

Game over?

Are experts now able to tackle the ultimate issue, asks Chris Pamplin



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Following FIFA's finding that Luis Suarez bit Italian defender Giorgio Chiellini in the final match of Group D in the World Cup in Brazil, Uruguay said they would appeal, calling it an "excessive decision" for which "there was not enough evidence". Suarez has been involved in a number of professional disciplinary hearings before, and his December 2011 hearing before the Football Association Regulatory Commission set out the approach to be followed when considering evidence in such matters—and perhaps surprisingly, footballers' antics on the pitch serve to illustrate the current state of practice when experts are called to opine on the central issue in a case.

It had long been a rule of evidence at common law that a witness should not give evidence in relation to the "ultimate issue" in a case, because that is a matter for the court to decide and should not be usurped. For some time, however, there has been a steady weakening of the rule against expert opinion on the ultimate issue. The 1972 Civil Evidence Act made expert opinion on the ultimate issue admissible in civil cases. In criminal cases, the abolition of the rule was recommended by the Criminal Law Revision Committee in its Eleventh Report (1972), but this recommendation was never put into effect.

However, when the issues in a case are so narrow and so specialist that the expert's opinion is, effectively, the only significant evidence in the case, and it will almost certainly decide the outcome, what happens?

Just this problem arose in *Football Association v Anelka* (unreported, 3 March 2014). The ruling made by the Football Association Regulatory Commission (the tribunal) in *Anelka* concerned disciplinary proceedings against Nicolas Anelka, a professional footballer, for misconduct involving a "quenelle" gesture that was alleged to be abusive, indecent or insulting, and constituted an aggravated breach of the rules because it included reference to ethnic, racial or religious origin (the quenelle is a gesture usually performed by pointing one arm diagonally downwards, palm down, while touching the shoulder with the opposite hand).

It was alleged that, during the course of a game between West Bromwich Albion and West Ham in December 2013, Anelka made a gesture that was contrary to Rule E3(1) of the Rules of the FA (Charge 1). Further, it was alleged that the misconduct was an "aggravated breach" as defined by Rule E3(2), and so could attract an increased sanction, because it included a reference to ethnic origin, race, religion and/or belief (Charge 2). Anelka denied both charges.

It was the approach to such charges that had been considered previously in the 2011 case against Suarez. It was agreed that Charge 1 required an objective analysis of the gesture used, ie was, objectively, Anelka's use of the quenelle abusive, indecent, insulting and/or improper. In applying the objective test and asking whether, in the assessment of the tribunal, the words or behaviour were abusive or insulting, it was necessary to view the matter in context.

How to interpret a gesture?

So how should this gesture be interpreted? It is one that is used commonly in France (Anelka's home country) and is analogous to the English "V" sign—it might be said to merely convey the abusive epithet "up yours". However, it also has the more sinister interpretation of a kind of inverted Nazi salute with anti-Semite overtones. In this context, it has been associated with the French comedian and political activist Dieudonné, a friend of Anelka's. It is claimed the gesture was invented by Dieudonné and is said by him not to be anti-Semitic, simply anti-establishment.

Accordingly, it was not merely the meaning of the gesture but the meaning that was likely, in the particular circumstances, to be ascribed by an observer (in both England and France) that the tribunal had to decide. To that end, the tribunal received expert evidence on the quenelle. The FA instructed a professor of French Studies at the University of Warwick and Anelka instructed a professor of French and European Politics at University College London. So complex was the question of meaning and interpretation that it was effectively a case in which the tribunal was entirely in the hands of the experts. Indeed, the consensus of the evidence would speak to the ultimate issue and, effectively, decide the case.

Following closing submissions from the parties, and after extensive deliberations, the tribunal found both charges proved. On the balance of the expert opinion it was concluded that the quenelle was strongly associated with Dieudonné, that Dieudonné was strongly associated with anti-Semitism, and, as a result, that the quenelle was strongly associated with anti-Semitism. The tribunal agreed with the FA that it is not possible to divorce that association from the gesture. As to the second charge, however, it was not found that Anelka is an anti-Semite, or that he intended to express anti-Semitism by his use of the quenelle.

Conclusion

This case follows the trend set by other recent cases on, for example, childhood memory and facial mapping in which experts have been permitted to give an opinion on the ultimate issue. There now seems to be general agreement that, provided the judge makes it clear to any jury that it is not bound to follow the opinion, an expert should be permitted to opine on the ultimate issue.

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