the procedure to be followed to determine the matter. The Player and all present agreed to proceeding on that basis.

- **The Player formally denied the citing against him (pleaded not guilty)**

7. At the initial hearing Mdme Moyersoen first submitted that the citing was invalid. This has already been noted within the related judgment in the case of Dupuy, but it is repeated here for the sake of completeness. Mdme Moyersoen said that the citing was not regular or normal and it was incomplete. The Citing commissioner could not say at what time the foul play happened, nor could he say what was the score at the particular time. He also stated that the photographs upon which he relied were made available by Ulster management coming from independent media source with whom he was not able to communicate directly. Furthermore the citing commissioner could not find any DVD evidence to support the citing, and nor did ERC send a copy of the citing sent by Ulster. Mr Duthie complained that he had no notice of this preliminary point and submitted that the Disciplinary Rules had been fully complied with in this citing. I ruled that if there was any prejudice or unfairness to Attoub then the citing would be dismissed at this stage.

However, I had no doubt that Mr Attoub understood the allegation against him and the time when it is said the alleged offence occurred from the combination of Mr Ferris's evidence and the photographs. The citing hearing could proceed.

8. Mdme Moyersoen then submitted that the photographs which formed the basis of the complaint against Attoub had been digitally tampered with and could not be relied upon. She said she had evidence from an expert witness which she received a few minutes before the initial hearing started to confirm that submission. Mr Duthie had been alerted to this evidence in advance and had invited the photographer and his own expert to attend the hearing to rebut the defence expert. I adjourned the matter to allow both counsel to consider all the evidence, including a view of the original photographs, before proceeding.

9. After an adjournment Mdme Moyersoen submitted that it was not possible for her to establish whether the photographs described as originals were original or not. She accepted that those photographs and the copies presented with the citing report showed a finger or fingers in Ferris's eye, but she sought an adjournment for her expert to examine the originals. She said that she did not impugn ERC's integrity in this matter, but Attoub had said that he had not put his fingers in Ferris's eye, or if he had it was unknowing, and therefore it was important that the original evidence was properly examined.

10. I therefore adjourned the case and made the following directions, all of which were subsequently complied with:

- Mdme Moyersoen was to provide ERC with e mail address of her expert so that the 4 relevant original photographs could be transmitted for investigation;
- ERC were to transmit those four photographs within 24 hours;
- Mdme Moyersoen was to obtain and serve a further expert report by 7 January;
- The adjourned hearing would be reconvened in the week commencing 11 January.

11. I heard submissions from both parties as to whether Attoub should be subject to an interim suspension until the next hearing with reference to ERC Disciplinary Rule 6.7.5. I was satisfied that the circumstances warranted such a suspension because the evidence before me provided a *prima facie* case of serious foul play. However, I further ruled that if

the expert evidence showed that the original photographs had been tampered with, and it transpired that this interim suspension was unjustified, then I would consider whether to recommend that ERC pay compensation to Attoub. ERC wished it to be noted that in their view the Judicial Officer would have no power to make such a recommendation. I have not considered the point further because, as it transpired, it is not relevant. **Mr Attoub was suspended from playing rugby from 18 December pending final disposal of the case.**

Preliminary Matter at adjourned hearing on 13 January 2010

12. The case against Attoub had been adjourned to enable the original photographs provided by Mr Oliver McVeigh to be examined to establish whether they had been digitally altered or tampered with. In advance of the adjourned hearing Mdme Moyersoen served two statements from Roger Cozien a forensic expert whom she tendered as an expert witness. His qualifications included a PhD in maths and physics, and his experience included 15 years as a police officer and investigator in Paris and subsequently as a judicial expert for investigating magistrates in cases linked to IT.

13. The first report confirmed that all 32 original images provided by photographer Mr McVeigh were “free from any tampering or forgery”.

14. M Cozien undertook further examination of the photographs to enable him to provide expert opinion about what they depicted. Mr Duthie did not object to the introduction of this evidence, nor to M Cozien attending the hearing to give oral testimony. However, he asked the Judicial Officer to note that this further work undertaken by M Cozien had not been requested and he intended to demonstrate why it should be afforded little weight.

15. Mdme Moyersoen made an opening statement to clarify the Player’s position in relation to the photographs. She said that basing a citing on photographs is unusual and an exception. This was the reason why the club decided to look more precisely at the photographs. She said that the Player had never said the photographs had been tampered with to show a finger in the eye. He saw photographs and was distressed because he insisted that he did not do what they apparently showed. Then the club webmaster suggested that the photographs were ‘strange’, but there was very little time to check them before the first hearing. They decided to find an IT

expert, and M Cozien was engaged on the morning of the original hearing. He had only enough time to undertake a preliminary investigation and he was able to write a letter to explain that by looking at the photographs (those which had been cropped and enlarged for the citing) they had been tampered with. Mdme Moyersoen insisted that she never alleged the photos fabricated a finger in an eye, only that they had somehow been altered. Mdme Moyersoen said that the defence still maintained that the photographs provided as evidence in support of the citing (that is the enlargements of part of the original photographs) were tampered with – not just cropped but also enhanced in some parts (additional pixels) and M Cozien would be able to give evidence about that. This should not be held against the Player who was simply exercising his right to establish the authenticity of the evidence against him.

Evidence supporting the Complaint against the Player

16. The citing complaint against the Player reads:

"The still photographic shots made available to me by Ulster Management Sunday evening by E mail, form the basis of the citing. I have not been able to identify the incident on the match DVD despite the information from Ulster that the incident occurred just prior to the No 17 receiving a yellow card at 73 minutes game time.

I have identified the two players concerned in the following way. No 6 Stephen Ferris of Ulster facially and by his subsequent reaction shown in the stills to contact with his eye region. No 17 for Stade Francais, David Attoub, by his particular black upper body garment clearly visible on this arms.

Frame 2: The black left arm of a Stade Francais player, reaches towards an Ulster player on the ground.

Frame 3: Shows the index finger of Stade Francais players left hand extending toward the eye region of Ulster player lying on the ground.

Frame 4: Shows finger collecting Stade shirt and pushing down towards the turned face of the Ulster player still on the ground.

Frame 5: Shows the finger still with Stade shirt attached entering the eye region of Ulster player now identified as No 6, Stephen Ferris."

17. There was little assistance in relation to the actual contact from the DVD footage of the match although it enabled the incident to be placed in context. Mr Duthie produced in evidence all 32 photographs provided by Mr McVeigh and enlarged the two (Frame 4 and 5 above) which purported to show contact with the eye. Each photograph contained digital information and he was able to ascertain that the Player's hand was in the vicinity of Ferris's face for about 3 seconds.

18. Mr Ferris gave evidence by way of a written statement augmented by oral testimony over the telephone (as the weather precluded his attendance). He first described the attack on his eyes by Dupuy who has been subject to a separate sanction (see written judgment dated 18 December 2009). He said that as he wrestled with Dupuy he landed on the ground and was on his side. He felt a hit on his back which caused him to turn onto his back facing upwards and was aware of Dupuy on top of him pinning him to the ground. His left arm was free and he was wrestling with Dupuy and trying to get him off. The DVD footage showed Dupuy punching him, but he could not remember feeling any punches. He said that within seconds he felt a hand on his face and fingers in both of his eyes. He said it happened very quickly, but there was a small period when there was contact with both eyes. He said that the hand felt like it was feeling over his eye area and then made contact with both his left and right eyes. He said fingers were pushed into both of his eyes at this time; then a finger went very firmly and deeply into his right eye and remained there for a few seconds. He screamed and tried to break free but was pinned to the ground and could not get his arms free to defend himself. The contact was very strong and extremely painful – the finger in his right eye was forced downward in a poking and gouging motion; it was someone trying to drive a finger as hard as he could into my eye socket and I could not prevent it. He said this was much worse than the contact made by Dupuy with his eyes just moments earlier. He was very scared at the time and concerned as he had no way to defend himself. He said he managed to wriggle free and as he got up he shouted and tried to draw attention to his eyes. The video showed that when he stood up he appeared to be remonstrating with Stade No 20, Bergamasco, but it was clear that he had not been involved. He said that he was accusing him particularly, just remonstrating generally. He said that he could not identify his assailant at the time and could not be sure who it was, so he accepted that since he did not see his assailant at the time there was possibility that it could have been

someone else. However, having seen photographs of the incident he was sure that it was Attoub.

19. Ferris said that after the gouging he had difficulty in opening his eyes and then his vision was blurred. He said his eyes and in particular his right eye was very painful at the time and they were both watering. He said he got some medical treatment straight away and his eye sight gradually came back. He remained on the pitch for the last 7 or so minutes of the match.

Medical evidence

20. The Ulster Team Doctor (David Irwin) provided a statement in relation to the injuries suffered by Ferris. He said that he attended Ferris during the 73rd minute of the game. He was complaining of blurred vision and pain in and around his eyes, especially his right eye. In examination on the pitch Doctor Irwin said it was evident that Ferris had several fresh scratch marks around his right eye and both eyes looked slightly injected and watery. After the match Doctor Irwin examined him again. He said that further assessment revealed some redness/inflammation in the outer (lateral) recess of the right eye. There did not appear to be any internal eye damage (anterior/posterior chambers, iris, lens or retina). He made a third assessment the following day and recorded that Ferris was complaining of a bruised feeling especially around the right eye, worse on eye movements. Ferris said that his eyes remained bruised and sensitive two days after the match although he was told by his doctor that there would be no permanent damage.

21. Ferris said that he could not ascribe injuries to either the two occasions when Dupuy made contact with his eyes of the second incident, but he thought injuries were caused in the further incident alleged against Attoub. He said: "I am not 100% sure, but because of the other incident that felt a lot worse and both incidents happened so quickly. However, I put my injuries down to the second gouge."

22. Three photographs of Ferris, taken shortly after the match, showed reddening and swelling around the right eye (below the eyebrow) and abrasions below the right eye just above the cheek bone.

Player's defence

23. The Player gave evidence on his own behalf. He said that he arrived at the melee and saw Dupuy wrestling with Ferris and two other Ulster players. He saw Ferris drag Dupuy to the ground before he and the Ulster No 17 started to exchange punches and the Ulster 17 pushed him to the ground. He said his right arm was blocked and his shoulder was hurting, he was receiving a punch and just trying to get away and release himself. He did this by pushing on his right hand and arm but that was hurting so he used his left hand to find the ground and then push upwards. He was trying to get some leverage. In fact he there were at least two players on top of him, so rather than push himself upwards he managed to rotate himself on the ground and then get up. He said that throughout this very short incident he was concentrating on Ulster 17 and was not aware of where Ferris was and did not hear him scream. He said that the way he was lying meant he could only see a pair of Ulster shorts, and those may have been Ferris's. After this incident he and Ulster 17 were both temporarily suspended for fighting, and when he was later told he was being cited he thought that must relate to the punching. He was very surprised to be cited for eye gouging because he did not do it, and that is why he wanted to have a full analysis of the photographs which purport to show his finger in Ferris's eye.

24. The Player was shown the enlarged photograph which appeared to show his left hand outstretched and parallel to the ground, with his little and ring fingers clenched and his middle finger pushing through Dupuy's shirt down into Ferris's right eye. He was asked whether he remembered contact with the face. He replied: "I do not know exactly where that arm was. In my head my focus was to get out of that action. I am very sorry for what happened in the end." He was then asked whether it was possible that he made contact with Ferris's eye. He replied: "I do not know, I am sorry I am not able to answer that question." He was also asked whether it was possible he caused some injuries to Ferris. He replied: "I do not know but I am not a doctor. I can see he had injuries from the photograph but I do not know if I caused them. I was concentrating on my fight with Ulster 17."

25. Following receipt of the citing report Stade Francais issued a statement in which Dupuy and the Player apologised. He said this apology was for receiving a yellow card for fighting not for eye gouging because he did not do that. He made this public apology because he is responsible for coaching and refereeing young players at the club and his image is very important.

26. M Cozien gave comprehensive evidence in relation to the photographs to support the defence submission that still photographs by themselves, taken from such a distance, without any other direct evidence, cannot be relied upon as evidence against the Player.

Tampering. He first explained why he considered the enlarged photographs which had been used to support the citing had been tampered with. He said the pictures had been cropped down but the enlargement meant that there was a loss of quality in relation to the finger. Furthermore pixels had been duplicated on the black garment covering the Player's arm and that might alter the perception of those who try to interpret the photograph. This was not a criticism of Mr McVeigh but is common among photographers using JPEG to touch up photographs in this way (for example to get rid of shadowing). That is why when he first saw this picture he advised that it did not reflect reality. However, he did not say, and does not say, the finger had been added or lengthened.

Depth of field of vision. M Cozien calculated that Mr McVeigh was 70m away from the scene. Knowing the size of focal properties of the camera, he could calculate the rapport between zooming and compressing different angles. The frame in the axis of zoom would make objects seem to be closer together and an optical illusion is created. For example, in the picture from which Frame 4 was cropped, the end of the pitch and scoreboard looked very close to the players, whereas in reality it was tens of metres away. He calculated that the background looks 14 times closer to the players. The first consequence of this is that the relative position of two players cannot properly be ascertained. ERC suggested that the Player's arm was aligned at same level of Ferris's shoulder, but this is not the case because of the compression of the angles. In reality they were lying on the floor with each of their heads adjacent to each other's shorts so the Player's arm, instead of being outstretched at a right angle was more likely to be at an acute angle downwards from his shoulder. The second consequence of this optical illusion relates to where the finger is in relation to Ferris's face. If you look at this image as if you were just beside the players it appears to be clear that the finger is in the eye socket. However, with a shot taken 70m away with a zoom of 500 mm it means that the finger could actually be anywhere between the eyebrow and the cheekbone. In other words it is impossible to say with any certainty where the finger is within that area.

Reconstruction. M Cozien said that a photograph is not a true reflection of reality – it is a sample of reality. Even putting the photographs in sequence one after another, although that is better than one sample, is still only a sample. A photo does not render the sound of what is going on, so the viewer can rely on only one of his senses. In this matter, the most incriminating photos are 37 and 38 (originals from which Frames 4 and 5 were cropped and enlarged). M Cozien determined that Mr McVeigh took shots as a burst with a Nikon D3 camera. This allowed up to 10 photos per second. He took bursts of varying numbers of shots – for example the burst containing the incriminating photographs was at 4 shots per second, that is where each shot represented 1/1250 second with 0.33 seconds between each shot. The average DVD film would contain 24 frames per second but you could have as many as 412. This was to support his thesis that: “an isolated photograph taken out from a full sequence is not a testimony nor [an] evidence, it is just a limited sample of a faded away reality.” He demonstrated this by showing three videos of reconstruction. One played all of the photographs in sequence in which, he said the striking feature is that the Player rotated through 90 degrees before he managed to free himself to get up. One played them in sequence in accordance with the time they were taken (to show the different speeds) and the final one showed each photograph in time but with blanks in between. Clearly nobody could say within the blanks what was going on.

ERC Submissions

27. Mr Duthie said that the principle evidence against the Player is Ferris’s testimony, the photographs, medical evidence and DVD evidence which puts the player in the right position. The photos taken over 3 seconds, shows the Player’s hand outstretched making contact with head and in two (Frame 4 and 5) his right hand is curling like a fist except middle finger sticking out and the tip of finger is not visible suggesting it is in the eye socket. He suggested that the Judicial Officer is entitled to conclude from the photo that for the duration of image (however short) his finger was in the eye and an expert is not required to tell the tribunal that. He said that Ferris’s evidence spoke for itself. Victim players are normally extremely reticent about giving evidence against fellow players but he felt so strongly that he did on this occasion. Ferris’s evidence is clear there was a period where he felt a hand finding his eyes and then poking and gouging.

28. Mr Duthie also submitted that the Player’s evidence does not accord with reality. Had he been trying to push himself up his hand would have been next to him and not outstretched.

In short, the case is straightforward and not helped by the expert evidence which should be given little weight.

Player's Submissions

29. Mdme Moyersoen said that the Player did not question Ferris's statement but it was not he who gouged his eye. The photographs should not be relied upon for all of the reasons provided by M Cozien, otherwise the decision is based on supposition and speculation about what was occurring in between the individual shots. In all the circumstances the photographic evidence is weak and should be discounted.

30. The Player was solely concerned with his altercation with the Ulster No 17. He admits that his conduct in was poor in relation to those punches and he has apologised for it. However, he had no intention of attacking Ferris's eyes and he is not the sort of person who would do that. He has an excellent disciplinary record, with only two technical Yellow Cards when he first started to play. When he gave evidence his sincerity should not be questioned because he is an honourable man. He knows his career is in jeopardy – and that is more difficult because his wife is expecting a baby – but he also helps the young people at the club. She submitted that the Judicial Officer should be very cautious about accepting photographic evidence – it took a long time before The Game accepted video evidence and these photographs are not reliable. Finally Mdme Moyersoen said she had got to know the Player well over the past few months and she was convinced that he had not committed this offence.

Decision as to whether or not the Complaint should be upheld

31. Before finding the complaint proved I must be satisfied on the balance of probabilities that the person cited committed the act of foul play (ERC Rule 6.7.11).

32. Much has been made of the photographs in this case as they formed the original basis of the citing. However, the most compelling evidence is the testimony of Stephen Ferris. His account has not been challenged by the Player, who simply says he did not gouge an opponent. The DVD footage, and the photographs, indicate that only two players could have made contact with Ferris's head: Dupuy and Attoub. It is agreed that Dupuy

was wrestling with and punching Ferris, and Ferris was aware of his interaction with Dupuy, so he can be discounted as the person who made contact with Ferris's eye.

33. I found M Cozien's evidence very helpful and I accept that there can be optical illusions when pictures are taken from a long distance and then enlarged. Photographs taken in this way from such distance must be treated with some caution particularly if there is no other direct evidence of the alleged act. In this case there is other evidence – Ferris's testimony and the medical report. However, M Cozien confirmed that the pictures did show the Player's finger making contact in an area between the eyebrow and the cheekbone. The eye socket is within that area, so the photographs and M Cozien's expert opinion are consistent with Ferris's account. These photographs therefore provide powerful corroboration to Ferris's account.

34. The Player's own evidence was also telling. His account skated over the period when his hand was clearly near and on Ferris's face and he declined to explain precisely what he was doing other than trying to move away from where he was. When he was shown the incriminating photographs and asked to explain what he saw or what was happening he replied that he did not know. He refused to accept the possibility that his finger was in the eye. It was this evasiveness which satisfied me that his account was less than truthful and that he knew that he had deliberately attacked the eyes of an opponent but was trying to evade responsibility.

35. Taking all of the evidence into account I have concluded that:

- Ferris was deliberately eye-gouged by a player from Stade Francais. I can draw this conclusion from Ferris's unchallenged evidence that he felt someone searching for his eye and then pushing a finger hard into the eye socket.
- Attoub is the only player in the vicinity who could have carried out this act.
- The photographs corroborate that conclusion by showing Attoub's middle finger inserted into the eye socket which is within the area between the eyebrow and cheekbone (as described by M Cozien).

36. The citing is upheld and I find David Attoub guilty of making contact with the eyes of an opponent.

37. The case was adjourned again until 18 January 2010 for consideration of sanction and reconvened at HMS NELSON in Portsmouth (the location of the Judicial Officer) with all parties attending by live video link or telephone conference.

Submissions on sanction and mitigation

Submissions on behalf of ERC

38. Mr Duthie referred the Judicial Officer to the IRB's directions about the need for strong deterrent sanctions in relation to contact with the eye or eye area. He submitted that it would be inappropriate to aggravate any sanction upwards to reflect the fact that the Player had called the photographs into question. He was entitled to do so as part of his defence, but he should be required to pay for the additional costs paid by ERC to validate the photographs. He also referred to the case of Dupuy and submitted that the calculation of entry point should not include any consideration of deterrence, such consideration should be reflected in an increase from the entry point as an aggravating factor.

39. Mr Duthie produced the Player's disciplinary record which indicated the following:

- 2003/4 – suspended for 2 weeks for an unspecified act of foul play committed in the European Challenge Cup. Mdme Moyersoen clarified that this was for two Yellow Cards in a match.
- 2004/5 – suspended for 6 weeks by an ERC disciplinary committee for making contact with an opponent's eyes. The committee found that the offence was reckless but also ordered him to pay a fine of Euro 5000 with a further suspension of 12 months, that suspension being suspended for two years. It was never activated.
- 2008/9 – suspended for 10 days for two Yellow Cards in the same match.

Submissions on behalf of the Player

40. Mdme Moyersoen said that notwithstanding my decision, the Player still maintained that any contact with Ferris's eye was 'unconscious'. He said that if there was any contact with the eye area he apologised, but he insisted that he was not aware of that contact.

Mdme Moyersoen referred to the evidence of M Cozien and suggested that Mr Ferris may have been mistaken in his evidence, although she did not suggest he was lying. She suggested that Ferris had not remembered Dupuy punching him and could be mistaken about the contact with the eye. I interrupted Mdme Moyersoen, reminding her that I had already determined culpability, and asked her to address me on sanction, but she persisted in suggesting that my decision was wrong and unfair because Attoub did not intentionally commit this offence and he is not a liar. She declined to make any further comment apart from answering my questions about the Player's background.

41. Attoub is 28 years old, has been a professional rugby player since 2003 and has three international caps for France. He has played for Stade Francais for three seasons and his contract has two more years to run. As already noted he undertakes a significant amount of work to coach and referee lower levels of the game.

Decision as to disposal

Sanctioning regime – general comment

42. I first made an assessment of the seriousness of the conduct of the Player and in so doing referred to the judgment in the RFU case of Dylan Hartley 24 April 2007 (imposing a sanction of 26 weeks suspension) in which I sat as Chairman of a Disciplinary Panel. The following statement of principle has been adopted by the IRB in a letter to all Judicial Personnel dated 10 July 2009:

Contact with an opponent's eye or eye area is a serious offence because of the vulnerability of an eye and the risk of permanent injury. It is often the result of an insidious act and is one of the offences most abhorred by rugby players. Serious offences of this sort – and particularly those known colloquially as "eye gouging" must be dealt with severely to protect players, to deter others from such activity and

to remove offenders from the game to ensure that they learn the appropriate lesson. Clearly “contact” encompasses a wide range of activity from applying pressure with an open hand to a finger intentionally inserted into the eye socket intending to cause injury. Offences which would properly be classified as at the Lower End of the scale of seriousness would include, but not be limited to, wiping with an open palm or fist without any real force or intent and causing no injury. In certain circumstances it might also include reckless contact with a finger into the eye area. Offences which would properly be classified as at the Top End of the scale of seriousness would include, but not be limited to, an intentional act designed to cause serious discomfort or injury to the eye or area around the eye of an opponent. The most serious offences in this category would be where permanent damage is caused.

43. The IRB directive referred to a letter from Mr Bernard Lapasset, Chairman IRB, dated 1 July 2009 which expressed concern about lenient sanctions imposed on Schalk Burger (South Africa v British and Irish Lions) and Sergio Parisse (Italy v New Zealand) in June 2009. Mr Lapasset said:

“The prevalence of eye-gouging in the Game is a major worry for the IRB with cases ranging from reckless to intentional. In order to arrest recourse to this heinous act it is necessary that strong sanctions are disbursed as a deterrent..... We felt it necessary... to express our strongly held view that such serious offences of this sort must be dealt with severely to protect players, deter others from such activity and to remove offenders from the game to ensure that they learn the appropriate lesson.”

Entry Point

44. In assessing the seriousness of the Player’s conduct I took account of the following features of his offending:

- a. The offending was deliberate. Ferris felt a hand searching for his eyes and then apply significant force with his finger gouging into his right eye. This was neither accidental nor reckless and was clearly designed to cause significant discomfort to Ferris.
- b. The actions were serious. The Player used considerable force pressing his finger into the eye socket and maintaining the pressure for a not insignificant period until Ferris

managed to wriggle away. That is also inconsistent with the Player's assertion that any contact with the eye was accidental.

- c. There was no provocation.
- d. Ferris suffered some injury which, although not apparently permanent, was obviously painful and left him in some discomfort for a day or so after the match. It is not possible to determine whether Dupuy (who made contact with Ferris's eye immediately before) or Attoub caused the injuries described, but I take account of Ferris's own opinion which was that the majority of the injuries and pain were caused by Attoub.
- e. This contact occurred during a melee which was taking place after the ball had moved away and then broke up, but it drew an angry reaction from the victim.
- f. Ferris was in an extremely vulnerable position. He was lying on his back, wrestling with Dupuy who was on top of him, his arms were trapped and he was unable to protect himself;
- g. This may have been opportunistic, but there was a certain amount of premeditation because the Player searched for the eye before attacking it.
- h. The conduct was completed.

45. In my view the Player, having found his hand to be in contact with Ferris's face, deliberately targeted Ferris's eyes intending to cause serious discomfort to his victim. I draw that conclusion from Ferris's very clear evidence that he felt the hand feeling around his face and then concentrating on the eyes. I do not believe or accept the Player's assertion that any contact was unintentional or accidental when he was trying to obtain leverage to move him away from his fight with Ulster No 17. There is overwhelming evidence which contradicts that assertion: the series of photographs together with Ferris's testimony support's ERC's case that he searched for Ferris's eyes, and when he found them he applied significant pressure in what could be described as a deliberate gouge. He must have realised that there was a risk of causing a serious injury and he had no concern for the welfare of his victim. **In those circumstances this offending is at the Top End of the scale of seriousness.**

Sanction

46. In cases where the offending is classified as being at the Top End of the scale of seriousness, a Judicial Officer must assess the appropriate entry point within a given range. The Top End range for offences of contact with the eye or eye area is 24 – 156 weeks (3years).

In assessing the entry point within that range ERC Disciplinary Rules do not provide any guidance on what factors should be taken account of. General practice is, however, that only those matters listed in ERC Disciplinary Rule 6.7.32 (assessment of seriousness) may be considered, and I follow that practice. I have taken account of:

- The offending player's intent. The pressure applied with his finger to Ferris's right eye, and the length of time for which contact continued, indicate a clear intent not only to make contact with Ferris's eye but also to inflict a significant degree of discomfort and pain to the victim;
- The effect on the victim. Ferris received not insignificant injuries and was in considerable fear and distress during the attack and discomfort for a number of days following;
- The IRB's directive that this sort of offending should be dealt with severely.

47. In those circumstances the appropriate entry point is a suspension of 52 weeks. I have made a distinction between the Player and Dupuy – the former made one contact while the latter made two, but the former's contact was a sustained gouge with a finger intentionally inserted into the eye socket having first searched for it while the latter's were swipes across and in the eyes. The victim player, Ferris, was in no doubt as to which was more serious – and I have given some weight to his view and particularly his description that "*the contact was very strong and extremely painful – the finger in my right eye was forced downward in a poking and gouging motion; it was someone trying to drive a finger as hard as he could into my eye socket and I could not prevent it.*" Had the evidence indicated that the Player caused more serious injuries the entry point would have been considerably higher – that is well up the Top Entry range. This entry point reflects the factors already mentioned: the Games abhorrence for this sort of offending and the need for offenders to be dealt with severely.

48. With reference to ERC Disciplinary Rule 6.7.34 there are three aggravating features in this case:

- a. The absence of remorse and/or contrition. Not only is their no remorse, but the Player continues to assert that he did not knowingly commit the offence even in the face of overwhelming evidence and my decision. Nevertheless I have decided not to add anything to the entry point because this lack of remorse can

be taken into account by making no reduction to the entry point which would have been available had the Player pleaded guilty.

- b. The Player's status as an offender against the Laws of the Game. The Player has three matters recorded against him, but the most serious is a previous offence of making contact with the eye of an opponent. This merits an increase of 10 % to the entry point, that being 5 weeks, even though that offence was committed five years ago because it is a similar serious offence concerning contact with the eyes.
- c. The need for a deterrent to combat a pattern of offending. Despite a number of previous high profile cases involving contact with the eye or eye area over the past two years, the sanctions imposed do not seem to have deterred this insidious offence and higher sanctions are necessary to change the behaviour of some players and indicate that this conduct will not be tolerated. Deterrence in this case merits an increase of 25% from the entry point, that being 13 weeks.

49. I also considered whether the fact that the Player has made serious allegations about the integrity of the citing process, suggesting that evidence had been fabricated, should be considered as an aggravating feature under ERC Disciplinary Rule 6.7.34(d) (any other off-field aggravating factor that the Disciplinary Committee considers relevant and appropriate). Even when given the opportunity to reconsider this allegation at the initial hearing on 18 December the Player maintained the assertion that the photographs had been tampered with so as to strengthen a case against him. Subsequently, having accepted that the original photographs were legitimate, and the part showing the finger in or near the eye had not been changed, he still argued that they could not be relied upon. Given my finding of fact that the Player deliberately forced his finger into Ferris's eye socket, I also determine that he made these allegations in relation to the photographs in the full knowledge that he had committed the offence. In other words, he was attempting to create a defence on the basis of some potential technical defect or irregularity in the evidence when he was fully aware of his wrongdoing. This was a serious attempt to evade responsibility by impugning the integrity of the photographer or Ulster or ERC. I was minded to increase the sanction further to reflect this approach, but I have been persuaded by Mr Duthie not to do so. Nevertheless I note that the conduct of the defence in this respect was particularly unattractive and it unnecessarily and unfairly called into question the

integrity of Mr McVeigh. Mr McVeigh should be congratulated on the quality of his photography and thanked for the assistance he has given to the citing process.

50. Having considered the aggravating features in this case I have considered the mitigating factors listed in ERC Disciplinary Rule 6.7.35:

- a. The presence and timing of an acknowledgement of culpability/guilt by the player – since he vigorously contested the matter even after my finding of guilt he is not entitled to any credit for this factor.
- b. A good record and/or good character – he is not entitled to any discount under this heading as he has three previous acts of foul play, including a similar offence, on his record.
- c. The age and experience of the player. He is not entitled to any reduction based on youthful impetuosity.
- d. The player's conduct prior to and at the hearing. The player did not comply with the standing directions in relation to disciplinary hearings and raised issues without any prior notification to ERC. He questioned the integrity of the photographs even when, on my finding, he knew that he had intentionally placed his finger in Ferris's eye. The rugby disciplinary system relies on the integrity of players and gives credit for those who accept culpability. Those players who know they have committed offences but then seek to evade responsibility by impugning others will receive higher sanctions than those who accept the hearings, but his conduct in challenging the evidence and putting all parties to additional expense and time negate any credit he may otherwise have gained.
- e. The player has shown no remorse;
- f. There are no other off-field mitigating factors.

51. In short, there is no mitigation in this case. **In all the circumstances the appropriate sanction is a suspension for 70 weeks. As this suspension is so long, it includes periods when the Player might not be playing, for example during the summer when he might have sought to play in another jurisdiction. The Player is therefore suspended from playing all rugby worldwide, including any domestic rugby in France, from the date of his temporary suspension, 18 December 2009 – 22 April 2011. He may play again on 23 April 2011.**

52. This is a significant sanction but it must be set into the context that the Top End entry range for contact with the eye or eye area is 24 – 156 weeks (6 months to three years) and this sanction is still less than half of the maximum sanction. This is the worst act of contact with the eyes that I have had to deal with: it is a case of deliberate eye gouging which caused significant distress and some injury to the victim and the sanction must be such to make other players stop and think before someone suffers a really serious eye injury.

Costs

53. Mr Duthie asked the Judicial Officer to make an order that all reasonable costs incurred by ERC should be paid by the Player. He made three points:

- a. The first adjournment in this case was not caused by bad weather but by Mdme Moyersoen forgetting to take her passport to the airport and being delayed
- b. ERC did not seek to punish the Player through the award of costs but merely seek to recover what has been spent.
- c. Considerable costs were incurred in validating the photographs after the Player alleged they had been doctored. ERC submitted that once M Cozien had suggested the photographs had been tampered with the Player should have ascertained the extent to which changes had been made and whether they showed something (the finger in the eye) which did not happen. Cropping and adding pixels to make clothing look blacker was entirely different from fabricating evidence, but the Player did not make that distinction when he complained about the photographs.

54. Mdme Moyersoen objected to the recovery of full costs. I have directed that she may make written submissions as to costs within 14 days and I will then decide whether all or some of the costs should be recovered.

Right of Appeal

55. The Player was reminded of his right of appeal in accordance with the ERC Disciplinary Rules.

18 January 2010

HHJ Jeff Blackett
Judicial Officer