

EUROPEAN RUGBY CUP

Decision of the Disciplinary Committee in the matter of

ERC

v

**Marius Tincu (USA Perpignan)
and
Paul James (Ospreys)**

**HELD IN THE IRB BOARD ROOM, ST STEVENS GREEN,
DUBLIN**

on

4th November 2008

Disciplinary Committee:

His Honour Judge Jeff Blackett (Chairman)
Mr Robert Horner
Dr Barry O'Driscoll

Representing ERC:

Roger O'Connor (ERC Disciplinary Officer)
Max Duthie (Counsel)

Representing Marius Tincu:

Pierre Becque (Counsel)

Representing Paul James

Seamus Clarke (Counsel)

In attendance as observers

Mike Cuddy and Roger Bligh both of Ospreys

The hearing was conducted in English with simultaneous translation into French.

Introduction and Preliminary Matters

1. This citing concerned an incident in the 30th minute of the match between Ospreys and USA Perpignan played at Swansea on 18 October 2008. The Committee was convened on 23 October but adjourned as Tincu was attending a medical appointment and the Committee considered that a comprehensive medical report was necessary before the hearing could proceed. The citing was brought under Disciplinary Rule 6.5 and the Disciplinary Committee appointed in accordance with Disciplinary Rule 6.1.3. Neither player objected to the composition of the Committee.

2. Mr Becque raised a preliminary point that there was no evidence on the face of the citing papers which showed that Ospreys had brought the incident to the attention of the citing commissioner within 24 hours of the end of the match as required by ERC Disciplinary Rule 6.4.4. By inference, therefore, the citing had not been properly brought. Mr O'Connor confirmed that the citing officer had telephone him on 19 October, and within 24 hours of the conclusion of the match, to inform him that he had received complaints from Ospreys about contact with the eyes and that he was investigating those complaints. Mr Duthie submitted that this was conclusive proof of the fact but in any event, the citing had been brought within the 50 hour period required by ERC Disciplinary Rule 6.4.6 and Tincu had suffered no prejudice.

3. The Committee ruled that the citing had been brought within the required period and proceeded to hear the case against both players.

Charges and Pleas

4. Tincu was cited for an act contrary to good sportsmanship in that he made contact with an opponent's eye. He denied the offence. James was cited for striking an opponent with his hand, arm or fist contrary to Law 10(4)(a). He admitted the offence.

The Citing Complaint

5. The Committee decided to hear the cases against both players together because they arose out of the same alleged incident: that is the allegation was that Tincu deliberately made contact with James's eye and James reacted by punching Tincu. The Committee decided to hear evidence about the incident so that it could determine the facts before proceeding to any sanction if required.

6. The Citing complaint against Tincu stated:

“My attention was drawn to an allegation of interference with the face/eyes of O1, Paul James, by Andrew Hore and Jonathan Humphreys of the Ospreys management. From my examination of the available TV evidence I could not immediately detect the action referred to by Mr James in his statement but his reaction is clear from the DVD evidence and as detailed in the citation against him. I believe that this allegation is of such a serious nature that it should be brought to the attention of the Disciplinary Officer by this citing. The evidence takes the form of (1) statement by Paul James, (2) statement of Dr Crane, (3) the

photographs of Paul James injuries, (4) the match DVD, (5) DVD of various angles.”

7. The Citing complaint against James stated:

“As the scrum breaks up O1 appears to hold P2 and then swings his right arm at P2 which makes contact with P2’s neck/chin/head and from which P2 falls to the ground backwards. P2 lies on the ground as he is treated by the physio and after a significant delay resumes play. O1 also seems to push P2 after the contact with the swinging arm.”

8. The DVD reflected the citing officer’s account against James. There is no footage which shows any detail of the reasons for the scrum to collapse and there were no close-up views of what occurred when the scrum collapsed. However, two slow motion angles show James and Tincu both getting up from the collapsed scrum facing each other. James swung his right fist and made contact with his wrist or forearm on Tincu as described in the citing. He pushed Tincu immediately afterwards. Tincu fell backwards to the ground and lay motionless for a short while. He was treated by a physiotherapist very quickly. The DVD also showed James walking away from the incident, and at one stage he points to his right eye. There is also a close up shot of James’s eye and there is no visible damage to the eye lid nor any blood on his face. The soundtrack of the referee speaking to the touch judge indicates that they saw a swinging arm but no contact.

9. The referee reported to the citing officer that during the match Ospreys players made him aware of allegations of contact with the eyes/gouging by Perpignan players on at least three occasions, including at the scrum incident after 30 minutes in the first half which gave rise to the citings of James and Tincu.

Evidence as to fact

10. James gave oral evidence. He stated that as the scrum collapsed and he went to ground he felt fingers pressing into his right eye. He closed his eye very tightly to prevent contact with the eye ball but the pressure was very painful. He said he grabbed hold of the hand which was making contact with his eyes and tried to pull it away. As he looked up he saw that he was holding Tincu’s hand. He recognised him immediately. As soon as he was on his feet he swung a punch at Tincu and made contact around his neck/jaw area with his wrist. He apologised for this action, which he said he regretted, but he said it was a spontaneous reaction to being “gouged”. He said that he had absolutely no doubt that the player who had made contact with his eye was Tincu. He said that he immediately complained. He was questioned at some length about how sure he was that it was Tincu who had made contact with his eye and he was unshaken. He was also asked to describe any distinguishing features of the hand which made contact with his eye. He said there were none and he was not aware of whether his assailant was wearing mittens or not.

11. He was not aware that there was any blood around his eye which he had wiped after the incident. He continued to play for the rest of the half and was replaced in the 56th minute. He said that he was examined at half time and received four stitches in the head for an unrelated injury and two stitches in a small laceration in the right

eyelid. He assumed that the injuries to his eyelid had been caused by the “gouging” incident because he could not recollect any other occasion where he felt a blow to his eye.

12. Tincu also gave oral evidence. He said that the scrum collapsed, he thought, because the Ospreys’ second row slipped and pulled it down. He went to ground between his two props with his arms behind them. He denied that he had made contact either deliberately or accidentally with James’s eye. He said that from watching the DVD footage it was clear that such an action would not have been possible. As hooker he had both his arms over his props and the scrum first collapsed on the right hand side so his left arm was still trapped by the other prop opposite James. He said that when he got up to his feet James hit him and he fell back unconscious. He could not remember very much after the incident but his recollection of before the punch was very clear. He insisted that nothing untoward happened and James did not hold onto his hand. He also confirmed what was apparent from the DVD footage that he was wearing mittens during the match.

13. Tincu said that he did not play in the same manner after the incident because he had been concussed. He was replaced at the same time as James in the second half. He did not feel any ill effects, but after the game he felt nauseous and had head aches. He did not train during the week apart from undertaking some static drills and on the following Friday he trained, but without contact, in preparation for the match the next day in which he played. On 23 October he was examined by Doctor Carlo Vela, a specialist in sports’ medicine and he underwent a CT scan. Doctor Vela reported:

“He (Tincu) underwent an examination by Computerised Tomography of skull which does not show the brain abnormality, nor of haemorrhagic complications. He was seen in consultation by the Doctor Denis Sablot, Medical Head of the Service of Neurosciences which noticed in the interrogation that “in days which followed the traumatism Mr Tincu suffered from headaches, from nausea and from the minor sleep disorders.” But also the complete disappearance of symptoms after 72 hours of the traumatism, authorise him to take back the sport’s activity of rugby. No prescription.”

14. In a second note, dated 24 October, Doctor Vela noted:

“The neurological test is absolutely normal, there is no sign of any intracranial hypertension or any meningeal sign, or any pyramidal irritation. He is now training again. The CT scan carried out yesterday does not show any haematoma or particular bruise, and gives no reason to suspect a secondary vein thrombosis.”

15. Ian Evans (Ospreys No 5) gave oral evidence on a telephone conferencing link. He said that after the scrum collapsed he was lying on his stomach about an arm’s length from James. As he looked up he could see Tincu placing his finger into James’s right eye, although he could not remember whether Tincu was wearing mittens or not. He said the fingers were hooked and moving in a gouging motion. He said he was “100% sure that it was Tincu” whom he recognised immediately. He said that he heard James swear. Evans looked at the referee to see if he had seen the

incident and then a scuffle started. He said that he did not see James punch Tincu. After they had all got up Evans said that he heard James complain about being gouged. He could see blood coming from his eye – he said it was not gushing out but it was dripping noticeably from a cut which he thought was under the eyelid. He said that he did not know why the scrum collapsed in the first place.

16. The Committee read a statement dated 18 October (the date of the match) from Doctor Tony Crane who examined James during the half time interval. He said:

“During the half time interval I attended Paul James to assess some injuries sustained during the first half. He required 4 stitches to a laceration on the right side of his temporal-occipital region to his scalp. He also required 2 stitches to a smaller laceration to the lateral aspect of his right eye. During this assessment he complained of a painful burning sensation in his right eye following an alleged gouging incident during play. He described being able to partly squeeze his eye tight to avoid a full gouging penetrative injury during the incident. Examination findings revealed a hyperaemic eye with some dilated superficial blood vessels and profuse watering. There was no evidence of any significant injury to the cornea and the remaining examination was unremarkable. Following re-assessment after the game, there were no new findings, the watering had settled down and the eye had a mild hyperaemia only. Although I cannot comment on the exact cause of this injury, the clinical findings would certainly fit in with a gouging type injury.”

Submissions as to finding

17. Mr Duthie submitted that although there was no direct evidence on the DVD of contact with an opponent’s eye, James’s reaction was very clear. He said that this supports the direct evidence of James and Evans which is corroborated by the medical report of Doctor Crane and by the referee’s evidence that Ospreys had complained to him at the time.

18. Mr Becque accepted that James had received an injury to the eye, but there was insufficient evidence for the Committee to conclude that Tincu had caused that injury. He said that the referee was only two or three metres from the incident but did not see anything. He submitted that it was simply not possible for Tincu to have caused the injury: this is apparent from the DVD footage, he said, where the scrum collapses first on Osprey’s left side. For Tincu to have put his fingers into James’s eye he would have had to remove his arm from behind his prop or reach round him – both of which were not physically possible. He said that, importantly, neither of the Osprey’s players had identified that the assailant was wearing mittens, and Evans spoke of blood on James’s face when the DVD footage shows clearly that there was none. He did not receive any medical attention on the pitch at the time, and there was little further reaction after the punch, so one could assume that he did not take the matter very seriously. However, Mr Becque suggested, James has subsequently made up the story to lessen the seriousness of his offence of striking Tincu and to reduce any sanction he might receive for it.

Finding

19. ERC Disciplinary Rule 6.7.11 specifies that “in a citing case, the burden shall be on the Disciplinary Officer to prove, on the balance of probabilities, that the Person cited committed the acts of Foul Play specified in the complaint.” The balance of probabilities is a sliding scale: the more serious the allegation, the less likely it is that the event occurred and hence the stronger the evidence needed to prove that it did occur. Allegations of contact with the eyes are serious and carry significant sanctions if proved. In such cases, therefore, disciplinary committees need stronger evidence than just sufficient to show that the events were more likely than not to have occurred.

20. Thus, in assessing the evidence, the Committee reminded itself that it must apply a higher standard of proof than a simple balance of probabilities and would require strong evidence of offending before finding against Tincu.

21. The Committee first noted the undisputed facts:

- James sustained an injury in his right eye during the first half of the match and that injury was consistent with contact by an opponent’s finger;
- The DVD footage of James immediately after the alleged incident shows that there was no blood around his eye or face; and
- Ospreys complained to the referee that they were being gouged at the time of this alleged incident.

22. In assessing the oral testimony the Committee concluded that James was an honest witness and we accept that contact was made with his eye at the time he said it was. He genuinely believed that Tincu had made contact with his eye. He took hold of his assailant’s hand, looked up and identified Tincu. We did not consider it to be particularly relevant that he could not remember that Tincu was wearing mittens; the incident happened quickly and James was concentrating solely on identifying who had attacked him. We gave little weight to the evidence of Evans who may well have been confused and has provided a retrospective account having discussed what may have occurred with others. His evidence relating to blood on James’s face was clearly mistaken. Tincu was concussed and, although he said he could remember all of what occurred before the punch but little or nothing after, we believe that he may not have remembered everything that led up to the blow to his head. Weighing all of this in the balance, we gave significant weight to James’s evidence as to the identity of his assailant and that provided the strong evidence required to prove that Tincu was guilty of making contact with his eye.

23. Our finding of fact is, therefore:

- The scrum collapsed;
- Tincu’s arms were released;
- Tincu pushed his fingers into James’s right eye for a short period;
- James immediately stood up and struck Tincu;
- The fingers caused James to suffer a hyperaemic eye with some dilated superficial blood vessels and profuse watering, but not the split to the eyelid which must have been caused by some other event unrelated to these events.

Submissions on behalf of the players as to sanction

24. Mr Becque said that Tincu, who is 30 years old, had been playing professional rugby in France since 2002 and has over 40 international caps for Romania. Apart from a suspension for 10 days following two Yellow Cards when playing for Pau, he has never been sanctioned either as a result of a citing or Red Card. He does not have a reputation as a dirty player. Mr Becque submitted that this was a case where there was minor injury which should be considered the least serious type of offending of its type and attract a Low End entry point sanction.

25. Mr Clarke said that James, who is 26 years old, has played professional rugby since he was 17 and, in over 105 matches for Ospreys has never received a Red Card or been cited. He was clearly provoked on this occasion but immediately accepted responsibility and expressed sincere regret. He was suspended for one week by Ospreys on 21 October and was not selected for an EDF match against Worcester on 26 October. Mr Clarke submitted that, given the provocation, the lack of permanent injury, the absence of any aggravating features and presence of significant mitigation the appropriate entry point was Low End and maximum discount from that point would be appropriate.

Sanction - Tincu

26. The Committee reminded itself of the statement of principle in the RFU case of Hartley (24 April 2007):

“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.”

27. Against that background the Committee undertook an assessment of the seriousness of the offending. It concluded that:

- a. The offending was deliberate as described in our finding of fact;
- b. It was serious – insidious offences which involve deliberate contact with an opponent’s eyes will always be treated as grave;
- c. There was no provocation;

- d. The medical effect on the victim was minor – the injury sustained caused some discomfort as a result of swelling and watering which eased during the second half of the match and left no lasting damage. The non medical effect on the victim was that he reacted immediately and aggressively, thereby leading him to commit an act of foul play which merits a suspension from playing;
- e. The Game was affected to a certain extent in that there was a scuffle and Ospreys complained to the referee about gouging. Those complaints continued after the match was over.
- f. The victim player was vulnerable; and
- g. Although the offending was opportunistic rather than premeditated, it was completed.

28. Taking all of these factors into consideration the Committee decided that this was the most serious offending of this type and concluded that it was at the Top End of the scale of seriousness. The Top End entry range is a suspension from 24 weeks to three years and the Committee considered where in that range the entry point should be. It decided that since the contact was very short and the injury flowing from deliberate contact with a finger in an eye as minor as it could be, there was no reason to elevate the entry point from the very bottom of the range. The appropriate entry point is, therefore, 24 weeks.

29. The only off-field aggravating feature is the need to deter a pattern of offending. The Committee are concerned that there appears to be an increasing incidence of players attempting to interfere with the face and eyes of opponents and sanctions for this sort of offence should contain an element of deterrence. In this case the entry point is sufficiently high in itself to be a deterrent and there is no need to increase from that point.

30. As far as mitigation is concerned, Tincu does not get the benefit of a plea of guilty since he denied the offence. However he does have a very good record over a long period and his conduct both before and at the hearing were exemplary. Those are factors which have been taken into account to his credit when deciding the appropriate sanction.

31. In those circumstances the Committee decided that the Player merited a reduction from the entry point of 25% (six weeks). He is, therefore, suspended for eighteen weeks from 4 November 2008 to 9 March 2009. He may play again on 10 March 2009.

Sanction - James

32. The Committee also undertook an assessment of the seriousness of James's offending.

- a. It was a deliberate punch, delivered with some force, with contact being between his wrist or forearm on the bottom of Tincu's face. We had no doubt that he intended to punch him on the jaw. Had he connected with his fist he may have caused a fracture;

- b. There was severe provocation which caused James to react in the way he did;
- c. The strike caused Tincu to suffer minor concussion which affected the way he played the game and subsequently induced nausea and headaches. There was no lasting damage and Tincu was able to play the following week.
- d. There was a minor effect on the game but the scuffle was broken up very quickly;
- e. This was an act of retaliation – it was reactive rather than premeditated – and it was completed.

33. The Committee decided that had it not been for the severe provocation this would have been assessed as being in the Mid Range on the scale of seriousness. However in the circumstances of this case it was properly classified as being at the Low End on the scale. There were no aggravating features and all of the mitigating factors listed in the Regulations were present thus enabling the Committee to reduce the sanction from the entry point of 2 weeks by 50%.

34. In the circumstances, therefore, James is suspended for one week from 21 – 28 October 2008, the dates during which he had been suspended by his Club, whose prompt action in imposing the Club ban upon receipt of the citing the Committee applauds. He is, therefore, free to play with immediate effect.

Costs

35. ERC are to submit written submissions as to costs by 11 November. Responses by Tincu and James are to be submitted by 18 November and the Committee will give a ruling as to costs thereafter.

Right of Appeal

36. Both parties are reminded of their right to appeal against the decision of this Committee as to sanction and/or costs.

Post Script

37. Before the Committee retired to consider sanction Mr Duthie drew our attention to ERC Disciplinary Rule 6.7.44 which states: “In determining the length of any fixed period of suspension, the Disciplinary Committee shall take into consideration all playing consequences of such a suspension and exclude any close season periods of inactivity for the Player, so as to ensure that the suspension is effective.” Mr Duthie submitted that the Committee could consider whether clubs had any games during particular windows in the season (for example while international matches were being played) and increase a sanction to ensure a player was suspended from a meaningful game. The Committee were not persuaded by this argument. We consider that this Rule is directed specifically at the close season and any attempt to give it wider application would be fraught with practical difficulties requiring detailed examination of potential playing plans together with a facility for a player to seek changes to the sanction where circumstances change.

Jeff Blackett
Chairman

Robert Horner
Member

Barry O'Driscoll
Member

Date: 5 November 2008