

10-24-2008

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## Recommended Citation

Paul White. (2008) "Malicious Drugging and the Contaminated Catheter: Adams v Canadian Centre For Ethics in Sport" *Sports law eJournal*, 1-7.

<http://epublications.bond.edu.au/slej/8>

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## **Abstract**

Adams' case concerns a doping violation by a blameless wheelchair athlete leading to the usual two year ban. The CAS wished to overturn the ban and had to strain the meaning of Article 10.5.1 of the WADA Code to prevent the unfair penalty. An amendment to the Code to allow a more flexible principle of proportionality in doping offences that involve exceptional circumstances might be an answer.

## **Keywords**

sports athlete doping, para olympian

## **Disciplines**

Law | Legal Ethics and Professional Responsibility

## **Publication Details**

Published Version.

White, P. (2008). Malicious drugging and the contaminated catheter: Adams v Canadian centre for ethics in sport. *Sports law ejournal*.

Access the [Journal's](#) homepage.

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## MALICIOUS DRUGGING AND THE CONTAMINATED CATHETER: *ADAMS V CANADIAN CENTRE FOR ETHICS IN SPORT*

PAUL WHITE\*

*Adams'* case<sup>1</sup> concerns a doping violation by a blameless wheelchair athlete leading to the usual two year ban. The CAS wished to overturn the ban and had to strain the meaning of Article 10.5.1 of the *WADA Code* to prevent the unfair penalty. An amendment to the *Code* to allow a more flexible principle of proportionality in doping offences that involve exceptional circumstances might be an answer.

### POSITIVE DOPING TEST

Jeffery Adams (Adams) is a Canadian, elite-level, track-and-field wheelchair athlete. He is funded by the Canadian government, and under contract, must submit to doping control procedures.<sup>2</sup> Because of his paraplegia, Adams must self-catheterize to urinate.

Adams was tested after an athletic event on the 28 May 2006. He used a catheter to give his urine sample to the Canadian Centre for Ethics in Sport (CCES). The sample tested positive to a cocaine metabolite. Cocaine is a banned substance under the Canadian Anti-Doping Rules (CADP Rules).<sup>3</sup>

Adams alleged that an unknown woman made him ingest cocaine without his consent six days prior to the athletic event. She placed the powdered substance on his lips while he was pretending to be asleep in his chair. This occurred at a bar in Toronto called the Vatikan. Adams also claimed he passed urine using a catheter (the 'Vatikan catheter') soon after he ingested the cocaine. It was this, now contaminated catheter, that he used at a later date to supply the doping test sample.

Adams submitted to the CCES that errors were made in the 28 May doping control procedures. He claimed that his urine was contaminated because the Vatikan catheter was used to collect the test sample. He also alleged that the CCES violated his constitutional rights.

The CCES concluded that Adams committed an anti-doping violation because his urine sample tested positive to a banned substance.<sup>4</sup> A Canadian doping tribunal disqualified Adams' 28 May competition results, banned him from competing for two years, and permanently disqualified him from receiving any financial support from the Canadian government.<sup>5</sup>

### STRICT LIABILITY VIOLATION

On the 16 May 2008 the CAS heard Adams' appeal. The CAS concluded that the CCES did not violate Adams' rights during the doping control procedure. It found that there was no legislative or procedural burden on the CCES to offer Adams a clean catheter.<sup>6</sup>

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<sup>1</sup> *Adams v Canadian Centre for Ethics in Sport* [2008] CAS2007/A/1312 (16 May 2008).

<sup>2</sup> *Ibid* [1].

<sup>3</sup> *Ibid* [7].

<sup>4</sup> *Ibid* [12].

<sup>5</sup> *Ibid* [20].

<sup>6</sup> *Ibid* [131], [135].

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The CAS found that Adams committed the 'strict liability violation of a presence of a Prohibited Substance'.<sup>7</sup> The Court forfeited Adams' 28 May competition results under *WADA Code* Article 10.1.<sup>8</sup>

The CAS, however, found that Adams could not be held negligent or at fault. The Court concluded that he was the victim of an assault (the Vatican incident) and that he could not have reasonably known about the contamination risks regarding the Vatican catheter.<sup>9</sup> The CAS, under *WADA Code* Article 10.5.1 eliminated the two-year competition ban set by the tribunal. The CAS also reinstated Adams' eligibility to receive financial support from the Canadian government.

### EXCEPTIONAL CIRCUMSTANCES, 'NO FAULT OR NEGLIGENCE', AND KNOWLEDGE

The decision in *Adams* has clouded the interpretation of 'No Fault or Negligence' as it applies to *WADA Code* Article 10.5.1. Previous CAS cases show that for this Article to be applied, it is essential for an athlete to establish his or her lack of knowledge about how the prohibited substance was used, or administered. However, Adams did know he was assaulted and had ingested a banned substance. Does the CAS decision upset the meaning of Article 10.5.1? And ought the principle of proportionality, which has limited recognition in Article 10.5, be applied more liberally in meritorious situations such as *Adams*?

*Adams* is unusual. Only on the rarest of occasions has the CAS completely removed all of the penalties imposed on an athlete who has committed an anti-doping rule violation. *Adams* joins a very short list of CAS cases that have applied the WADA exceptional circumstances provision<sup>10</sup> - Article 10.5.1. This Article allows an athlete's ineligibility period to be eliminated if the circumstance in which the violation was made was found to be exceptional. To identify an exceptional circumstance that reduces a penalty to zero, the CAS must find that there is 'No Fault or Negligence [on behalf of the athlete] for the violation'.<sup>11</sup>

In the *WADA Code* the definition of 'No Fault or Negligence' is dependent upon the athlete's knowledge of the circumstances that caused the violation. The athlete must establish that,

he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered *the Prohibited Substance* or *Prohibited Method*.<sup>12</sup>

The definition makes it clear that a lack of knowledge about how a prohibited substance entered the body is one of the requirements needed to establish 'No Fault or Negligence'. Post-WADA decisions have supported this interpretation of the 'No Fault or Negligence' definition.

When concluding that Adams' circumstances were exceptional, the CAS relied on *Pobyedonostsev v IIHF CAS 2005/A/990*. Here an ice hockey player was given a prohibited substance while he was unconscious in hospital.<sup>13</sup> The prohibited substance was administered

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<sup>7</sup> Ibid [161].

<sup>8</sup> 'Generally, a doping offence occurs where a urinalysis records a positive test result for a banned substance. Doping policies area all drafted to operate in this way': Saul Fridman and Antonio Buti, *Drugs Sport and the Law* (Scribblers Publishing 2001) 113.

<sup>9</sup> Ibid [159]-[160].

<sup>10</sup> The CADP Rules are based on the *WADA Code*. See CAPD Rule 7.38 'Elimination or Reduction of period of individual ineligibility based on exceptional circumstances'.

<sup>11</sup> Ibid.

<sup>12</sup> *WADA Code* (2003), Definitions p 76; CADP Rules (2007), Glossary, p 59.

<sup>13</sup> William Hue, *Update* (2007) 'Trust But Verify: News Research and Commentary about the Floyd Landis Doping Allegations', < <http://trustbut.blogspot.com/> > at 15 August 2008.

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as part of a heart condition treatment. The player knew he was admitted to hospital for emergency treatment. However, he was not told that while he was unconscious he was also given treatment for a heart condition. The player's circumstances were found to be exceptional.<sup>14</sup> The CAS annulled his suspension.<sup>15</sup> This could only have been accomplished if the CAS concluded that there was 'No Fault or Negligence' by Pobyedonostsev.<sup>16</sup>

The CAS has previously accepted, when interpreting pre-WADA anti-doping rules, that a lack of knowledge is an essential element of exceptional circumstances. In *ITF v K CAS 99/A/223*<sup>17</sup> the CAS accepted that a lack of knowledge is a 'necessary ... definition of [exceptional] circumstances' for a suspension to be reduced.<sup>18</sup>

CAS cases show that, for an athlete's suspension to be removed, a lack of knowledge regarding the use or administration of the prohibited substance must be shown. A sporting tribunal case has also concluded the same.

The Association of Tennis Professionals' (ATP) Anti-Doping Tribunal, in *Perry*<sup>19</sup> removed all of the penalties imposed on an Australian tennis player because he had no knowledge that he was ingesting an illegal substance from his inhaler. His (Todd Perry's) violation occurred because a doctor refilled his asthma inhaler with a banned substance. Perry did not know that this had occurred. It was found that his circumstances met the 'No Fault or Negligence' definition under the *WADA Code*.

I find this to be a an illustration of the No Fault or Negligence definition within the Anti-Doping Rules ... the Player could not have reasonably known or suspected that he had used or been administered a Prohibited Substance ... Therefore, the Player satisfies all of the requirements ... for the elimination of the period of Ineligibility that might otherwise arise from a Doping Offense ...<sup>20</sup>

The CAS in *Adams* applied the 'No Fault or Negligence' standard, even though it was shown that there was no lack of knowledge on Adam's part. The CAS concluded that Adams' circumstances were exceptional and eliminated his ineligibility period.

The circumstances of this case are, in our view, also truly exceptional ... While we still find the Appellant to have committed the strict liability violation of presence of a Prohibited Substance, in the unique circumstances of this case, we must eliminate the Appellant's Ineligibility period under CADP Rule 7.38<sup>21</sup> because he was not at fault.<sup>22</sup>

The CAS concluded that the *WADA Code* article 10.5.1 (CADP Article 7.38) applied. The Court found Adams was not at fault because of two things. First, Adams had shown that the contamination came from the Vatican catheter and not his body. Second, Adams could not have 'reasonably appreciated the risks of using a used catheter'.<sup>23</sup>

<sup>14</sup> *Adams v Canadian Centre for Ethics in Sport* [2008] CAS2007/A/1312, (16 May 2008) [156].

<sup>15</sup> Jan-Ake Edvinsson (ed) 'CAS annulled IIHF suspension of Ukrainian player' 10(5) (October 2006) *Ice Times* 3.

<sup>16</sup> It can be difficult to obtain unreported CAS decisions. *Pobyedonostsev* is not readily available. However, the Player's sanctions were reduced to zero; the CAS found the circumstances to be exceptional; and Pobyedonostsev had no knowledge that he was administered a banned substance. It is therefore safe to assume that *WADA Code* article 10.5.1 and the definition of 'No Fault or Negligence' was applied.

<sup>17</sup> Matthieu Reeb (ed), *Digest of CAS Awards II 1998 – 2000* (2002) 345.

<sup>18</sup> *Ibid* [30] – [31].

<sup>19</sup> *ATP Tour Anti-Doping Tribunal Appeal of Todd Perry* [2005] (30 November 2005).

<sup>20</sup> *Ibid* [56]-[57].

<sup>21</sup> Note CADP Rule 7.38 is Canada's *WADA Code* Article 10.5.1.

<sup>22</sup> *Adams v Canadian Centre for Ethics in Sport* [2008] CAS2007/A/1312, (16 May 2008) [157], [161].

<sup>23</sup> *Ibid* [159] - [160].

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For an athlete to meet the requirement of 'No Fault or Negligence' under article 10.5.1, it must be shown that he or she could 'not reasonably have known or suspected ... that he or she had Used or been administered the *Prohibited Substance* or *Prohibited Method*'.<sup>24</sup> For Adams to be found he was not at fault under Article 10.5.1 would require a re-wording of the WADA definition of 'No Fault or Negligence'. This would be required because WADA definitions are 'an integral part of the *Code*'.<sup>25</sup> An application of *WADA Code* Article 10.5.2, which uses the definition of 'No Significant Fault or Negligence'<sup>26</sup> could have avoided this problem.

### WADA ARTICLE 10.5.2 AND 'NO SIGNIFICANT FAULT OR NEGLIGENCE'

CAS's conclusion in reducing Adams penalties to zero, in itself, may not be flawed. It is surely reasonable to assume that the victim of an assault should not be punished for being assaulted. However, it is CAS's reasoning in using Article 10.5.1 to eliminate Adams' penalties that is problematic. Adams' circumstances do not meet WADA's requirements regarding no fault or negligence under *WADA Code* Article 10.5.1. However, Article 10.5.2 (CADP Article 7.39) relies on the athlete establishing 'No Significant Fault or Negligence':

The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation.<sup>27</sup>

Adams did have knowledge he had ingested a banned substance, but it was ingested without his consent. The definition of '*No Significant Fault or Negligence*' might have been a more accurate description of Adams' level of fault under the *WADA Code*. But Article 10.5.2 only allows a maximum reduction of 50% to the athlete's suspension. This seems too harsh when considering Adams' circumstances. Indeed, Adams ought not receive any kind of penalty for being forced against his will to ingest a banned substance. So the CAS, in *Adams* applied Article 10.5.1 to reduce Adams' penalties to zero.

However, Adams circumstances could have allowed a flexible application of the principle of proportionality<sup>28</sup> that goes beyond what is contained in the *WADA Code*. This could address the imbalance between Adams' violation and the punishment he would receive under Article 10.5.2.

### THE PRINCIPLE OF PROPORTIONALITY

In EU law the principle of proportionality can be used to 'strike down a measure ... that is manifestly inappropriate to achieve its objective'.<sup>29</sup> This would fit Adams' circumstances – ie, it would be manifestly inappropriate for Adams to receive a penalty after being, in effect, assaulted with cocaine.

True, proportionality is addressed in the *WADA Code*, but in a brittle fashion. The degrees of punishment in Article 10.5 allow for some flexibility in the allocation of sanctions to athletes committing a doping offence. So the *WADA Code* already recognises the principle of proportionality. Kaufmann-Kohler, Malin-Verni, and Rigozzi, in their legal opinion to

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<sup>24</sup> *WADA Code* (2003) Definitions, p 76.

<sup>25</sup> *WADA Code* (2003) Article 24.6, Interpretation of the Code.

<sup>26</sup> *WADA Code* (2003) Article 10.5.2.

<sup>27</sup> *WADA Code* (2003) Definitions, p 76.

<sup>28</sup> Richard McLaren in *The Court of Arbitration for Sport 1984 – 2004* (2006), Blackshaw, Ian S et al (ed), at p 192 comments: 'Proportionality involves assessing the justifiable aim pursued against the effect of the action chosen. To be proportionate, the action must not exceed that which is reasonably required in search of the justifiable aim.'

<sup>29</sup> Trakis Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> ed 2006) 138.

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WADA,<sup>30</sup> think the Code struck the right balance between proportionality and harmonization regarding sanctions for doping violations.

If some flexibility is required in order to comply with the principle that the sanction must be proportionate with the offence, the scope of this flexibility must be carefully defined and limited. To this end we recommend that the only possible basis for exercising flexibility in the setting of sanctions should be the existence of fault or negligence, or lack thereof, on the part of the athlete ... we conclude that Articles 10.2, 10.3 and 10.5 pursue a legitimate aim and satisfy the requirement of proportionality.<sup>31</sup>

Also a 2006 CAS Advisory Opinion on the adoption of the *WADA Code* by FIFA:

The sanction must also comply with the *principle of proportionality*, in the sense that there must be a reasonable balance between the kind of the misconduct and the sanction ... The Panel is of the view that the principle of proportionality is guaranteed under WADC, moreover proportional sanctions facilitate compliance with the principle of fault.<sup>32</sup>

This did not properly address the circumstances in *Adams*, though. To punish someone for being assaulted still offends the principle of proportionality, even if the punishment is the lesser sanction available under the *WADA Code* (Article 10.5.2). Adams' rights would certainly have been violated if the sanctions permitted under Article 10.5.2 had not been eliminated.

The Swiss Federal Supreme Court commented upon the rights of athletes when an appeal was made to set aside a CAS award under the anti-doping rules of FINA. In this case, *N, J, Y, W v FINA*,<sup>33</sup> the Swiss Court held that the issue of proportionality could only be considered if the rights of the individual were attacked.

The issue of the proportionality of the penalty could therefore only arise ... if the arbitration award were to constitute an attack on personal rights which was extremely serious and totally disproportionate to the behaviour penalised.<sup>34</sup>

A sanction made under the *WADA Code*, in light of the above, could be legitimately challenged if it did not adhere to the principle of proportionality and violated the rights of the athlete. The CAS has indicated that it is not averse to considering lesser sanctions that may not be accounted for in the *WADA Code*. In *Squizzato*<sup>35</sup> the CAS confirms this by referring to the proportionality statement in *N, J, Y, W v FINA* as considered in the CAS case *Hipperdinger*:<sup>36</sup>

in spite of the provisions of the World Anti-Doping Code (here DC 10.5), a Panel feels itself free to still apply a potentially more-forgiving principle of proportionality ... the principle of proportionality would apply if the award were to constitute an attack on personal rights which was serious and totally disproportionate to the behaviour penalised

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<sup>30</sup> Gabrielle Kaufmann-Kohler, Giorgio Malinverni, Antoio Rigozzi, *Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law* (2003).

<sup>31</sup> *Ibid* [184] – [185].

<sup>32</sup> *FIFA & WADA* [2006] CAS 2005/C/976 & 986 (21 April 2006) [139].

<sup>33</sup> Excerpt of the judgment of 31 Mars 1999, delivered by the 2<sup>nd</sup> Civil Division of the Swiss Federal Tribunal in the case *N, J, Y, W v Federation Internatioanle de Nataion (FINA)*: from Matthieu Reeb (ed), *Digest of CAS Awards II 1998 – 2000* (2002) 775.

<sup>34</sup> *Ibid* 780.

<sup>35</sup> *Squizzato v Federation Internationale de Natation Amateur (FINA)* [2005] CAS 2005/A/830 (15 July 2005).

<sup>36</sup> *Hipperdinger v ATP Tour Inc* [2005] CAS 2004/A/690 (24 March 2005).

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(see *Hipperdinger v/ATP Tour, Inc.* CAS 2004/A/690 note 86 with reference to the Swiss Federal Supreme Court).<sup>37</sup>

*Hipperdinger* in referring to the Swiss Court's reasoning in *N, J, Y, W v FINA*, considers whether the penalty imposed on an athlete is 'extremely serious'.

The Supreme Court further held that, therefore, the issue of proportionality could only arise if the award were to constitute an attack on personal rights which was extremely serious and totally disproportionate to the behaviour penalised.<sup>38</sup>

Would it be appropriate for the court to consider Adams' penalty under Article 10.5.2 to be an attack on his personal rights and disproportionate to his circumstances? Could the CAS then apply 'a more forgiving principle of proportionality' in order to eliminate his penalties? In *H v FIM*<sup>39</sup> the CAS states:

[an] athlete needs to have the possibility of discharging himself ... This is required in accordance with common principles of law and the human rights of the accused athlete even if the federation rules do not explicitly provide for it. The athlete may for example provide evidence that the presence of the forbidden substance is the result of an act of malicious intent by a third party ...<sup>40</sup>

This was indeed the situation in *Adams*. Mr Adams was assaulted with malicious intent by a third party.

### WADA CODE 2009 AMENDMENTS

Amendments commencing in 2009 to the WADA Code will provide more flexibility on suspensions.<sup>41</sup> These new amendments, however, are not applicable to Adams' circumstances.

The 2009 amendments will include a new Article 10.4. This Article provides a different set of sanctions compared to those under Article 10.5. Under the new Article 10.4 it is possible for an athlete to avoid being suspended altogether. This can only be considered if the banned substance used in the violation is listed as a 'specified substance' in WADA's 2009 *Prohibited List*.<sup>42</sup> Cocaine is not a specified substance on the *Prohibited List*<sup>43</sup> therefore the new Article 10.4 would not apply to Adams' circumstances.

Other 2009 amendments will 'widen the application of the 'No Significant Fault or Negligence defence'<sup>44</sup>. But the definition of 'No Fault or Negligence' will remain unchanged, and the reduction in a suspension under Article 10.5.2 by half has not been altered.<sup>45</sup>

### REVIEW OF ARTICLE 10.5

*Adams* will not be the last case to test the CAS's ability to deal with unique exceptional circumstances. The case offers support for an amendment to Article 10.5 of the *WADA Code* to make it more sensitive to, for example, the malicious drugging situation. CAS can always

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<sup>37</sup> *Squizzato v Federation Internationale de Natation Amateur (FINA)* [2005] CAS 2005/A/830 (15 July 2005) [10.26].

<sup>38</sup> *Hipperdinger v ATP Tour Inc.* [2005] CAS 2004/A/690 (24 March 2005) [86].

<sup>39</sup> Digest of CAS Awards II 1998 – 2000, 410.

<sup>40</sup> *Ibid* 417.

<sup>41</sup> J E Marshall, 'Will the WADA Code plug all the gaps? Will it make new ones?' (paper presented at the Seventeenth Annual Australian and New Zealand Sports Law Association, Gold Coast, 1 November 2007) [8]

<sup>42</sup> *Ibid* [11]-[12].

<sup>43</sup> World Anti-Doping Agency, *The 2009 Prohibited List International Standard*, S6a.

<sup>44</sup> JE Marshall, above n 42, [15]

<sup>45</sup> *WADA Code* (2009) Article 10.5.2.



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follow the Swiss Federal Supreme Court's statement in *N, J, Y, W v FINA* – furthermore it has been accepted in *WADA Code*-cases: *Squizzato*, and *Hipperdinge*.<sup>46</sup>

*N, J, Y, W v FINA* affirms that the CAS can resort to the principle of proportionality if reluctant to impose a disproportionate penalty under Article 10.5 of the *WADA Code*. This is better than applying the 'No Fault or Negligence' requirements creatively. Even better might be an amendment to the Article.

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<sup>46</sup> In *Perry* the principle of proportionality was also considered. In this case the ATP Anti-Doping Tribunal also referred to *N, J, Y, W v FINA* and *Hipperdinge*.