

RWC 2019 DISCIPLINARY DECISION



Match	England v USA		
Player's Union	England	Competition	RWC 2019 Japan
Date of match	26 September 2019	Match venue	Kobe Misaki Stadium
Rules to apply	Regulation 17 World Rugby and RWC 2019 Tournament Disciplinary Programme		

PARTICULARS OF OFFENCE

Player's surname	Francis	Date of birth	20 June 1990
Forename(s)	Piers		
Referee Name	Nic Berry	Plea	<input checked="" type="checkbox"/> Not admitted
Offence	Law 9.13: A player must not tackle an opponent...dangerously. Dangerous tackling includes, but is not limited to, tackling or attempting to tackle an opponent above the line of the shoulders even if the tackle starts below the line of the shoulders.	Citing <input checked="" type="checkbox"/>	
Summary of Sanction	No Sanction		

HEARING DETAILS

Hearing date	29 September 2019	Hearing venue	RWC Disciplinary Room, Atsumi & Sakai, Tokyo
Chair	Nigel Hampton QC (New Zealand)		
Other Members of Disciplinary Committee	Frank Hadden (Scotland) John Langford (Australia)		
Appearance Player	YES <input checked="" type="checkbox"/>	Appearance Union	YES <input checked="" type="checkbox"/>
Player's Representative(s)	Richard Smith QC (counsel) Richard Hill (England team management)	Disciplinary Officer and/or other attendees	Yvonne Nolan (WR – DDO) Alistair Maclean (WR)
List of documents/materials provided to Player in advance of hearing	<ul style="list-style-type: none"> • Notice of Disciplinary Hearing • Citing Commissioner's Report • Reports of Referee, both ARs and TMO • USA Team Manager's reports on USA 15 and Team Doctors • Video Clips • Match statistics/summary/team lists • ToP Disciplinary Section • Regulation 17 • High Tackle Decision Making Framework 		

SUMMARY OF ESSENTIAL ELEMENTS OF CITING/REFEREE'S REPORT/FOOTAGE

1. **AR2** did not see the incident.

2. **AR1** stated that he "did not see where contact was made during this tackle, nor was I alerted to any potential foul play based on player reaction by USA".

Referee

3. "Live I had no suspicion that any foul play had occurred. From the angle I was approaching it looked like a legal tackle and there was no player reaction from the ball carrier or any other USA players in the vicinity to alert us that something was wrong. USA #15 was quickly back to his feet once the ruck had ended and USA proceeded to find touch. England played the lineout quickly and play resumed. Had any of the TO3 suspected anything untoward we could have tried to slow the lineout down which would have given (the TMO) more time to review the footage. Unfortunately, we didn't suspect anything so allowed play to continue".

TMO

4. "Immediately after the ball kicked off there is a collision between USA (#15) and England (#12). The nature of the collision led me to ask the Hawkeye team to provide various angles straight away.

"I cannot remember exactly the order of the angles I received (however the TMO camera and audio will inform the sequence of my process). I do remember viewing what appeared live to be a head clash between the right side of the ball carrier's head and the left side of the tackler's head. I also observed the tackler's arms also presented in a wrapping motion. However, a further angle appeared to show the tackler's left shoulder making contact with the ball carrier's head. By the time I had a further opportunity to confirm what I had seen play had restarted.

"Unfortunately, formal referral was not able to be instigated on this occasion as the foul play is followed by only one further tackle, then a clearing kick for touch and a quick lineout by England. If time had presented in the form of further phases, or an injury stoppage, or a slow forming lineout I would have commenced a formal TMO check as the angles in totality supported a foul play discussion incorporating the framework".

Citing Commissioner's Report

5. The Report cited the Player for an alleged breach of Law 9.13, occurring in the first minute of the match. It relevantly stated:

"The alleged foul play occurred when USA 15 is in a clear and open space having just caught the kickoff for the match and England 12 has a clear line of sight to USA 15. England 12 rushes up at pace chasing the kick-off and with his arms outstretched, tackles USA 15 making initial contact to the left shoulder of USA 15 with his right shoulder, with England 12's left shoulder making contact to the head of USA 15 with force. At no stage did England 12 attempt to slow down to assist his management of the tackle.

"Prior to impact, USA 15 can see England 12 advancing at pace and prepares for impact by dropping his body height whilst also turning his shoulder forward and bracing for contact. Contact by England 12 is with force and the head of USA 15 is seen to move back from the impact.

"Neither the Referee nor his assistants took action at the time.

"After the contact there is no reaction from USA 15 and he does not require medical attention and immediately plays on and appears unaffected by the contact.

"I have carefully considered the actions of England 12 against the Decision Making Framework for High Tackles. In my opinion, England 12 has made an illegal high tackle causing head contact by making clear contact with his shoulder to the head of USA 15 with a high degree of danger and the incident has reached the Red Card threshold.

Because the England 12 and USA 15 are in open space and the tackler has a clear line of sight, mitigation has not been applied in this instance.

Accordingly, I cite the England No 12 for a dangerous high tackle in breach of Law 9.13...”.

Citing Commissioner’s Evidence (and discussion arising from it)

Evidence

6. The Panel, at the hearing, sought clarification of the Commissioner’s words “*mitigation has not been applied*”.

7. This was done because, in written submissions on behalf of the Player provided before the hearing, it was stated that “*The Citing Commissioner did not consider any mitigating factors*”. The DDO in response wrote “*The Citing Commissioner’s Report does not say that mitigation was not considered, it says that mitigation was not applied*”.

8. That matter needed to be cleared up and, in addition, given:

- (i) the comparative “sparseness” of the Citing Commissioner’s Report in that critical paragraph “*Because the England 12 and USA 15 are in open space and the tackler has clear line of sight, mitigation has not been applied in this instance;*
- (ii) that in this hearing the factors against and for mitigation (as per the “Decision making framework for high tackles” [“the Framework”]) would be the primary area of scrutiny, both factual and legal; and
- (iii) that the Panel were to be asked, on behalf of the Player, to (and using the words of Regulation 17.17.4(a)) “*make a finding contrary to the Citing Commissioner’s decision to cite*” on the basis that “*on the balance of probabilities that the Citing Commissioner’s decision was wrong*”;

the Panel needed to hear from the Citing Commissioner as to the factors which he had considered, if any, over and above the “against mitigation” factors in the Framework of “*open space*” and “*clear line of sight*”, and as to his methodology and reasoning.

9. The Commissioner gave helpful evidence by audio link at the commencement of the hearing.

10. In answer to the Chair, he made it clear that he had considered a mitigating factor (“*BC suddenly drops in height*”) along with factors to be considered against mitigation (both players “*are in open space and the tackler has clear line of sight*”).

11. Interestingly (and relevantly, when the Panel comes to discuss how these matters of mitigating factors should be considered and decided upon, by Citing Commissioners [“CCs”] and Judicial Officers/Panels [“JOs”]), the Commissioner did not refer to the factor of “*clear...time*”, and nor did he mention (whether in his Report or in his evidence) the two words which qualify both clear line of sight and time, viz “*before contact*” .

12. To the Panel it seemed, exercising commonsense and the Panelists’ combined knowledge of, and experience in, the game, that those two concepts of clear line of sight and time almost inevitably (if not inevitably) will be entwined, inextricably, together; and certainly, in the Panel’s opinion, in the factual circumstances of this case had to be looked at together – in effect as a one. And, as will be discussed later (at paragraph 52), both sight and time need to be considered together with, and at the same time as, any “*clear and obvious*” mitigating factors found by the fact finder (whether CCs or JOs) to exist.

13. The Commissioner, having been referred to the matters in paragraph 8 above, made it clear that he had not applied the mitigation which he had found existed (USA 15 “*dropping and turning his body*” - which, from the video footage, was that player dropping, and at the same time turning his body to

his right, promoting his left shoulder), because both players were in open space and the tackler had clear line of sight.

14. The Commissioner was permitted by the Panel to be asked some questions by the Player's counsel. He said that he had "*reasoned*" for himself that USA 15 had suddenly dropped in height and that, having done that, he went back to the factor that he had considered to be against mitigation, i.e. open space and clear line of sight, and accepted as correct that he thought that that stopped him from allowing that mitigation to apply. The Chair sought clarification as to what the Commissioner actually did in forming his conclusion not to apply mitigation.

15. From the Commissioner's responses, it became apparent that this was not some sort of mandatory and mechanical approach by him; that his process had been to put all factors he had found in the balance, assessed and weighed them and, using his experience and judgement, reached the conclusion that the factor(s) he found against mitigation out-weighed the mitigation he had found. This will be, always, a difficult balancing exercise. And it is a part of the wider dilemma which contact sports, such as rugby, grapple with: how is the balance to be struck between concerns to ensure the safety and welfare of rugby players on the one hand, and the continued enjoyable playing of rugby, as a dynamic and fluid contact game.

Discussion

16. The Panel will return to the assessing, weighing and balancing process later in this decision, but suffice to say here that the Panel thought that this process adopted by the Commissioner was an appropriate one. The weighting to be given to individual factors found, whether for or against mitigation, will always be a difficult (if not the most difficult), and somewhat subjective, task. It should be noted that that is one of the core tasks that CCs are given to perform; and they are appointed for the experience, skills, reasoning abilities and judgement that they have and which they bring to their role.

17 (a) It would be a bold, and wrong, JO that, acting on a Reg 17.17.4(a) review of a CC's decision to cite, would set aside a CC's finding of the facts and factors, and the CC's assessment and weighting of those factors, and replace those conclusions with their own, merely because the JO held a different view. Reasonable people do hold different views, and do reach different, yet reasonable, conclusions from studying the same set of facts. An illustrative example is to be found in this case, if one reads the discussion, under "*Digression*", at paragraph 27(iii).

(b) On a Reg 17.17.4(a) review a JO will (normally) have the benefit of hearing and seeing the player, and of assessing his account of the incident as it unfolded. To have that explanation does put the JO in a somewhat more advantaged position than the CC. And it did so in this case.

(c) On such a review, a player's representatives, may well try and persuade the reviewer that the CC had made an error of substance in the CC's fact finding process (getting a significant fact wrong or misinterpreting it; failing to include a relevant fact; including irrelevant facts; asserting opinions as fact; failing to find and/or include in the reasoning process either, say, a relevant factor against mitigation or a clear and obvious mitigating factor; including factors which, on the facts, could not, properly, be considered or applied; failing to spell out, at least in summary, the CC's decision making process – i.e. the factors either way as to mitigation and where and why the balance fell the way it did). In the Panel's view, there would need to be, at the least, some clearly apparent and compellingly strong reasons before a CC's factual findings and conclusions should be set aside.

18. To return to the present case - the Commissioner agreed that the Player had dropped his own body height as "*he lined him up*", but from his evidence on this issue it did not become clear whether the Commissioner had considered that change of height by the Player as a potential mitigating factor or not. It did rather seem not.

19. Counsel for the Player raised with the Commissioner certain of the factual statements which he made in his Report. It was suggested that the Commissioner was wrong in three respects. First, in his statement that the initial contact in the tackle was by the Player's right shoulder to USA 15's left shoulder – it was put to him that it was, rather, that the first contact was the Player's left side of head to USA 15's left shoulder. Secondly, that contrary to the Commissioner's statement that the Player did not attempt to slow down, there was evidence of that available from the video clips (and the Player would say so, in evidence). Thirdly, (and relating back to the first point here) the main force of the impact was to USA 15's left shoulder and not his head.

20. This evidence, and the discussion of it, will be returned to and commented on later in this decision. It is of importance in relation to the Panel's determination.

Video footage

21. The footage was some 20 minutes 30 seconds in length, and primarily comprised 8 camera angles, displayed at 3 different speeds (100%, 50%, 25%) and split screen footage showing alternate angles in unison. In summary, it shows:

The match starts with an England kick-off.

The kick is high and travels down to about 1.5 to 2 metres into the USA 22, where it is taken, successfully, by USA 15, upright, with his feet on the ground.

At that stage the Player is on, or about on, the 22m line.

There appear to be 3 England kick chasers, including the Player.

There are some 4 USA players who take up positions in front of their kick catcher (USA 15), and through which the chasers, including the Player, must thread. It appears that, as he nears the 22m line, he has to alter his line, and perhaps slightly, his pace to get around a blocker, USA 13.

As the Player nears and then crosses the 22m line, he is moving at speed and is running in a normal upright stance.

Because of the Player's speed, the gap between the would-be tackler and the ball catcher closes quickly.

At or about the time the Player crosses the 22m line, he starts to lower his stance, apparently readying his body to tackle USA 15 head-on.

USA 15, feet on the ground, appears to be stationary.

The two players are only a matter of, perhaps, 1.5 to 2 metres (at the most) apart when:

- (a) USA 15 catches the ball in an upright position before suddenly dropping his body height a significant extent in an apparent reflex, evasive action upon realising the Player's fast approach (*refer to video clip "6 NL Corner" at 10.03 mins*). USA 15, with ball clasped to him at upper chest level, also turns from front on, to his right to brace for contact as he drops in height; and
- (b) the Player starts to bring his body down into a tackling position (with his arms progressively moving to "conventional" tackling positions – a two arm wrap position), which would have resulted in a tackle at or about chest/ball level if USA 15 had remained in the earlier upright position.

On impact, both bodies are at a similar level, with the initial contact being the Player's left face onto USA 15's left shoulder (*reference can be made to video clip, split screen, at 2.08 mins*); and eventually the left shoulder of the Player makes contact with the head of USA 15. At the time of contact, both ARs were at or about the same latitude of the impact, and the Referee was a few metres behind the Player.

Additional video clip

22. As part of the Player's case, a short video clip was put into evidence (it had been copied from the video footage, but had added "graphics", in the form of both a vertical and a horizontal line, against which the body positions of both players could be measured). From that additional material, the Panel asked for, and was given a series of 9 screenshots (numbered 1 to 9) showing, from USA 15's left side:

(ph 1) his ball catch, at his full height;



(ph 2) the Player emerging into frame, at left, arms extended, right shoulder forward;



(ph 3) the Player's body appearing to be in a semi-crouching run, both knees bent, and USA 15 starting to drop, with perhaps one metre at most between the players;



(ph 4) with less than a metre between them, the Player's head and right shoulder lower than in ph 3, and USA 15's bottom lower to the ground as he appears to be crouching, with his left shoulder starting to rotate to his right, promoting that shoulder forwards;



(ph 5) further drop in height of USA 15, with apparent bracing for contact;



(ph 6) with contact imminent, respective heights and positions;



(ph 7) at near contact, the Player's head turning to its right as his left cheek nears contact with USA 15's left shoulder; with the Player's right shoulder both separated and down from, USA 15's left shoulder;



(ph 8) contact, with USA 15 going further down and back, and the Player's left side face against USA 15's left shoulder, with the Player's arms wrapped at chest level of USA 15;



(ph 9) contact, with both players starting to go to ground.



23. These 9 screenshots are inserted above.

24. The Panel has estimated that the time which expired between USA 15 commencing to drop down and contact was approximately one-third of a second.

ESSENTIAL ELEMENTS OF OTHER EVIDENCE (e.g. medical reports)

25. The **USA Team Manager** reported that USA 15 “is unable to give a statement...due to the concussion he suffered late in the second half” and that he had spoken “to our team doctors and they did not evaluate or treat...our 15 after the opening kick-off hit”.

ISSUES; SUMMARY OF PLAYER’S EVIDENCE

26. After the Citing Commissioner had given his evidence, the Chair, in discussion with counsel, identified **the Issues** which were not in dispute from the Player’s perspective; and isolated the remaining issues to be decided.

Not in dispute

27. For the Player it was accepted that:

- (i) Contact had been made by the Player on USA 15’s head in the tackle - this was a high tackle.
- (ii) The high tackle was foul play – a breach of Law 9.13.
- (iii) The degree of danger was high, as the tackle made was an active and completed one, in which, at initial contact, the Player’s speed was high.

A digression. It is noteworthy that, on this issue, one member of the Panel was of the view that, given the way this tackle had developed, where the initial contact was made on USA 15’s body and the lesser force and “indirect” nature of the secondary contact to USA 15’s head, there was not here sufficient indicators to demonstrate to him a high degree of danger (the Panelist using his own rugby experience and judgement; and after looking at the 6 “*video signs*” referred to in the Framework). This route, if followed, would have ended in a sanction at a Yellow Card level, in any event – i.e. the same result as was determined, but by a different path.

This matter is worthy of mention, for it vividly illustrates something that was mentioned earlier (at paragraph 17) – that reasonable people when faced with the same set of facts, reasonably may draw different conclusions.

28. In issue, and for decision

- (i) Ultimately, has the Panel been satisfied, from all the evidence, on the balance of probabilities, that the Citing Commissioner's decision to cite the Player was wrong (Reg 17.17.4(a))?
- (ii) What are the Panel's Findings of Fact, particularly on all matters touching on both aspects of mitigation (against and for)?
- (iii) On the evidence, what were the factors to be considered against mitigation?
- (iv) On the evidence, were there clear and obvious mitigating factors?
- (v) What weighting should have been given, in the factual circumstances as found by the Panel, to each of those identified factors (in ii and iii above)?
- (vi) Whether, after assessing and weighing these competing factors, should the balance have come down against any mitigation or in favour of allowing mitigation, thereby reducing the danger and, possibly, reducing the sanctioning by one level, i.e. from a Red Card to a Yellow Card?
- (vii) Whether the Citing should be upheld or not?

Player's evidence

29. In precis, the Player contended that, as designated kick chasers, he and England 7 hoped to arrive at the kick receiver simultaneously with the ball – and perform almost a “*pincer*” movement on USA 15. He intended to make contact, in his tackle, with USA 15's midline, as coached, hoping to dislodge or secure the ball. As he approached, at speed, and in his usual manner, he lowered his body and extended both his arms to “wrap”.

30. He said that he was aware of the possibility of USA 15 changing height and/or position, but was almost upon USA 15 at or coming down to a midline tackle height, intending to make contact on USA 15 with his right (dominant) shoulder, when USA 15, in a movement that he had not expected (and to the Player, not a normal movement), dropped down almost to his haunches, at the same time swivelling his body to his right and bringing his (USA 15's) left shoulder forward towards him.

31. The Player realised that, because of the sudden change of position by USA 15, he could no longer hit him with his right shoulder – that likely would have endangered them both through a possible head clash. He described trying to lower his own body further (hence he said, the knees bent almost touching the ground, at a 45degree angle, as can be seen in the video clip screenshots – not a knee/leg angle which would give momentum in a tackle). He described his reaction as “*very much a screech of the brakes and absorption kind of technique*”. And at the same time, he decided to “*take the hit*” on his own left face, by turning to his right, thereby bringing his left shoulder around, across and forward towards the opponent's left side, putting himself in “*a vulnerable position*”.

32. The Player described the left side of his face taking the initial contact, with force, on USA 15's left shoulder. The Player thought that he had broken his own cheek. He said that there was no contact made on USA 15 with his right shoulder. The Player was not aware of any part of his body contacting USA 15's head; but accepted, having seen the video clips, that his left shoulder slid upwards and contacted the head, as his own momentum took him upwards in the collision. He believed, from the impact he felt on his face, that the force of the contact was absorbed, or largely absorbed, there.

FINDINGS OF FACT; SUBMISSIONS and DISCUSSION

Findings of Fact

33. Before coming to those findings, the Panel think that the following observations of the match officials are important and do have some affect in the fact-finding process undertaken:

- (i) Both AR1 and the Referee say they were not alerted to any potential foul play by the actions or reactions of either USA 15 or other USA players; and to the Referee “*it looked like a legal tackle*”.

- (ii) Comments were made as to USA 15 being quickly back to his feet and that he was uninjured (confirmed both from the video clips and the USA team doctors' comments).
- (iii) The TMO observed the wrapping of the Player's arms (confirmed from the video clips).

34. The Panel found, contrary to the Citing Report, that:

- (i) The Player did attempt to slow down.
- (ii) The initial contact to USA 15 was with the Player's left head (and not his right shoulder) on to the opponent's left shoulder.
- (iii) The force in the initial contact was to USA 15's left shoulder.

35. The drop in the ball carrier's (USA 15) height was "*sudden*", i.e. in being both quick and unexpected (adopting unreservedly the DDO's expression of "*happened quickly and in a manner that was unexpected*"). The drop was also significant in extent, i.e. the depth of the drop in such a short time. The Panel accepts (and accepted and applied it in this finding) that the unexpected has to be something occurring outside the expectations of a reasonable rugby player in the particular circumstances.

36. There was some discussion as to the word *significant* being used to describe the drop in height. The issue is suddenness of drop, not its extent or significance; although the shorter the available time and the greater extent or significance of the drop in that available time, might accentuate the suddenness of it. It may well be that, in a particular case, it is the extent (the significance) of the drop that is unexpected (and, indeed, that was a factor in this case).

37. The Panel is reinforced in its view as to the suddenness of the drop by the Commissioner's own conclusion as to that, and his consideration of it as a mitigating factor (refer to paragraphs 13 and 14 above). The Commissioner is experienced and very familiar with the Framework and the concepts contained within it.

38. The Panel also observed that the sudden dropping was accompanied by USA 15 turning his body to his right, promoting his left shoulder (refer, inter alia, to paragraph 21(a) above). This was a matter not commented on by the Commissioner (and it is, perhaps "small beer" – the Commissioner has not the luxury of time that this Panel has).

39. The Panel found that the Player did make a definite attempt to change his own height, and the direction of his body, in an effort to avoid USA 15's head. (The Panel understood the DDO's submission that, although in particular cases and depending on the facts, other positional changes by the tackler might be seen as a factor, the primary focus really should remain on height – the aim is to try and avoid head clashes). As commented upon in paragraph 18, it was not clear whether the Commissioner had considered it as a mitigating factor or not.

40. The Panel found that the contact with USA 15's head was indirect, in that it started elsewhere on his body and slid up, a consequence of the movement of the bodies following the initial non-head contact. This resulted in minor contact to the head (minimal, insignificant, are perhaps synonyms that might describe the contact). There was no injury to USA 15; he rose immediately to his feet and played on; and as the Commissioner reported "*after the contact there is no reaction from USA 15 and he does not require medical attention and immediately plays on and appears unaffected by the contact*".

41. Bearing in mind its own admonitions at paragraph 17, and the need for real caution before supplanting a CC's findings of facts and as to factors, to the Panel these three factors (as set out in paragraphs 35, 39 and 40) were "*clear and obvious*" from all the evidence, and these were to be seen as, and should have been seen as, mitigating factors. In the oral decision at the conclusion of the hearing, the three mitigating factors were expressed as follows:

“(i) in the sudden change of height by the USA player immediately before contact. It was only at the time of that sudden change that the clear line of sight factor (against mitigation) came into play and could become of relevance; and that line of sight factor, therefore, was somewhat limited in its application, and the weight to be given to it;

(ii) in that the Player, being in control of the tackle, attempted to avoid the opponent’s head by making a definite attempt to change his own height and his body position;

(iii) in the Player’s initial contact being with his own head on the ball carrier’s left shoulder (and which initial contact absorbed a large degree of force), with the Player’s left shoulder then slipping up to make indirect and minor contact to the ball carrier’s head, causing no apparent injury”.

As was said in the oral decision, this was an awkward tackle, in the course of which the Player (who was at all relevant times in control of the tackle) displayed a degree of recklessness.

42. How does a CC (JO) go about working out when and how a set of clear and obvious mitigating factors may be applied (or, for that matter, just one such factor)?

Submissions and discussion

43. Primarily the submissions, on behalf of both World Rugby and the Player, and in discussions with the Panel, focussed on the matters now set out. What follows may, the Panel hopes, offer some guidance.

Status of “Video signs” and “Factors against mitigation” and “Mitigating factors”

44. The Panel and all parties agreed that none of the signs and factors listed in the three areas down the right side of the Framework were to be seen and applied as mandatory; that the lists of signs and factors were neither exclusive nor exhaustive. The Framework is, as stated in it, a *“guideline...intended to improve consistency in applications of sanctions by distinguishing between dangerous tackles that warrant a penalty, yellow card or red card”*. The Framework is not a provision having regulatory force, binding on decision makers. It is a guideline giving decision makers a *“systematic tool that guides decision making”*.

45. If a sign or a factor, which is not listed in the Framework, is found by a CC to be present in a particular case, and it is relevant, then it might be had regard to. But the relevant aspect must be stressed – CCs (and JOs), ordinarily, should stay within the confines of the Framework. After all, players, coaches and match officials are trained to play, coach and officiate the game, using the guidance of the Framework. And the underlying reason for the existence of the Framework, the deliberate way it has been written/drawn and its use at all levels of the game, is to diminish the risks of head injuries.

Standard of Proof and Methodology

46. Staying within the Framework, where CCs (and JOs) have found both factors against mitigation and factors in favour of mitigation, how are they to go about the tasks expected of them - of assessing and weighing each of the individual factors on either side (pro and con) and determining which is the set of factors which will predominate?

47. What is required is for CCs (and JOs) to do no more than apply the ordinary standard of proof (proof on the balance of probabilities) which is the standard written into, and to be applied, throughout Regulation 17. Jurors, sitting in civil cases, in many jurisdictions, apply that standard to cases they are sitting on, finding facts by applying that standard.

48. Thus, the processes to be used, and the standard to be applied, are well known. Pieces of evidence are assessed, both as individual items, and collectively with others, then put in their respective pans and using commonsense, experience and rugby knowledge (for which CCs and JOs are chosen and appointed), the CC/JO determines which side the scale comes down in favour of: if the factor(s) against mitigation outweigh the mitigating factor(s) then no reduction in sanction will result. If the mitigating factors predominate, the sanction can go down one level. It matters not if the scale goes down a little or a lot on one side – if it goes down at all on that side, then the decision made must be in favour of that side.

49. The DDO put forward in submissions, a sensible and commonsense approach to the task, which the Panel thinks is appropriate. The starting point for a CC (and it is the same process for a match official or a JO) is to pose the question:

- (i) Are there clear and obvious mitigating factors?
- (ii) In order to start to decide that, the CC must first take account of the “Factors to consider against mitigation” which the CC has found to exist in the particular case.
- (iii) The CC must then consider “Mitigating factors” (which must be clear and obvious), which the CC as found to exist.
- (iv) “Factors to consider against mitigation” do not necessarily exclude “Mitigating factors” being applied by the CC, but careful consideration ought to be given as to whether they outweigh the “Mitigating factors”.
- (v) As an example, where tackler and ball carrier are in open space, and tackler has a clear line of sight of the ball carrier, and sufficient time to respond to a sudden drop in the ball carrier’s height, then the “Factors to consider against mitigation” are likely to outweigh the “Mitigating factors”.
- (vi) The nature of any “sudden” drop in the ball carrier’s height must be considered by the CC; with “sudden” bearing its ordinary meaning of quickly and unexpectedly. The CC must consider whether the ball carrier’s actions happened quickly and in a manner that was not reasonably to be expected.

Factors against mitigation

50. The Panel saw force in a submission made on behalf of the Player that a factor against mitigation should not be brought into the balance unless, in relation to the facts of the particular case, it was a factor of relevance – it had a “*real bearing*”. If it is not factually relevant, then it should not have application. The Panel sets out the submission on behalf of the Player as to this: “*If the fact that a player has a ‘line of sight’ has no real bearing on what subsequently took place in terms of a mitigating factor, then the previous line of sight should not preclude the implementation of a mitigating factor*”.

51. The point may be best illustrated in the present case. The fact that the Player had, as he accepted, a clear line of sight from where he was at the kick-off to where the USA 15 was some 25m away has no relevance. The factor of the Player’s line of sight before contact is of relevance as at the time of the sudden drop – what was the tackler’s line of sight (to contact) then. The tackler’s line of sight to contact becomes relevant when the change occurs, which the tackler is able to see.

52. As already mentioned (paragraphs 11 and 12), the Panel is of the view that the other aspect mentioned in the “Factors to consider against mitigation”, namely “*the tackler has clear...time before contact*”, can be easily overlooked. But it is important, and will usually, if not invariably, be inextricably intertwined with the “*clear line of sight...before contact*” provision. (It is worth setting down the full sentence: “*If the tackler and BC are in open space and the tackler has clear line of sight and/or time before contact*”).

53. To then go back to the present case to illustrate: just as the Player’s clear line of sight before contact becomes relevant when the sudden drop occurs, so also does the Player’s clear time before contact become relevant when that sudden drop happens. On the Player becoming aware of that

sudden drop by the ball carrier, what then was both his clear line of sight to contact and his clear time to contact?

Result

54. Acknowledging that the Panel had far more materials and more deliberative time than the Commissioner, and was able to hear the Player's account and thereby be given a different perspective, and make better sense, of the video footage, the Panel concluded, on the balance of probabilities, that:

- (i) given the difficulties with the lack of detail in the Citing Commissioner's Report (set out in paragraphs 6, 7 and 8);
- (ii) given the factual errors in the Report and the Panel's factual findings contrary to those in the Report (at paragraphs 19 and 34); and
- (iii) given the existence of the three clear and obvious mitigating factors found by the Panel to exist here (at paragraph 41)

the Citing Commissioner's Report was flawed.

55. In those circumstances, the Panel took the view that it should carry out the sort of process discussed at paragraph 28 and again at paragraphs 46 to 49 above. In doing so, it thought that the "sudden drop mitigating factor" was deserving of quite some weight; with the time of that drop, as close as it was to contact with the ball carrier, having a lessening effect on the "clear line of sight and time before contact, factor against mitigation".

56. Although the other two mitigating factors (change of the Player's own height, contact was indirect and minor), did not carry as much weight as the sudden drop, the Panel found that the cumulative effect of the three clear and obvious mitigating factors outweighed the very short period (starting from the occurrence of the sudden drop, perhaps a third of a second) over which the Player had clear line of sight and time before contact.

57. That being so, the mitigation should have been applied by the Citing Commissioner, which would have had the effect of reducing the sanction by one level, i.e. from the Red Card level to that of a Yellow Card.

58. The Panel, being satisfied on the balance of probabilities that the Citing Commissioner's decision to cite the Player was wrong, does not uphold the Citing.

The Citing was not upheld.

DECISION

Not proven

Costs	NA
-------	----

Signature Chair	Nigel Hampton QC	Date	1 October 2019
--------------------	------------------	------	----------------

NOTE: YOU HAVE **48 HOURS** FROM NOTIFICATION OF THE DECISION OF THE CHAIRMAN/JO TO LODGE AN APPEAL WITH THE TOURNAMENT DIRECTOR – R 17.22.2(a) (or equivalent Tournament rule)