

Decision of the Independent Judicial Officer

ERC Heineken Cup 2011/12

Held at Huguenot House, St Stephens Green, Dublin

17th November 2011 at 10:00 am

In respect of

Shontayne Hape (“the Player”)

And

In respect of a citing complaint arising out of the London Irish –v–Edinburgh match at the Madejski Stadium, Reading on the 12th November 2011 that he did dangerously tackle an opponent in contravention of Law 10.4(e) of the Laws of the Game (“the Laws”) wherein a player must not tackle an opponent early, late or dangerously.

Judicial officer appointed to hear the case:

Robert H P Williams (Wales) (“the Judicial Officer”)

The Decision of the Judicial Officer:

- (i) The Player did not contest the citing complaint brought against him. The Judicial Officer found the Player had committed the act of illegal and/or foul play alleged in the citing complaint.
- (ii) The Player admitted that the act of illegal and/or foul play merited a red card. The Judicial Officer was satisfied that 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 a game of rugby up to and including the 16th December 2011. This represents a four week suspension commencing on 17th November 2011.
- (iv) The Judicial Officer made an award for costs against the Player of the ERC’s costs, such costs to be limited to 50% of the Judicial Officer’s costs.

Introduction

The Judicial Officer was appointed by Professor Lorne D Crerar, Chairman of ERC's Independent Disciplinary Panel pursuant to the Disciplinary Rules found in the Participation Agreement of the Heineken Cup, 2011/2012. The Judicial Officer was appointed to consider the citing complaint against the Player in the match between London Irish and Edinburgh on the 12th November 2011 in the Heineken Cup 2011/2012.

The Citing Complaint

Mr Yves Thieffine was appointed as Citing Commissioner to this match and the citing complaint read that he had cited the Player for that he did:

"Law 10.4(e) Dangerous tackling. A player must not tackle an opponent early, late or dangerously".

The Parties at the Hearing

Present at the hearing in addition to the Judicial Officer were the following persons:

- Mr Roger O'Connor ("the Disciplinary Officer, ERC")
- Liam McTiernan ("Regulation Executive, ERC")
- Kieran McCarthy ("London Irish Rugby Manager")
- Toby Booth ("London Irish Head Coach")
- The Player

Preliminary Matters & Procedures

At the commencement of the hearing, the Judicial Officer noted the identities of all present and in particular that the Player acknowledged that he was the player referred to in the citing commissioner's report.

The Judicial Officer narrated the complaint reminding the Player that the complaint was in respect of an allegation that he had tackled a player dangerously contrary to Law 10.4(e) of the Laws.

The Judicial Officer reminded all parties that the ERC Disciplinary Rules found in the Participation Agreement of the Heineken Cup, 2011/2012 ("the Disciplinary Rules") ("DR" in the singular) would apply. The Judicial Officer outlined the procedure to be followed to determine the matter. The Player and all present agreed to proceed on that basis.

The Judicial Officer established what evidence had been placed before him prior to the hearing and enquired as to whether all present had received the same in good time. The Judicial Officer then enquired as to whether any additional evidence was to be presented before him and was advised that London Irish would be producing additional video clips of the incident. The evidence for consideration was therefore as follows:

- (i) The notice of the hearing and appointment of the Judicial Officer etc from Professor Lorne D Crerar.
- (ii) The letter from the Disciplinary Officer to Professor Lorne D Crerar of 14th November 2011 confirming that a citing complaint had been made and for a Disciplinary Committee to be convened.
- (iii) The citing complaint from the Citing Commissioner.
- (iv) The request from the Disciplinary Officer to vary the standing directions so that Player and/or his representatives would file their responses to standing direction found in Section B-1 of Appendix 6 of the Disciplinary Rules by 6:00 pm on Tuesday, 15th November 2011.
- (v) The Judicial Officer's direction varying the standing directions for the Player and/or his representatives to comply with the standing directions by 6:00 pm on Tuesday, 15th November 2011.
- (vi) The report from Dr Sam Hewitt and Miss Joanne Hanna of Edinburgh Rugby on the medical condition of David Denton (the injured player).
- (vii) A note dated 15th November 2011 from the injured player.
- (viii) The response dated 15th November 2011 by the Player to the standing directions.
- (ix) The email dated 15th November 2011 from Romain Poite, the referee at the match.
- (x) The email dated 15th November 2011 from Cyril Lafom, the assistant referee at the match.
- (xi) The response of the Disciplinary Officer dated 16th November 2011 to the Player's direction statement and attached to which was the memorandum from the International Rugby Board of the 4th August 2011 re dangerous tackles replacing the memorandum of 21st January 2011.
- (xii) Video footage.

NB: London Irish were introducing additional video footage.

The Judicial Officer summarised the Player's response to the standing directions as follows:

- He accepted that he was the Player.

- He accepted that the citing complaint was a true and accurate account of the incident.
- He denied that he had hit the injured player with his head.
- He admitted that he had committed an act of foul play.
- His act was unintentional.
- The act warranted a red card.
- There were no preliminary issues to be raised.

The Disciplinary Officer informed the Judicial Officer and the Player and his representatives that he was not alleging that there had been any hitting of the injured player by the Player's head.

As there were no preliminary issues being raised, the Judicial Officer reviewed the complaint in full and narrated the Citing Commissioner's report from the match. Although the Player had already responded in the standing directions to the complaint, the Judicial Officer asked, for the sake of the record, the Player whether he accepted that:

- The complaint was a true and accurate account of the incident and the facts surrounding the incident
- That the complaint should be upheld (namely whether he admitted an act of illegal and/or foul play contrary to Law 10.4(e) by committing an act of a dangerous tackle in the London Irish –v– Edinburgh game on the 12th November 2011 and
- The alleged act of illegal and/or foul play warranted a red card.

The Player admitted the complaint and that the act warranted a red card.

As the Player had therefore accepted that the complaint should be upheld, the Judicial Officer advised the parties that he did not have to be persuaded that the Player had committed an act of illegal and/or foul play. The Judicial Officer advised the parties he would therefore immediately proceed to deal with the issue of sanction but in order to do so and to dispose of the matter, he would require the Disciplinary Officer to present his evidence regarding the incident to which the Player would be entitled to respond.

Evidence Supporting the Complaint

The Disciplinary Officer informed the Judicial Officer that he would refer him to:

- the documents which have been disclosed prior to the hearing and he accepted;
- there had not been a clash of heads.

- the medical report from the Edinburgh team medical officer and physiotherapist referred to the injured player being treated immediately following the incident and that although he was conscious when the medical team arrived, he appeared disorientated and was unable to answer questions relating to the match or the previous week's match. He had no pain or palpitation of cervical spine and had pain-free rotation to both right and left sides. Following assessment, he was removed from the field. He was continually observed throughout the rest of the match and was reassessed at the end of the game. On departure from the ground, the injured player began to feel unwell and he has been diagnosed with concussion. He is unavailable to play the upcoming week as a result of the incident.
- the note from the injured player stating that due to the impact of the tackle he did not have any recollection of the actual events as it happened, only the time shortly before the collision where he got the ball and shortly afterwards.
- the report from the referee and the assistant referee which did not take the matter any further (the Judicial Officer indicated that the referee's opinion after he had reviewed the tackle on the video was not being taken into account by him).
- the video evidence which was then shown without the sound and the clippages were repeated at different speeds and the shots of the incident itself were broken down.

The Video Evidence

The Disciplinary Officer submitted that the clippage showed that:

- the Player's shoulder made contact with the injured player's neck and chin above the shoulder line.
- there was a significant impact at the neck.

The Player was then asked to explain his position.

The Player's Position

The evidence of the Player was noted as follows:

"I intended doing a wrap tackle. My intention was to run at him (the Injured Player) and wrap the ball up.

He is 6' 5" and I am 6' 2".

In a millisecond, he drops down to the same height as me. I have no time to adjust my position. I followed through to complete the tackle as he is coming down and it resulted in an impact collision which I thought was a good tackle.

The contact was to the lower part of the jaw but I thought it was shoulder to chest.”

The London Irish Head Coach put forward the following points:

- The Player was intending to carry out a wrap tackle whereby there is a two-handed grab, the target being the ball so as to prevent the attacking player getting his hands free and passing out of the tackle.
- The attacking (i.e. in this instance the injured) player is 6ft 5in and the Player is 6ft 2in and within a millisecond he (the injured player) is seen dropping down to the same height as the Player and this was estimated to be a drop of some 20cms and he is coming up at speed towards the Player and the Player is following through to complete the tackle and has no time to adjust his position.
- The impact is greater because of the velocity and the angle of the running.
- The Player intended the contact to be shoulder-to-shoulder but the dropping down as he arrived meant that contact was to the lower part of the jaw and neck.
- The Player thought at the time it was a very good tackle to the chest thereby wrapping up the ball.
- The Player's left arm is seen on the video clippage to be down around the victim player's back and the right arm is up around the victim player's left-hand side and this demonstrates that it was a genuine attempt at a tackle and not a charge.

The London Irish Head Coach produced their video clippage in support of the submission about the drop in height by the Injured Player and there was no collision with the head (the Disciplinary Officer had already conceded that there was no clash of heads).

The Judicial Officer was also asked to consider video footage of other wrap tackles where there had not been any citations. The Judicial Officer ruled he would not consider these as part of his deliberation in the same way as he would not be considering the referee's opinion of the video footage.

The Judicial Officer was also informed by the Player that he was ashamed that he had to appear before a disciplinary hearing. He saw himself as a good role model as to how one played the game. He had spoken to the injured player after the game and was genuinely concerned about the effect of the tackle on him. He had been in the top-flight professional game for 12 years. He had had 62 premiership games and 13 Heineken Cup matches. He had represented New Zealand in Rugby League and had also represented England and had just returned from the

World Cup. He had appeared in 13 tests. He had had a hitherto clean record throughout his professional career.

The Judicial Officer invited the parties to address him on sanction.

Submissions on Sanctions

As the evidence had been heard on what had happened, the Judicial Officer invited, firstly the Disciplinary Officer to make submissions as to sanction.

Disciplinary Officer

The Disciplinary Officer referred to the on-field factors taking into account DR 6.7.32 submitting that:

- (a) He accepted that the Player may not have intended a dangerous tackle above the shoulder line however;
- (b) Irrespective of what the Player thought or intended, there was a clear risk of it being dangerous and against the laws of the game; and
- (c) As to gravity the Player struck with his shoulder; and
There was no existence of provocation and the Player could not be said to be acting in retaliation and/or self-defence.
- (d) The effect of the Player's actions on the injured player were that the injured player was removed from the field of play in the 28th minute and took no further part in the game and the blow was a head injury and the medical evidence is that it caused him to be concussed and he will miss the second round of the Heineken Cup.
- (e) There was no evidence that the incident itself affected the match (it already having been noted that the victim player however took no further part in the match).
- (f) As to vulnerability of the injured player, it is inevitable that the players in these types of situation are vulnerable.
- (g)(h) The Player was the only one who participated in the incident and it was completed but the Disciplinary Officer was not submitting that it was premeditated.
- (i) There were no other features of the Player's conduct that constituted the offending.

The Judicial Officer next invited the Disciplinary Officer to address him on whether there were any aggravating factors to be taken into account and in particular asked him to address him on DR 6.7.34.

The Disciplinary Officer referred the Judicial Officer to the IRB memorandum of the 4th August 2011 replacing the memorandum of the 21st January 2011 relating to dangerous tackles and in particular that:

“Law 10.4(e) in relation to dangerous tackles provides as follows:

A player must not tackle an opponent early, late or dangerously. A player must not tackle (or try to tackle) an opponent above the line of the shoulders even if the tackle starts below the line of the shoulders. A tackle around the opponent's neck or head is dangerous play.....”

The memorandum goes on to state:-

“At an IRB Medical Seminar...it concluded that most injuries in rugby and the elite game are now occurring as a result of high tackles. The participants generally recognise that tackles above the line of the shoulders have the potential to cause serious injury and noted that a trend had emerged whereby the players responsible to such tackles were not being adequately sanctioned....the purpose of this revised memorandum it to emphasise that as with tackles this type of dangerous play must be dealt with severely by referees and all those involved in the off-field disciplinary process.....”

The referees and Citing Commissioners should not make their decision based on what they consider was the intention of the offending player. Their decision should be based on an objective assessment (as per Law 10.4(e)).... of the overall circumstances of the tackle or clearout”

The Disciplinary Officer submitted that the Judicial Officer could take into account the directive when considering DR 6.7.34(c) which refers the Judicial Officer to regard a need for a deterrent to combat a pattern of offending as an aggravating factor.

The Disciplinary Officer referred the Judicial Officer to previous cases where the initial sanction as per the entry point had been increased because it was felt that the act of illegal and/or foul play came within the category of where there was a need to show a deterrent to combat a pattern of offending and he was referred in particular to:

- RFU –v- Dale Rasmussen 14 September 2011 where the Disciplinary Panel increased the sanction to be imposed for a dangerous tackle contrary to Law 10.4(e) of the Laws by one week stating in paragraph 5:
 “The Panel identified one aggravating feature namely, the need for a deterrent to combat a pattern of offending. The practice of tackling around the chest has become common place. The inherent danger of so doing is plain, obvious and frightening. At an IRB medical seminar in November 2010 it was noted that most injuries to elite players occurred as a result of high tackles and that tackles above the line of the shoulders had the potential to cause serious injury. The panel increased the tariff by one week.”
- IRB –v- Giga Gagoshvili 5th June 2011 where the Judicial Officer increased the sanction which was being imposed for a dangerous tackle contrary to Law 10.4(e) of the Laws by one week stating in paragraph 29 that:
 “.....there was a need for a deterrent to combat a pattern of offending and therefore added a further week to the entry point.”
- LV Cup –v- Chris Hala’Ufia 8th February 2011 where the disciplinary panel increased the sanction for dangerous tackle contrary to Law 10.4(e) of the Laws by two weeks stating in paragraph 25 that:
 “In the Panels views the Players record warranted an increase of two weeks from the entry point. In addition, the clear need to give the effect to the IRB’s intention to deter offending of this nature also required an uplift of a further two weeks from the entry point.”

The Player

On behalf of the player it was submitted that insofar as DR 6.7.32 was concerned, the Judicial Officer should consider:

- (a) there was no intention to cause a dangerous tackle.
- (b) as to recklessness, the intention was to carry out a legal tackle and the incident happened within a millisecond.
- (c) as to the gravity offence, there was no intention for the shoulder to come into contact above the line of the line of the victim player’s shoulder.
 It was accepted there was no provocation, retaliation nor was it a case of self-defence.
- (d) the Player was not in any way challenging the medical evidence.
- (e) there was no evidence that the incident itself affected the outcome of the match.
- (f) the victim player was no more vulnerable than any other player who was being tackled in such a situation.
- (g) the Player accepted that it was only he who was involved in the incident but it was not premeditated.

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- (h) the Player accepted the action of being completed but it was not intentionally and certainly not premeditated.
- (i) there were no other on-field factors which should influence the Judicial Officer's decision on sanction.

As to the aggravating features referred to in DR 6.7.34, the Judicial Officer was asked to take into account:

- (a) the Player had shown genuine remorse and that his contrition was borne out by his expressions of shame.
- (b) the Player had a clean record over a twelve year period as a professional.
- (c) as to the issue of a deterrent, the Judicial Officer was asked to consider that the incident took place in a millisecond and there can sometimes be a tiny margin between a tackle being legal and a tackle being deemed to be a foul.

As to the mitigating factors (DR 6.7.35) the Judicial Officer was once again reminded of the Player's record (see above) and to accept there was genuine remorse once he had realised the consequences of his actions and that:

- (a) the Player had acknowledged his culpability as soon as possible and confirmed this in his response to the standing directions.
- (b) he has had an unblemished record and is regarded as a good role model.
- (c) he is an experienced player and is mindful of the risk inherent in the game.
- (d) he had conducted himself appropriately and in a professional manner before and at the hearing.
- (e) he had concerns about the concussion caused to the injured player.

Decision as to Disposal

The Judicial Officer deliberated in private in respect of what, if any, sanction would be appropriate in the circumstances. The Judicial Officer concluded that the following had occurred:

- That the incident occurred in the 28th minute of the match in open play when the ball is passed by Edinburgh No. 10 to Edinburgh No. 6 David Denton, the injured player. He receives the ball and is running with it held in both hands chest-high when he is struck by the Player.
- It took one second from receiving the ball to being tackled.

- There was no change of angle, and at the very most, his body position drops 20cms at the point of impact.
- Immediately before impact, the Player's shoulder was level with the injured player's face.
- The Player's upper arm and point of shoulder made contact with the injured player's neck and chin and it was above the shoulder line.
- The Player's left arm was around the injured player's back, and the Player's right hand was on the upper part of the injured player's body grasping him and it was not a shoulder charge.
- There was no clash of heads.
- It was quite clear from the way in which the injured player crashed to the ground that it was a significant impact to the neck and chin area, which resulted in a recoil and the Player crashed to the ground.
- The medical evidence was that it was a significant injury and he was concussed as a result and will miss the next round of the Heineken Cup.
- There was no evidence that the incident affected the result of the game.
- The Player has played at the highest level for very many years and has distinguished himself being recognised as an international and he has an unblemished record.
- The Player and his representatives had responded in a timely manner to the standing directions.
- The Player accepted that the tackle warranted a red card and his plea was unequivocal.

In turning to the question of sanction, the Judicial Officer considered the terms of the Disciplinary Rules, including DR 6.7.29 through to DR 6.7.44. The Judicial Officer considered that this was an offence for which a suspension ought to be imposed.

The Judicial Officer noted that the offence of dangerously tackling an opponent contrary to Law 10.4(e) was listed within the IRB recommendation sanctions or offences within the playing enclosure (found at Appendix 3 of the Disciplinary Rules) as follows:

- | | |
|--------------------|-----------|
| • Low-end | 2 weeks. |
| • Mid-range | 6 weeks. |
| • Top-end | 10 weeks. |
| • Maximum sanction | 52 weeks |

To decide upon the appropriate entry point, the Judicial Officer assessed the seriousness of the Player's conduct by reference to the following on-field issues (following the criteria in DR 6.7.32):

- (a) It was not intentional. The Judicial Officer accepted that the Player did not intend a dangerous tackle above the shoulder line, but an objective assessment of the circumstances surrounding the tackle showed that;
- (b) It was reckless because irrespective of what the Player thought or intended, the Player knew or should have known that there was a risk of him committing a dangerous tackle and that it would be against the laws of the game.
- (c) With regard to the gravity of the Player's actions, it was noted that:
 - (c.1) The Player used his shoulder and upper arm; and
 - (c.2) There was no provocation and the Player accepted he was not acting in retaliation and/or self-defence.
- (d) The effect of the Player's actions on the injured player was that he was removed from the field of play and took no further part in the match and will miss the next round of the Heineken Cup.
- (e) There was no evidence that the Player's actions affected the match itself or its outcome.
- (f) As to vulnerability the Player made contact with the injured player's neck and chin and it is inevitable that players in these situations are vulnerable.
- (g)(h) The Player was the only one to participate in the incident and the act was fully completed.
- (i) There were no other features of the Player's conduct that constitutes the offending.

Insofar as the incident was concerned, the Judicial Officer determined that the appropriate entry point was mid-range i.e., six weeks. He had deliberated as to whether or not it should be top-end. Causing concussion is a significant effect. The Judicial Officer had concluded the Player's action was reckless. Had it been intentional it would have been a top-end entry point and could have been above the minimum entry point of the top-end. The incident happened in a millisecond. Although this is probably inevitable and all too common, all players should guard against that and be conscious of it and be mindful of the fact that such tackles could end up being dangerous and contrary to the laws of the game. The Judicial Officer carried out, what in his view was an objective assessment of the whole incident and having done so, took the view that it was a mid-range offence.

The Judicial Officer then considered the off-field aggravating factors (having regard to the 6.7.34 criteria) and also whether there were any off-field mitigating factors (following the 6.7.35 criteria).

With regard to the aggravating factors, the Judicial Officer noted:

- (a) With regard to an absence or lack of remorse and/or contrition on the part of the Player, this was not the case. The Player had expressed his remorse and the Judicial Officer had

an opportunity of seeing and hearing the Player in person and looking at his body language and ruled out any absence or lack of remorse and/or contrition etc.

- (b) As to the status as an offender against the laws of the game, the Player had a hitherto unblemished record.
- (c) As to the need for there to be a deterrent to combat a pattern of offending, however, the Judicial Officer was of the view that this incident came within that category. There had been an IRB directive which is referred to above. He had considered some previous decision where the entry point sanction had been increased so that a message could be sent out to all participants in the game that they had to guard against committing offences of this nature. Accordingly, the Judicial Officer decided to increase the sanction of the mid-range entry point of six weeks by one week.
- (d) There were no other aggravating factors which the Judicial Officer considered to be relevant or appropriate.

Having taken the aggravating factors into account, the Judicial Officer concluded it warranted an increase in the suspension by one week, therefore a seven week suspension.

With regard to the off-field mitigating factors, the Judicial Officer took into account:

- (a) The Player acknowledged his culpability in a timely manner responding to the standing directions by accepting that his actions warranted a red card.
- (b) The Player had an unblemished record and was of good character.
- (c) The Player is mature and experienced and had been a credit to the game.
- (d) The Player and his representatives adopted a very realistic approach to the proceedings not making any obtuse or unnecessary points nor seeking to put any blame on anyone else and in particular the injured player.
- (e) It was quite clear from the Player's body language, together with the way he answered questions and had acted at the hearing that he was genuinely concerned about the incident.

Pursuant to DR 6.7.37, the Judicial Officer was entitled to grant a reduction of up to 50% from the entry point of suspension and this would mean a three week reduction so that the suspension would be for four weeks.

In the circumstances, therefore, the Player would be suspended for 4 weeks from the date of the hearing being the 17th November 2011 up to the 16th December 2011.

Insofar as the costs were concerned, the Player had responded to the standing directions earlier than he would ordinarily be required to do so, and had responded in a clear and unequivocal manner so that the Disciplinary Officer was able to address the issues and had sought not to engage the services of a legal representative thereby reducing the costs of the proceedings. The Player was therefore ordered only to pay the costs of the Judicial Officer attending the hearing and as the Judicial Officer was dealing with another case on the same day, he will be ordered to pay 50% of the total costs.

Announce the Decision

The Judicial Officer announced that having reviewed the evidence and considered the submissions and reminding himself of the criteria under the Disciplinary Rules, and in particular, DR 6.7.32 and the Player having admitted the citing complaint in that he accepted he had committed a dangerous tackle, that it was reckless, and because of all of the factors referred to above, the Judicial Officer deemed that the appropriate entry point was mid-range for which there would ordinarily be a sanction of six weeks.

The Judicial Officer said that he had looked at the aggravating factors as per DR 6.7.34 and his view is that where there is an IRB directive dealing with a particular offence, then that should be regarded as a situation where there is a need for a deterrent to combat a pattern of offending, and there is an IRB directive in place for dangerous tackles and the suspension would therefore be increased by a further one week.

The Judicial Officer considered the criteria under DR 6.7.35 with regard to the mitigating factors and reduced the sanction from the entry point by three weeks which meant that the player would be suspended for four weeks to take effect from the 17th November 2011 and it would expire midnight on the 16th December 2011.

The Judicial Officer announced that a written judgment will follow by close of business Wednesday, the 23rd November 2011.

Costs

There would be an Order for costs which would be 50% of the costs of the Judicial Officer attending the hearing.

Appeal

The Player and his representatives were reminded of their right to appeal under DR 7.

Robert H P Williams
Judicial Officer

Date