

RUGBY FOOTBALL UNION

DISCIPLINARY HEARING

Judgment

At: Holiday Inn, Stoke on Trent

On: Monday, 30 March 2009

Player: **DARREN CLAYTON**

Club: Coventry RFC

Match: Coventry RFC v Sedgley Park RUFC

Date of Match: 28th March 2009

Panel: John Brennan (Chairman), Bob Taylor, Andrew Lockhart

Secretary: Liam McTiernan

Attending: Darren Clayton ("the player")

Professor Brian Thomas-Peter (the player's representative)

Nigel Yates (Sedgley Park's representative)

Oliver Cook (Sedgley Park player and witness called by Sedgley Park)

Ben Lloyd (Sedgley Park player and witness called by Sedgley Park)

Geoff Roberts (Sedgley Park player and witness called by Sedgley Park)

Charge

1. The charge arose following a citing by Sedgley Park.
2. The material extract from the citing dated 5 March 2009 stated: "About 25 minutes into the game with a score of 7-0, Sedgley had a scrum in their own 22. Sedgley No. 8 picked up and was tackled by Coventry No.19 (D Clayton). Clayton failed to roll away and continued to stay directly on top of Sedgley No.8. He niggled and eye gouged the Sedgley No.8 whilst on the floor and as they got to their feet it developed into a general brawl. A short time later the Sedgley No.8 is being held by two Coventry players and again the Coventry No.19 attacks and punches him."

3. The RFU's disciplinary manager framed a single count namely, that Darren Clayton committed an act contrary to good sportsmanship, contrary to Law 10.4(k).
4. The particulars of the charge stated: "On 28th February 2009, Darren Clayton, Coventry RFC, made illegal contact with the eye(s) area of an opponent during (25th minute of first half) the match Coventry v Sedgley Park."
5. Mr Yates opened the case on the basis that the evidence disclosed that Clayton had intentionally gouged Cook in his left eye in two separate incidents within a short space of time after he had tackled Cook.

Preliminaries

6. Mr Yates invited the panel to consider an additional charge, namely that the player punched Mr Cook. The panel declined to do so. Consideration of the proposed additional charge would have served no useful purpose. The charge Clayton faced was far more serious than the proposed additional charge. If the former was proved, the latter would either not materially add to the sanction or be dismissed.
7. Professor Thomas-Peter expressed his dissatisfaction regarding the late service of the DVD footage and some of the witness statements upon which Sedgley Park proposed to rely. He did not, however, go so far as to seek an adjournment of the hearing.

The Plea

8. The player did not admit the charge.

The Evidence

The DVD Footage

9. Two DVD's were shown. Even though the footage had been filmed from different sides of the pitch, it was of little practical assistance. What could be seen and heard on the footage only informed the panel's assessment of events to a certain extent. The principal benefit of the footage was that it enabled the witnesses to clarify the point in time to which their evidence related.
10. It was common ground that Oliver Cook, the Sedgley Park No.8, picked the ball up from the base of a scrum 5 meters from his own try line, ran to blind side of the scrum and was tackled by Darren Clayton, the Coventry blind side flanker. The player smothered Cook, drove him backwards and to the ground. The players wrestled on the floor as Cook tried to plant the ball out of Clayton's reach. At all material times, Clayton was on top of Cook and Cook was either on his

back or pinned on his shoulder. It subsequently became clear that it was during this time that Cook stated that Clayton had made unlawful contact with his left eye.

11. There came a time when Cook looked towards the referee and used his arm to fend off Clayton who was on top of him - Clayton's case was that he was punched, but it matters not. Clayton responded by fending off Cook himself with what appeared to be either his right hand or his forearm - Sedgley Park sought to characterise that action as something more aggressive but, again, it matters not. It subsequently became clear that it was immediately after this incident that Sedgley Park initially sought to prove that Clayton had made further unlawful contact with Cook's left eye.
12. As players came in on both sides, the referee penalised Clayton for not rolling away from the tackle. As Cook got to his feet, he reached out towards Clayton and grabbed his shirt. When Cook had got back on his feet, he threw two punches at Clayton. The first missed. The second hit Clayton in the face. A melee ensued. Some players sought to diffuse the situation. Others did not. Precisely who did what to whom was not material.

Oliver Cook

13. Oliver Cook gave evidence. He was the Sedgley Park No. 8. He gave evidence as to what had occurred immediately after he had been driven to the ground following Clayton's tackle. The DVD footage affords no clear view of these moments. These events occurred before Cook can be seen on the DVD footage fending off Clayton with his arm.
14. Cook said that he could recall Clayton's right hand coming towards his face and, in particular, his thumb coming towards his left eye. He demonstrated what he recalled he had seen. He put his right thumb in his left eye socket at a point below his eye ball at or about the top top of his cheekbone. He said that Clayton's thumb did not move at all thereafter and remained where it was for some little time. He said that his immediate response was to crane his neck in order to put as much distance as possible between Clayton's thumb and his face.
15. When asked by Mr Yates whether the event that he had described ought to be regarded as part and parcel of the rough and tumble of the game, Cook expressed his disagreement. He said in terms that he had played for many years and that he was prepared to accept a measure of foul play but that the incident in question overstepped the mark. When asked by the panel if he thought it could have been an accident, he collected his thoughts, shook his head and said, more in sorrow than anger, that Clayton's thumb had been in his eye for far too long for its presence to

have been merely accidental. He said that he had been poked in his eye many times over the years, knew what it felt like and that this incident was materially different.

16. When asked about the DVD footage in which he was to be seen looking towards the referee, Cook said that he was looking to see if the referee had seen what had happened because he felt that Clayton had been guilty of serious foul play. It was, therefore, abundantly clear that Cook was saying that the unlawful contact with his eye area had already happened by then.
17. When asked whether any unlawful contact had been made with his eye area after he can be seen looking towards the referee, Cook said that no such contact was made. It was, therefore, abundantly clear that Cook disavowed the allegation that any unlawful contact with his eye area was made at or immediately after the time when Clayton can be seen using his right hand or forearm to fend off Cook.
18. Cook candidly explained that the red mist descended, as he put it, after the incident and that he made it his business to grab hold of Clayton so as to better enable him to retaliate. Cook did not dispute the fact that he had punched Clayton after the referee's whistle had blown, although he said that he did not himself have any recollection of hearing it at the time.
19. After the melee had ended, the referee consulted his assistant. He beckoned Cook towards him. At this point, one of the Sedgley Park players can be heard to protest to the referee, in terms, that Cook's eye had been gouged and that his response ought not, therefore, be regarded to have been disproportionate.
20. Cook can be seen on the DVD footage to make a gesture as the referee explained the reason for his dismissal that might fairly be regarded as an attempt to draw the referee's attention towards his left eye.
21. It should be noted that the panel read the referee's report dated before the hearing began. It read: "The player dismissed had sustained an injury to the face, around his eyes ..." For whatever reason, possibly oversight, Sedgley Park did not adduce this evidence at the hearing. Accordingly, the panel disregarded it.
22. Cook said that his upper left eye lid had been grazed and that he had a small cut below his left eye. He said that BOTH those areas went red. He said that the cut stung a little after the incident. He said that he went to the A&E department of the Manchester Royal Infirmary at the insistence of his club in order to obtain a forensic medical report. He said that he would not have bothered to do so but for the perceived need to obtain independent corroboration of his injury. He said that his vision was not affected in any way at all. At no point in his evidence did Cook state that

Clayton had applied any pressure to his eye-ball. However, the fact that a witness subsequently recalled that his eye was watering immediately after the incident would suggest that some pressure was applied, albeit, perhaps, for a fleeting moment.

23. When asked by the panel whether he had suffered any injury to his left eye in the 25 minutes of the match that preceded the incident, Cook stated that he did not recollect anything that might have given rise to any such injury and that he was quite sure that he had not suffered any such injury.

Ben Lloyd

24. Ben Lloyd gave evidence. He was the Sedgley Park second row. He said that he did not approach the ruck until shortly before the referee blew his whistle. It was evident that the incident in which Cook had stated that Clayton had made unlawful contact with his left eye had already happened by then. Lloyd said that as he approached the ruck he appealed to the referee for a penalty on the grounds that Clayton had failed to roll away from the tackle. He said that he noticed that Clayton had his hands on Cook's face. He demonstrated what he recalled he had seen. When he did so he held up his hands in the same way one would do if one was holding a round or oval object in both hands. When cross-examined on the point, he stated that he had no recollection of seeing Clayton put a finger or thumb into either of Cook's eyes. In particular, he disavowed the accuracy of his written statement which stated that he saw Clayton had "a clear view of Clayton pushing his hand and fingers into the eye area of Cook's face whilst he was on the ground".

Geoff Roberts

25. Geoff Roberts gave evidence. He was the manager of Sedgley Park. He was in the dug out. He said that Cook took a seat in the dug out immediately after he had been dismissed. He recalled that Cook's eye was watering and that he had red marks above and below his eye. He said that he saw this clearly but paid little heed to it at the time. The significance of it only became apparent to him after the event.

Medical Evidence

26. On the Tuesday after the game, Cook attended the Manchester Royal Infirmary. A letter dated 3rd March 2009 provided by Jimmy Stuart, a clinical director of emergency services, confirmed that Cook had presented with a complaint of an injury to his left eye; that upon examination a 1.5 cm wound was found on his lower eyelid; that it was treated with ointment; and that the injury was consistent with the mechanism that was alleged to have caused it namely, an assault.

Darren Clayton

27. Darren Clayton gave evidence. He did not start the game. He was substituted for another player after about 20 minutes. He was playing blind side flanker. He had been on the field for about 5 minutes. He said that his hands did not come into contact with Cook's face at any time. He said that the only contact that occurred between any part of his body and Cook's face was when he used his forearm defensively to protect himself after Cook had struck him whilst Cook was on the ground. When asked by the panel, Clayton fairly accepted that if Cook's left eye had not been injured at an earlier stage in the game, only he could have caused the injury. Clayton accepted the medical evidence that Cook's eye had been injured. Clayton stated that the injury must have occurred at any earlier stage in the game.

The Finding

28. The panel found unanimously that Clayton had recklessly made unlawful contact with the area around Cook's left eye on one occasion and that, if the referee had been aware of the foul, he would have dismissed Clayton from the field of play.
29. The panel reminded itself that Sedgley Park bore the burden of proof. The panel reminded itself that the allegation fell to be proved not only on the balance of probabilities but that it had to be distinctly proved given the gravity of the allegation.
30. The first issue to arise is whether unlawful contact had been made with the area around Cook's left eye. It was in no doubt that unlawful contact had been made. There had been an immediate complaint. The complain was made so soon after the incident it was fanciful to suggest fabrication. Cook's eye was watering by the time he took a seat in the dug out immediately after the incident. This pointed strongly to the fact that the injury had been sustained in the immediate past as opposed to an earlier stage in the game. At that time, there were red marks to be seen above and below his eye. There was a small cut still to be seen underneath Cook's left eye on the Tuesday following the game.
31. More particularly, Cook himself gave clear and compelling evidence as to what had occurred. It would be difficult to exaggerate how impressive Cook was when he gave evidence. He demonstrated no bitterness or hostility towards Clayton at all. He listened carefully to each question and gave a short, direct and considered response to each one of them. He was careful to distinguish between what he could and could not recall. He was conspicuously fair; he did not even suggest that Clayton may have made unlawful contact with his eye on a second occasion even though he had been sitting next to Mr Yates when he opened the case and must surely have

realised that Ben Lloyd's statement suggested that Clayton had done so. In short, after having considered the totality of the evidence and assessed it in the round, each member of the panel expressed complete satisfaction as to the accuracy of Cook's account of the circumstances in which he sustained an injury to his left eye. In other words, in so far as Cook's account differed from Clayton's, the panel had no hesitation in preferring the former.

32. The second issue to arise is whether the injury to Cook's eye had been caused by Clayton in the circumstances alleged by Cook. For the reasons stated above, the panel disregarded the possibility that the injury could have been caused at an earlier stage in the game. As Clayton had, himself, fairly acknowledged, if the injury had not been caused at an earlier stage in the game, it must have been caused by him. The panel considered whether the injury to Cook's left eye could have been caused by contact with Clayton's forearm in the incident that occurred immediately after Cook had attempted to fend off Clayton. It considered this to be very improbable. If the small cut underneath Cook's eye had been caused by a blunt trauma such as a blow from Clayton's forearm, one would surely have seen extensive soft tissue damage such as bruising in and around Cook's left eye. There was none. The inherent improbability was only increased by the fact that the DVD footage strongly suggested that any contact that had taken place between Clayton's right hand or forearm and Cook's face occurred on the right hand side of Cook's face.
33. The third issue to arise is whether the contact might have been accidental. The panel concluded that it had not been accidental. In doing so, it accepted Cook's assessment that Clayton's thumb remained in his eye socket for too long for it to have been accidental. The panel felt it was incumbent upon them to consider the position from both a subjective and an objective point of view. Judged subjectively, there was little doubt that Cook concluded that Clayton's conduct was not accidental. His reaction was violent and immediate. Cook's record indicated that he had acted out of character. Judged objectively, the panel felt that Clayton's thumb bore down on Cook's face for too long for it to have been inadvertent. In this connection, the panel's assessment of the veracity and accuracy of Cook's account was vital. The panel's view was that Clayton had sought to dominate Cook by using his right hand to force the back of Cook's head into the ground. The violence with which Clayton had done so as evident in the fact that it caused injury. It was inherently risky that in so doing Clayton might make unlawful contact with one of Cook's eyes or the area immediately around it: unfortunately, that risk eventuated.
34. The final issue to arise was whether the proven findings satisfied the red card test. The panel was of no doubt that the referee would have sent off Clayton if he had realised what he had done.

35. For the avoidance of doubt, the panel dismissed the allegation that Clayton had subsequently made unlawful contact with Cook's face. Taken at its highest, the evidence went no further than the fact that Clayton's hands were on Cook's face. Cook, himself, had denied that any subsequent contact was made with his eye or the area around it at that time.

Sanction

36. The panel assessed Clayton's offence to lie within the low range of the scale of seriousness. Unlawful contact with the eye or the area around it is a very serious offence. It cannot be doubted that the circumstances in which foul play of this sort ordinarily occurs means that the seriousness of the player's conduct will generally lie in the top or, at best, the middle of the range of the scale of seriousness. However, the fact that Clayton had acted recklessly, had made no contact with Cook's eyeball, had kept his thumb still and had caused minimal injury were significant findings that could not be ignored.
37. The entry point for such offences following a not guilty plea is 12 weeks.
38. There were no aggravating factors.
39. Clayton was 23 years old. He had played rugby professionally since he left school, initially for NEC Harlequins and latterly for Coventry. He expressed anxiety about his future at Coventry given the nature of the finding that had been made. His ardent wish was to play rugby for England. He had received yellow cards in the past but had never been sent off. The yellow cards had been awarded in the most part for technical offences, in particular, killing the ball. He took an active part in the visits that Coventry arranged to local schools and its coaching programme. He expressed his shame at having been found guilty of foul play of this nature and his regret for the injury that Cook had suffered. He bore Cook no ill will. His conduct at the hearing was exemplary.
40. The panel gave anxious consideration to the significance of the fact that Clayton had maintained his denial of the charge throughout.
41. It was evident to the panel that Clayton's defence had been prepared on the assumption that Cook would assert that Clayton had deliberately sought to gouge his left eye in the incident that occurred immediately after Cook used his arm to fend off Clayton. More particularly, it was evident that Clayton's defence had been prepared without any specific reference to the minutiae of Clayton's conduct between the time when the players had fallen to the ground and the time when Cook had used his arm to fend off Clayton. Indeed, when asked to explain the nature of Clayton's defence following the conclusion of Cook's cross-examination so as to enable the

panel to put Clayton's version of events to him, Professor Thomas-Peter and Clayton gave the impression that the question had not previously been considered at all. The objective of the cross-examination appeared to be directed towards the issue whether Cook had thrown a punch at Clayton. This is not to belittle Professor Thomas-Peter's efforts. He had obviously spent a great deal of time preparing Clayton's defence and proved to be an able and fluent public speaker. However, he was not a professional advocate and may well have not appreciated the need to address what Clayton had done in the moments immediately after the players had gone to ground or the possibility that Clayton had acted recklessly without any intent to cause an injury to the area around Cook's eye. The nature of the charge, the nature of the evidence and Sedgley Park's approach to the citing combined to present difficulties that even an experienced advocate would have found challenging. The panel, two of whom were professional advocates, felt strongly that a professional advocate would have given Clayton the benefit of specific advice as to his plea either once Cook had given his evidence in chief or, at the very latest, at the close of Sedgley Park's case. If Clayton had admitted the charge at that juncture, the panel would have given Clayton credit for his plea. The panel was inclined to give Clayton the benefit of the doubt as to what he would have done if he had been given such advice. In the event, it was submitted by Professor Thomas-Peter on Clayton's behalf in his closing submissions that Clayton faced an allegation that he had gouged Cook with intent to cause him serious harm. At all times after Cook had given evidence, it was plain that Clayton was facing nothing of the sort. Taken at its highest, the evidence went no further than Clayton had made unlawful contact just below his eye. It was telling that Mr Yates, an experienced advocate, did not seek to persuade us otherwise in his closing submissions. The panel preferred not to hold against Clayton the fact that grave allegations had been made in closing on Clayton's behalf for which there was no evidence at all, such as the suggestion that the evidence against him had been fabricated in order to mitigate Cook's admitted actions.

42. The upshot was that the panel took the exceptional course of proceeding on the same basis that would have obtained if Clayton had admitted the charge. In so doing, the panel acknowledged, but was prepared to run the risk, that it may have been being unduly generous to Clayton. The panel was not in a position to know what advice Clayton had been given or how he would have reacted to the advice it thought he should have received. Unpalatable as it was to run that risk, it was more palatable than the risk that Clayton would be penalised for having not been advised of the possibility that the charge might be proved even if he had not acted with intent and/or in relation to an incident that occurred before the moment when he used his hand or forearm to fend

off Cook. If the panel has indeed fallen into error, it trusts that Professor Thomas-Peter will not take umbrage. It intends on discourtesy.

43. The panel was of the opinion that it was entitled to take these matters into account on the basis that it is entitled to take into account “any other off field mitigating factor that the Disciplinary Panel considers relevant and appropriate” under 8.2.9(f) of the RFU Disciplinary Regulations. In this connection, it is emphasised that the panel consciously adopted an exceptional course.
44. In those circumstances, the panel resolved to impose a suspension of eight weeks. The entry point was 12 weeks. It was not necessary to increase the entry point to take account of any aggravating factors. It was necessary to reduce the entry point by one week to take account of the mitigating factors referred to above under 8.2.8(b), (c), (d) and (e) of the Regulations and a further three weeks for the mitigating factor referred to above under 8.2.8(f) of the Regulations.
45. In the unusual circumstances of this case, the panel reassessed the sanction of 8 weeks and asked itself whether it was appropriate. The panel considered it to be the least unsatisfactory outcome of what had been an unusual and difficult sentencing exercise.
46. It was not felt necessary to stagger the period of suspension over the close season given the nature of the playing commitments that Clayton would otherwise have assumed after the league season had ended.
47. Clayton is free to play again on 26 May 2009. Clayton was reminded of the fact that the suspension encompassed all formats of the game. Clayton was advised of his right to appeal and the time limits relating to the same.

JOHN BRENNAN

Chairman