

DRUGS IN SPORT

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Introduction

There is no doubt that drugs in sport is one of the major areas of sports law, and in fact it can be considered to be the main area in which sport has developed its own law, rather than the general law in areas such as contract and torts being applied to a sporting context. This law originates from an international code, namely the World Anti-Doping Agency (WADA)'s Code which prohibits the use of drugs that are considered to enhance a person's performance in sport. Legislation is then passed in the countries that abide by the Code, such as Australia, to allow for drug testing of competitors. This paper will therefore look at the WADA Code before looking at examples of drug taking in sport and how this issue has been handled by the respective governing bodies, including the Court of Arbitration for Sport (CAS).

The WADA Code

WADA was established in November, 1999, and it is now the world body responsible for the testing of drugs in sport with the Code,¹ setting out the rules relating to drug testing, with the banned substances being listed in the WADA Prohibited List. A new version of the Code came into effect on 1 January, 2009. It should also be noted that a feature of the Code is that each country is expected to have its own national anti-doping organisation, and in Australia, it is the Australian Sports Anti-Doping Authority (ASADA).²

Substances are placed on the Prohibited List if there is medical or other scientific evidence, pharmacological effect or experience that indicates that the substance has the potential to, or does, enhance sport performance. What is also taken into consideration is whether there is medical or other scientific evidence, pharmacological effect, or experience that indicates the use of the substance will

¹ This is available at http://www.wada-ama.org/rtecontent/document/WADA_Code_Redline_3.0_to_2003pdf.

² John Marshall, 'Will the WADA Code plug all the gaps? Will it make new ones?' Paper presented to the 17th Annual Australian and New Zealand Sport Law Association Conference, 1-2 November, 2007, Gold Coast, Australia, 1.

represent an actual, or potential, health risk to athletes. The final consideration is whether the use of the substance violates the spirit of sport.

Arguably the major two divisions in the Prohibited List are substances like anabolic steroids that are clearly performance enhancing, and substances such as cocaine that are used as a recreational drug, but are also considered to have performance enhancing qualities. There are, however, some practical differences in the treatment of recreational drugs according to where they are placed on the Prohibited List. The Prohibited List contains a number of different categories, and the use of substances classified as S1 to S5 and M1 to M3 are prohibited at any time, that is, both in and out of competition. Substances classified as S6 to S9, however, are prohibited only during competition with recreational drugs such as amphetamines, cocaine, marijuana and heroin all being classified in these latter categories. This means that they will be tested on match or race days, but will not be tested by the anti-doping agencies out of competition.

One of the main problems with drug testing is that occasionally people will inadvertently have drug material in their system, and a cough mixture or cold tablet that contains a banned substance being a good example. Former Australian swimmer, Samantha Riley, was one sportsperson who tested positive after taking such medicine. The Code, therefore, does contain a category called 'Specified Substances' that contains the drugs for which there is a greater risk of being inadvertently taken. Testing positive to these substances attracts a reduced sanction, if the athlete can show that their use was not intended to enhance sport performance.

In relation to the recreational drugs, marijuana already appeared on the Specified Substances list prior to 2009, with cocaine being added to the new code that came into operation on 1 January, 2009. This would have enabled someone to argue that they had only used cocaine for recreational purposes, and not to enhance performance, and if this had been accepted, that person may have received a sentence of around 6-12 month suspension, rather than an automatic two year ban.³

³ John Marshall, 'Will the WADA Code plug all the gaps? Will it make new ones?' Paper presented to the 17th Annual Australian and New Zealand Sport Law Association Conference, 1-2 November, 2007, Gold Coast, Australia, 4.

The 'Recreational Drugs' and Sport

In recent years Australian sport has seen a number of high profile footballers involved in either positive tests for recreational drugs, or known or admitted use. Former Wallaby and Kangaroo, Wendell Sailor, tested positive match day drug test for cocaine after the NSW Waratahs and ACT Brumbies Super 14 match in April, 2006. Since the Australian Rugby Union (ARU) had adopted a WADA compliant anti-doping policy, Sailor received an automatic two year suspension. It should be noted, however, that if the offence had occurred after 1 January, 2009, Sailor would have been able to argue that he had only used cocaine for recreational purposes, and not to enhance his performance. This may have entitled him to a lighter 6-12 month suspension, rather than the two year ban he received.⁴ Sailor returned to rugby league after his suspension was completed, and played one and half seasons with St George-Illawarra, before retiring.

In the Australian Football League (AFL) the persistent drug use by Ben Cousins, a star player with the West Coast Eagles, became public knowledge, despite the fact that he never actually tested positive in any drug test he had been asked to undertake. It was also revealed that the club had been aware of the problem since July 2006, yet it allowed Ben Cousins to continue playing, despite the fact that he was regularly missing training sessions, with it being speculated that the drugs Ben Cousins had been using were cocaine and ice.⁵ He was suspended by the club and later had his contract terminated by the Eagles and later joined Richmond after being suspended by the AFL for 12 months. This action by the AFL indicates the importance of corporate image to an organisation like the AFL, and the fact that the Cousins drug saga was having an adverse affect on this image.

Rugby league star, Andrew Johns, likewise never tested positive during his playing days, but later admitted that had been a regular user of illicit, recreational drugs.⁶ North Queensland Cowboy's, Mitchell Sargent, however, did test positive for cocaine during a club run test at a recovery session the morning after a match in August, 2006.

⁴ John Marshall, 'Will the WADA Code plug all the gaps? Will it make new ones?' Paper presented to the 17th Annual Australian and New Zealand Sport Law Association Conference, 1-2 November, 2007, Gold Coast, Australia, 4.

⁵ Chip Le Grand, 'Double life of champion going off the rails', *The Australian*, 22 March, 2007, 31.

⁶ Brad Walter, 'Johns confesses: I use drugs', *The Sydney Morning Herald*, 31 August, 2007, 1.

Despite the fact that it was his first offence, Sargent had his contract with the club terminated, the Cowboys having adopted a strict, no tolerance attitude to the use of illicit drugs by its players.⁷ Manly's Andrew Walker, meanwhile, tested positive in an official testing and received the automatic two year ban.

A recent CAS decision on a drug case relating to cocaine use was that involving French tennis player, Richard Gasquet. Gasquet, a professional tennis player who has been ranked in the world's top ten, was in Miami for a tournament in March, 2009. However, after trying out his injured shoulder in training, he decided to withdraw from the tournament. On the night before he was going to officially withdraw he went out with a few other people, firstly to a restaurant called Vita before heading off to a night club called the Set, later a club called Goldrush. At Vita he and his party had been socialising with four young women, one of whom was called Pamela and Gasquet spent most of his evening talking to her, though not all the time. At the Set the two had 'kissed mouth to mouth about seven times, each kiss lasting from about five to ten seconds' while later at the Goldrush they had kissed one more time.

When Gasquet went to officially withdraw from the tournament he was required to provide a urine sample which when tested on 21 April was found to contain benzoylecgonine, a cocaine metabolite, and a very small amount of unmetabolised cocaine.⁸ Gasquet was therefore charged with a doping offence under Art. C.1 of the Tennis Anti-Doping Programme 2009,⁹ though a test on a sample of his hair proved he had not ingested a quantity of 10mg of cocaine during a period of around four months before the test. This was proof that he was not a regular use of cocaine.¹⁰ Pamela meanwhile denied having taken cocaine on the night in question, though a test on her hair indicated that she was a regular cocaine user.¹¹

⁷ Brent Read and Stuart Honeysett, 'Sargent axed for cocaine positive', *The Australian*, 25 August, 2006, 31.

⁸ CAS 2009/A/1926 *International Tennis Federation v Richard Gasquet*; CAS 2009/A/1930 *WADA v ITF & Richard Gasquet* at [2.17]. www.tas-cas.org

⁹ *Ibid* at [2.18].

¹⁰ *Ibid* at [2.20].

¹¹ *Ibid* at [2.25].

Gasquet did not dispute the laboratory's findings, but denied ever having deliberately taken cocaine,¹² claiming that kissing Pamela had resulted in contamination,¹³ with the Tribunal of the International Tennis Federation (ITF) imposing a two and half month ban.¹⁴ Both the ITF and WADA then lodged appeals to CAS against the ITF Tribunal's findings.

The CAS Panel firstly agreed that the hair test indicated that the amount of cocaine in Gasquet's body was 'so minute' that it must come from incidental exposure.¹⁵ Despite the fact that there was no clear evidence that Pamela consumed cocaine on the night in question, the Panel concluded that she more likely than not had consumed cocaine on that night and that Gasquet's 'contamination with cocaine resulted from kissing Pamela.'¹⁶ Since it was also the Panel's conclusion that Gasquet had acted with no fault or negligence,¹⁷ the ITF and WADA appeals were dismissed.¹⁸

The Performance Enhancing Drugs

During the 1970s and 1980s it was suspected that the East German and Soviet Union athletes were involved in state organised doping involving performance enhancing drugs. This was later confirmed when the East German records became available in the 1990s and the athletes who had been given these drugs started to show numerous physical problems. It therefore highlighted that drugs such as steroids will help athletes in many events, but also that it can create serious health problems for the athletes. For both these reasons the testing for such drugs is therefore important. The problem with in-competition testing for steroids is that they do not stay in the body for more than a few weeks, so athletes and/or their advisors became very good in timing the use of them so it did not show up in any test that were conducted during a competition. One famous case where this did not work was that involving Ben Johnson who won the 100m at the 1988 Seoul Olympic Games in world record time, but then tested positive to steroids in the subsequent testing. The out-of-competition

¹² Ibid at [2.28].

¹³ Ibid at [2.34].

¹⁴ Ibid at [2.36].

¹⁵ Ibid at [5.11]-[5.12]

¹⁶ Ibid at [5.25].

¹⁷ Ibid at [5.37].

¹⁸ Ibid at [5.38].

testing that now takes place makes it much harder for an athlete to get away with taking performance enhancing drugs such as steroids.

One recent case that resulted in a ban after a positive steroid test is that involving Sureyya Kop, a Turkish middle distance runner, who won a silver medal in the 2003 IAAF World Championships in Paris.¹⁹ In 2004, however, she was charged with anti-doping violations after out-of-competition testing, and received a two year ban which expired in August, 2006.²⁰ The following year she was subject to an out-of-competition testing which revealed the presence of stanozolol and methandienone metabolites which are prohibited substances, classified as exogenous anabolic androgenic steroids.²¹ On 25 January, 2008, the Disciplinary Commission of the Turkish Athletics Federation (TAF) imposed a life ban on Kop for her second anti-doping rule violation,²² though this was reduced to four years by the Turkish Youth and Sport Arbitral Tribunal.²³ Appeals were then lodged with CAS.

In her appeal to CAS, Kop argued that she could have been contaminated by meat containing steroids, or from contaminated nutritional supplements. Kop also claimed that as an endurance athlete she would not have benefitted from the taking of steroids.²⁴ The Panel, however, held that on the balance of probabilities Kop had not provided concrete proof as to how the prohibited substances had entered her body.²⁵ The Panel then held that the Youth and Sport Arbitral Tribunal had erred in only giving a four year ban, with CAS then applying the life ban mandated by the IAAF Rules.²⁶

Disqualification after a Positive Drug Test

While a positive drug test may involve a mandatory ban, what it can also involve is disqualification from the event the athlete was competing in if it was an in-competition test. This is what happened to Norwegian equestrian competitor, Tony

¹⁹ CAS 2008/A/1585 *Yucel Kop v IAAF & TAF*; 1586 *Sureyya Ayhan Kop v IAAF & TAF* at [4].

www.tas-cas.org

²⁰ *Ibid* at [9]

²¹ *Ibid* at [20]

²² *Ibid* at [23]

²³ *Ibid* at [28]

²⁴ *Ibid* at [67]

²⁵ *Ibid* at [119]

²⁶ *Ibid* at [128]

Hansen at the 2008 Beijing Olympic Games where Norway won a team's bronze medal.²⁷ The team, however, was disqualified after capsaicin was found in the urine of Hansen's horse, Camiro, with Hansen also receiving a four and half month ban. The case also indicates that it is not only the athletes who are tested, but also the horses that are used with the rider being considered to be the 'personal responsible' for any substance that is found in the horse.

This disqualification after a positive test can also include previous events and any medals won can be taken from the athletes involved, or teammates if it was a team event. Marion Jones had been one of the great female athletes of all times after her performances in the 2000 Sydney Olympic Games. In 2006, however, she gave a positive drug test to the blood boosting hormone, EPO, then confessed to steroid use prior to the 2000 Sydney Olympic Games. She was therefore forced to return her five Olympic medals that she won in Sydney, three gold and two bronze. Two of these events were relays, 4 x100m and 4 x 400m, which meant that her teammates also lost the medals they had won in those events.²⁸

Avoiding Drug Tests

An aspect of the Code is that a refusal to participate in a drug test is considered to be the same as producing a positive test and can potentially lead to a two year ban, or a lifetime ban if it is a second offence. In *WADA v IIHF & Busch*²⁹ for instance a German ice hockey player refused to participate in a test when a doping officer visited his given premises. His reasons were that he had been tested a number of times recently, he had just had a meeting with his partner under unpleasant conditions, he had had bad training session that morning, and he was just about to go to lunch.³⁰ These reasons were rejected and he was treated the same as if he had returned a positive test and received a two year ban.³¹

The decision was correct, both under the rules and also for the fact that the system of out-of-competition testing could not work if athletes could decide if, and when, they

²⁷ CAS 2009/A/1768 *Hansen v Federation Equestre Internationale (FEI)* www.tas-cas.org

²⁸ CAS 2009/A/1545 www.tas-cas.org

²⁹ CAS 2008/A/1564 www.tas-cas.org

³⁰ *Ibid* at [5]-[6].

³¹ *Ibid* at [94].

agreed to be tested. The case, does however illustrate that drug testing can be intrusive on the athlete, particularly as they are now required to indicate where they will be at all times, and must nominate a particular time when they will be at home.

In *WADA v CONFI, FIGC & Nicolo Cherubin*³² however, a footballer who was supposed to undergo a test immediately after a game but instead had attended a team meeting in the dressing room at the insistence of the coach was not considered to have intentionally missed a doping test.

Criminal Responsibility and Drugs in Sport

While many sportspersons who have tested positive in sport conducted drug tests, these have not led to criminal charges, partly due to the fact that the police have had a policy of not apprehending the athletes, but probably also because, as *Australian Football League v The Age*³³ indicates, a positive sports drugs test does not provide sufficient evidence to achieve a conviction. Some sportspersons, however, have had a more active involvement in drugs and have had to face criminal charges. For instance, former Olympic swimmer, Scott Miller, and former rugby player, Mark Catchpole, both faced the court for serious drug charges after their careers were over. More recently the Newcastle Knights' Danny Wicks had his contract terminated due to being charged by police with the possession and dealing of prohibited substances.³⁴ The actual drugs charge is therefore unrelated to sport, but the sporting ramification for Wicks was the termination of his contract.

AFL player, Matthew Stokes, who won a premiership with Geelong in 2007, was also arrested by police in February, 2010, and charged with the possession and trafficking in cocaine. Geelong then suspended him until round 8 and also fined him \$5000. However, if he is found guilty of trafficking then it will almost certainly finish his career since under the WADA Code there is a penalty of four years to life for trafficking.³⁵

³² CAS 2008/A/1551 www.tas-cas.org

³³ *The Australian Football League v The Age Company Ltd* [2006] VSC 308.

³⁴ P. Kogey, 'Second Knight under drug microscope,' *The Australian*, 23 December, 2009, at 23.

³⁵ G. Denham and S. Reilly, 'Stokes threatened with life ban,' *The Australian*, 4 February, 2010 at 40.

Conclusion

The taking of performance enhancing drugs by athletes not only creates an uneven playing field, but can also lead to long term health problems for the athletes who use them. The world and national sporting bodies have therefore cracked down on the use of performance enhancing drugs with out-of-competition testing as well as in-competition testing making it ever more difficult for athletes to get away with using such drugs. However, it is always possible that an innocent athlete may show a positive test which is why it is also necessary for there to be national sporting tribunals to determine drug in sport cases with CAS then providing a final means of appeal.