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INADVERTENT DOPING AND THE WADA CODE: CAN ATHLETES WITH A COLD NOW BREATHE EASY?

ANNE AMOS*

> Doping equals death. Death psychologically, with the profound, sometimes irreversible alteration of the body's normal processes through inexcusable manipulation. Physical death, as certain tragic cases in recent years have shown. And then also the death of the spirit and intellect, by the acceptance of cheating. And finally moral death, by placing oneself outside the rules of conduct demanded by any human society.[1]

A Romanian gymnast loses her Olympic gold medal after taking two Nurofen Cold and Flu tablets because she had a cold. The tablet was given to her by her team doctor. The gymnast did not intend to enhance her performance and the drugs would not have helped her win gold.[2]

> Doping is the negation of sport and its role as we understand it. Athletes who use banned substances to improve their performance commit a series of acts that transgress and violate certain immutable principles.[3]

A British alpine skier loses his Olympic bronze medal after using a Vicks Vapor Inhaler for his nasal congestion. He used the same product in the UK but did not realize that the US product contained a prohibited substance. The skier did not intend to enhance his performance and the drug would not have helped him win bronze.[4]

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1 Juan Antonio Samaranch, 'President of IOC condemns drug use', New York Times (13 September 1988) in John Hoberman, 'How Drug Testing Fails' in Wayne Wilson and Edward Derse (eds), *Doping in Elite Sport: The Politics of Drugs in the Olympic Movement* (2001) 241, 243.

2 Arbitration CAS ad hoc Division (O.G. Sydney) 2000/011, *Andreea Raducan v International Olympic Committee (IOC)*, award of 28 September 2000 in Matthieu Reeb (ed), *Receil des sentences du TAS Digest of CAS Awards II: 1998-2000* (2002), 665.

3 Juan Antonio Samaranch in 1996 quoted by John Hoberman, 'How Drug Testing Fails' in Wayne Wilson and Edward Derse (eds), *Doping in Elite Sport: The Politics of Drugs in the Olympic Movement* (2001), 241.

4 Arbitration CAS 2002/A/376, *Baxter v International Olympic Committee (IOC)*, award of 15 October 2002 in Matthieu Reeb (ed), *Recueil des sentences TAS Digest of CAS awards III: 2001-2003* (2004), 303.

> Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as "the spirit of sport"; it is the essence of Olympism; it is how we play true. Doping is fundamentally contrary to the spirit of sport.[5]

A Canadian rower loses her Pan American gold medal after taking Benadryl to treat a cold. The athlete had consulted two doctors about using Benadryl but inadvertently purchased Benadryl Decongestant instead of plain Benadryl. The purchased medication contained a prohibited substance, pseudoephedrine, but Benadryl contained only permitted substances. The rower did not intend to enhance her performance and the substance would not have helped her win gold.[6]

The strict liability rule in doping law has been called the cornerstone of anti-doping programmes.[7] According to this approach there is no need for an authority to prove that the athlete intended to enhance their performance, simply showing that a prohibited substance was present in their body is sufficient to prove that doping has been committed. And yet there is a certain set of cases in which the application of such an approach seems perverse and has attracted severe criticism. The criticism is warranted. In cases such as those outlined above the imposition of a strict liability rule seems unnecessarily harsh. As Richard McLaren says 'the inadvertent stimulant cases like Baxter and the over-the-counter medication cases like Raducan and Edwards cried out for some form of reduction of the rigours of the sanction imposed by the mechanical and rigid application of the strict liability principle.'[8]

The problems created by the strict liability rule in these types of cases have been recognized by the drafters of the universal anti-doping code, the *World Anti-Doping Code* (2003) which has become the basis for anti-doping programs throughout the world since its creation in 2003.[9] A number of provisions have been included in the

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5 World Anti-doping Agency, *World Anti-Doping Code* (2003) <http://www.wada-ama.org/rtecontent/document/code_v3.pdf> at 23 March 2006, 3.

6 Maclean's the Canadian Encyclopaedia, *Laumann Fails Drug Test* (1995) <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=M1ARTM0010416> visited 12 October 2006.

7 Andy Gray, 'Doping Control; The National Governing Body Perspective' in John O'Leary (ed), *Drugs and Doping in Sport: Socio-Legal Perspectives* (2001), 14.

8 Richard McLaren, 'Exceptional Circumstances: Is it Strict?' (2005) 2 (May) *International Sports Law Review* 32, 34.

9 A copy of the Code can be found at World Anti-doping Agency, *World Anti-Doping Code* (2003) <http://www.wada-ama.org/rtecontent/document/code_v3.pdf> visited 23 March 2006 (hereafter "WADA Code") and the 2006 *Prohibited List* at World Anti-Doping Agency, *The World Anti-Doping Code: The 2006 Prohibited List* (2006) <http://www.wada-

Code designed to ameliorate the harsh effects of the strict liability rule in the type of case outlined above.[10] The provisions have now been in operation for just over two years.[11] From a cursory view the 'exceptional circumstances' and 'specified substances' provisions appear to give welcome relief to athletes who are in danger of inadvertently ingesting a prohibited substance. However, is this cursory view accurate or are initial impressions deceiving?

The purpose of this article is to examine how effective the changes dealing with inadvertent doping cases have been. The article will examine cases brought under the Code, as well as considering how effective the provisions would have been in providing relief in pre-WADA Code cases such as those outlined above. The first section of the article will outline the relevant provisions of the WADA Code, the second will examine the way in which these sections have so far operated and the third will consider how the sections may have (hypothetically) worked in past cases.[12] The final section of the article will consider why the operation of anti-doping laws in these situations seems particularly repugnant to us and what measures could be taken to deal with this repugnancy.

The following discussion will deal with what McLaren describes as the 'inadvertent stimulant cases' and 'over-the-counter medicines' cases.[13] Such cases usually involve an athlete suffering from a sudden illness or discomfort on the eve of or during a competition and then taking medication to relieve their symptoms. Often they seek medical advice and either this advice proves to be faulty or the athlete makes a mistake in following the advice. The cases are substantially different from the

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ama.org/rtecontent/document/2006_LIST.pdf> visited 23 March 2006 (hereinafter '*Prohibited List*').

10 McLaren, above n 8 at 37 and Richard McLaren, 'CAS Doping Jurisprudence: What can we Learn?' (2006) 1 *International Sports Law Review* 4, 18.

11 The first major international competition at which the Code was in force was the 2004 Athens Olympics. In order to participate in those games international federations were required to accept the Code. McLaren, above n 10, 4. National governments are required to adopt the Code before the 2006 Winter Olympics at the risk of sanctions from the IOC. See World Anti-Doping Agency, *Q&A on the Code* (2006) <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=367> visited 27 October 2006.

12 The Court of Arbitration for Sport (CAS) is the final court of appeal under the Code for international level athletes, Article 13.2.1. As a court of arbitration, the CAS is not necessarily bound by precedent. Thus how the court may decide in a particular case is less certain than in a court bound by past decisions. See James A.R. Nafziger, 'Lex Sportiva and CAS' in Ian S Blackshaw, Robert C.R. Siekmann and Janwillem Soek (eds), *The Court of Arbitration for Sport 1984-2004* (2006) 409. However, the CAS does have a history of consistency in doping cases and thus it is possible to predict an outcome to some extent.

13 McLaren, above n 8, 34.

situation where an athlete takes a nutritional supplement which is contaminated with a prohibited substance. In the case of supplements, the athlete intends to improve their performance, albeit in a way which they think is legal. In the non-supplement inadvertent doping cases the athlete simply seeks to relieve a common illness or discomfort. The inadvertent doping with contaminated nutritional products therefore will not be considered as they appear to give rise to different issues. The term 'inadvertent doping' in this article will refer to the non-supplement cases.

(a) WADA Code Provisions dealing with inadvertent doping

There are a number of ways in which the inadvertent doping cases have been addressed in the WADA Code, the most notable of which are the exceptional circumstances provisions.[14]

2 Exceptional Circumstances

Despite doping being defined according to the strict liability principle in the WADA Code, under Article 10.5 there is opportunity for the hearing panel to take into account the level of fault of the athlete. Under this provision the ineligibility period (i.e. the period of suspension after the relevant competition) can be either eliminated or reduced due to exceptional circumstances. If the athlete is able to show that there was no fault or negligence on their part and can establish how the prohibited substance came to be in their system then the ineligibility period can be eliminated under Article 10.5.1. The commentary to the Code gives an example of where this section may apply; in the case where 'despite all due care he or she was sabotaged by a competitor.'[15] The commentary also gives examples of where the ineligibility period will *not* be reduced: sabotage by someone within the athlete's entourage, administration by the athlete's physician without the athlete's knowledge and mislabelled or contaminated supplements.

If the athlete is unable to meet the high standard of 'no fault or negligence' then Article 10.5.2 ('no significant fault or negligence') may be relevant. According to the commentary, the situations listed above, although not eliminating the ineligibility period under Article 10.5.1, might lead to a reduction in the ineligibility period under Article 10.5.2. If the athlete can show that there was no *significant* fault on their part

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[14] It is noted here that this article refers to the WADA Code version of these provisions. In the cases considered the applicable rules are based on the WADA Code but do not necessarily have identical wording. For ease of reference the WADA Code wording will be used. There should rarely be significant differences between the Code and the federation's policy since the provisions in question are ones which are required to be included in anti-doping rules without any substantive changes. See WADA Code, Introduction, p 6-7.

[15] WADA Code, p 31.

and can establish how the prohibited substance came to be in their system then the ineligibility period may be reduced by up to half the applicable period (2 years for a first offence and life for a second offence).[16] Examples of how these articles operate will be discussed below.

3 The Specified Substances Provision

Under Article 10.3, the applicable ineligibility period will be reduced if the athlete is able to show that use of a specified substance was not intended to enhance performance. A specified substance is a prohibited substance which has been especially identified on the *Prohibited List*, being substances 'particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents.'[17] If the athlete proves that they did not intend to enhance sport performance then the ineligibility period can be reduced to somewhere between a warning/reprimand and 1 year suspension for a first offence, while a second offence attracts a 2 years suspension. Life ineligibility will only apply after a third offence under this section.

Examples of specified substances include: glucocorticosteroids, alcohol, betablockers, cannabinoids, ephedrine and a number of other stimulants.

4 Changes to the Prohibited List

Although there have been a number of changes to the *Prohibited List*, there is one of particular significance for these types of cases. The substance which has been the responsible drug in many of the "worst"[18] inadvertent doping cases is pseudoephedrine. It is found in a number of regular cold and flu medications. Pseudoephedrine is no longer found on the *Prohibited List* which will, no doubt, bring some relief to athletes who are suffering from colds at the time of competition. Caffeine has also been removed from the List. Although not many inadvertent doping cases appear to have arisen as a result of the inadvertent ingestion of caffeine,[19] its presence in many soft drinks and snacks makes it a possible danger for inadvertent doping.

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16 Article 10.2.

17 Article 10.3.

18 The word 'worst' refers here to the perceived fairness of the outcome.

19 The Australian athlete, Alex Watson may be an exception. He was sanctioned for doping due to excessive levels of caffeine but unsuccessfully argued that his drinks had been spiked. See Antonio Buti and Saul Fridman, *Drugs, Sport and the Law* (2001), 115.

(b) The provisions in operation

1 New Cases Under the Code

Since its inception in 2003, there have been a number of inadvertent doping cases under the WADA Code, most under the exceptional circumstances provisions.

2 *No fault or negligence*

As McLaren points out, despite a number of attempts, as yet athletes have failed to successfully argue a case before the Court of Arbitration for Sport (CAS) under the 'no fault or negligence' category (which would allow the ineligibility period to be completely eliminated).[20] There have been a number of cases in which the athlete has attempted to show that this provision should apply but so far all have failed to pass the test. The WADA Code defines the test for 'no fault or negligence' as 'he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of the utmost caution, that he or she had used or been administered the Prohibited Substances or Prohibited Method.'[21]

This test has proved extremely difficult to meet in three recent cases.[22] The first case was *Vencill* in which a nutritional supplement was contaminated with nandrolone. Using the above test, the CAS found that although Vencill did not know that his supplements were contaminated, he could *reasonably* have known since he had been warned of the dangers of supplement use and still 'exercised not the slightest caution in the circumstances.'[23] This, however, was a nutritional supplement case and therefore not the subject of the discussion in this article. Of more interest to this article are the other two cases which involve inadvertent doping through medication.

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20 McLaren, above n 10, 19.

21 WADA Code, Definitions section, p76.

22 Two cases have been under the Fédération Internationale de Natation Amateur (FINA) rules and one under the International Tennis Federation (ITF) both of which are based on the WADA Code. The cases are *Kicker Vencill v United States Anti-Doping Agency (USADA*), CAS 2003/A/848 available at United States Anti-Doping Agency, *US Swimmer Vencill Received Revised Sanction Following CAS Decision (Final CAS Decision), March 2004* (2004) <http://www.usantidoping.org/files/active/resources/press_releases/pressrelease_3_17_2004.pdf> visited 10 October 2006 and *G. Squizzato v FINA*, CAS 2005/A/830. The most recent case was *Puerta v ITF* CAS 2006/A/1025.

23 *Kicker Vencill v United States Anti-Doping Agency (USADA*), CAS 2003/A/848 available at United States Anti-Doping Agency, *US Swimmer Vencill Received Revised Sanction Following CAS Decision (Final CAS Decision), March 2004* (2004) <http://www.usantidoping.org/files/active/resources/press_releases/pressrelease_3_17_2004.pdf> visited 10 October 2006, 23.

In *G. Squizzato v FINA*, the swimmer failed to show 'no fault or negligence' in using a cream to treat a skin infection. The cream was purchased by her mother and Squizzato used it without asking her doctor or coach whether the cream contained a prohibited substance. She was found to have failed in her duty of diligence. The CAS stated that 'with a simple check, she could have realized that the cream was containing a doping agent [sic]' as the cream listed the prohibited substance on the label and therefore had shown negligence.[24]

Puerta v ITF would, on its face, appear a more likely situation in which Article 10.5.1 might apply. There a tennis player inadvertently ingested etilefrine when he accidentally drank from a glass that his wife had used to take medication. Puerta had been sitting at a table with his family before his match where they had been drinking water from a number of identical glasses. Puerta left but then returned when his game was delayed. While he was away his wife used the glass that he had been drinking from to take her Effortil medication which was tasteless, odourless and colourless. She was gone from the table when Puerta returned. He took the same glass and drank water from it. The CAS found that, although the circumstances of case were exceptional, Puerta had failed to exercise the utmost caution. The panel stated:

> [a]thletes must be aware at all times that they must drink from clean glasses, especially in the last minutes before a major competition…In the Panel's view it would not have been too much to expect of him to ask his brother-in-law upon returning to the table whether the glass that he was going to use was "his glass" or whether "anyone had used his glass" during his absence. Mr Puerta cannot avoid the conclusion that he suffered a momentary lapse of attention and exhibited a momentary lack of care when he used a glass over which he had lost visual control.[25]

Puerta therefore did not meet the 'no fault or negligence' standard.

The cases under Article 10.5.1 certainly suggest that when McLaren predicted that it is not likely that the section will see much use he will probably prove to be correct.[26] Foschi goes further and claims that Articles 10.5.1 (and 10.5.2) are 'included in the Code as empty language' since the sections present an 'insurmountable burden' for the athlete. Foschi colourfully suggests that since every athlete is held responsible for substances found in their body,[27] the athlete is required to 'test every bottle of every supplement that he or she uses, must guard these bottles against any kind of

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24 *G. Squizzato v FINA*, CAS 2005/A/830 at 11.

25 *Puerta v ITF* CAS 2006/A/1025, 26.

26 McLaren, above n 8, 34.

27 Under Article 2.1.1.

sabotage from a competitor or a close relation, and might even want to get their food and drink tested as well, just to be sure.'[28] The cases above certainly provide evidence to support Foschi's comment but there is one case which may suggest that the situation is not quite as dire as Foschi foresees.

The case of *Oliferenko* at the Athens Olympic is one situation in which the ineligibility period has been totally eliminated for an athlete.[29] Oliferenko was a member of the bronze medal winning Ukraine womens' quadruple skulls. She inadvertently took the prohibited stimulant, Ethamivan, which was present in a medicine prescribed for her by the team doctor. The IOC Executive Board decided that she and the team would be disqualified, due to the positive analytical finding. No other sanction was given to Oliferenko, by either the IOC or the international rowing federation, FISA, while the doctor was suspended for 4 years. The period of ineligibility which would usually apply was eliminated.[30] Dennis Oswald, IOC executive board member and FISA president stating that 'there was no way she could be aware it [the medicine] contained a prohibited substance.'[31]

Accordingly, although it may be extremely difficult to bring a case under the 'no fault or negligence' provision, it may not be impossible.

3 *No Significant Fault or Negligence*

So far the exceptional circumstances provisions do not appear to have been much help to athletes caught in inadvertent doping situations. But before accepting Foschi's view that the provisions are merely 'empty words', the operation of Article 10.5.2

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[28] Jessica K Foschi, 'A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport' (2006) 16 *Duke Journal of Comparative and International Law* 457, 479.

[29] Detailed reasons for the decision have not been published by the IOC so it is difficult to be sure what sections of the Olympic anti-doping rules were applied. Comments by the CAS (regarding the subsequent decision by the international rowing federation) seem to suggest that Olefirenko satisfied the no fault and negligence test but McLaren in 2006 states that no athlete has brought a successful case under this provision. McLaren, above n 10, 19. It is hard to imagine how else the ineligibility period could have been totally eliminated so it is assumed that this section was applied in Olefirenko's case.

[30] In *Puerta v ITF*, above n 25, 26. Although the CAS does not actually say so it is implied that Olefirenko satisfied the no fault or negligence test.

[31] Per Dennis Oswald in USA Today, *IOC Laments 'Mistake by a Doctor' Strips Rowing Medals* (2004) <http://www.usatoday.com/sports/olympics/athens/boat/2004-08-26-doping-ukraine_x.htm> visited 19 August 2005.

must also be considered. For this is the provision which has seen the most use so far.[32]

The definition section of the WADA Code sets the test for 'no significant fault or negligence' as involving: 'the athlete 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.'[33] In a number of recent cases anti-doping panels have found this test to be satisfied.

In the cases of *Squizzato* and *Puerta* (above), the athlete did not satisfy the 'no fault or negligence' test but they were able to satisfy the 'no significant fault or negligence' provision. In *Squizzato*, the CAS found that since the athlete did not have any intention to enhance her performance, her negligence in forgetting to check the cream that she used for prohibited substances was 'mild in comparison with an athlete that is using doping products in order to gain such advantage.'[34] Squizzato was therefore given a 1 year suspension rather than the usual 2 years. Similarly, Puerta was given a 2 year sanction for his inadvertent ingestion of his wife's medication instead of the applicable life suspension.[35] The circumstances the CAS took into account in finding that Puerta was not significantly at fault or negligent included the fact that the substance that he ingested was water which he had brought with him (in an effort to avoid inadvertent doping); the colourless, odourless and tasteless nature of the prohibited substance; the fact that he had no reason to know that his wife had used his glass in his absence; that the glass was only unattended for a few minutes and the fact that the concentration of etilifrine in his urine could not have been performance enhancing.

Another case in which the CAS has reduced the applicable ineligibility period under Article 10.5.2 of the WADA Code was that of the tennis player, Guillermo Canas. In February 2005 the player was found to have a prohibited substance, hydrochlorothiazide (HCT), in his doping specimen. The substance entered the player's system as a result of a mix up of medications by ATP tournament staff. Canas had visited the tournament doctor and had medication prescribed which was to be left at the reception desk for him. Unfortunately the medication which was left

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32 McLaren, above n 8, 35.

33 WADA Code Definition section, p76.

34 *Squizzato v FINA*, above n 24, 11-12.

35 This was Puerta's second doping offence. The CAS panel reduced the 8 year suspension that the ITF anti-doping panel had given Puerta as they were of the view that this was indistinguishable from a life suspension and was therefore disproportionate to the circumstances of the offence. *Puerta v ITF*, above n 25, 41.

for Canas was the wrong one, being one that had been prescribed for someone else who had also visited the tournament doctor. The CAS panel found that Canas had been negligent in taking the medication 'with no review whatsoever of the contents of the box even though he knew that the medication had been through several hands before being delivered to him.'[36] Relying 'blindly' on the system set up to take care of him was 'clearly negligent'. If the doctor had actually handed him the medication it seems there would be no duty to check the ingredients. However, the CAS was of the view that, in light of the fact that the medication had changed hands a number of times, there was a duty on Canas to check it. He thus failed to show that his was without fault.

Nevertheless, the CAS did accept that he was without significant fault. Factors which were taken into account included the fact that the player's use of the medication was medicinal (as opposed to taking a substance with an aim to supplementing his performance), the fact that Canas had never returned a positive doping test before, the way in which the player dealt with his illness was the safest possible way (i.e. seeing a tournament doctor who specialises in sports medicine would presumably be the safest way to avoid inadvertent doping) and the fact that the mistake was made by the ATP's staff, and not by the player himself. These factors reduced the applicable sanction from 2 years to 15 months.

The 'no significant fault or negligence' provision is not going to be a panacea for all inadvertent doping cases, however. As well as the case of Kicker Vencill (above), Tori Edwards was an athlete who failed to prove 'no significant fault'. Edwards tested positive for the prohibited substance, nikethamide, which she ingested when she took two glucose tablets given to her by her chiropractor. Although the CAS found that Edwards had 'conducted herself with honesty, integrity and character' and that she did not seek to 'gain any improper advantage or "cheat" in any way', she was negligent in failing to check whether the glucose tablets given to her contained a prohibited substance. Of particular significance were two facts: the tablets were purchased in a foreign country and the packaging contained warnings (in French) that the product contained a prohibited substance. These factors should have led the athlete to enquire further. Her situation therefore was not 'truly exceptional' and therefore neither the 'no fault' nor the 'no significant fault' provision was found to apply. Consequently Edwards was suspended from athletics for the usual two years.[37]

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[36] *Canas v ATP*, CAS 2005/A/951, 14.

[37] One other case which shows that it is not impossible to satisfy the exceptional circumstances criteria is the ATP Anti-Doping tribunal decision of Oliver, .ATP Anti-Doping Tribunal, *The ATP Anti-Doping Tribunal Appeal of Gordon Oliver* (2004)

What then can be concluded regarding the application of the no significant fault or negligence provisions to inadvertent doping situations? Since the test under the Code requires the panel to consider the totality of the circumstances, the operation of the provision will certainly vary from case to case. A few points can be made though. Firstly, unless an athlete gets their medication directly from a medical practitioner or they ask the medical practitioner to check the ingredients of the medication for them, they will be negligent if they do not check the ingredients list of any product that they intend to use. The source of the prohibited substance will also be of significance. In *Puerta*, the fact that the substance he tried to take was water and not 'a vitamin, nutritional supplement, medication, tonic or salve'[38] was a factor which weighed in his favour. Accordingly it seems that ani-doping panels will look more favourably upon inadvertent doping involving medicinal use of products rather than use of nutritional supplements. This might be due to the fact that medicines are seen as examples of 'restorative' substances while nutritional supplements are 'additive' (that is adding to normal functioning levels).[39] Other factors which will be significant include the effect of the substance; the experience, age, knowledge and character of the athlete; previous doping violations; the party whose advice was relied on and where the product was purchased (in a foreign country versus locally).

Even while these general comments seem to be consistent with the case law, it is not at all clear exactly where the line is to be drawn between Article 10.5.1 and 10.5.2 or where neither section will apply. As the CAS panel said in Canas '[e]ach case will be different'.[40]

4 Old cases under the code

Thus far this article has considered the operation of the new exceptional circumstances provisions in cases which have arisen since the WADA Code was drafted. This certainly gives us some idea of how the provisions may operate to alleviate the injustices of the application of the strict liability principle in doping.

<http://www.atptennis.com/en/common/TrackIt.asp?file=http://www.atptennis.com/en/antidoping/oliver.pdf> visited 11 October 2006. In that case the positive doping test arose from the athletes' use of the herbal pills 'Relax Aid' which he took to help him sleep. The ATP anti-doping rules have a slightly different exceptional circumstances provision which is not divided into no fault or negligence and no significant fault or negligence. The case will therefore not be considered here. See McLaren, above n 8, 35-36 for a good overview of the case.

38 *Puerta* above n 25, 28.

39 In restorative drug use the athlete seeks to obtain normal functioning of their body while in additive drug use seeks to go beyond this. See Norman Fost, 'Banning Drugs in Sport: A Skeptical View' 1986(August) *Hastings Centre Report* 5.

40 *Canas v ATP*, above n 36, 17.

However the effect of these provisions can be seen even more clearly by considering the way in which the WADA Code would have dealt with some of the cases which were problematic under previous anti-doping regimes. Since the exceptional circumstances and other provisions are a response to these problematic cases, the provisions can really only claim to be effective if their operation would have changed the outcome of such cases.

(c) Raducan

The case of the 16 year old Romanian gymnast, Andreea Raducan was one which attracted a large degree of public attention and criticism. The result, in which Raducan was stripped of her gold medal, was seen as particularly harsh given the circumstances of the case.[41] Moreover Raducan was one of the cases which the changes to the WADA Code were designed to address.[42] It therefore seems the most suitable place to start an examination of how the WADA Code would have operated in past cases.

At the 2000 Olympics Raducan was found to have pseudoephedrine in her urine, a substance prohibited under the Olympic Movement Anti-Doping Code (OMAC) at the time. As doping was defined as the presence of a prohibited substance, she was found guilty of a doping violation and disqualified. The disqualification stood despite a lack of intent on her part and despite the fact that no performance enhancing effect was gained.

Pseudoephedrine was removed from the *Prohibited List* in 2004, thus under the WADA Code pseudoephedrine is no longer a prohibited substance.[43] Thus, from the initial definition of the doping offence, the Raducan story would have been very different today as she would not have been found guilty of doping at all.

However, had pseudoephedrine still been on the *Prohibited List* it would have in all likelihood been a specified substance. Since the CAS accepted that Raducan had not had any intent to enhance her performance by taking the Nurofen[44] it seems likely that she would have satisfied the requirements of Art 10.3. The least severe sanction

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[41] Ryan Connolly, 'Balancing the Justices in Anti-Doping Law: the Need to Ensure Fair Athletic Competition through Effective Anti-Doping Programs vs The Protection of Rights of Accused Athletes' (2006) 5(Spring) *Virginia Sports and Entertainment Law Journal* 161, 11.

[42] McLaren, above n 10, 18.

[43] World Anti-Doping Agency, *The World Anti-Doping Code: The 2006 Prohibited List* (2006) <http://www.wada-ama.org/rtecontent/document/2006_LIST.pdf> visited 23 March 2006 It is now a monitored substance.

[44] The CAS did not actually express a finding to this effect but the tone of the judgment, and the fact that they referred to Raducan as a 'fine, young elite athlete' leads to the assumption that Raducan was without intent. *Raducan v IOC*, above n 2, 673.

under this provision is disqualification, a reprimand and warning with no future ineligibility. Under the OMAC, Raducan received a disqualification and 'no further disciplinary sanction',[45] not even a warning. Thus, if pseudoephedrine was a specified substance then Raducan would have been worse off under this provision as she would have lost her gold medal and received a warning and reprimand as well.[46]

Furthermore, if pseudoephedrine was a prohibited substance but not a *specified* substance then the operation of Article 10.5.1 would need to be considered. As discussed above, the case law concerning the application of the test for 'no fault or negligence' shows that the athlete will be held to a high level of caution in order to discharge this duty. On the basis of this case law it seems unlikely that Raducan could have discharged such a duty since the ingredients of Nurofen would have been plainly visible to anyone. However, given that the IOC executive board eliminated the ineligibility period, in similar circumstances in the *Olefirenko* case, the fact that the tablet was given to Raducan by her team doctor might have been looked on sympathetically by the panel. In this case she would have been held as being without fault and received only a disqualification and no further ineligibility period, exactly the same punishment that she received under the OMAC.[47]

It therefore appears that, but for the fact that pseudoephedrine is no longer a prohibited substance, Raducan would have received the same or worse under the WADA Code compared to the OMAC in terms of her sanction. Notwithstanding this, the WADA Code must be considered as a whole and all the changes in their entirety. The fact is that pseudoephedrine *has* been removed from the *Prohibited List* so it must be said that the Code, as it stands today, would effectively deal with the problems created by the Raducan situation.

5 *Baxter*

Baxter is the other case which has been identified as demonstrative of the problems associated with the strict liability rule in situations of inadvertent doping.[48] Baxter was the British alpine skier who lost his bronze medal at the Salt Lake City Olympic Games and was suspended from competition for 3 months[49] due to his mistake in taking the US version of the Vicks Vapor inhaler. The US version contained the

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45 Ibid.

46 It is admitted here that a warning or reprimand may not be thought of as particularly significant since it would have no further effect on the athletes' ability to compete.

47 In *Puerta v IOC*, above n 25, 26 the CAS seems to imply that Raducan, like Olefirenko would have satisfied the no fault or negligence section.

48 McLaren, above n 8, 34.

49 McLaren, above n 10, 9.

prohibited substance, levmethamfetamine. Again, this seems a harsh punishment for an innocent mistake. How would Baxter have faired under the WADA Code?

Unlike the Raducan case, the substance that Baxter inadvertently ingested is still on the *Prohibited List*. Although at the time Baxter unsuccessfully argued that levmethamfetamine was not a prohibited substance since it did not specifically appear on the OMAC *Prohibited List*,[50] any confusion over the legal status of levmetamfetamine has been eliminated in the WADA *Prohibited List*, levmethamfetamine being specifically listed in the *2006 Prohibited List*.[51] Had Baxter been under the jurisdiction of the WADA Code at the time he would also have been found guilty of a doping rule violation under Article 2.1 since a prohibited substance was discovered in his urine specimen.

Article 9 of the Code clearly states that an anti-doping rule violation will automatically lead to disqualification from the relevant competition. The provisions which are designed to ameliorate the harshness of the strict liability rule do not operate on the disqualification (and forfeiture of all prizes) from the competition in which the doping violation occurred. Any relief from these sections comes only through the elimination or reduction of the additional ineligibility or suspension.[52] Therefore, no matter how the specified substances or exceptional circumstances provisions may operate on the Baxter case, he would still have been disqualified and lost his bronze medal.

The 2006 *Prohibited List* does, however, make levmethamfetamine a specified substance. Article 10.3 would therefore need to be considered. Since disqualification was not the only sanction Baxter received for his doping violation, (he was also banned from competition for 3 months) the specified substances provisions may have come to his assistance. Since the panel found that Baxter had not intended to enhance his performance,[53] it is likely that he would satisfy the specified substances provisions test. The minimum sanction under Article 10.3 would be a disqualification and reprimand, the maximum 1 year suspension. Consequently, it is possible that

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50 *Baxter v IOC*, above n 4, 306.

51 World Anti-Doping Agency, *WADA Prohibited List 2006, Summary of Modifications* (2006) <http://www.wada-ama.org/rtecontent/document/Explanatory_Note_2006.pdf#search=%22WADA%202006%20Prohibited%20List%20major%20modifications%20summary%22> visited 12 October 2006

52 This approach is consistent with the principle firmly established in CAS jurisprudence which holds that disqualification must be automatic because 'fairness of the result of a certain competition must prevail over any consideration of fault.' Frank Oschutz, 'Doping Cases before the CAS and the World Anti-Doping Code' in Ian S Blackshaw, Robert C.R. Siekmann and Janwillem Soek (eds), *The Court of Arbitration for Sport 1984 - 2004* (2006) 246 .

53 *Baxter v IOC*, above n 4, 310.

Baxter could have received only a disqualification and a reprimand under the Code rather than a three month disqualification. How likely it is that Baxter would receive the minimum sanction is still open to question, particularly in the light of more recent case law discussed above where the CAS has been willing to allow sanctions against athletes for what appears to be minimal negligence.[54] The significant point here is that the minimum penalty that Baxter could have received under the WADA Code is only slightly better than that he received under the OMAC (3 months being a short suspension period).

It is also interesting to consider how the exceptional circumstances provisions may operate in Baxter's case if levmethamphetamine was not a specified substance. It is unlikely that Baxter would have been able to meet the test for 'no fault or negligence' even though the panel accepted that he did not intend to enhance his performance. Baxter did not consult the team doctor regarding his use of this particular inhaler and did not read the back of the package because it looked the same as the product which he had safely used at home. As previously pointed out, athletes have been held to a very high standard in terms of their duty to beware of the dangers of inadvertent doping. This is particularly so when they take over-the-counter medications and supplements in foreign countries (such as the Edwards case). It is therefore unlikely that Baxter would have been able to prove that he was without any fault. From the case law under Article 10.5.1 it seems that Baxter *could* have reasonably known or suspected that the product might contain a prohibited substance and that he had not exercised the utmost caution by not conferring with the team doctor. This is particularly so given that the team doctor had recommended another product for the athlete which had not worked well. The panel may have taken this as significant in that it should have led Baxter to question why the doctor had not prescribed the product he had used with success in the UK. Thus, it seems unlikely that Article 10.5.1 would operate to eliminate the ineligibility period in the Baxter case.

Baxter would have needed to argue that his case was one of 'no significant fault or negligence' to reduce his sanction if the substance in question was not a specified substance. We have seen in recent cases above that the test of weighing the culpability of the athlete in all the circumstances is not easy to satisfy. However, given the sympathetic tone which the CAS judgement exhibits, it may be that the

[54] Under the OMAC Raducan's case would have been penalized according to Article 3(1)(a) and Baxter according to 3(1)(b) which prescribes a longer sanction according to the substance involved. However, there is provision in 3(1)(b)(iii) to modify the suspension sanction. This seems to have been done in Baxter's case. It might therefore be possible to totally eliminate the suspension period under 3(b)(1)(iii) as well but the IOC and CAS did not. Given that the IOC chose to suspend Baxter for 3 months despite other options being available, it may be that a similar outcome would ensue under the Code.

Baxter case would have been seen as a case worthy of inclusion under the 'no significant fault or negligence' category. Factors which might weigh in Baxter's favour would be his obvious lack of intent,[55] his seeking medical treatment for his condition from the team doctor,[56] the similarity of the packaging and his lack of previous doping infractions.[57] Even satisfying these criteria though, the shortest possible suspension under the Code would have been 1 year in addition to his disqualification.

In all likelihood, then, the case of Baxter would have attracted a similar sanction under the WADA Code to that which he received under the OMAC or only slightly less. This seems a strange situation given that the Baxter scenario was one that the provisions were designed to overcome.

6 *Laumann*

Like the Raducan case, Silken Laumann's inadvertent doping involved pseudoephedrine which is no longer on the *Prohibited List*. Laumann ingested the substance after mistakenly purchasing the wrong type of Benadryl for her cold. Since pseudoephedrine was the substance involved, under the WADA Code Laumann would not have been guilty of a doping violation and would have retained her gold medal.[58] But how would the other provisions of the WADA Code have worked in Laumann's case had pseudoephedrine still be prohibited?

Since the medication Laumann ingested had the fact that it contained pseudoephedrine clearly marked on the label[59] it is unlikely that Laumann could satisfy the requirement that she 'could not reasonably have known, even with the utmost caution', that she had ingested a prohibited substance. The fact that she did not read the label would certainly suggest that she had not exercised the 'utmost caution' which is required for a finding of no significant fault or negligence. Despite the international rowing federation finding that there was no negligence on Laumann's part, it seems more likely that under the WADA Code she would have failed to satisfy the 'no negligence' test.[60] She may, however, have been able to satisfy the 'no significant fault or negligence' test. The totality of the circumstances including her attendance at two doctors, her lack of doping infractions in the past, her obvious

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55 *Squizzato v FINA*, above n 24, 11

56 *Canas v ATP*, above n 36, 16.

57 Ibid.

58 Although Laumann was later re-instated by the international rowing federation (FISA) she did not get her gold medal back since that was under the jurisdiction of the Pan American Games organizers. See Buti and Fridman, above n 19, 121.

59 Maclean's encyclopaedia, above n 6.

60 Buti and Fridman, above n 19, 121.

lack of intent to gain an advantage and the ease with which such a mistake could have been made, makes her negligence seem fairly insignificant.

If this analysis is correct, then Laumann would have had her ineligibility period reduced by a maximum of half the original (2 year) sanction. Since Laumann was later reinstated by the international rowing federation she actually only received a disqualification for her inadvertent doping. Thus, like Raducan, but for the fact that pseudoephedrine is no longer a prohibited substance; Laumann would have faired 'worse' under the WADA Code than the previous anti-doping regime. But again, in looking at the provisions of the WADA Code as a totality it must be said that the Laumann would have not even arisen as a doping case under the Code.

7 Conclusion: the effect of the WADA Code on inadvertent doping

Having considered the operation of the provisions in cases before and after the introduction of the WADA Code some conclusions can now be drawn regarding the efficacy of those provisions.

The factor which has been the most effective in dealing with the problems associated with inadvertent doping cases has been the changes to the *Prohibited List*. By excluding pseudoephedrine from the List a whole category of cases has evaporated, since athletes who mistakenly take pseudoephedrine in cold and flu medications are no longer guilty of a doping offence.

The combination of these changes and the inclusion of the specified substances provisions are also likely to have some effect. The potential effect of the specified substances provisions is evidenced in the fact that by including levmethamphetamine as a specified substance, cases like Baxter may have received slightly less in terms of length of the sanction. The specified substances provisions so far have not received much consideration by anti-doping panels. In one case which considered Article 10.3, *Kowalczyk*,[61] the test for proving that the use of the substance was not intended to enhance performance did not seem terribly difficult to prove. There the athlete was said to have shown a prima facie case by submitting medical certification which showed medical reasons for the use. The burden then shifted to the authority to prove that the substance was used 'as a doping agent.'[62] Nevertheless, even a successful case under the specified substances provisions attracts a minimum sanction of disqualification and a warning/reprimand. It has been noted that this is actually more than was handed out in the Raducan and Laumann cases.

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61 *Justyna Kowalcyk v International Ski Federation (FIS)* CAS 2005/A/918.

62 Ibid, 15.

On the other hand, the operation of the exceptional circumstances provisions appears to have had relatively little impact in the inadvertent doping cases. An athlete hoping to prove that they were not at fault or negligent and have their ineligibility period eliminated has a truly arduous task before them. So far athletes have failed to pass that test, with the only exception being *Olefirenko*. Furthermore, it is unlikely that cases which were heard under previous anti-doping rules would have been able to satisfy this provision, even the type of case which such provisions were intended to deal with. According to present case law, if Baxter and Laumann had to argue their cases under the 'no fault' provision they probably would have failed and so received a higher sanction under the WADA Code than they did under its predecessors. It seems probable that of the three 'test' cases only Raducan would have been successful in having her ineligibility period totally eliminated under Article 10.5.1. This hardly seems a satisfactory outcome given the intention behind the provisions.

Although also difficult, it appears less onerous to bring a case under the 'no significant fault or negligence' provision in Article 10.5.2. There have been a number of cases which have successfully proved this test, thereby having their sanctions reduced by up to half. However, it needs to be noted that the cases considered above which satisfied Article 10.5.2 would have attracted a minimum 1 year sanction instead of the simple disqualification which was possible under the OMAC for inadvertent doping (as was the case in *Raducan*).

It has to be said that although the provisions are obviously included in the Code with the admirable intent of dealing with the harshness of inadvertent doping cases, Foschi may be correct in saying that these sections are merely 'empty words'. For any relief that has come to these athletes through the WADA Code has come by way of changes to the *Prohibited List* and not so much by way of inclusion of the exceptional circumstances provisions. Indeed, instead of ameliorating the harshness of the strict liability rule the exceptional circumstances provisions as interpreted by anti-doping panels, may have actually increased the applicable sanction in some cases. In light of the fact that anti-doping panels have historically taken subjective factors into account in sanctioning before the introduction of the WADA Code,[63] the impact of these sections is seems even less noteworthy.

(d) The repugnancy of anti-doping cases

It is somewhat ironic that instead of moderating the harsh effects of the strict liability rule, the exceptional circumstances provisions may have made the situation worse for athletes who inadvertently ingest prohibited substances. But ironic is not an

[63] *Arbitration CAS 95/141 C v FINA, award of April 22, 1996* in Matthieu (Ed) Reeb, *Recueil des sentences du TAS, Digest of CAS Awards II 1986 - 1998 (1998)*, 220.

adequate word for expressing the situation. For this is not simply a bemusing quirk of doping law. The provisions have real life effect on athletes all over the world, on their careers and reputations. The effect of the strict liability rule on athletes' careers is one reason why the approach has been criticized in the past. To take away an athlete's livelihood due to a mistake which they may not have had any control over is a harsh punishment.[64]

But it is not simply the harshness of the punishment that makes us uncomfortable with inadvertent doping cases. At the heart of the problem in these cases lies the definition of the doping offence. Our discomfort with the way in which the inadvertent doping cases work really stems from a fundamental inconsistency between our idea of what doping is and the operation of the doping provisions of the WADA Code.

1 An intuitive definition of doping: intent of the athlete

What drives our abhorrence of doping in the end comes down to the intent of the athlete. This is true even after decades of defining doping according to the strict liability doping principle. Although we are used to the fact that the legal definition of doping is 'the presence of a prohibited substance in the body of the athlete', in reality our idea of doping is inextricably linked with the mindset of the athlete. This may be a controversial statement to make but the evidence for such a statement can be found in the language that we use to describe doping. Our unconscious definition of doping can be demonstrated in the language used to decry doping, the language used by the CAS in doping case law and the language of the Code itself.

(a) Doping rhetoric and the intent of the athlete

One of the most notorious condemnations of doping was a speech by Juan Antonio Samaranch, then president of the IOC, which this article opens with. He describes doping as death of the body, spirit, intellect and morality. The message of the speech is that by 'cheating' (i.e. deliberately ingesting substances which have been prohibited in sport) athletes are committing a dreadful sin against themselves and their community. It is a deliberate act involving the mind as well as the body. Other condemnations of doping by Samaranch such as 'athletes who use banned substances to improve their performance commit a series of acts that transgress and violate

[64] See for example Buti and Fridman, above n 19, 116-120 and Paul McCutcheon, 'Sports Discipline, Natural Justice and Strict Liability' (1999) 28(1) *Anglo-American Law Review* 37 at 63. See also Ryan Connolly, 'Balancing the Justices in Anti-Doping Law: the Need to Ensure Fair Athletic Competition through Effective Anti-Doping Programs vs The Protection of Rights of Accused Athletes' (2006) 5(Spring) *Virginia Sports and Entertainment Law Journal* 161, 182.

certain immutable principles'[65] also relates to the moral/psychological life of the athlete. In these comments it is clear that the mindset is the repugnant element. Doping is still fundamentally about "cheating", however the concept may be legally defined.

(b) Language of doping case law and the intent of the athlete

Even in the language of the CAS it is possible to detect the implicit assumption that doping involves intent. For instance, in *Kowalczyk* the CAS had to consider if there was evidence that use of a specified substance was not intended to enhance performance. The CAS stated that by submitting medical certification, the athlete had shown a prima facie case that the use was medical. It was then up to the authority to prove that the substance was used as a 'doping agent'. Doping is here juxtaposed against the words of Article 10.3, 'was not intended to enhance performance'. 'Doping agent' then was used by the CAS to mean a substance used which was intended to enhance performance. This is consistent with our own implicit idea of what doping is – the intentional use of prohibited substances to enhance performance. The inadvertent ingestion of such substances, particularly in the course of doing something as innocent as treating a cold or other common illness, is not what we intuitively think of as 'doping'.

(c) Language of the Code and the intent of the athlete

The intuitive definition of doping also carries over into the language of the Code. The introductory statements to the WADA Code reads:

> Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as "the spirit of sport"; it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is characterised by the following values:
>
> Ethics, fair play and honesty
>
> Health
>
> Excellence in performance
>
> Character and education
>
> Fun and joy
>
> Teamwork

[65] Hoberman, above n 1, 243.

Dedication and commitment

Respect for rules and laws

Respect for self and other participants

Courage

Community and solidarity

Doping in fundamentally contrary to the spirit of sport.[66]

Reference to such things as 'ethics', 'honesty', 'values' and 'spirit' shows that what is repugnant to us about doping is that it exhibits the wrong mindset and that doping athletes do not share the 'right' values. This can only be true if doping is defined as an intent based offence for it is preposterous to say that an athlete who accidentally and unknowingly ingests a prohibited substance has exhibited an attitude about sport or doping at all, let alone one which is contrary to the 'spirit of sport'. Nor has an inadvertent 'doper' acted contrary to the values listed above. The implicit definition of doping which drives this rationale statement is based on the concept of 'cheating', an intentional use of performance enhancing drugs.

In all these sources it is implicitly accepted that 'doping' refers to intentional use of performance enhancing drugs; where the athlete has the aim of enhancing their performance. And yet for almost four decades, doping has been defined as the mere presence of a prohibited substance in the athlete without any such intent. Thus we feel uncomfortable punishing inadvertent dopers because these athletes have not really done anything which we unconsciously define as doping.

2 Expanded definition of doping: unfair advantage

Despite the fact that we unconsciously define doping as intent based, we have come to accept that it may be necessary to extend the legal definition of doping to cover *inadvertent* ingestion of prohibited substances in order to ensure fairness of competition.[67] As the CAS said in Quigley:

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66 WADA Code p3.

67 The author is not one who necessarily accepts this argument as it appears to be based on some problematic assumptions regarding the extent to which a doping agent is determinative of the outcome of a sporting competition. The argument is particularly weak in light of the fact that there are a number of substances on the *Prohibited List* which do not enhance performance, marijuana being the prime example. See Srikumaran Melethil, 'Making the WADA Prohibited List: Show me the Data' (2005) 50 *Saint Louis University Law Journal* 75, 83. It is also noted here that this argument cannot be extended to justify

> …it appears a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently.[68]

The idea is that it is better to sacrifice the one unfortunate inadvertent doper who happens to have a performance advantage rather than affecting the level playing field of sport by allowing the 'doped' athlete to compete. We therefore are able to ignore our unease about punishing the inadvertent doper because we believe that we need to, in order to be fair to the other competitors.

3 Inadvertent doping cases: neither intent nor unfair advantage

Yet in these inadvertent doping cases there is often another factor which rekindles the flames of our discomfort. For in many inadvertent doping cases the athlete has not gained a competitive advantage from the substance which they inadvertently ingested. However, under the WADA Code, and the OMAC before it, the effect of the prohibited substance is not relevant to the determination of a doping offence. The WADA Code[69] (and the OMAC[70]) states that the 'success or failure of the use of a prohibited substance' is irrelevant in determining if an athlete has used a prohibited substance. [71] The 'success or failure' provision has been applied in situations where a

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competition suspension. This is a criticism which has surfaced in the doping related literature. See Oshutz, above n 52, 253.

68 Arbitration CAS 94/129, *USA Shooting & Q. v International Shooting Union (UTI),* award of May 23, 1995 in Matthieu (Ed) Reeb, *Recueil des sentences du TAS, Digest of CAS Awards II 1986 - 1998* (1998),193.

69 Article 2.2.1.

70 Article 4.4.

71 On the face of it this statement seems only to apply to the 'use of' provisions and not the 'presence of a prohibited substance' provisions. On a plain reading the wording of the 'use of' provisions would imply a knowing ingestion of a prohibited substance. Judge Tarasti was at one time of the view that 'use of' implied need for intent [see Michael Beloff, 'Drugs, Laws and Versapaks' in John O'Leary (ed), *Drugs and Doping in Sport: Socio-Legal Perspectives* (2001), 44ff]. It is submitted that if intent was needed for the 'use of' provisions then the 'success or failure' provision would be more satisfactorily applied to just that provision since this would involve one element of our intuitive notion of doping (i.e. intent). However, comments by the CAS in the French case [*Mark French v Australian Sports Commission and Cycling Australia*, CAS 2004/A/651], as well as the commentary to the Code suggests that 'use of' is also strict liability [Commentary associated with Article 10.5.1. states that fault or negligence is already required to be proven in all doping violations apart from Article 2.1 and 2.2, that is the 'presence of' and 'use of' provisions]. This seems consistent with case law where the 'presence of' provision and 'use of' provision appear to

prohibited substance is detected in the urine specimen of the athlete in the absence of any knowledge or intent.[72] The application of this provision in cases where there is no intent is highly significant. A doping sanction can then be applied to an athlete who has neither intended to enhance their performance and in fact has not gained any such enhancement. This is the situation which arose in *Raducan, Baxter, Squizzato* and *Puerta*. Although none of these athletes intended to gain a performance enhancement and none of them did actually gain any such enhancement, they were sanctioned for 'doping'.

This is more than a mere idiosyncrasy of doping law. It demonstrates a further inconsistency between our inherent notion of what doping is and the operation of doping law. We may be willing to extend our definition of doping to include the strict liability rule because even if the athlete did not intend to enhance their performance, they must be removed from competition if they have benefited from the inadvertent ingestion of a prohibited substance. Our moral outrage is not stirred by an athlete in this situation but for the sake of fairness, we are willing to sacrifice the interests of the innocent yet unfortunate inadvertent 'doper.'

In a subset of inadvertent doping cases, thanks to the operation of the 'success or failure' provision, an athlete who does not satisfy either of these definitions is punished for 'doping'; they have neither intent to enhance their performance nor have they actually gained any advantage. This is why these types of cases sit so uneasily with us, not just because a morally innocent athlete is sanctioned but because they have done nothing which satisfies our instinctive definition of doping. It is the inconsistency between what we know as doping and what we punish as doping which leads to such discord over the operation of doping Codes in these situations.

In order to overcome the inconsistency, both the intent of the athlete and the performance enhancing effect of the substance would need to be taken into account in determining whether a doping violation had taken place. If intent to enhance performance was present then the doping sanctions could be applied as they stand. If no intent was found then a further enquiry could be made into whether any performance enhancing effect was gained by the athlete. If no ergogenic effect was present then the competition result could be allowed to stand. If the athlete did gain a competitive advantage then that athlete could be excluded from the competition. There would be no need, however, for the athlete to be held guilty of 'doping'. Another offence could be created which does not have the name, nor connotation

have been used almost interchangeably. See *Raducan v IOC*, above n 2 and *Baxter v IOC* above n 4. In these cases neither effect nor intent is present.

72 *Raducan v IOC*, above n 2 for example.

associated with 'doping'. An offence such as 'negligent misuse of prohibited substances' could be created for such a situation. There would also be no reason why the mandatory doping sanctions should be applied to this situation.

Many will argue that such a system would be unworkable because intent and performance enhancement are too difficult to prove in every case.[73] This may be true in some cases but the fact that anti-doping panels make findings about both intent and effect already suggests that it is well within the panels' ability.[74] And the standard of proof which the parties have to meet is the 'comfortable satisfaction'[75] of the hearing body, not the higher criminal standard of 'beyond reasonable doubt'. Therefore in cases of doubt as to performance enhancing effect then the athlete can be excluded in order to protect the fairness of the competition. Such a system would not, of course, be perfect but it would come much closer to applying punishment according to our understanding of what 'doping' is. If we wish to overcome our discomfort with the operation of doping codes on inadvertent doping situations both intent and performance enhancing effect must be part of the enquiry.

(e) Conclusions: The Dangers of Inadvertent Doping

The above analysis of inadvertent doping under the WADA Code can lead to one conclusion: it is the changes to the *Prohibited List* and the specified substances provision that have eased the burden on athletes. This covers a very small number of prohibited substances. The case law arising from the operation of the exceptional circumstances provisions which, along with the specified substances provisions, were

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[73] Connolly, above n 42, 161 Connolly, in footnote 80 states that information gained from Don Caitlin (head of the largest WADA accredited laboratory and research facility) suggests that it is very difficult to be completely sure whether there has been any performance enhancement in a given case due to individual athlete characteristics. Connolly therefore argues that to allow the effect to be of significance in doping would be to open up doping cases to becoming a battle of experts and opening the floodgates, as intentionally doping athlete would also try to argue no performance enhancing effect. It is difficult to accept these arguments given that hearing bodies already make findings as to effect of the drug. Most doping cases seem to already involve a large amount of expert evidence so it seems ironic to reject the suggestion on these grounds. As for opening the floodgates to intentional dopers it is submitted that by first raising the question of intent the enquiry into performance effect would only be allowed in non-intentional doping situations. Melethil, an academic in pharmacy, is one commentator who suggests that expert pharmacological testimony should be allowed on the issue of performance enhancement. Melethil, above n 68, 87.

[74] In most of the cases considered above the CAS made findings about both intent and effect of the substance.

[75] Article 3.1.

designed to help inadvertent doping cases, seems to signify that the provisions will be tough going for athletes. The new provisions do not address the disqualification from the event; disqualification and forfeiture of medals are still automatic (which is of most significance if the event happens to be the Olympics or World Championships). The elimination of a further sanction has proved so far to be beyond the reach of almost all athletes. There have been a number of athletes who have successfully had their sanctions reduced under the 'no significant fault' provision but only in one has it been eliminated.

So, inadvertent doping is still a clear and present danger. Athletes with a cold might be able to breath easy in the knowledge that they can now safely take pseudoephedrine. But athletes with headaches,[76] stuffed noses,[77] skin infections[78] or wives with hypertension and menstrual pain[79] need to be very wary, small mistakes might cost them dearly. The important question remains: can the sports world breathe easy knowing that under the WADA Code we are continuing to punish conduct which does not fit with our intuitive definition of doping? We punish athletes for doping because they show a 'momentary lack of attention' or a 'momentary lack of care' in accidentally taking substances that do not give any athletic advantage. In this situation are we really punishing 'doping'?

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[76] See *C v FINA* CAS 95/141 in Matthieu (Ed) Reeb, *Recueil des sentences du TAS, Digest of CAS Awards II 1986 - 1998* (1998), 215 and Samantha Riley's case in Buti and Fridman, above n 19, 122.

[77] *Baxter v IOC*, above n 4 and Laumann, above n 6.

[78] *Squizzato v FINA*, above n 24.

[79] *Puerta v ATP*, above n 25.