

WHAT'S WRONG WITH THE COMMISSIONER? SOME LESSONS FROM DOWNUNDER

*Ian Dobinson**

*David Thorpe***

| | |
|---|-----|
| INTRODUCTION | 106 |
| I. AMERICAN DISCIPLINARY SYSTEMS..... | 111 |
| A. The NFL | 112 |
| B. The NHL..... | 113 |
| C. The NBA..... | 115 |
| D. The MLB..... | 116 |
| E. Problems with the Commissioner System | 118 |
| 1. Excessive Violence | 118 |
| 2. Perceived and/or Real Bias..... | 120 |
| 3. Arbitrary and Infrequent Punishment | 121 |
| 4. Systemic and Procedural Problems | 121 |
| 5. Economics of Violence..... | 122 |
| II. THE AUSTRALIAN DISCIPLINARY SYSTEM | 123 |
| A. The NRL | 123 |
| B. NRL Judiciary and Appeals Committee | 124 |
| 1. On-field Offenses and Demerit Points | 125 |
| 2. Referred Charges | 129 |
| 3. The Match Review Committee | 129 |
| 4. The NRL Judiciary | 131 |
| 5. Judiciary Counsel | 133 |
| 6. The Adjudicating Panel..... | 134 |
| C. The Hearing and Procedural Guidelines..... | 136 |
| 1. Substantive Provisions | 136 |
| 2. Evidence | 137 |
| 3. The Chairman's Explanation of Procedure..... | 138 |
| 4. The Prosecution Case | 138 |
| 5. The Defense Case..... | 139 |

* Ian Dobinson is currently a Senior Lecturer at the Faculty of Law, University of Technology, Sydney, Australia.

** David Thorpe is currently a Lecturer at the Faculty of Law, University of Technology, Sydney, Australia.

| | |
|---|-----|
| 6. Closing Address | 139 |
| 7. Chairman's Directions | 139 |
| D. Decisions and Appeals | 140 |
| 1. The Panel's Decision and Sentence..... | 140 |
| 2. Appeals..... | 141 |
| 3. The Appeals Committee | 142 |
| CONCLUSION | 144 |

INTRODUCTION

Concern over the level of on-field violence in North American sports remains high. This is particularly true for the four major professional leagues of football, ice hockey, basketball and baseball. Such concern, however, is not new. As far back as 1982, Chris Carlsen and Matthew Walker advocated the creation of a sports court in the United States because, in their view, "league discipline and criminal and civil liability—inadequately deter sports violence¹ Others similarly stated that the level of on-field violence had become unacceptable.² Carlsen and Walker noted that on-field sports violence in all the professional leagues was dealt with by internal procedures under the general control of an appointed commissioner.³ In their opinion, this system was failing largely because of its arbitrary application and infrequent use.⁴ They believed that a sports court could deal with matters of compensation arising from injuries sustained, impose penalties on players who caused injuries, and limit the involvement of the criminal justice system in prosecuting players for assault.⁵

Limiting the involvement of the criminal justice system in sports is an important and accepted concept. Reforms to league disciplinary systems since the 1980s, however, have failed to remedy the problem of on-field violence, with

1. Chris J. Carlsen & Matthew Shane Walker, *The Sports Court: A Private System to Deter Violence in Professional Sports*, 55 S. CAL. L. REV. 399, 414 (1982).

2. Linda S. Calvert Hanson and Craig Dernis note that a 1983 U.S. survey indicated that half of the nation's sports fans thought sports were too violent. See Linda S. Calvert Hanson & Craig Dernis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years*, 6 SETON HALL J. SPORT L. 127, 128-129 (1996).

3. Carlsen & Walker, *supra* note 1, at 404.

4. *Id.*

5. *Id.* at 414.

authorities and commentators continuing to call for the criminal prosecution of players for excessively violent acts. Players have been charged and convicted of assault and received fines in addition to lengthy suspensions, but levels of violence still remain high. Minimal consideration has been given, however, to the need to reform the current internal disciplinary procedures.

Some scholars, such as Simon Gardiner and Alexandra Felix, have argued that “juridification” of the football field should be resisted.⁶ Additionally, Wyatt Hicks states that “[l]eague self regulation has emerged as the most effective way to deal with on-field events,” but notes that “the proper way to prevent and punish those players who commit a violent act against another player. . .has been hotly debated.”⁷ Hicks also acknowledges the shortcomings of self-regulation, but he concludes that it remains the most appropriate means to deal with on-field violence.⁸ Similarly, John Timmer concludes that one reason to allow leagues to tackle disciplinary proceedings is that a “league understands the sport better than does any court” because “league officials are more familiar with the customs of the sport and with what risks players assume than a judge or jury.”⁹ Timmer further notes that the NHL is able to, and does, hand out significant suspensions which require players to sit out games without pay.¹⁰ In his view, this penalty is more severe than any a criminal court would likely impose and “would better serve as a deterrent to future conduct of the sort being punished.”¹¹ Action by the NHL would also be swifter than a traditional court remedy. Moreover, the NHL is “better able to impose uniform and predictable sanctions, and thus better able to deter future excessively violent acts.”¹² However, both Hicks

6. Simon Gardiner & Alexandra Felix, *Juridification of the Football Field: Strategies for Giving Law the Elbow*, 5 MARQ. SPORTS L. J. 189, 189 (1995).

7. Wyatt M. Hicks, *Preventing and Punishing Player-to-Player Violence in Professional Sports: The Court System Versus Self-Regulation*, 11 J. LEGAL ASPECTS OF SPORT 209, 209-210 (2001).

8. *Id.* at 210.

9. John Timmer, *Crossing the (Blue) Line: Is the Criminal Justice System the Best Institution to Deal with Violence in Hockey?*, 4 VAND. J. ENT. L. & PRAC. 205, 212-213 (2002).

10. *Id.* at 213.

11. *Id.*

12. *Id.*

and Timmer fail to offer any suggestions as to how to improve the existing procedures for disciplining players' on-field violence. Timmer notes that the NHL may actually have a vested interest in promoting violence because the NHL "will only protect players against in-game violence when it rises above a certain 'entertainment' level."¹³

Many believe that the continuing problem with the commissioner system is the somewhat arbitrary and highly discretionary nature of disciplinary actions. This is not to say that fines and suspensions have not been severe, but the continuing and perhaps increasing level of on-field violence has brought into question the effectiveness of self-regulation and the possible need for state intervention, including criminal prosecution. For example, in 2004, Todd Bertuzzi of the NHL's Vancouver Canucks broke an opposing player's neck.¹⁴ He subsequently pleaded down to assault, receiving a year's probation and community service.¹⁵ The NHL, however, imposed an indefinite suspension on Bertuzzi.¹⁶

Experts have debated the key to solving these violence problems. Jeff Yates and William Gillespie believe that "[t]he key to solving the problem of excessive sports violence through criminal prosecutions is in symbolic prosecution."¹⁷ Kevin Fritz does not go as far as Yates and Gillespie, but he reasons that excessive player violence requires stronger control than the current system provides.¹⁸ Fritz recommends the establishment of a National Sports Policy Commission created by Federal legislation which would be empowered with secondary review of sports violence cases after any resolution by the relevant league.¹⁹ The agency would also have the power to punish players through fines and suspensions as well as award compensation to injured

13. *Id.*

14. Barry et al. note that Bertuzzi is appealing the NHL's decision to indefinitely suspend him and that he also may face a civil action by the victim. See Mathew P. Barry, Richard L. Fox & Clark Jones, *Judicial Opinion on the Criminality of Sports Violence in the United States*, 15 SETON HALL J. SPORTS & ENT. L. 1, 1-2 (2005). At the time of writing, the status of the appeal and any civil action is unknown.

15. *Id.*

16. *Id.* at 2.

17. Jeff Yates & William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 CORNELL J. L. & PUB. POL'Y 145, 168 (2002).

18. Kevin A. Fritz, *Going to the Bullpen: Using Uncle Sam to Strike Out Professional Sports Violence*, 20 CARDOZO ARTS & ENT. L. J. 189, 189 (2002).

19. *Id.* at 222.

players.²⁰ Fritz notes the possible reluctance of the United States government to become involved, and to date there appears to be little, if any, interest in implementing such legislative reforms.²¹

The overriding preference for dealing with sports violence in America is self-regulation by the relevant leagues, but there continues to be a call for players to be criminally prosecuted.²² As Mathew Barry points out, “[t]he debate regarding who is properly equipped to address sports violence is not a new one, and given the increasing frequency of violent incidents, the United States is clearly at a crossroads on the issue.”²³ Reported acts of violence, such as that involving Bertuzzi, along with the perception that violence in some sports may be increasing, have led some to conclude that the major leagues are incapable of dealing with on-field violence themselves. In commenting on the NHL, Tracey Oh stated,

If the NHL would rather avoid the negative publicity of criminal prosecution of its players, it should beef up the implementation of its supposedly new and improved rules. Instead of merely paying token end-of-season lip service to the problem of violence and implementing new rules for each new season, the NHL needs to enforce its existing rules diligently.²⁴

Oh even goes as far as suggesting that the NHL not only tolerates on-field violence but promotes it.²⁵ For example, reluctance by certain sports teams to eliminate fighting due to its adverse effect on attendance at games is a major obstacle to reform. Ultimately, this apparent acceptance of a certain level of on-field violence requires fundamental consideration.

In 1998, the National Rugby League (“NRL”) was established to administer Australia’s national rugby league

20. *Id.* at 225-229 (outlines a detailed plan of Fritz’s proposed federal agency).

21. *Id.* at 227. *See also* The Sports Violence Act, H.R. 7903, 96th Cong. (1980). The bill was reintroduced in 1981. The Sports Violence Act, H.R. 2263, 97th Cong. (1981); The Sports Violence Arbitration Act, H.R. 4495, 98th Cong. (1983). The bill was reintroduced again in 1985. The Sports Violence Arbitration Act, H.R. 2151, 99th Cong. (1985); Hicks, *supra* note 7, at 215-216.

22. *See e.g.*, Mathew P. Barry, Richard L. Fox & Clark Jones, *supra* note 14, at 2.

23. *Id.* at 3.

24. Tracey Oh, *From Hockey Gloves to Handcuffs: The Need for Criminal Sanctions in Professional Ice Hockey*, 28 HASTINGS COMM. & ENT. L. J. 309, 311 (2006).

25. *Id.* at 317. *See also* Timmer, *supra* note 9, at 213; J.C.H. Jones & Stewart Kenneth, *Hit Somebody: Hockey Violence, Economics, the Law, and the Twist and McSorley Decisions*, 12 SETON HALL J. SPORT L. 165, 167 (2002).

competition. As part of the planning for the overall NRL, those involved sought to develop a disciplinary system beneficial to the continued prosperity and popularity of the game. "Rugby league realized in the 1990's that it would have to market itself aggressively if it was to survive in the competitive Australian sporting market; the levels of objectionable aggression inherent in the sport, including head-high tackles, were addressed."²⁶

The NRL competition is now governed by the NRL Rules. These include provisions that regulate player behavior, the penalties for misconduct and the procedures for hearing misconduct cases.²⁷ Specifically, the NRL Rules include the Code of Conduct, Anti-Doping Rules, Anti-Vilification Code, Judiciary Code of Procedure and Appeals Committee Procedural Rules. Most pertinent to this Article, the Judiciary Code of Procedure and Appeals Committee Procedural Rules ("the NRL Rules") set out the disciplinary system for dealing with incidents of on-field misconduct and its punishment.

In 2005, an almost identical system was adopted by the Australian Football League ("AFL").²⁸ The fact that these two national multi-million dollar sports leagues utilize the same system for disciplining players for on-field violence is extremely significant for Australian sports; particularly as these two leagues involve physical impacts between opposing players as an integral and lawful part of the game. Furthermore, each season, on-field incidents of violence attract extensive media coverage and scrutiny, which extends to the disciplinary action that follows in addition to any match suspensions. Unlike Carlsen and Walker's sports

26. Jack Anderson, *Policing the Sports Field: The Role of the Criminal Law*, INT'L SPORTS L. R. 25, 27 (2005).

27. The NRL Rules are not available on-line. Requests for a copy of the Rules or any of the Codes should be addressed to the Judiciary Secretary, National Rugby League, GPO Box 3498, Sydney, NSW, 2001, Australia. Certain information can be obtained from the NRL website. See generally <http://www.nrl.com/> (a copy of these rules is on file with the authors and Seton Hall's Journal of Sports and Entertainment Law).

28. The AFL is the sporting body which controls the national Australian Rules Football competition. Andrew Stops, a partner in Piper Alderman's Dispute Resolution Group, Melbourne, commented that, "The tribunal system is a great credit to the AFL. It is transparent, predictable and flexible enough to deal with a wide variety of incidents that can and do occur in our national game." See Andrew Stops, *A Very Public Introduction to the AFL Tribunal*, 61 *The Commentator* 2, 2 (2005).

court, which appears to be based on an arbitral model, the NRL system is based on a combination of the procedures adopted in Australian Local Magistrates Courts and a military court martial.²⁹ However, the NRL Judiciary is still a private, domestic tribunal under NRL control rather than under the control of a separate, independent body.

This Article argues that sports disciplinary tribunals are the most appropriate forum to deal with on-field violence. The NRL reinforces this concept through formal rules which include specified punishment for breaches and a judiciary hearing for disputed cases. This formalized approach to the administration of “sports justice” underpins the role of the NRL Judiciary within the national competition and has made the NRL Judiciary Code the accepted means for dealing with all on-field violence in Australia’s rugby league.

To what extent can professional sports in North America learn from this Australian experience? In order to assess this inquiry, the following analysis is divided into two parts. Part I considers various issues relevant to the player disciplinary systems operating in the National Football League (“NFL”), National Hockey League (“NHL”), Major League Baseball (“MLB”) and National Basketball Association (“NBA”). Part II describes, in detail, the Australian NRL Judiciary system, highlighting how this system addresses many of the apparent North American shortcomings.

I. AMERICAN DISCIPLINARY SYSTEMS

The disciplinary systems for on-field violence operated by the NFL, NHL, NBA and MLB are similar in that the authority to deal with such incidents and punish players lies with each sport’s Commissioner.³⁰

The jurisdiction afforded to each American Commissioner resides in the contractual arrangements entered into between the players, or the Players Association, and the sports organization itself. Typically, these contractual

29. This was communicated to the authors by two of those interviewed. *See infra* note 95, describing the interviews conducted by the authors in preparation for this piece.

30. In the MLB, such power additionally lies with the various League Presidents. While clubs also have disciplinary power, as recognized in the various Collective Bargaining Agreements, this article does not address clubs’ discipline of players.

arrangements are found in three documents: the Collective Bargaining Agreement, the Uniform Player Contract, and the League Constitution (including its By-Laws). Crucial to the disciplinary powers of the Commissioner is the interplay between these documents since “the constitution of a league may purport to give its commissioner unlimited authority to impose discipline, [but] that authority may be curtailed or subject to outside review as a result of the collective bargaining process and provisions incorporated into the collective bargaining agreement.”³¹ Jan Stiglitz notes,

On the field discipline would include actions taken against a player for excessive violence, attacking another player, or misconduct involving an umpire or referee. As a general rule, discipline on the field misconduct is initiated by a representative of the league (either a game official or someone appointed by the commissioner) and is ultimately resolved by a representative of the league (usually, the commissioner). While it is a frequent source of discipline, the issues are relatively simple. In addition, because the discipline stems from the game itself, the appropriateness of discipline, and the legitimacy of league self-rule, are generally accepted.³²

Whether such discipline is appropriate and whether league self-rule is acceptable with respect to on-field misconduct depends on how each sport’s disciplinary system operates in practice.

A. *The NFL*

Player discipline for on-field violence against another player or players is conducted in accordance with the NFL Collective Bargaining Agreement.³³ Article XI, Section 1(b) outlines the process for fines or suspensions for “unnecessary roughness or unsportsmanlike conduct on the playing field”³⁴

31. Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L. J. 167, 171-172 (1995).

32. *Id.* at 177.

33. National Football League, Collective Bargaining Agreement (Mar. 8, 2006), available at <http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=622&pid=0&type=1> (last visited Nov. 17, 2008).

34. *Id.* (“[f]ines or suspensions imposed upon players for unnecessary roughness or unsportsmanlike conduct on the playing field with respect to an opposing player or players shall be determined initially by a person appointed by the Commissioner after consultation concerning the person being appointed with the Executive Director of the

while Section 1(c) sets out the appeal procedures.³⁵ At any hearing, a player may be represented by counsel of his choice, which is often a representative of the NFL Players' Association.

The NFL Rules do not detail how "unnecessary roughness or unsportsmanlike conduct on the playing field" comes to the attention of the Commissioner.³⁶ It is presumed that the Commissioner would learn of these incidents through complaints by on-field officials or the victim's team, but Article XI gives no indication that this is the case. The NFL Rules do make provisions for fouls, but it is difficult to assess these provisions since the NFL website only provides a Digest of Rules.³⁷ This Digest indicates that game disqualifications and many 15 yard penalties involve player violence,³⁸ and it is assumed that these could form the basis of action by the Commissioner. Incidents may also come to the Commissioner's attention through viewing of video footage of a game, but again, this is not stated in the Rules.

While the Rules do set out on-field offenses that could lead to fines and/or suspensions, there is no indication of the applicable penalty for any particular offense. Whether or not a player faces any fine and/or suspension and the amount of any fine or length of any suspension appear to be at the sole discretion of the Commissioner.

B. The NHL

Comparatively, the NHL has the most comprehensive set

NFLPA, as promptly as possible after the event(s) in question. Such person will send written notice of his action to the player, with a copy to the NFPLA. Within ten (10) days following such notification, the player, or the NFPLA with his approval, may appeal in writing to the Commissioner.").

35. *Id.* ("(c) On receipt of a notice of appeal...the Commissioner will designate a time and place for a hearing to be commenced within ten (10) days thereafter, at which he or his designee...will preside. The hearing may be by telephone conference call, if the player so requests. As soon as practicable following the conclusion of the hearing, the Commissioner will render a written decision which will constitute full, final and complete disposition of the dispute and will be binding upon the player(s) and Club(s) involved. ... Any discipline imposed...may only be affirmed, reduced, or vacated by the Commissioner in such a decision, and may not be decreased.").

36. *Id.*

37. See National Football League Rulebook - Penalty Summaries, available at <http://www.nfl.com/rulebook/digestofrules> (last visited Nov. 24, 2008).

38. *Id.*

of provisions dealing with on-ice violence. This is important because, ironically, it is the NHL which has been subjected to the most criticism for its apparent failure to control high levels of player violence and effectively implement the system it has in place.³⁹

Sanctions for excessive on-ice violence may be imposed by either the Commissioner or the on-ice officials.⁴⁰ The relevant on-ice offenses are set out in the NHL Rules.⁴¹ Using the foul of “boarding” as an example, the Rules provide for four levels of on-ice penalty: Minor, Major, Match and Game Misconduct.⁴² Match and Game Misconduct Penalties arise where a player deliberately attempts to or injures an opponent (Match) or injures the opponent’s face or head (Game Misconduct).⁴³ Any player who incurs two Game Misconduct Penalties in a regular season is automatically suspended for the next game.⁴⁴ Where there is a Major Penalty, the NHL imposes an automatic fine of \$100.⁴⁵

Rule 29 authorizes the Commissioner to take further action over and above these standard on-ice penalties.⁴⁶ Such supplementary discipline must accord with the relevant provisions of the Collective Bargaining Agreement. Article 18.1 of the CBA states that the initiation of any supplementary discipline, notification, formal and informal hearings, fines and suspensions must accord with Article 18.3 and Exhibit 8.⁴⁷ Article 18.3 provides for a maximum fine of \$2,500, the methods for calculating “salary lost due to suspension,” and a differentiation of penalty according to a “first offenders” and “repeat offenders” regime.⁴⁸

Under Article 18.5, violation of on-ice playing rules which

39. See, e.g., Oh, *supra* note 24.

40. See National Hockey League, Rulebook (2006-2007) Sections 6 and 8, available at www.cdn.nhl.com/rules/20062007rulebook.pdf.

41. *Id.*

42. *Id.* at NHL Rule 42.

43. *Id.*

44. National Hockey League, Rulebook (2006-2007) Sections 6 and 8, available at www.cdn.nhl.com/rules/20062007rulebook.pdf at NHL Rule 42.

45. *Id.*

46. *Id.* at NHL Rule 29.

47. See National Hockey League, Collective Bargaining Agreement (Jul. 22, 2005), available at www.nhl.com/cba/2005-CBA.pdf.

48. *Id.* at 18.3(a).

carry an automatic suspension can be appealed to the Commissioner or his designee.⁴⁹ It is unclear whether a party may appeal from a decision by the Commissioner, but a party may appeal from any supplementary discipline. Additionally, the NHL CBA outlines a “Grievance” procedures in Article 17,⁵⁰ but such grievance proceedings can only be initiated by the NHL or NHL Players Association.⁵¹ Where parties are unable to resolve a matter between themselves through a Grievance proceeding, then the matter will be heard by an Impartial Arbitrator whose decision is final.⁵²

C. The NBA

Rule 12 of the NBA Official Rules sets out a number of provisions regarding types of fouls and their penalties.⁵³ For example, the penalties for on-court fighting include ejection from the game as well “[a] fine not exceeding \$50,000 and/or suspension [which] may be imposed. . . by the Commissioner at his sole discretion.”⁵⁴ Stiglitz notes that, “[u]nder the collective bargaining agreement and the Uniform Player Contract, basketball players have agreed to subject themselves to discipline by the Commissioner and the Board of Governors in accordance with Rule 35 of the N.B.A. Constitution and its By-Laws.”⁵⁵ Rule 35 obligates the players to be bound by the provisions and allows the Commissioner or Board to effectuate the CBA provisions.⁵⁶

In accordance with the above rules, initial disciplinary

49. *Id.* at 18.5.

50. *Id.* at 17.

51. *Id.* at 17.2(a).

52. *Id.* at 17.13.

53. See SPORTING NEWS, OFFICIAL RULES OF THE NATIONAL BASKETBALL ASSOCIATION (2006) available at www.nba.com/media/rule_book_2006-07.pdf.

54. *Id.* at § VI(e).

55. Stiglitz, *supra* note 31, at 185.

56. NBA Player’s Association, Excerpt from NBA Constitution, Rule 35, available at http://www.nbpa.com/cba_exhibits/exhibitA-excerpt.php (last visited on Oct. 16, 2008). Rule 35(a) states that:

(a) Each Member shall provide and require in every contract with any of its Players that they shall be bound and governed by the provisions of this Article. Each Member, at the direction of the Board of Governors or the Commissioner, as the case may be, shall take such action as the Board or the Commissioner may direct in order to effectuate the purposes of this Article.

action by the Commissioner appears to be discretionary.⁵⁷ Review of any fine and/or suspension, however, must accord with Article 35(g), which provides:

(i) any challenge by a Team to the decisions and acts of the Commissioner pursuant to Article 35 shall be appealable to the Board of Governors, who shall determine such appeals in accordance with such rules and regulations as may be adopted by the Board in its absolute and sole discretion, and (ii) any challenge by a Player to the decisions or acts of the Commissioner pursuant to Article 35 shall be governed by the provisions of Article XXXI of the NBA/NBPA Collective Bargaining Agreement then in effect.⁵⁸

Article XXXI provides for a grievance hearing, at which a player may appeal a fine and/or suspension.⁵⁹ Those present at such hearings include the Grievance Arbitrator and representatives from the NBA and NBPA.⁶⁰ In accordance with § 5, the Arbitrator's decision "shall constitute full, final and complete disposition of the grievance."⁶¹

D. The MLB

The MLB League Rules contain a number of offenses that can lead to fines and/or suspensions.⁶² These rules further set

57. Rule 35(d) provides that:

(d) The Commissioner shall have the power to suspend for a definite or indefinite period, or to impose a fine not exceeding \$50,000, or inflict both such suspension and fine upon any Player who, in his opinion, (i) shall have made or caused to be made any statement having, or that was designed to have, an effect prejudicial or detrimental to the best interests of basketball or of the Association or of a Member, or (ii) shall have been guilty of conduct that does not conform to standards of morality or fair play, that does not comply at all times with all federal, state, and local laws, or that is prejudicial or detrimental to the Association.

58. See NBPA Collective Bargaining Agreement, available at www.nbpa.com/downloads/CBA.pdf. This version of the CBA is dated 1999. The latest CBA was signed in July 2006 but does not appear to be available on-line. No differences, however, exist regarding the disciplinary procedures for on-court violence.

59. *Id.*

60. *Id.*

61. *Id.* at § 5.

62. See, e.g., Commissioner of Baseball, Official Rules (2008) available at http://mlb.mlb.com/mlb/official_info/official_rules/foreword.jsp. Rule 8.02 (d), which disallows pitchers from intentionally harming batters, states:

(d) The pitcher shall not intentionally pitch at the batter. If, in the umpire's judgment, such a violation occurs, the umpire may elect either to: Expel the pitcher, or the manager and the pitcher, from the game, or may warn the pitcher and the manager of both teams that another such pitch will result in

forth the procedure for disciplining player violations of the proscribed rules.⁶³

The MLB League Rules authorize the Commissioner to hand down disciplinary measures for on-field misconduct by players.⁶⁴ Any disciplinary action that follows must be in accordance with Article XII of the CBA.⁶⁵ Article XIII states, "[t]he Parties recognize that a Player may be subjected to disciplinary action for just cause by his Club, the Vice President, On-Field Operations or the Commissioner. Therefore, in grievances regarding discipline, the issue to be resolved shall be whether there has been just cause for the penalty imposed."⁶⁶ Disciplinary action by the Commissioner or League President for on-field misconduct, however, appears somewhat discretionary.⁶⁷ There is also no guidance as to the amount of a fine or length of suspension applicable to various offenses.

Unlike other grievances, there is significant limitation placed on appeals from disciplinary action stemming from on-field violence.⁶⁸ As Stiglitz observes, "[w]here a dispute

the immediate expulsion of that pitcher (or a replacement) and the manager.

63. *Id.* at Rule 9.05. Rule 9.05 outlines this procedure as follows:

(a) The umpire shall report to the league president within 12 hours after the end of a game all violations of rules and other incidents worthy of comment, including the disqualification of any trainer, manager, coach or player, and the reasons therefor.

(b) When any trainer, manager, coach or player is disqualified for a flagrant offense such as the use of obscene or indecent language, or an assault upon an umpire, trainer, manager, coach or player, the umpire shall forward full particulars to the league president within four hours after the end of the game.

(c) After receiving the umpire's report that a trainer, manager, coach or player has been disqualified, the league president shall impose such penalty as he deems justified, and shall notify the person penalized and the manager of the club of which the penalized person is a member. If the penalty includes a fine, the penalized person shall pay the amount of the fine to the league within five days after receiving notice of the fine. Failure to pay such fine within five days shall result in the offender being debarred from participation in any game and from sitting on the players' bench during any game, until the fine is paid.

64. *Id.*

65. See Major League Baseball Collective Bargaining Agreement, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf. This is the 2003-6 CBA. A new CBA was signed in July 2006. There are no changes to the Articles referenced.

66. *Id.*

67. As noted earlier, Club penalties are not covered in this article.

68. See Major League Baseball Collective Bargaining Agreement, *supra* note 58, at Article XI C.

involves a fine or suspension which has been imposed by the League President or the Commissioner, for conduct on the playing field, the player has no recourse to neutral arbitration," and appeals are conducted "in most cases by the very person who imposed the discipline."⁶⁹

E. Problems with the Commissioner System

1. Excessive Violence

As noted earlier, high levels of on-field violence in American sports have led to the belief that players should be prosecuted for assault. Underlying this belief is the view that "[t]he prevalence of excessive violence in professional sports events presents a serious social problem in both the United States and Canada."⁷⁰ As Mathew Barry notes, "[s]ports violence could also pose a significant threat to our society as everyday amateur athletes, particularly children, may feel encouraged to replicate senseless acts of sports violence that are replayed ad nauseam on sports programs such as ESPN's SportsCenter."⁷¹

Much of the relevant literature provides little, if any, information on the extent of the problem. Despite reforms to internal disciplinary systems, sports have failed to deal with excessive on-field violence. While Hanson and Dernis acknowledge the methodological difficulties in measuring levels of violence, their research attempts to provide some descriptive analysis of the problem.⁷² However, the only statistic referred to in this study is the number of injuries sustained in one NFL season.⁷³ In order to properly evaluate the levels of sports violence in America, Hanson and Dernis suggest that a comprehensive analysis of violence "at the

69. Stiglitz, *supra* note 31, at 180.

70. Fritz, *supra* note 18, at 189.

71. Barry et al., *supra* note 14, at 4.

72. Hanson and Dernis, *supra* note 2. Even though the research by Hanson and Dernis is now quite dated, it continues to be cited in support of more recent literature contending that levels of on-field violence remain excessive. See e.g., Barry et al., *supra* note 14.

73. Hanson and Dernis, *supra* note 2, at 134. The figure cites that 1,638 NFL players missed two or more games through serious injury in one season. Hanson and Dernis acknowledge, however, that such data does not differentiate between injuries resulting from legitimate and illegitimate play.

professional, collegiate, amateur and recreational levels” is necessary.⁷⁴ To date, however, no research of this nature appears to have been attempted.

Instead, the literature that does exist is largely anecdotal and/or concerns specific incidents and cases. The research conducted by Barry and his colleagues is a rare example of an empirical study in this area. In that study, the researchers surveyed U.S. judges’ attitudes “towards the criminal and legal status of violence in professional sports.”⁷⁵ The results set out in the Table below encapsulate many of the overriding perceptions concerning on-field violence.⁷⁶

Table 1 - Judicial Attitudes Towards the Problem of Sports Violence

| | |
|---|-----|
| Percent who agree sports violence is a significant problem..... | 64% |
| Athletes do not consent to intentional acts of violence beyond the scope of the rules | 93% |
| The professional sports leagues do a poor job of dealing with violence in their respective sports..... | 60% |
| Having a biased decision-maker such as a commissioner within a professional sport results in inconsistent judgments about punishment..... | 67% |

Barry further notes that “[j]udges are in agreement with those commentators that conclude leagues are biased decision makers and have a history of poorly regulating sports violence.”⁷⁷ This sentiment remains despite the reforms to the various league systems introduced since the 1980s. This is not to say that there has been no improvement. In his article on the NHL, Jonathan Katz refers to certain media reports indicating a 35% drop in player injury rates.⁷⁸ Another report

74. *Id.* at 132.

75. Barry et al., *supra* note 14. For a description of the methodology employed, see *id.* at 16-17.

76. *Id.* at 18.

77. *Id.*

78. Jonathan H. Katz, *Symposium: Federalism after Alden: Note: From the Penalty Box to the Penitentiary—The People versus Jesse Boulerice*, 31 *RUTGERS L. J.* 833, 865 fn. 228 (2000).

stated that the fights-per-game average had fallen from 2.1 in 1987-88 to 1.2 in the first half of 1998-99.⁷⁹ Of course, one must ask whether 1.2 fights per game is acceptable.

2. Perceived and/or Real Bias

In all the major leagues, the power to initiate an investigation, to lay a charge, to conduct a hearing or to impose a penalty for misconduct generally resides in the office of the sport's Commissioner. Some argue that investing such a power in one office is inherently unfair:

Critics contend that internal disciplinary procedures of the leagues amount to a private system of justice, which gives the commissioners power similar to that of the accuser, judge and jury. Having a partial or biased decision maker could result in inconsistent judgments about punishment and its severity. Moreover, the effectiveness of the internal regulations will be dependent upon the priorities of the individual commissioner or disciplinarian.⁸⁰

On-field officials impose penalties that can lead to automatic fines and suspensions. Such penalties may also result in subsequent supplementary action by the Commissioner; however, this is very much at the Commissioner's discretion. In most cases, on-field penalties are the only form of sanction actually imposed although there are some examples of commissioner initiated action. There does not appear, however, to be any overall scrutiny of the game by the Commissioner and/or his delegates. Incidents not detected by game officials may therefore escape disciplinary action. In 1997, for example, Barbara Svoranos noted that "[d]espite its so-called attempt at 'getting tough,' fighting in the NHL increased in 1996 due in part to the fact that in only 26 percent of the fights was an instigator even identified by the officials."⁸¹

All of this, of course, must be considered in light of the relationship between the clubs and the Commissioner. Because the clubs effectually appoint the Commissioner, his

79. *Id.*

80. Hanson and Dernis, *supra* note 2, at 162-3.

81. Barbara Svoranos, Comment, *Fighting? It's All in a Day's Work on the Ice: Determining the Appropriate Standard of a Hockey Player's Liability to Another Player*, 7 SETON HALL J. SPORT L. 487, 493 (1997).

independent capacity to “get tough” on violence must be questioned.

3. Arbitrary and Infrequent Punishment

The amount of discipline and the frequency of punishment are extremely difficult to measure. However, because of the continued high levels of violence present in professional sports, many commentators, academic and otherwise, contend that discipline is inconsistently administered and not applied frequently enough. Although recent penalties have been severe and more frequent, the imposition has remained inconsistent. Katz, for example, in referring to a “get tough” approach taken in the 1999 NHL season, noted that the newly appointed Commissioner suspended and fined three times as many players for on-ice violence than his 1998 predecessor.⁸²

4. Systemic and Procedural Problems

Bias⁸³ and arbitrary disciplinary action⁸⁴ are significant systemic problems. Another systemic and procedural problem is the lack of detail about offenses and punishments. Apart from the NHL, all the other leagues define on-field offenses vaguely and in general terms. This is not to suggest, however, that the NHL is not without problems. For example, the NHL regulations do not define “game” or “gross” misconduct. According to Oh, this “leaves players free to take advantage of the ambiguous limits before they incur more serious administrative forms of punishment.”⁸⁵

Where action is taken by the Commissioner, the various systems do not clearly disclose how the matter is to be heard. In some cases, particularly in the NFL, it can take considerable time to resolve the matter. This is further exacerbated where a player appeals his penalty. This is true, to differing degrees, for all leagues with players seemingly able to continue playing while the matter progresses through all disciplinary stages.

82. Katz, *supra* note 78, at 866. Statistically, however, this could also be interpreted as a response to increasing levels of violence and not necessarily a result of being tougher than before.

83. See Part (I)(e)(ii), *supra*.

84. See Part (I)(e)(iii), *supra*.

85. Oh, *supra* note 24, at 316.

Jamey Newberg made the following observations concerning certain MLB player suspensions in 2006:

Armed with the right to appeal, players often use the schedule to strategically time their suspensions. Having pitched five innings in the brawl-marred game and dealing with a sore knee anyway, Angels reliever Kevin Gregg chose not to appeal his four-game suspension. Los Angeles second baseman Adam Kennedy waived his right to appeal his four-game suspension as well, since his club was slated to face left-handers three times in that span, three games he probably wouldn't have started.

On the other hand, Angels reliever Brendan Donnelly, whose four-game suspension is set to begin on Tuesday, is appealing his punishment, hardly a surprise since Los Angeles is playing Boston three times and the Yankees once in that stretch. By delaying his suspension while a hearing is scheduled, even if the penalty isn't reduced, it could start late enough that Donnelly ends up missing games against Seattle rather than against the Red Sox.⁸⁶

In Barry's study, an Illinois trial court judge commented, "[i]f there was an immediate and certain penalty, it would go far to keeping such disputes out of the courts."⁸⁷

5. Economics of Violence

As previously noted, certain sports may have a vested interest in promoting a certain level of violence. In this regard, Barry states:

Clearly, leagues want to retain control over sports violence punishments to ensure a positive public image that promotes fan interest and protects revenues for the team owners. Therein lies the greatest argument against league self-control since leagues clearly have a biased financial interest in how and when to mete out punishment.

Instances of excessive violence are a component of almost every professional hockey and football game. The marketing of and profiting from sports violence is a major argument against allowing leagues to regulate cases of sports violence.⁸⁸

This underlying problem, particularly within the NFL and

86. See Jamey Newberg, *Going Deep: An Unappealing Situation*, available at http://texas.rangers.mlb.com/news/article.jsp?ymd=20060821&content_id=1621519&vkey=news_tex&fext=.jsp&c_id=tex.

87. Barry et al., *supra* note 14, at 21.

88. *Id.* at 15-16.

NHL, stands as the biggest single obstacle to reforming internal disciplinary systems. Some contend that both the Commissioner and the clubs have vested interests in maintaining a so-called level of “acceptable” violence. A number of authors refer to public comments by the NHL that “fighting” is part of the game and that eliminating fighting would not only be problematic but would adversely affect game attendance.⁸⁹

II. THE AUSTRALIAN DISCIPLINARY SYSTEM

A. *The NRL*

The NRL was formed in 1998 under a partnership arrangement between the Australian Rugby League and News Limited to administer the national rugby league competition (Telstra Premiership).⁹⁰ It is a private limited company with approximately 35 staff members. Unlike the American leagues, however, the individual rugby clubs have no control over the NRL. Further, the Chief Executive Officer (“CEO”), a position which might be compared to that of a commissioner, is an NRL employee.

Incidents of on-field player misconduct are governed by the NRL Judiciary Code of Procedure and Appeals Committee Procedural Rules.⁹¹ These provisions establish an internal disciplinary system, independent of the NRL and the clubs, based on pre-determined offenses and penalties. A tribunal hears contested cases, and players dissatisfied with the outcome of a hearing may appeal.⁹² The NRL in turn is controlled by three independent shareholders, including TELSTRA, Australia’s largest telecommunications company and the major sponsor of the NRL, who hosts an annual competition called the TELSTRA Premiership.

Those responsible for developing the current NRL system, after assessing a number of major sports around the world, particularly in North America and Europe, recognized that an

89. Oh, *supra* note 24; Fritz, *supra* note 18; and Barry et al., *supra* note 14.

90. See <http://www.nrl.com.au/AbouttheGame/ReferenceCentre/tabid/10429/default.aspx> (last visited Oct. 16, 2008).

91. *Id.*

92. *Id.*

effective disciplinary system for on-field misconduct needed to be based on fixed and known offenses. The system that ultimately evolved has a number of listed and specifically described offenses, each of which is divided into various grades to reflect the seriousness of the violence in question. For example, a grade 5 striking offense is more serious than grade 2 striking. Additionally, each grade of offense has a prescribed number of demerit points assigned to it; the greater the number of demerit points, the greater the penalty imposed on the player. Players are notified in writing of the charge against them and given the option to plead guilty or contest the matter during a hearing. In order to expedite proceedings, players are given three pleading options for the offense(s) and the grading(s) charged: a plea of guilty to the offense and the grade; a plea of guilty to the offense but not guilty to the grade; or not guilty to the offense and grade. Those designing the system decided that there should be a considerable incentive, in the form of a discount of the penalty points, for players pleading guilty. In essence, the system is designed to avoid hearings.⁹³ A hearing is required only in those cases where a player pleads not guilty to either the charge or the grading.

In forming the system, consideration was also given to the creation of a body responsible for the determination of the charges to be laid against the player prior to conducting a hearing. This body, which later became the Match Review Committee, was seen as central to the operation of the new system, particularly in light of the need to ensure consistency in the charges.

To what extent can the American leagues learn from the NRL experience? In order to assess this question, the next section provides a detailed analysis of the NRL disciplinary system.

B. NRL Judiciary and Appeals Committee

This Section is based on research conducted at the beginning of 2005 analyzing the provisions of the Judiciary Code of Procedure and Appeals Committee Procedural Rules. Interviews were also carried out with members of the NRL

93. This is discussed in detail in Part 2B(i) *infra*.

executive,⁹⁴ the Match Review Coordinator, the Judiciary (including the Chair and members of the Panel) and its support staff (the Judiciary Secretary), the Chair of the Appeals Committee, a Judiciary Counsel (prosecutor), a defense lawyer; and a Queensland barrister who played a major role in the drafting of the NRL Rules including the Judiciary Code.⁹⁵ The purpose of these interviews was to obtain information on the historical development of the NRL player disciplinary system, its structures and functions.⁹⁶ The research also assessed due process protections in the system. Interviewees were questioned about such protections. Audio CDs of a sample of cases heard during the 2004 season, together with video recordings of the on-field incidents were provided by the NRL and were analyzed to assess the practical application of due process.⁹⁷

1. On-field Offenses and Demerit Points

The elements of each offense⁹⁸ are described within the Judiciary Code along with demerit/penalty points for the

94. This included the NRL's Chief Executive Officer and Chief Operating Officer.

95. The authors conducted several interviews with NRL Judiciary affiliates in preparation for writing this piece. All interviews were recorded and transcribed. All those interviewed, with the exception of the defense lawyer, could have a vested interest in promoting the system. Telephone interview with Martin Burns, Queensland Barrister, Sydney, Australia (April 14, 2004); interview with Sir Lawrence Street, former Chief Justice of the New South Wales Supreme Court, private offices, Sydney, Australia (March 16, 2004); interview with The Honorable Greg Woods, District Court Judge of Australia, NRL Judiciary Chairman, private chambers in Sydney (March 2, 2004); Interview with Malcolm Cochrane, ex-player for the Manly Sea Eagles rugby team, current Judiciary Adjudicator, various coffee shops, Sydney, Australia (March 8, 2004); Interview with Darrell Williams, ex-player for the Manly Sea Eagles, current Judiciary Adjudicator, coffee shop, Sydney, Australia (March 2, 2004); Interview with Peter Kite, Senior Counsel for the Judiciary Counsel, private chambers, Sydney, Australia; Interview with Greg McCallum, ex-top grade rugby league referee, current Chairman of the Match Review Committee, private offices, Homebush, Sydney (Feb. 17, 2004); Interview with Graham Annesley, ex-top grade rugby league referee, current Chief Operating Office of the NRL, NRL Headquarters, Sydney, Australia (Feb. 10, 2004); Interview with David Gallop, Chief Executive Officer of the NRL, NRL Headquarters, Sydney, Australia (Feb. 10, 2004); Interview with Nathan McGuirk Judiciary Secretary of the NRL, NRL Headquarters, Sydney, Australia (Feb. 10, 2004) (hereinafter "the interviews conducted by the authors").

96. It was decided not to interview club representatives and players as this involved an evaluative perspective not intended at this stage of the research.

97. See NRL Rule 69.

98. An exception is for referred offenses, which are discussed at section 2(B)(ii), *infra*.

various grades of each offense.⁹⁹ The Table below sets out the offenses, gradings, and demerit points.¹⁰⁰

| SHORT DESCRIPTION OF OFFENSE | DEMERIT POINTS | | | | |
|--------------------------------|----------------|---------|---------|---------|---------|
| | Grade 1 | Grade 2 | Grade 3 | Grade 4 | Grade 5 |
| Tripping | 75 | 175 | 275 | 375 | 475 |
| Kicking | 100 | 200 | 300 | 400 | 600 |
| Striking | 125 | 225 | 325 | 425 | 525 |
| Intentional-High Tackle | 550 | 650 | 750 | 850 | 950 |
| Reckless-High Tackle | 300 | 350 | 400 | 450 | 500 |
| Careless-High Tackle | 75 | 125 | 175 | 225 | 275 |
| Dropping Knees | 200 | 300 | 400 | 500 | 600 |
| Dangerous Throw | 125 | 325 | 525 | 725 | 925 |
| Law Breaking | 75 | 100 | 125 | 150 | 175 |
| Offensive Language | 75 | 100 | 125 | 150 | 175 |
| Disputing Decision | 75 | 125 | 175 | 225 | 275 |
| Re-entering Play | 75 | 125 | 175 | 225 | 275 |
| Contrary Conduct | 125 | 225 | 325 | 425 | 575 |
| Obstructing | 75 | 125 | 175 | 225 | 275 |
| Detrimental Conduct | 125 | 225 | 325 | 425 | 525 |

Once the Match Review Committee decides on the charge, the Match Review Coordinator prepares and forwards a

99. These offenses are defined by NRL Rule 37 and include those described in the First Schedule of the Code.

100. Third Schedule, NRL Judiciary Code of Procedure.

Notice of Charge to the player by 6:00 p.m. on the first business day following the game in which the offense is alleged to have occurred.¹⁰¹ The Notice must specify the evidence that will be relied upon to support the charge, including video evidence and any oral or expert evidence.¹⁰²

Upon receipt of the Notice of Charge, players must complete a Notice of Election and forward it to the NRL no later than noon on the second business day following the game.¹⁰³ Failure to comply will result in the charge being scheduled for hearing before the Judiciary. The player has three options: plead guilty to the offense as charged and accept the penalty, effectively concluding the matter; plead guilty to the offense but dispute the grading, which means the matter will be heard by the Judiciary;¹⁰⁴ or plead not guilty to the offense, which is again heard by the Judiciary.¹⁰⁵ If any hearings are required, they are set down for the evening of the third business day.¹⁰⁶ Subject to any appeals,¹⁰⁷ all offenses are resolved by the fourth business day after the game with suspensions starting immediately.

Suspensions served expunge points at the rate of 100 points per game not played; points in excess of 100 carry over should the player commit another offense.¹⁰⁸ Any extra points remaining at the end of a season are carried over to the following year. In addition, a proven charge forms part of a player's record. When players commit other offenses within a two year period following the initial offense, their points are increased by 50% in cases of the same offense and 20% in cases of a different offense.¹⁰⁹ The purpose of this system is to deter and punish repeat offenders.

While a poor playing record is punished, a clear record is rewarded. Players with a seven year clean record are known

101. See NRL Rule 54. This is usually a Monday. This Notice can also include Match Official Reports and complaints from the opposing club.

102. NRL Rule 56.

103. This is usually a Tuesday.

104. This plea has to be considered in light of NRL Rule 57A where the offense is one of an Intentional or Reckless High Tackle.

105. NRL Rule 58.

106. Hearings are usually held on Wednesday nights.

107. For more discussion involving player appeals, see section 2(D)(ii), *infra*.

108. NRL Rule 47.

109. NRL Rule 42(3).

as “clean skins.”¹¹⁰ Such players are entitled to a 25% reduction in the points allocated to an offense charged and are also entitled to a 25% reduction when they enter an early plea of guilty to an offense charged.¹¹¹ Thus, a player with a clear record who enters an early plea will receive a 50% reduction. As noted below, it is the Match Review Committee that decides the initial grading of the offense and therefore the points faced by each player. The Judiciary Secretary calculates any loadings or reductions affecting the calculation of the demerit points and the suspension faced for a guilty plea, which is then sent to the player as part of the Notice of Charge.¹¹²

For example, Luke Ricketson from the Sydney Roosters was charged with Grade 3 Striking, a charge which carried 325 demerit points.¹¹³ The player did not enter an early plea, but rather, argued at the hearing that his offense should be downgraded.¹¹⁴ He was accordingly ineligible for the 25% reduction for an early plea. Had he taken the early plea, his points would have been reduced to 244, resulting in a two match suspension. However, the Judiciary Panel found him guilty of Grade 3 Striking.¹¹⁵ Ricketson did not have a clear record but was not liable for any loading as his previous offenses were more than two years prior to the current offense. He accordingly received 325 demerit points and was suspended for three games.¹¹⁶ Twenty-five points were carried over. This matter, which occurred in a semi-final, received considerable media attention as Ricketson’s team moved on to the grand final with Ricketson facing possible exclusion. His ultimate three match suspension not only meant that he missed the grand final, but also that he would be ineligible for the first two matches of the following season.

110. NRL Rule 42(1).

111. *Id.*

112. NRL Rule 54.

113. Luke Ricketson Judiciary Hearing (Sept. 26, 2004) (hereinafter “Ricketson Hearing”). An audio recording of this Judiciary proceeding was made by the NRL and is available upon request. A copy of the Ricketson Hearing recording is on file with the authors.

114. See section 2(D)(i), *infra*, for more discussion involving downgrading of player offenses.

115. Ricketson Hearing, *supra* note 113.

116. *Id.*

2. Referred Charges

Very serious on-field offenses are referred directly to the Judiciary without any initial determination by the Match Review Committee.¹¹⁷ For example, Clint Newton of the Newcastle Knights was charged with referred striking when he struck his opponent in the face with his elbow.¹¹⁸ The maximum graded offense of striking carries a base penalty of 525 demerit points.¹¹⁹ This was the third referred charge of the league's 2004 season, and the Judiciary Counsel stated that there was a need to deter these serious types of offenses. Newton subsequently received a penalty of 937 points (a nine match suspension with 37 carry-over points).¹²⁰ This charge was calculated on the basis of a head sentence of 1250 points reduced by 25% for his guilty plea.¹²¹

3. The Match Review Committee

The NRL Chief Executive Officer is responsible for appointing at least three persons as Match Reviewers.¹²² Each person must be a former player, coach, or referee of a top grade rugby league.¹²³ The Committee, led by and including a Match Review Coordinator, is comprised of three Match Reviewers.¹²⁴ Every game each weekend is covered, with each Reviewer responsible for scrutinizing several games. The Committee's principal role is to "investigate, examine and consider any conduct by a Player that may constitute an offense."¹²⁵ This is done by viewing video replays of the games, though Reviewers may have actually

117. NRL Rule 53.

118. Clint Newton NRL Judiciary Hearing (August 20, 2004) (hereinafter "Newton Hearing"). An audio recording of this Judiciary proceeding was made by the NRL and copies are available from the organization upon request. Copies of the Newton Hearing recordings are on file with the authors.

119. *Id.*

120. *Id.*

121. *Id.* Being a referred case, there was no stated maximum penalty. The head sentence of 1250 points was arrived at by reference to the Williams Appeal and the penalty this player received. See Williams Appeal, *infra* note 135. The 25% discount reduced this to a total of 937.5 points rounded down to 937. On the basis of 100 points per game suspended, this resulted in a 9 game suspension plus 37 carry-over points.

122. NRL Rule 18(1).

123. NRL Rule 18(2).

124. NRL Rule 18(1).

125. NRL Rule 19(1)(d).

attended actual games.

On the Monday morning following the round of weekend games, each Match Reviewer presents to the Committee his concerns regarding possible breaches of the playing code. These are considered and explained through the use of videotape and discussion. The player concerned will either be cleared or charged with a specific offense and grading, determined by a majority.

As noted above, very serious incidents which lie outside the maximum grading provided under the Code are referred directly to the Judiciary for hearing and for the Adjudicating Panel to ultimately determine the charge and penalty. In most cases, however, the elements of the offense and the penalty are predetermined. The Match Review Committee, accordingly, has the authority and discretion to initially charge a player. Charges do not rely on a complaint or report from a match official, and charges can be laid by the Committee in circumstances where the incident has gone unnoticed by any official. This of course is due to the extensive video coverage available to the Committee. A number of guidelines are listed within the Code to assist the Match Review Committee in the use of its discretion.¹²⁶ The Committee is required to consider all the circumstances of the offense as well as the necessity to maintain public confidence in the judiciary process.

Those interviewed believe that the use of experts (in the form of ex-players and referees) to lay charges is a major strength of this part of the system. While there is little debate regarding the type of offense committed, the challenge, according to the Coordinator,¹²⁷ is to correctly grade an offense so that the matter proceeds with expediency and to the benefit of all parties. For example, the offense of "striking" is quite obvious, but whether the striking is a grade two or a grade four offense is less apparent. The distinction, however, is important given the effect the grading has on the length of the suspension ultimately imposed. According to the Coordinator, no charge was laid "unless we were ninety-five percent sure there would be a conviction and that the incident

126. See NRL Rules 52 and 53.

127. The current Coordinator is an ex-referee. See interviews conducted by the authors, *supra* note 95.

is one that can be prosecuted successfully.”¹²⁸ The fact that the system relies heavily on video evidence helps to limit errors.

4. The NRL Judiciary

The NRL Judiciary is composed of a Chairman, a Judiciary Counsel and a three person Adjudicating Panel.¹²⁹ As noted, it sits to hear disputed cases and referred charges.

The Chairman has a similar function to a judge in a jury trial or a judge advocate in a court martial.¹³⁰ The Chairman is required to decide all questions of law, evidence and procedure, and to instruct or direct the Judiciary Panel in these matters.¹³¹ The Chairman issues orders concerning the conduct of matters before the Judiciary and regulates submissions, the reception of evidence, the procedure, and the venue.¹³² Unlike a judge in a criminal trial, however, he has no role in determining the penalty.

The Chairman must be a person serving, or who has served, as a Judge of the Supreme Court or District Court of any state or territory in Australia, or alternatively, as a Judge in the Federal Court of Australia.¹³³ The fact that the Chairman is a judge facilitates comparisons between the level of justice delivered through the NRL Judiciary system and that of a criminal trial. According to the Chairman, a number of mechanisms are aimed at securing just outcomes in Judiciary hearings.

There are many filters in the system and it is very protective of the player. The charging process is separate from the process of the hearing. In a sense the hearing is a kind of appeal because very often, simply on the video presentation before the Match Review Committee, any borderline offense is merely set aside at this initial stage so that by the time a hearing is conducted only those matters that are genuinely arguable by the prosecution are set down for

128. See interviews conducted by the authors, *supra* note 95.

129. NRL Rule 21.

130. While the term Chairman is used throughout this article, the NRL Rules do not bar women from holding this position.

131. NRL Rules 22-25.

132. *Id.*

133. NRL Rule 23. The current Chairman is His Honor Judge G. D. Woods QC, Judge of the New South Wales District Court. See http://www.lawlink.nsw.gov.au/lawlink/district_court/ll_districtcourt.nsf/pages/dc_judge_contacts (last visited Oct. 16, 2008).

determination. There is the hearing proper and the presentation of evidence. Where he is found guilty the player or his representative can present a case to me for his matter to go to appeal. I am the filter for that. The way the appeal works in a practical sense is that the player comes to my office usually on the Thursday or Friday morning after their Judiciary hearing, with their Counsel. A hearing to consider the grounds for appeal is then conducted and recorded. I will ponder the case during the course of the day or over the weekend and then decide to grant leave to appeal or not. Finally there is the tribunal appeal mechanism itself consisting of the President and a member representing the Players Association.¹³⁴

There is no doubt that the Judiciary is a developing system of “law,” as new types of offenses and, for that matter, new defenses constantly arise. For example, in the case of Danny Williams from the Melbourne Storm, Williams, after being tackled high around the head, walked past two opposing players and violently struck the man who tackled him in the jaw.¹³⁵ The blow knocked the tackler unconscious.¹³⁶ Williams was given a referred charge, and the matter was heard by the Judiciary.¹³⁷ Williams pleaded guilty to the charge, but what made the case controversial was William’s argument in mitigation: that he was in a state of automatism due to the earlier head high tackle by the victim. There was further controversy over whether such an argument should be allowed and whether the Panel would have the required level of understanding to consider such evidence. Ultimately the plea and the evidence were allowed.¹³⁸

In this regard, the developing rules, the testing of arguments, and the procedures appear to be creating a form of Judiciary “common law.” The acceptance of the “automatism” defense is one example. Another example is the Judiciary’s effort to create an “attempt” offense. It is not unusual in contact sports for a player to attempt to make illegal contact with an opposing player but fail to fulfill this

134. See interviews conducted by the authors, *supra* note 95.

135. Danny Williams NRL Appeal Judgment of Judiciary Chairman (August 4, 2004) (hereinafter “Williams Appeal”). An audio recording of this Judiciary proceeding was made by the NRL and copies are available from the organization upon request. Copies of the Williams Appeal recordings are on file with the authors.

136. *Id.*

137. *Id.*

138. *Id.*

goal. Often, had the attempt been successful, such as a swinging forearm directed at the head, the victim could have suffered severe injury. The accepted position, however, is that there is no offense of attempt.¹³⁹

The most serious cases, or those which resulted in a player being suspended and missing important games such as a grand final, generate considerable media interest. The Chairman voiced his concern about the need to maintain an essential “fairness” in a system despite such exposure to the influences of immense media attention.¹⁴⁰ The Chairman’s concerns are well-founded, given the level of public interest in a major national sport. As discussed later, however, the members of the Adjudicating Panel are quite aware of the need to preserve their independence in such circumstances. This explains, in part, the formality of the process. The Chairman observed that:

The system is deliberately formal. In my view the more formal you can make the actual hearing, the more friendly it is because although you can wear your informal clothes or be informal in other ways, you can’t get away from the fact that there is a serious dispute going on. If a fellow is found guilty he is going to miss a few weeks play and it might affect him financially. So it is actually a dispute of some significance and whilst it is not as formal as a criminal trial to try to describe it as having an atmosphere of a campfire bonding seems to me to be unhelpful.¹⁴¹

5. Judiciary Counsel

The Judiciary Counsel prosecutes those players who appear before the Judiciary. The Code requires that the Judiciary Counsel members be former rugby league players at some level and either a barrister or solicitor of the Supreme Court of Australia.¹⁴² The functions of the Judiciary Counsel are to receive the charge and grading from the Match Review Committee and to prosecute this charge if it proceeds to a hearing.¹⁴³ This requires the Judiciary Counsel to present

139. “Attempt” was discussed with the NRL Judiciary Chairman and Match Review Coordinator, and the overall view was that no such offense exists. See interviews conducted by the authors, *supra* note 95. Additionally, the NRL Rules currently do not punish an “attempt” to commit an offense.

140. See interviews conducted by the authors, *supra* note 95.

141. *Id.*

142. NRL Rule 15.

143. NRL Rule 16.

evidence to support the charge, to test the defense case, question witnesses and address the Adjudicating Panel.¹⁴⁴ If a player appeals to the Appeals Committee, the Judiciary Counsel is required to make submissions relating to the application.¹⁴⁵

Having lawyers as Judiciary Counsel members necessarily brings aspects of the legal profession into the rugby league disciplinary system. All cases analyzed were prosecuted in a robust manner, resembling to some degree the prosecution of a criminal offense. The Counsel interviewed stated, "I apply all the rules and obligations of a prosecutor laid down by the Bar Association."¹⁴⁶ It is certainly arguable that the application of professional ethics to the role benefits an accused player by ensuring the proceedings are fair. On the other hand, a player and his supporting witnesses are likely to be subjected to stringent cross-examination from Counsel, raising the question as to whether this is appropriate for a sports disciplinary tribunal. The Counsel felt that his role was to prosecute "forcefully and fairly."¹⁴⁷

6. The Adjudicating Panel

The Adjudicators, collectively known as the Panel, are similar to a jury, with the Panel using their expert knowledge as former rugby league players to analyze cases. There are three Adjudicators (from a pool of five) appointed to the Judiciary hearing following the weekend's round of matches.¹⁴⁸ The Code requires that each Adjudicator discharge his functions with independence and impartiality.¹⁴⁹ An Adjudicator cannot be a current director, shareholder or employee of the NRL or a Club.¹⁵⁰

At the conclusion of each hearing the Chairman gives directions to the Panel regarding the charge, the burden of proof, and the standard of proof. Given that the Panel

144. *Id.*

145. Leave must be granted by the Chairman. See NRL Rule 95(1).

146. See interviews conducted by the authors, *supra* note 95.

147. *Id.*

148. NRL Rule 26.

149. NRL Rule 30.

150. NRL Rule 27(1)(c). A Club is any of the Clubs which comprise the NRL competition. Ex-players, all adjudicators played for Clubs currently participating in the NRL competition. As reported in the interviews with the Adjudicators.

members are all ex-players functioning within a quasi-legal setting, the interviewing authors questioned the Panel's ability to understand their role and to decide the matter according to the evidence presented at the hearing, rather than upon personal notions of "player justice." One of the Adjudicators commented, "I don't form any preconceived notions before I go in. We are instructed not to read newspaper reports, but obviously we do see television grabs and we have a look at it [the incident] and it gives you a bit of an idea."¹⁵¹ In terms of the evidence and arguments presented to the Judiciary, the Chairman in reflecting upon the expertise of the Judiciary Panel, said "[t]here is hardly an argument that can be run by a player that the Panel do not know about or haven't considered, accepted or rejected."¹⁵²

Maintaining consistency of charges and penalties was a major reason for creating the Judiciary in its present form. To help ensure this consistency, the Panel is provided with video recordings of incidents that they then grade and use as a template for comparison throughout the season.¹⁵³ In addition, the Panel meets and debriefs with the Match Review Committee to attempt to create a uniform view of the various offenses.¹⁵⁴

Two matters, about which the interviewed Adjudicators expressed concern, were ensuring player safety and attracting young people to the sport of rugby.¹⁵⁵ In regard to player safety, it was noted that players themselves had an increasing awareness of the need to preserve their future sports careers by ensuring they were not the victims of illegal violence.¹⁵⁶

The authors also questioned the adjudicators about how they dealt with the personal attention generated by public reaction to their decisions. One commented as follows:

We understood that when we took the role on it was likely to be a "no-win" situation at times. There might be a time when you make a decision that is going to affect a person's ability to play the game

151. See interviews conducted by the authors, *supra* note 95.

152. *Id.*

153. NRL Rules 89(c), 90(2)(d); see also interviews conducted by the authors, *supra* note 95.

154. NRL Rule 53(1); see also interviews conducted by the authors, *supra* note 95.

155. See interviews conducted by the authors, *supra* note 95.

156. *Id.*

and to make a living; we understand that. But again it comes back to you as an individual and how you handle different pressures. You make a decision based on what is put before you at the time—of course pressures come from that decision. Everyday I come to work, and even coming into my office, there will be people on the way who will say “that was a lousy decision” or the player deserved what he got. That’s human.¹⁵⁷

C. The Hearing and Procedural Guidelines

As noted, hearings take place only when a player pleads not guilty or contests the grading of the offense. Most charges are dealt with by an early plea of guilty.

1. Substantive Provisions

Rule 71 states that the substantive law to be applied is that “generally accepted in common law jurisdictions.”¹⁵⁸ Proof of guilt of the offense charged is established where, on the balance of probabilities, the panel finds the offense proven.¹⁵⁹

An Adjudicator believed that the general public was unlikely to be aware that the offense had to be proven to this extent.¹⁶⁰ He also noted that it was the duty of the defense to raise an element of doubt in the minds of the Panel, and, if successful, the Panel would generally give them the benefit of the doubt.¹⁶¹ He did note, however, that the defense’s job is a difficult one, particularly in light of the video evidence.¹⁶² Another Adjudicator stated that “the more serious the offense, the greater the responsibility of applying the balance of probabilities test correctly, and of course you have to always keep that in the back of your mind: is the offense more probable than not.”¹⁶³ This same Adjudicator further noted that, “the more serious the offense, the higher the benchmark

157. *Id.*

158. NRL Rule 71(1).

159. NRL Rule 72. The ‘balance of probabilities’ standard is the civil standard of proof in English common law as compared to the criminal standard of “beyond a reasonable doubt.” As such, the players guilt must be proven on the basis of it being “more likely than not.”

160. See interviews conducted by the authors, *supra* note 95.

161. *Id.*

162. *Id.*

163. *Id.*

on the balance of probabilities.”¹⁶⁴

The Panel must decide all questions of fact.¹⁶⁵ They can find the player guilty of the charge, acquit the player, or find him guilty of a lesser offense.

2. Evidence

Video footage is the central evidence in all cases. All those interviewed acknowledged its significance and the extent to which it invariably supplied proof, or otherwise, of the offense charged.¹⁶⁶ Other forms of evidence often include witness testimony from the victim, doctors, referees, and touch judges. Of course, the player charged will always make a statement in his defense. Rule 76(1) states that “the Judiciary is not bound by the rules of evidence usually applicable to proceedings in courts of law” and that “although direct evidence is to be preferred, the judiciary may inform itself of the facts in any other way in which the Chairman considers both reliable and appropriate.”¹⁶⁷

Video footage of an incident leading to a charge is made available to the charged player’s club one to two days after the game.¹⁶⁸ The Judiciary Counsel interviewed noted that this “streamlined” the procedure and was the reason why most players took the option of an early guilty plea.¹⁶⁹ In the cases analyzed, it was often the only evidence tendered by the judiciary counsel in support of the charge laid. The Judiciary Counsel stated that he “didn’t have any cases [in 2004] where the video was not the primary evidence.”¹⁷⁰ At times, the defense also seeks to rely on such video evidence, either that produced by the NRL or recorded through its own resources. In those cases, the defense essentially argues that, based on the video, a contrary interpretation of the incident is possible.

At a hearing, the Judiciary Counsel generally begins his prosecution with a presentation of the video evidence. The incident is usually shown from five or more camera angles in both real-time and slow motion, but absent any commentary.

164. *Id.*

165. NRL Rule 74.

166. NRL Rule 77. See interviews conducted by the authors, *supra* note 95.

167. NRL Rule 76(1).

168. NRL Rule 49(2)(b).

169. See interviews conducted by the authors, *supra* note 95.

170. *Id.*

Both prosecution and defense can tender a variety of other types of evidence. Examples include witness testimony and documentary evidence in the form of expert or medical reports. Witnesses can give their evidence in person, or by telephone conferencing or video conferencing. As noted, the Notice of Charge or Notice of Referred Charge must include copies of any official reports and any other evidence that will be relied upon to support the charge.

A player's previous convictions are specifically excluded when determining the player's guilt.¹⁷¹ With regard to all other evidence, the Chairman retains considerable discretion as to whether to admit such evidence.¹⁷² Several considerations guide the exercise of this discretion, particularly, the need to expedite hearings and to avoid fully replicating the procedures of a court of law.¹⁷³

3. The Chairman's Explanation of Procedure

At the beginning of every hearing the player is asked to plead to the charge.¹⁷⁴ This is followed by an explanation from the Chairman as to the procedures of the Judiciary.¹⁷⁵ The Chairman has developed a consistent statement in this regard and delivers this at every hearing.¹⁷⁶

4. The Prosecution Case

With a few exceptions, such as the case involving the post-traumatic amnesia defense, the prosecution case is extremely straightforward. In many of the cases analyzed, the only evidence relied upon was the video of the incident. In addition, the Judiciary Counsel may tender any referee reports or medical reports if the victim required any treatment either during or after the game. In order to

171. NRL Rule 76(3)(a). Previous convictions are relevant to the penalty imposed, however. See NRL Rule 89(2)(ii).

172. See NRL Rule 73.

173. NRL Rule 73. Note here the exclusion of rules of evidence under Rule 76(1).

174. NRL Rule 79(1).

175. NRL Rule 80.

176. This was true for most of the cases analyzed but in a few cases, due to certain issues, the case was commenced somewhat differently. An example of this was the Ricketson case where there was a need to initially make arrangements to contact witnesses by phone prior to the hearing commencing. As noted in the audio recording of the hearing provided by the NRL.

substantiate the grading of the charge, prior videos of similar charged offenses by other players are used.

While the hearing may not be as formal as courtroom proceedings, it nevertheless has many of the characteristics of a trial. In most cases, the principal witness called by the defense was the charged player. The Judiciary Counsel was often quite vigorous in his cross-examination of the player.

5. The Defense Case

The evidence tendered by the defense varied quite considerably. In the Williams case, detailed and complex medical reports were presented to support the defense of automatism after Williams knocked out an opposition player with a blow to the jaw. In the Ricketson case, the defense challenged the evidence of the doctor who treated the victim's injuries on the basis that those injuries could have been sustained at an earlier stage of the game rather than when he was struck by Ricketson. In the majority of cases, however, the defense case consisted mainly of a consideration of the video evidence questioning the extent to which it supported the charge or rather supported a lesser grading of the charge. In support of this position, the defense would often call the player and, in some cases, club officials such as the coach, to give their view of the incident. In some of the referred charges, such as that involving Newton, the defense called character witnesses to attest that what had occurred was "out of character" in terms of the player's history.

6. Closing Address

After both the Judiciary Counsel and defense have presented their evidence, examined and cross-examined relevant witnesses, each is given the opportunity to give a closing address to the panel.¹⁷⁷

7. Chairman's Directions

Following the addresses by the Judiciary Counsel and defense, the Chairman gives directions to the Panel prior to

177. NRL Rule 83.

their deliberations.¹⁷⁸ These directions include reference to specific aspects of the case, but, as indicated by the Chairman in his interview, he has developed standard directions that he always gives which include: 1) the burden and standard of proof lies with the Judiciary Counsel; 2) the need to ignore any publicity or external pressure such as the effect of the suspension on the player's availability for important games; 3) the duty on every player to avoid forceful contact with the head of an opposing player; and 4) the need to consider the evidence objectively and impartially.

D. Decisions and Appeals

All Judiciary hearings are recorded, and these recordings are made available to the parties. Decisions are not transcribed but presented orally to the player at the conclusion of the Judiciary Panel's deliberation. As noted below, however, the Panel is not required to give any reasons for its decision.

1. The Panel's Decision and Sentence

After the Chairman's directions, the Panel retires to a separate room to consider its verdict. There are three panel members at every hearing and the Rules require a majority verdict.¹⁷⁹ It is not disclosed whether the verdict is unanimous or by majority. Three verdicts are possible: guilty as charged, guilty but of a lesser grade, and not guilty. A not guilty outcome will immediately bring the hearing to a conclusion.¹⁸⁰ Where the player is found guilty as charged, the sentence is in effect predetermined and based on the demerit points allocated for the offense plus any accumulated points and loadings from previous offenses.¹⁸¹ Where a player pleads guilty to the charge but disputes the grading and is successful, he is also entitled to the discount for the early plea.¹⁸²

Ben McDougall from the Melbourne Storm, for example,

178. NRL Rule 84.

179. NRL Rule 86(1).

180. NRL Rule 86(4).

181. NRL Rule 86(5).

182. NRL Rule 87.

was charged with a Dangerous Throw - Grade 2 (325 points).¹⁸³ The Panel decided in favor of the player and downgraded the charge to Grade 1.¹⁸⁴ The base penalty for this offense is 125 demerit points, but this was reduced by 25% due to his guilty plea.¹⁸⁵ The outcome was 93 demerit points. There were no prior offenses or accumulated points so the player received no suspension, but had 93 carry-over points.¹⁸⁶

The decision and sentencing are more complicated in referred cases. In these cases there is no base penalty.

2. Appeals

A player has seven days after the hearing to appeal from a guilty verdict, the sentence, or both.¹⁸⁷ The grounds for appeal are set out in Rules 94(1) and (2), but a player must first seek leave from the Judiciary Chairman to appeal. The Chairman should only grant leave if the case is fit to proceed as an appeal.¹⁸⁸ Rule 27 of the NRL Appeals Committee Procedural Rules states that a "fit case" is one in which the appellant has "good prospects of success."¹⁸⁹ The Rule further states that the decision as to whether there are good prospects of success lies with the person empowered to grant leave, the Judiciary Chairman.¹⁹⁰

As noted in the Williams case, the player was charged with Striking Referred. The defense sought leave to appeal from this decision based on the sentence being manifestly excessive. The defense submitted that the notion of "good grounds of success," as set out in Rule 27 of the Appeals Committee Procedural Rules, should be defined as merely arguable and "that 'good prospects of success' may mean simply securing from the appeals tribunal a reduction in some kind of the penalty, even by so minimal amount as 100 points."¹⁹¹

183. See Table, *supra* Part 2(B)(i).

184. *Id.*

185. See NRL Rule 42(1)(c).

186. See NRL Rule 39.

187. NRL Rule 94.

188. NRL Rule 95(2).

189. *Id.*

190. NRL Rule 95(3).

191. As stated in the Chairman's Judgment on Leave Application by Williams,

In refusing leave, the Chairman held that “good grounds for success” did not simply mean that the case was arguable, but that the appeal had “good prospects” of succeeding. In his view the case and its evidence were not unique. With regard to the Panel, he noted:

The provocation and the mental state of the player were minutely considered in the evidence and, no doubt, by the Panel. The Panel consisted of former players who must inevitably in the course of their vast experience have themselves been provoked, knocked and subjected to various on field irritations of one kind or another. There is no doubt that they were well qualified to determine the matter, even with medical evidence involved.¹⁹²

The Chairman also stated that there were very good reasons for the Panel not being required to provide details of their deliberations.

This is exactly as happens with juries in the ordinary courts of law in all Australian jurisdictions. Their role is well understood. Juries hear medical evidence—often complex medical evidence—in many cases every day of the week. I am not privy to the panelists’ deliberations, but, they have heard everything that was put forward on behalf of Williams, and they have reached a certain decision. I am satisfied that that decision is correct, and I have no doubt that an appeals committee, were it to examine all the evidence in the case, would not determine a penalty less than 1800 points.¹⁹³

The fact that there were no appeals, successful or otherwise in 2004, illustrates the considerable burden facing the defense in establishing that an appeal is “fit.”

3. The Appeals Committee

The Appeals Committee has the power to uphold the decision of the Judiciary, quash it or find the player guilty of a lesser offense.¹⁹⁴ Significantly, the Committee may increase the penalty imposed by the Judiciary.¹⁹⁵ All decisions of the Appeals Committee are final and binding on all parties, and

August 16, 2004. Such judgments are not published, but reports are held by the NRL Secretary. A copy of this specific judgment was provided to the authors. *See* interviews conducted by the authors, *supra* note 95.

192. *Id.*

193. *Id.*

194. NRL Rule 103(2)(a).

195. NRL Rule 103(2)(b)(i).

no compensation following a successful appeal is permitted.¹⁹⁶ No new evidence may be introduced by either party, although an appellant may seek leave to introduce further character evidence.¹⁹⁷ There is an additional requirement that the player lodge a \$5,000 security with the Secretary prior to his appeal being heard. The security is forfeited if the player's appeal proves unsuccessful, thus minimizing frivolous claims.¹⁹⁸

The Appeals Committee is chaired by the President of the Appeals Committee, who, similar to the Judiciary Chairman, must have served in a judicial capacity.¹⁹⁹ There are two other members of the Committee,²⁰⁰ one each nominated by the President of the Rugby League Professional Players Association and the Chairman of the Council.²⁰¹

The President of the Appeals Committee outlined the basic practices involved in an appeals hearing.

It is an informal hearing in the sense that no oath is administered. It is run similarly to an ordinary trial—counsel prosecuting tenders documents and calls the witnesses to give evidence followed by the accused who may offer whatever evidence they wish. This is followed by brief addresses. The proceedings are audio taped and when we have been through the evidence stage the tapes are transcribed and we refer to these or our personal notes, whatever is most convenient. We then come back and deliver a short judgment. There are very few appeals from the Judiciary and in that sense it could be said that the system is working well.²⁰²

In other words, the standard used on appeal is informal and flexible, unlike in a traditional court proceeding.

The following case (from the 2005 season) is an example of a successful appeal after leave was granted. Shane Dunley was charged with “contrary conduct,” in the form of spitting

196. NRL Rule 104.

197. NRL Rules 101(2), 101(3).

198. NRL Rules 96(b), 103(4).

199. NRL Rules 32, 33. The current President is an ex-Chief Justice of the New South Wales Supreme Court. Sir Laurence Street was Chief Justice from 1974-1988. See Sir Laurence Street Biography, <http://www.laurencestreet.com.au/bio.htm> (last visited Nov. 3, 2008).

200. The composition of the Appeals Committee must comply with NRL Rules 15-18 inclusive, NRL Appeals Committee Procedural Rules. See NRL Rules 31-34.

201. The NRL Council is the body that represents the Clubs that comprise the NRL competition. See NRL Rule 21(3).

202. See interviews conducted by the authors, *supra* note 95.

on an opponent.²⁰³ He pleaded not guilty but was found guilty by the Panel and received a sentence of 425 points and a four game suspension.²⁰⁴ Dunley's defense was that the video evidence simply did not support the charge.²⁰⁵ At the leave hearing, the Chairman considered a written submission from a Queen's Counsel.²⁰⁶ Leave was ultimately granted by the Chairman on the grounds that "a real issue arises as to whether or not the decision was unreasonable or insupportable having regard to the evidence."²⁰⁷

In Dunley's appeal, the matter turned on two pieces of evidence: a medical report that Dunley suffered from a condition that generated excessive amounts of saliva and a video of the incident which was capable of differing interpretations. This latter argument was significant in that the charge alleged that Dunley intentionally spat at the opposing player. In allowing the appeal, the President concluded:

The matter comes down essentially to one of whether or not the evidence before the Judiciary was sufficient to establish the intent. The question for this committee being whether the decision of the Judiciary that it was an intentional spitting was "unreasonable" or "insupportable" having regard to the evidence.

Bearing in mind the paucity of the evidence, that is to say, the interpretation one must place on ambiguous video clips, I have reached the conclusion that the test to be made out by the appellants has been satisfied. The evidence was not, in my view, strong enough to withstand the test of denying that it was unreasonable or insupportable to conclude that this was an intentional spitting.²⁰⁸

CONCLUSION

It is arguable that sports disciplinary tribunals are the most appropriate forum to deal with on-field violence. A large amount of literature, however, concludes that the internal

203. Shane Dunley NRL Leave to Appeal Application, May 26, 2000 (hereinafter "Dunley Appeal"). An audio recording of the Dunley Appeal was made by the NRL and copies are available from the organization upon request. Copies of the Dunley Appeal recordings are on file with the authors.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

disciplinary systems operated by the NFL, NHL, NBA and MLB are all failing to stem the incidence of on-field violence. This is despite changes to such systems, increased penalties, lengthy player suspensions and large fines. All this has, in turn, led to ongoing calls for more players to be criminally prosecuted. There have been proposed changes including the establishment of a sports court²⁰⁹ and legislative intervention,²¹⁰ but none have been implemented. In this regard, the status quo remains in the United States that the appointed sports commissioner is the ultimate authority for disciplining players for on-field misconduct.

As highlighted in the above analysis, the commissioner-based system is seen as biased and arbitrary. Current disciplinary systems must also be considered in light of the role of the commissioner as an appointee of the clubs and the vested interest that exists from both the club and league in accepting certain levels of violent on-field conduct. The current disciplinary system operated by the Australian NRL offers a model for reform.

In terms of its system of offenses, penalties and hearings, the NRL system is an exemplar for how sports at this level should deal with on-field violence. The adoption of such a system reinforces and demonstrates the sport's ability to deal with this aspect of the game. This, in turn, supports the criminal justice system's continued position of allowing the sport to police itself, with no reason to interfere.

To a certain extent, a sport can achieve internal regulation through an adoption of principles quite similar to those under a "rule of law." This includes a system of rules that is fair and understandable. Where such rules are applied to punish an offending player they must also afford that player due process.

A consistent theme expressed by those interviewed was a belief in the system as being fundamental to the interests of the game and a confidence that they exercised their roles independently, without any interference from the sports governing body. While the NRL Judiciary is a domestic tribunal under the direct control of the NRL itself, all Judiciary positions include a reference in the Rules to the

209. See Carlsen & Walker, *supra* note 1.

210. See Fritz, *supra* note 18.

independence of the person or body concerned. Rule 20, for example, states that the Match Reviewers and Coordinator shall at all times “act independently, impartially and fairly without fear, favor, affection or ill-will.”²¹¹ In this regard, the Match Review Committee acts independently of the NRL,²¹² the Judiciary and the Judiciary Counsel. Independence from the Judiciary Counsel is an important recent change to the Code and reflects the NRL’s commitment to independence as a vital component of the disciplinary system. Under the old rules, the Judiciary Commissioner (now Judiciary Counsel) would confer with the Match Review Committee in deciding the offense and its grading. The Commissioner would then prosecute the case when a hearing was required. The Code was amended after the 2003 season to create the new Judiciary Counsel position.

The Judiciary Counsel now has no role in determining the charge laid and is obliged to prosecute the offense as independently determined by the Match Review Committee, if the matter goes to hearing. The Judiciary Chairman commented that “[a] decision was taken that the Judiciary should be more in line with the traditional notion of the division of functions, separating the prosecution from the investigating process.”²¹³ An Adjudicator commented that “I think it is the essence of everything, it’s about integrity. If you’re perceived to be working on behalf of the organization, you are technically shot.”²¹⁴ The Match Review Coordinator added:

There is no interference whatsoever from anyone from within the game or the clubs. From my perception they have confidence in what we are doing and until such time as we do something that erodes that confidence, then we just keep sailing the ship in the same direction.²¹⁵

From the interviews and the cases analyzed, the procedures adopted at the hearings and in relation to appeals appear to conform to applicable rules of natural justice and are concluded in good faith. It would be misleading, however,

211. NRL Rule 20.

212. This can be subject to directions from the Chief Executive Officer but only in terms of the Objects in Rule 2. NRL Rule 20.

213. See interviews conducted by the authors, *supra* note 95.

214. *Id.*

215. *Id.*

to conclude that the Code and the NRL are only concerned with punishing those players who offend on the football field. Such objectives are only a means of achieving other ultimate goals. Those interviewed saw these ultimate goals as: i) providing a safe system of work for the protection of players and ii) maintaining the integrity of the game and its continued popularity.

When asked how important safety on the playing field was, a lawyer who played a major role in developing the NRL system stated:

Absolutely important, so important that it is a given. The penalties had to be adequate and they had to operate as a sufficient deterrent to other players. You get into all sorts of philosophical debates whether penalties really do deter heat of the moment type incidents but leaving those things aside, players are conscious of the risks they run if they engage in misconduct.²¹⁶

While the evidence is at this stage largely anecdotal, those interviewed also believe that on-field behavior has improved significantly. As noted by one Adjudicator, “[t]he spear tackle²¹⁷ would be a classic and what we see now is that they are all pulling out of these tackles, very few guys are landing on their heads or being driven onto their heads.”²¹⁸ At the same time, players who continually offend are severely dealt with to the extent that they can be removed from the game. One of the Adjudicators commented:

If you are a continual offender this system will take you out of the game and I don’t have a problem with that because we want people playing this game within the rules. We want people playing rugby league, playing it for the right reasons, not like the old days when after you walked onto the field you weren’t sure what was going to happen in the next tackle.²¹⁹

This is not to say that the NRL system is not without flaws or problems. It is arguable, for example, that the system is too formal and not in the intended spirit of the sport. Other concerns with the current system include the pressure to plead guilty and the insufficiency of time to prepare a defense, particularly in serious cases such as referred charges. The

216. *Id.*

217. A spear-tackle occurs when a tackler lifts the ball carrier’s legs beyond the horizontal and drives him into the ground *head* first.

218. See interviews conducted by the authors, *supra* note 95.

219. *Id.*

fact that the Panel is not required to state the reasons for its decisions and the apparent difficulty in obtaining leave to appeal were also identified as potential issues. The defense lawyer interviewed was quite specific in his criticisms of the system with regard to the loading for prior a record together with carry over points. In his view, a significant problem related to High Tackle offenses. He noted that there were three types of High Tackles (Intentional, Reckless and Careless), each with five gradings, totaling 15 separate offenses.²²⁰ His concern was the ability of the Match Review Committee to differentiate between the three types and then to actually further differentiate by way of grading.

The conclusion reached, however, is that the adoption of the NRL model is beneficial for two connected reasons: 1) the reinforcement of the sports internal disciplinary system as the accepted means for dealing with all incidents of on-field violence; and 2) the ability of the system to provide efficiency which affords a high level of due process to those charged. The evidence to date, while largely anecdotal, is that the system has been very effective in impacting the levels of on-field violence and injuries resulting from such violence.

220. See discussion, *supra* Part 2(B)(i).