

RUGBY FOOTBALL UNION

DISCIPLINARY HEARING

Judgment

At: Holiday Inn, Brighouse
On: Tuesday, 22nd April 2008
Player: **Lee Thomas** **Club:** Sale Sharks
Match: Sale Sharks v Bath
Date of Match: 28th March 2008
Venue: Edgeley Park, Stockport
Panel: Antony Davies (Chairman), Dr. Barry O’Driscoll and Clif Barker
Secretary to the Panel Liam McTiernan, RFU Disciplinary Department
Attending: Lee Thomas (“the Player”)
Michael Hayton (Counsel for the Player)
James Jennings (Chief Executive, Sale Sharks)
Giving evidence by telephone conference: Peter Colston (Citing Officer)
Shaun Berne (Bath RFC)
Mike Tremlett (Chief Rugby Writer, Bath Chronicle)

Background and Preliminary Matters

1. The Player and his representatives had no objection to the composition of the Panel.
2. This was the third hearing arising out of the incident involving Lee Thomas/Shawn Berne in the Sale Sharks v Bath game on 28th March 2008. The first hearing on 8th April 2008 had proceeded on the basis of submissions from Mr. Hayton that as there was no independent video the citing procedures were fatally flawed and the proceedings were a nullity. Upon being informed that there was in fact an independent video, Mr. Hayton had requested the matter be adjourned for consideration as it appeared his submissions had been based on a false premise and time was needed to consider both the video and medical evidence.

3. On 16th April 2008, amended submissions were made regarding the construction of the Premiership Citing Regulations in Appendix 7 to the Disciplinary Regulations. The Panel had ruled against the Player's submissions and that decision had been fully explained in a written judgment dated 17th April 2008. The Panel felt itself unable to override the citing time limits and the matter had been referred to H.H.J. Jeff Blackett, RFU Disciplinary Officer. Before referring the matter, the Player was advised by the Chairman that he should consider whether or not he wished to proceed with the technical points on the Citing Regulations and that his own interests as opposed to those of his employer may be better protected by waiving any claim to technical irregularity and allowing us to deal with the merits of the case. Mr. Hayton confirmed that the Player nonetheless intended to take all technical points available to him and was entitled to do so without criticism.

4. By written decision of 20th April 2008, the RFU Disciplinary Officer directed the substantive citing complaint to be heard by the Disciplinary Panel and that the mechanism which now places the case back before us is to be as a breach of RFU Rule 5.12.

5. James Jennings, on behalf of Sale Sharks, wrote to the Disciplinary Department on 21st April 2008 asking for this hearing to be adjourned to allow Sale Sharks to appeal the decision of the Disciplinary Officer. That e-mail evinced an intention so to do and confirmed that a written appeal had been submitted already in relation to the Disciplinary Panel's decision of 16th April.

6. We consider that request for a postponement now. We reject the application for any further postponement. We intend to proceed to take a plea from the Player as to the 5.12 charge and go on to consider the case on its merits. Thus far, we have spent some five hours listening to and considering Mr. Hayton's submissions with regard to Premiership Citing Regulation construction and we do not find it necessary or appropriate at this stage to do so further. In coming to our decision, we noted the following :

- (i) If we proceed to hear the case on its merits and find that there was in fact no foul play and therefore no sanction applies, there will be no necessity for Sale Sharks to indulge in any further appeal procedures at all. This will have a significant saving of time and expense.
- (ii) On 8th April 2008, the Chairman specifically drew Mr. Hayton's attention to the distinct possibility that even if he were successful on the Player's behalf in arguing on a technical construction of the Premiership Citing Regulations, and the citing were to be declared a nullity, then the most likely outcome would be that the matter would be dealt with on direction of the Disciplinary Officer pursuant to the provisions of RFU Regulation 5.12. We asked Mr. Hayton to address us on this point. He told us then that he did not intend to do so and that we were not entitled to consider this as a possibility. We should restrict ourselves simply to the merits of his argument on construction of the Premiership Regulations. We are now two weeks and five hours of hearing time later in exactly the position we anticipated on 8th April.
- (iii) Sale Sharks have already appealed in writing against our preliminary decision on point 1 on 16th April 2008. They have indicated an intention in writing to appeal against the finding and direction of the Disciplinary Officer. Whilst this is undoubtedly their entitlement, we are nonetheless disappointed and frustrated with the way Sale Sharks have chosen to conduct the Player's case, seeking postponement and prevarication rather than allowing us to adjudicate on the substantive merits of the case. Mr Hayton admitted this is out of character for this Club.

Charge and Plea

7. We referred the Player to the charge sheet, which stated the offence to be one of conduct prejudicial to the interests of the Union or the Game contrary to Rule 5.12 of the Rules of the Rugby Football Union 2007/2008, the particulars being that on 28th March 2008, Lee Thomas, Sale Sharks RFC, struck an opponent during (20th minute of the first half) the match Sale Sharks v Bath.

8. The Player formally denied the charge.

9. The Player was advised that the Panel would hear the evidence in support of the charge and that he would then have the opportunity of putting his side of the case.

Evidence of Peter Colston

10. The nominated Citing Officer, Peter Colston, gave evidence by telephone conference. He had received the independent DVD on the Monday following the game which had taken place the previous Friday evening. He had looked at the match result card and seen that the Player, Berne, had left the field on about 20 minutes with a blood injury, but he had not seen anything on the DVD which might indicate how he came by that injury. On Wednesday, 2nd April, he was informed that an allegation was coming from Bath that Berne's injury had been sustained through foul play. On Thursday, 3rd April, he received a signed statement from Shaun Berne explaining how he alleged to have come by the injury. He concluded that that constituted sufficient evidence to initiate a citing complaint. There had been injury, which he was informed was to be substantiated by medical evidence. The incident had been "off the ball". He had looked again at the DVD and seen Berne indicate to the Match Official an action which was consistent with a strike with an elbow. The sustaining by the player of an injury was confirmed by the blood injury reference in the match report. Mr. Colston did not see the injury.

11. When questioned by Mr. Hayton, Mr. Colston confirmed that his citing had been based upon the letter of complaint and not upon any foul play clearly depicted in the DVD.

12. We then went on to consider the DVD of the incident, first of all in actual time, then in slow motion, followed by frame by frame advance. Whilst not of the best or clearest quality, the DVD appeared to us to show the following :

On about 20 minutes from a ruck which follows a scrum, the ball is passed back to Sale 10 who is standing on or about his 22. To his left in the centre of the field, also on the 22, is Lee Thomas, and, opposite him about 20 metres away, Shaun Berne. If a line were drawn from posts to posts, Thomas and Berne

would be roughly on that line. The ball is kicked by Sale 10. It is a phenomenal kick given the conditions. It starts on the Sale 22 and lands just outside the Bath 22. It is in the air for some considerable time.

Before the camera pans from left to right to follow the line of the ball, the Player can be seen setting off to follow the kick. He runs towards Berne. He runs straight at him and there is a collision as he goes past on Berne's right. Even on frame advance, the point of collision is not distinct because the camera has begun to pan. The Player continues running, but Berne stands at the point of collision. Immediately prior to the collision, Berne can be seen to move slightly to his right and into the path of the Player. A Bath defender attempts to catch the ball. It is knocked backwards/sideways to his right, where it is picked up on the 22 by another defender and run back towards the centre circle (Edgeley Park is the home of Stockport County FC and the very wet conditions showed up the centre circle clearly).

The camera, after about 5 seconds, pans back to the left as Bath counter attack towards the centre circle. Berne comes back into picture 3 or 4 metres away from where he was last seen standing following the collision. He is now in the centre circle. He is standing still, with his left arm raised in the air. Play comes up to the centre circle and he seems oblivious to that. The ball is knocked on by Bath and the Referee blows for the infringement. He is taking no part in the game at this point and makes no effort to move to an on side position. When play stops, Berne walks 8 or 9 metres towards the Referee and is seen talking to the Referee. The Referee signals for blood injury. Berne starts to walk towards the touchline parallel to the halfway line and a metre or so from it. He is met halfway by a Match Official who comes onto the field. He is then seen to demonstrate the action of elbowing with a raised elbow. He then walks off the field and is replaced.

Evidence of Shaun Berne

13. Shaun Berne's written statement states as follows :

“After approximately 20 minutes of Bath's rugby game against Sale on 28th

March 2008, Sale's fly half, Charlie Hodgson, kicked a high ball. As this happened, Sale's inside centre, Lee Thomas, began to chase. I stood my ground, forcing Lee Thomas to have to run around me. As he ran past me to my right, I received an elbow to my mouth. This action had enough force to knock out my two front teeth, despite the fact that I was wearing a dental gumshield. In my honest opinion, this was an unnecessary and deliberate action. This elbow incident occurred some 30 metres away from where the ball landed.

Having played for many years, I fully appreciate that rugby is a contact sport, however an off the ball assault such as this is not something I consider to be part of the game of rugby and this is why I wish to draw your attention to this incident.”

14. The statement is signed and dated 3rd April 2008.

15. Shaun Berne gave evidence by telephone conference and confirmed the contents of his written statement.

16. Mr. Berne explained how and when he came to make the statement. After the game, his team left Edgeley Park fairly quickly and his coaching staff indicated they would look to see whether anything was shown on the video. Saturday and Sunday were rest days and when he returned to the Club on Monday he was informed that nothing of significance had been found, but was advised as to the citing procedures if he wished to take the matter further. He has played rugby since age 12 and has been a professional for the last 10 years. He is now 29. He has never been involved in a citing case before. He has had fractures and been knocked out and injured in play, without complaint. He appreciates it is a physical contact sport. However, this incident was different because it took place nowhere near the ball. It was, to his mind, clearly deliberate. Hodgson had put up a high kick. The Player had run towards him. He is coached to stand his ground so that a chasing player does not have a clear run and has to run around him. It gives his defending catcher a fraction more time before the chasing player reaches him. The Player deliberately raised his elbow into his mouth. If it wasn't his elbow, it must have been his fist, because it didn't feel like any other part of the body. He knew the

difference between impact from a shoulder, which was different to an elbow or fist. He was about 95% sure it was an elbow.

17. He was not happy about bringing the complaint, but said that he was the one who had been wronged and now had no front teeth. When, after the collision, he had pulled his gumshield out, one of his front teeth dropped into his hand. The other was hanging out of his mouth by a thread of skin and root. He described himself as being in a state of shock. He knew he was in trouble with blood pouring from his mouth. He believed he had remained stationary with his arm in the air, waiting to be “rescued at sea”. Play broke down and he talked to the Referee. He recalled telling the Referee that he wanted to cite the Sale 12 for an elbow. He was met by Bath Rugby medical staff. He said he was still in shock and did not remember exactly what he had said to the Doctor, but he did demonstrate the action of elbowing to the Touch Judge.

18. When asked whether the collision could have been accidental, Mr. Berne was certain that it could not have been, given the relatively even heights of the two players (Thomas was only slightly taller). In his specific words “You don’t cop that type of impact if it’s not deliberate”. Players simply do not run with their elbows raised above shoulder level unless they intend to use the elbow.

19. When asked about the extent of his injury, Mr. Berne indicated that the exposed root of one of the teeth had to be taken out. An X-ray showed a fracture of the upper jaw (maxilla). It had not been possible to save and replace either of the original two natural teeth, which were now lost permanently. He had been without his teeth from the incident to today, when he had a temporary plate and dentures fitted.

20. When questioned by the Panel, he stated that he remembered the contact and remembered the Player sprinting towards him aggressively. He stood his ground on an inside line, requiring the Player to sidestep to the left or run around him to the right. He remembered his elbow coming up towards his face. He was facing the Sale try line at the time and the Player ran past him to his right.

21. He had spoken to the Referee and remembered saying that he wanted to cite Sale

12 for the use of an elbow. He also recalled seeing the Player and calling him a “f...king dog” out loud as he considered it to be such a low act.

22. He clarified that he got his own customised “signature” gumshield from a dentist in Australia. The gumshield is made around a customised impression of his mouth/teeth. He did not recall whether it was 2mm or 4mm thick.

23. Under questioning from Mr. Hayton, he confirmed that he had not seen any video of the incident. He had been told that the Bath video did not show anything. When asked about whether the contact could have been accidental, he would not accept that it was anything other than deliberate. He had been uncomfortable with bringing the citing and if there had been any question of accident he would not have brought it. His two front teeth had been knocked out with some significant force and the Player had made no effort after the game to apologise or say sorry, or even say that it was accidental. He thought that if the Player had caused the injury in an accident he would have said so and apologised.

24. He confirmed that there had been no previous problems between the two of them in previous games and until this incident no problems on the field. He did not recall Lee Thomas making comments about the inclement weather, but he did recall the Player had dropped two balls prior to the incident and felt he may have been frustrated.

25. He did not remember looking at where the ball was alighting. He just remembered the Player running fast towards him in pursuit. He did not remember specifically taking a half step towards the Player’s line of running, but his intention was to stop him running to his left down the 15 metre channel in which Hodgson stood. He was doing his best to make life difficult for the Player so may well have taken a half step towards him to ensure he had to run round him to his right. He conceded when pressed that he may have made a movement into the Player’s line of running.

26. Mr. Berne could not say where the Player was looking when the collision occurred because the impact happened quickly and he was shocked by the strike. He was not unconscious or dazed, just shocked. He recalled being aware that Higgins, his

team mate, had knocked on, which had caused the Referee to stop play. He was in absolutely no doubt as to exactly who had struck him. He told the Referee who it was and demonstrated an elbowing movement to the Touch Judge. He also spoke to Kingsley Jones, the Sale Coach, and informed him that he had been elbowed by a Sale Sharks player. Mr. Jones had sympathised with him, saying that he had suffered the loss of his own teeth in a similar incident.

27. Mr. Hayton pressed Mr. Berne as to how sure he was that it was an elbow and not a fist, given that earlier he had said he was 95% sure. Having had a little more time to think, Mr. Berne was certain that it was not a punch. He had said elbow to the Referee, demonstrated elbow to the Touch Judge and told the Medical Officer and Kingsley Jones it was an elbow. His reference to fist had been an initial reaction to try and provide some other explanation for the seriousness of the injury, i.e. it was something hard that could only have been elbow or fist. When pressed again, he said he was certain that it was not an accident. He had broken his nose before in a badly executed tackle. He had made no complaint about this. It was part of the game. What was different about this incident was that it was nowhere near the ball. If the Player alleged it was an accident, that was not for him to decide, he was simply looking forward to getting some teeth back in his mouth.

28. At this point, the Chairman addressed the Player and asked him whether he wished to take advantage of the opportunity of having Mr. Berne available by conference call to say anything to him. The Player stated that he did not wish to say anything to Mr. Berne. However, before Mr. Berne departed he asked to speak to the Player. He said that what had happened had happened and that he held no personal grudge against the Player. He said that he had spoken with his team mates at Bath. Sale were due to travel to Bath this coming Sunday to play and he wished to reassure the Player that his Bath team mates would themselves hold no grudge and he should feel confident that the game would be played in a good spirit. He also wished to thank the Sale Dentist for his help.

Evidence of Mike Tremlett

29. Mr. Tremlett gave evidence by telephone conference. He had also provided a written report as follows :

“At the match in question, I was in attendance in my capacity as the Bath Chronicle’s Chief Rugby Writer and as a summariser on BBC Radio Bristol’s live commentary team. Approximately 20 minutes into the first half of the match, Sale fly half, Charlie Hodgson, put up a high kick into the Bath half, which was chased by his fellow backs. Shaun Berne was in the Bath defensive line and watching the flight of the ball with Thomas bearing down on him. Berne made what appeared to be an instinctive half step towards Thomas in an attempt to put him off as he chased through and Thomas took him out off the ball in an illegal challenge, raising his elbow as he closed and clearly aiming to make contact with Berne’s head. In my opinion, Thomas’s act was quite deliberate and showed a total disregard for Berne’s safety.”

30. We asked Mr. Tremlett about his relationship with the Bath Club. He attends all home and away games in his capacity as Chief Rugby Writer of the Bath Chronicle. His relationship is purely professional. He is not a member of the Club. He is a professional journalist and makes a definite effort to be objective. He has no vested interest in Bath’s success or otherwise. He would not regard himself as in any way partial to Bath.

31. He was next asked about his view of the incident. He was in the back of the main stand in the Press area, roughly on the halfway line. He would be about 25 metres from the near touchline and had a clear view of the entire pitch. He saw Hodgson kick over the Bath defence and the Player and Berne in an off the ball area. He had a wide enough angle to take in everything. He did not watch the ball. It went out of view. Edgeley Park is a football ground and the stand a football stand. He was in the row only one down from the very rear of the stand and when the ball is kicked high it goes out of view. When he commentates or watches at Edgeley Park and the ball is kicked, he knows not to watch it but the players themselves in terms of how they chase or defend. He kept his eye on the two three quarter lines and he saw clearly the collision. As the

Player and Berne closed, he saw Berne take a half step, possibly instinctive, into the running line of the Player, who raised his elbow and caught Berne in the face under the nose. He saw this in the centre of his vision. His view was not interrupted and he said he saw the Player lead with his elbow quite clearly. He said the action was one of running with the elbow raised and that the elbow was not swung into the face of Berne. It was however raised and certain to make contact with Berne's face.

32. Mr. Tremlett was certain that this could not have been an accidental collision with the elbow because he had not seen any player sprinting after a kick run with his elbow leading and above his shoulder line. In his experience, players in such situations always led with their arms in a normal running or sprinting motion.

33. Mr. Tremlett described seeing Mr. Berne put his hands to his face. From his actions, he looked visibly dazed and he thought Mr. Berne's knees had made contact with the ground. He stayed down some 35 to 40 seconds and received treatment at the next stoppage. He had seen Mr. Berne taken off and replaced.

34. To his mind, the Player could have avoided the collision and had no need to use his elbow. He had drawn the attention of his co-commentator, Andy Champion, off microphone immediately, saying that he had seen Berne taken off the ball and the Ref had missed it.

35. Mr. Tremlett had appended to his statement notes he made on the performance of each player during the match and a note in chronological order of significant incidents in the game, which went on to form the basis of his article for the paper. The relevant parts of those notes are reproduced below :

“Shaun Berne: undeserving victim of an horrendously late off the ball challenge from Lee Thomas, who led with his elbow midway through the first half. Lost three teeth and took no further part in the match – 5.”

“Berne lost three teeth in an unsavoury first half incident which saw Sale centre Lee Thomas take him out off the ball, leading with an elbow in a malicious late challenge.”

“21 mins.

6 – 3: Bath suffer a double injury blow when Berne, victim of an unpunished off the ball elbow in the face from Lee Thomas leaves the match minus three teeth and Duncan Bell limps off with a calf injury.”

36. Mr. Tremlett confirmed that reference to the incident was made in his handwritten notes contemporaneously. Mr. Hayton asked Mr. Tremlett to clarify exactly when he had made the various reports. His statement to the RFU had been made on the Monday following the Friday night match. His player profile had been done the day after the match. His Bath Chronicle article had been done over the weekend. He has until the following Thursday (publication day) to get everything completed. His minute by minute, play by play panel is written over the weekend, straight from his handwritten notes taken at the game. In general, he does not tend to add anything to the notes taken but simply types them up.

37. He had been contacted by the Director of Operations at Bath Rugby and asked if he had seen the incident whilst commentating on the game. He had confirmed that he had indeed seen it and would be referring to it in his article. He was requested to write to the Disciplinary Department at Twickenham confirming in his own words what he had seen of the incident.

38. When asked how he could have made reference to leaving the match “minus three teeth” when he had not seen the injury, he confirmed that information had been based on what he had been told by Steve Meehan in the after match conference. It had however been added to his typewritten notes over the weekend. Mr. Hayton then referred to Mr. Tremlett to an e-mail in 2005 concerning Bath Rugby Supporters Club in which he appeared to be named as a member. Mr. Tremlett confirmed that he had in the past been a member of Bath Rugby Supporters Club but not for the last couple of years. He was not enamoured of the suggestion that his journalistic impartiality was being called into question by Mr. Hayton. He said he always attempted to be impartial and cited his naming as man of the match Sale Sharks Charlie Hodgson as ample evidence of that fact.

39. Mr. Hayton then examined in considerable detail with Mr. Tremlett his positioning and view. He accepted that Mr. Berne's head was between him and the point of contact, but had no doubt that he had seen the elbow going into Mr. Berne's face. He described himself as a seasoned rugby watcher. He did not see the incident as accidental, but as a deliberate attempt to take Mr. Berne out. He had seen it clearly, even though it was over in a split second. He had been looking directly at it as he started to move his eyes to the right to the area where he estimated the ball would be alighting.

Evidence of the Player

40. The Player said that he is 23 and has been a professional player for five seasons. This is his second season at Sale, having previously played for Cardiff Blues. He has never previously received a red card, nor has he ever been cited. He has one previous yellow card for a technical offence in 2003. On the evening in question, he was playing 12 and has played against Mr. Berne three or four times in the past, with no problems, nor indeed prior to this incident on the evening had there been a problem in the game.

41. The first he had become aware of the incident was when he saw Bath's Mr. Barkley on the field, presumably in replacement for Mr. Berne, on about 30 minutes. He did not recall any incident at the time. The first he knew about it was after the match when Mr. Borthwick, the Bath Captain, had asked if he had seen the injury to Mr. Berne, who had lost two teeth. He had asked whether he should apologise but was told by Mr. Borthwick that Mr. Berne was too upset and he should leave it. He did not remember Mr. Berne calling him an "f...king dog" nor anything said to him at the time by Mr. Berne.

42. The first he had heard about the citing was the Thursday evening following the game, and the first time he had seen the DVD was at the first disciplinary hearing on 8th April 2008. He explained by reference to the DVD that the ball had been kicked and he had been chasing through after it. He was aware only of a slight bit of contact and not aware of with whom that contact had been made. He was the first player of the chasing Sale attack and got to within 15 to 20 metres of the point where the ball alighted (just outside the Bath 22). He described how, when the ball is kicked by Hodgson in these

circumstances, it is his job to either retrieve it or tackle the full-back in possession to gain field advantage. He described how his attention would be on the ball and any collision accidental. He denied leading with his elbow or fist. He is 6ft. 2ins. tall and 15½ stone and was sprinting at the point of contact. He referred to the DVD which he maintained showed Mr. Berne change position by taking a half step towards him. He appreciated that substantial injury had been caused, but there wasn't substantial contact and what contact there was did not slow him down. He said he was certain that any contact or injury was purely accidental and unintentional.

43. When questioned by the Panel, the Player accepted there was contact, but that all he was aware of was a peripheral shadow. He had intended to apologise when he became aware of the extent of the injuries, but had been told by Mr. Borthwick not to go onto the bus because Mr. Berne was too upset. He appreciated that he had been given the opportunity tonight by the Chairman to proffer an apology to Mr. Berne, but could not explain why he had declined to say anything to Mr. Berne. He appreciated that he could have apologised for the injury sustained, even if it had been accidental and that would not be inconsistent with his not guilty plea.

44. When further questioned, the Player accepted that it must have taken a heavy blow to result in this level of injury being two teeth dislodged through a customised gumshield. He explained that, because of his size and speed of running, if he were at full pace an accidental collision could cause that level of injury. He also accepted that the contact did not prevent his run or even slow him down. Had contact occurred body to body, he agreed that it would have resulted in one or both of them falling over and therefore it was highly unlikely that contact had been made in this way. When further questioned about which part of his body made contact with Mr. Berne, he conceded that it could well have been his elbow. He further conceded that when running in this manner to chase after a ball which has been kicked, the elbow is normally down by the side, not lifted above shoulder level. He also accepted that as both he and Mr. Berne were upright, if contact had been made between elbow and face, his elbow must have been lifted.

45. The Player confirmed that his original contract with Sale Sharks was due to end

this season, but that he had signed a new contract several months ago. Since 28th March 2008, he had received an elbow in his mouth which had caused an injury. He regarded that as accidental.

Final Submissions on behalf of the Player

46. Mr. Hayton submitted that this was a split second incident on a wet and cold night. The Player had no similar blemishes on his character. Mr. Berne had been a very eloquent witness by comparison with the Player, but that should not be held against the Player and the Panel should examine the evidence carefully. The Player had not taken up the offer of an apology out of fear that it might in some way be taken as an admission of foul play. The video evidence was not clear or distinct, it merely set up the possibility of a collision occurring in the manner complained of but it did not of itself prove it. The written evidence of Dr. Widdowson in the hearing bundle merely recited the details of the injury, which was not of probative value itself. He conceded that there must have been some significant contact to knock out two teeth, but that given the mechanics of the collision, that contact could nonetheless have been accidental.

47. The evidence of Mr. Berne and Mr. Tremlett had to be set against that of the Player. Insofar as Mr. Tremlett's evidence was concerned, he could be honest, but mistaken, and had made a number of factual errors in his evidence which were inconsistent with what was seen on the DVD. For example, Mr. Berne's knees being on the ground and him being replaced 3 or 4 minutes later. Mr. Tremlett, he suggested, was high in the air, some 50 metres away, and because of poor visibility, even under floodlights, had seen something in a split second and mistaken what he had seen. Whilst he had taken some notes contemporaneously, those had been added to later and were of less probative value.

48. Mr. Hayton submitted that the evidence of the two players should be weighed against each other. Mr. Berne was honest and open, but mistaken as to what had gone on. He had not been 100% sure that it was an elbow and had referred to being 95% sure. Although later he had gone on to clarify that, the Panel should be minded to accord more weight to his initial uncertainty. Furthermore, he was bound to have been disorientated

and dazed as a result of the injury and therefore less weight should be attached to his evidence.

49. Whilst Mr. Berne could be rightfully aggrieved, and was reluctant to bring a citing, the Player was not aware of any incident at the time. The Player was following the ball and the first he knew of injury was after the game. It was one word against another and in view of the evidence the Panel had heard it could only speculate as to how the incident occurred. Several elements of the evidence had been unsatisfactory and at best the Panel could conclude the evidence on each side equalled the other. 50-50 was not high enough in his submission. Finally, the Player had thought if he apologised it might be seen as an admission that he had done something wrong and he had been fearful about that.

50. Mr. Jennings made a final submission, describing the injury as unfortunate and that the Player was regarded very highly as an honest and brave player who could play, causing an injury without noticing or intending such an injury to be caused. So far as the lack of apology was concerned, this was the Player's third visit to the Panel and he had become increasingly intimidated on each occasion.

Decision on the Charge

51. We find the charge of conduct prejudicial through striking proved. We find further that the striking was with the elbow. We find this unanimously and for the following reasons :

- (i) The DVD evidence is only one part of the totality of the evidence. It does however clearly depict a situation where a collision between the two players occurred and does corroborate certain parts of the oral evidence we have heard, for example Mr. Berne is seen to be demonstrating the action of a strike with an elbow as he leaves the field.
- (ii) We have placed substantially more weight upon the evidence which has been given orally and subject to cross-examination and questioning. We found

Mr. Berne to be an excellent, honest, reliable and compelling witness. We have no doubt he brought his complaint in response to foul play which he regarded as unacceptable within the game and specifically because it was off the ball and resulted in serious and permanent injury. There are always inherent risks in a contact sport, but some incidents of foul play pass beyond the threshold of what the players themselves regard as acceptable and this is a consistent example. Mr. Berne's evidence was not shaken or undermined by Mr. Hayton's careful and respectful cross-examination.

- (iii) Mr. Tremlett is a seasoned and experienced observer of the game. We have personal knowledge of the view provided from the area where he was sitting to watch the incident and make his contemporaneous notes on what he saw. We, like him, were not enamoured of the suggestion that his view may have been clouded by some partiality towards one side or the other. We believe his evidence was given honestly, impartially and independently and was consistent with what Mr. Berne told us and what was shown on the DVD. We noted that Mr. Tremlett had not had the benefit of seeing what we had seen on the DVD but his evidence was nonetheless consistent with what was so shown. We see no reason why he should be regarded otherwise than as an honest, impartial witness and one who could not in his situation afford to compromise his journalistic principles. We believe he saw the incident exactly as he described.
- (iv) The Player himself accepted that to achieve this level of injury, a heavy blow would be required. He accepted that there was contact and that it could have been contact with his elbow. He further accepted that such contact must have been whilst the elbow was lifted
- (v) We agree entirely with Mr. Hayton's submission that this case should not be decided on anything other than to a very high standard of proof. The standard of proof we have applied is indeed extremely high, bordering on the criminal standard. We have unanimously found the case proved to such high standard. We cannot see how the injury sustained could have been caused

other than in the manner described by Mr. Berne and Mr. Tremlett.

The Player's Submissions on Entry Point and Mitigation

52. Mr. Hayton submitted that we should regard the strike as reckless, rather than intentional. There had been an extremely short period of time from the Player setting off on his run to coming into contact with Mr. Berne. Mr. Tremlett, in his evidence, was clear that it was a leading arm and not a deliberate strike, and there was no suggestion of the elbow having been swung into Mr. Berne's face. There had been significant injury and he sought in no way to diminish that, but in context it had not ended Mr. Berne's career or season. He has missed some two weeks or so. He has sustained permanent injury, but at least appropriate dental treatment will serve to restore entirely his appearance.

53. Mr. Hayton prayed in aid the Player's age, good character and loss of his unblemished record. By virtue of the nature of the legal advice he had received, he was unable to claim credit for a guilty plea and the failure to conclude the case on either of the previous occasions could not be laid at his door. It was unique not to have any evidence on video in these cases and he had accepted legal advice as to how his case should best be presented. Mr. Hayton had been instructed now to offer an apology to Mr. Berne. In all the circumstances, he submitted that the appropriate entry point was one of lower end, or mid range.

54. We asked Mr. Jennings for, and were given, details of the playing schedule of Sale Sharks for the end of this season and the season commencing 2008/2009.

A Decision on Entry Point

55. We find the offending to be intentional, i.e. committed with a deliberate action, not reckless. We also take into account the nature of the injury sustained and these two matters of themselves clearly, to our minds, put the matter in the top end category. The recommended sanction contained within Appendix 2 of the Disciplinary Regulations, gives a top end entry point of between 9 and 52 weeks. We are required to make a

further assessment of the appropriate entry point, pursuant to Disciplinary Regulation

8.2.6. We do so mindful of RFU Practice Note 1/07. We find as follows :

- It was an intentional strike – a “cheap shot” with a leading elbow.
- It was not reckless, as alleged by the Player.
- There was no provocation.
- The victim player took no further part in the game and has been out of the game for three weeks. He is permanently injured.
- The strike was not premeditated, but as a reaction to the victim player moving onto the Player’s line of running by his own admission to make it more difficult for the Player to continue his run.
- The act was completed.
- There was no spectator or player reaction.
- The victim player was vulnerable to the extent that he would not have been expecting a raised elbow in that situation.
- The Player did not intend to cause that level of injury.

56. Having considered the above and attached what we thought was appropriate weight to each element, we find the appropriate entry point in this case to be one of 18 weeks’ suspension.

57. We find one aggravating feature. The Player has been given every opportunity to apologise and express some sympathy or remorse to the victim player for the serious injuries he has sustained. It would not have been inconsistent with the Player’s not guilty plea to have at least said he was sorry for the injury. It was particularly noteworthy in this regard that the only apology or empathy which had been shown was from the victim player, Mr. Berne, to the Player in advance of their potential meeting again the following Sunday. We add onto the 18 week starting point 2 weeks further suspension on account of this aggravating feature.

58. Having considered relevant mitigating factors, we find that appropriate credit can be given on account of the Player’s character and record and also the level at which he has played the game. Accordingly, we reduce the period of suspension by six weeks.

Sanction

59. The Player is suspended for a period of 14 weeks. That suspension commences immediately and will be served in two parts as follows :

6 weeks from 22nd April 2008 to 3rd June 2008 and
8 weeks from 22nd August 2008 to 17th October 2008.

He may play again on 18th October 2008.

Costs

60. The Player is ordered to pay the costs set out in Appendix 6 of £250.00.

Appeal

61. The Player was reminded of his rights of appeal as set out in RFU Disciplinary Regulations.

Antony Davies

Antony Davies,

Chairman

24th April 2008

