

## **Anti-doping inconsistencies snare American star**

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# Anti-Doping Inconsistencies Snare American Star

PETER CHARLISH\* & ROB HEYWOOD\*\*

## ABSTRACT

*This Article examines the inconsistencies associated with doping control and explains the inequity which results from such inconsistent application particularly where the violation is caused by a recreational substance. This is achieved through an analysis of the WADA code anti-doping rules and the interrelationship with the principle of strict liability and an examination of the recent case IRB v. Keyter.<sup>1</sup> The application of these rules creates impossible behavioural burden on athletes; ultimately this may result in a further challenge to the legal status of such rules under EU competition law.*

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1. Int’l Rugby Bd. v. Keyter, CAS 2006/A/1067 (Ct. Arb. Sport 2006).

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I. INTRODUCTION

With ever-increasing regularity, the World Anti-Doping Agency Code (WADA Code), which sought to provide clarity to the question of doping control in sport, is being challenged.<sup>2</sup> And, disturbingly for firm adherents of the principle of strict liability and the WADA Code, participants who are found guilty of doping violations—as defined by the WADA Code—are not subjected to the mandatory two-year ban from competition.<sup>3</sup> The mechanisms in place for allowing a reduction in the mandatory sentence are found in the “exceptional circumstances defence”. A sanction can be reduced with a finding that a sportsperson has no direct or significant fault or negligence in relation to how the banned substance came to be in his body. While theoretically, the exceptional circumstances defence is a desirable exception, if applied too frequently it has the potential to undermine the notion of strict liability, the linchpin of the war against drugs in sport. Recent case law suggests there are some internal inconsistencies as to how this defence is being applied by sports governing bodies and thereafter the Court of Arbitration for Sport (CAS). On the one hand, it appears to be invoked too readily, allowing for the reduction in bans which otherwise would not be possible; on the other, it has sometimes been interpreted extremely restrictively creating unrealistic expectations on sports competitors. This Article explores a number of issues with respect to drugs in sport. This Article begins by examining the principle of strict liability and how this is applied in practice. The Authors provide an analysis of the legal relationship between sports participants and sports governing bodies, progressing to an exploration of the legal status of the anti-doping rules. The Article then focuses on the inconsistencies apparent in relation to recreational drugs in sport and highlights some of the definitional problems and evidentiary difficulties. The Article concludes by examining the exceptional circumstances defence via an in-depth case study analysis of one American rugby union star who seems to be the victim of an over zealous decision from the CAS.

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2. The football authorities in particular seem unable or unwilling to fully comply with the WADA Code in matters of doping control. This failure to comply has been formally acknowledged by the Court of Arbitration for Sport in the advisory opinion, issued by the Court. CAS 2005/C/976 & 986, FIFA & WADA.

3. The most recent example of this treatment of athletes through the WADA Code occurred with Pakistani cricketers Mohammad Asif and Shoaib Akhtar who both recently tested positive for the banned anabolic steroid nandrolone with a level of 13.07ng/ml and 14.06 ng/ml respectively compared to the legal limit of 2ng/ml. On December 5, 2006, they were cleared by the Pakistan Cricket Board (PCB) Anti-Doping Appeals Committee seemingly due to the more lenient approach taken by the PCB anti-doping code compared to the International Cricket Council approach. The decision is clearly at odds with the WADA Code and it was announced that WADA will appeal the decision to the CAS. Akhtar & Asif, Pakistan Cricket Board Anti-Doping Appeals Committee (Dec. 5, 2006), available at [http://www.pcboard.com.pk/Pakistan/Publications/Anti-doping/ADAC\\_Decision.pdf](http://www.pcboard.com.pk/Pakistan/Publications/Anti-doping/ADAC_Decision.pdf). Indeed, WADA did appeal the decision. Doping-WADA appeals against decision to clear Pakistan bowlers, Feb. 6, 2007, available at [http://today.reuters.co.uk/news/articleNews.aspx?type=cricketNews&storyid=2007-02-06T205652Z\\_01\\_L06713508\\_RTRIDST\\_0\\_DOPING-PAKISTAN.XML&src=rss](http://today.reuters.co.uk/news/articleNews.aspx?type=cricketNews&storyid=2007-02-06T205652Z_01_L06713508_RTRIDST_0_DOPING-PAKISTAN.XML&src=rss).

## II. THE PRINCIPLE OF STRICT LIABILITY

The principle of strict liability is a primary pillar in the fight against doping violations in sport, as it serves to remove the inherent uncertainty resulting from questions of guilt. The code defines the principle in the following way: “Under the strict liability principle, an anti-doping rule violation occurs when a Prohibited Substance is found in an athlete’s bodily specimen. The violation occurs whether or not the athlete intentionally or unintentionally used a Prohibited Substance or was negligent or otherwise at fault.”<sup>4</sup>

The WADA Code details a doping violation under Article 2 in several different ways.<sup>5</sup> Violations covered by Articles 2.1 to 2.4 provide the focus for discussion in this Article. These are:

- 2.1 The presence of a prohibited substance or its metabolites or markers in an athlete’s bodily specimen.
- 2.2 Use or attempted use of a prohibited substance or a prohibited method.
- 2.3 Refusing, or failing without compelling justification, to submit to sample collection after notification as authorised in applicable anti-doping rules or otherwise evading sample collection.
- 2.4 Violation of applicable requirements regarding athlete availability for out-of-competition testing including failure to provide whereabouts information and missed tests which are declared based on reasonable rules.<sup>6</sup>

If an athlete is found to be in violation of one or more of these articles, then the consequences, at least theoretically, are severe. Sanctions against individuals are covered under Article 10 of the WADA Code with Article 10.2 dealing specifically with bans and periods of ineligibility from competition for athletes following a positive drug test. The appropriate article states:

Except for the specified substances identified in article 10.3, the period of ineligibility imposed for a violation of articles 2.1 (Presence of prohibited substances or its metabolites or markers), 2.2 (Use or attempted use of prohibited substance or prohibited method) and 2.6 (Possession of prohibited substances and methods), shall be:

first violation: Two (2) years’ *ineligibility*

second violation: Lifetime *ineligibility*.<sup>7</sup>

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4. World Anti-Doping Agency, *World Anti-Doping Code*, art. 2.1.1 Comment, 2003.

5. *Id.* art. 2.2–2.8 (dealing with specific offenses).

6. *Id.* art. 2.1–2.4.

7. *Id.* art. 10.2.

Punishment for a violation of Articles 2.3 or 2.5<sup>8</sup> carries the same burden, and violation of Article 2.4 is punishable with a minimum period of ineligibility of three months and a maximum of two years.<sup>9</sup> Where the athlete can prove that the doping violation was not intended to enhance performance, the appropriate ineligibility period shall be amended to the following:

*First violation:* At a minimum a warning and reprimand and no period of ineligibility from future events, and at a maximum, one (1) year's ineligibility.

*Second violation:* Two (2) years' ineligibility.

*Third violation:* Lifetime ineligibility.<sup>10</sup>

The athlete found guilty of a doping violation under Articles 2.1 and 2.2 may, in exceptional circumstances, have their period of ineligibility eliminated.<sup>11</sup> In order for Article 10.5 to apply, where the offence is covered by Article 2.1, the athlete will also have to establish how the prohibited substance entered his body.<sup>12</sup> Where an athlete has committed an offence under Articles 2.1, 2.2, 2.3, or 2.8,<sup>13</sup> Article 10.5.2 explains further that the period of ineligibility may be reduced if the athlete can demonstrate no significant fault or negligence in the doping violation. Again, if the offence is committed under Article 2.1, the athlete must also establish how the prohibited substance entered his body.<sup>14</sup> Comments within the WADA Code, included as guidance on the issue of exceptional circumstances, state: "These articles apply only to the imposition of sanctions, they are not applicable to the determination of whether an anti-doping rule violation has occurred. *Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.*"<sup>15</sup>

Based on these comments, it seems that in the vast majority of cases involving a positive test, the athlete will be subject to a two-year ban for the first offence and a life ban for the second offence.

### III. THE LEGAL RELATIONSHIP

It has well-established that an athlete's relationship with his governing body, who is ultimately responsible for its doping regime, is a contractual one; further, doping regulation derives from this relationship.<sup>16</sup> There have been many legal challenges to the specific principles supporting the enforcement of doping control (as distinguished from challenges to the implementation of bans, or the enforcement of particular punishments, which have

8. *Id.* art. 2.5 ("Tampering, or Attempting to tamper, with any part of *Doping Control*").

9. *Id.* arts. 10.4.1, 10.4.3.

10. World Anti-Doping Agency, *supra* note 4, art. 10.3.

11. *Id.* art. 10.5.

12. *Id.* art. 10.5.1.

13. *Id.* art. 2.8 ("Administration or Attempted administration of a *Prohibited Substance* or *Prohibited Method* to any *Athlete*, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any *Attempted* violation.").

14. *Id.* art. 10.5.2.

15. *Id.* art. 10.5.2 Comment (emphasis added).

16. See *Wilander v. Tobin*, [1997] 2 Lloyd's Rep. 293 (A.C. 1996).

become commonplace—particularly in the CAS). As far back as 1988, Sandra Gasser<sup>17</sup> challenged the legality of a ban levied against her, attacking the principle of strict liability as an unreasonable restraint of trade. She claimed that her ingestion of the banned substance was innocent; however, as a result of the rule of strict liability, which presumed her guilt, she was treated in the same manner as an athlete who was guilty of knowingly ingesting a banned performance-enhancing substance. This, she suggested, amounted to an unreasonable restraint of trade. In finding against Gasser, Scott J. cited with approval evidence from the then-International Amateur Athletics Federation (IAAF) General Secretary John Holt, who stated:

The use of drugs is widely regarded as a disease in sport. Competitors who use drugs to enhance their performance are simply cheating. Any sport which is infiltrated by drugs and in respect of which it becomes common knowledge that its participants use drugs is likely to suffer substantially in its public image and reputation.<sup>18</sup>

Scott J., in explaining the crucial issue to address, explained:

The critical question, in my judgment, is whether or not the IAAF Rules 53(iv) and 144 are reasonable. They are the Rules by which the IAAF seek to *discourage and prevent the practice of doping as an aid to performance*. I need not emphasise the importance to world athletics, both in the public interest and in the interest of the athletes themselves, that the practice of doping should be firmly dealt with.<sup>19</sup> (Emphasis added)

We can see therefore that the imposition of strict liability as a means to doping control in sport, in terms of performance-enhancing substances, will not be viewed as an unreasonable restraint of trade. The policy is clearly aimed at maintaining fair balance in competition. Scott J., in further explaining the position with regards to performance-enhancing substances, continued:

The pressure for success in international athletics, as well as domestic athletics, and the national pride and prestige that have become part of international athletics have to be borne in mind. . . . The lengths to which some people will go in order to achieve the appearance of success for their nation's athletes in athletics competitions is in point.<sup>20</sup>

However, nowhere in this decision against Gasser is there any evidence presented which might draw the inference that such principles should also apply to *recreational* substances. Little or no justification is cited for restricting recreational drugs in this manner,

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17. See *Gasser v. Stinson*, (Q.B.D. June 15, 1988) (LEXIS, England and Wales Reported and Unreported Cases) (Gasser, a Swiss middle distance athlete, tested positive for a metabolite of methyl-testosterone after winning a bronze medal in the World Athletics Championships 1987. She maintained she had not knowingly ingested the banned substance and pointed out that she had tested negative after a meeting just 14 days previously).

18. *Gassser*, (Q.B.D. June 15, 1988).

19. *Id.*

20. *Id.*

and yet, even today, there is little difference in the treatment of performance-enhancing and non-performance-enhancing drugs in the WADA Code.<sup>21</sup>

#### IV. THE LEGAL STATUS OF ANTI-DOPING RULES

Recently, the European Court of First Instance,<sup>22</sup> and on appeal the European Court of Justice,<sup>23</sup> was asked to rule on the anti-doping rules of the International Olympic Committee (IOC), their implementation by the Federation Internationale de Natation,<sup>24</sup> and whether or not they were compatible with European Union (EU) competition laws. In the case, David Meca-Medina and Igor Majcen, two long-distance swimmers, both tested positive for the banned anabolic steroid nandrolone following a World Cup event in Brazil.<sup>25</sup> Although they were initially banned for four years, both men on appeal before CAS obtained two year reductions. But the key finding from the case was that EU competition laws were not violated by anti-doping procedures. The court made clear their view that the anti-doping rules had a legitimate purpose and therefore did not fall outside competition rules. The court stated:

Therefore, even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective. Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.<sup>26</sup>

The Advocate General continued:

[I]t does not appear that the restrictions which that threshold imposes on professional sportsmen go beyond what is necessary in order to ensure that sporting events take place and function properly. Since the appellants have, moreover, not pleaded that the penalties which were applicable and were imposed in the present case are excessive, it has not been established that the anti-doping rules at issue are disproportionate.<sup>27</sup>

While the findings of the court are perhaps unsurprising, the reasons cited by the Court as influential in deeming the system of doping control in sport as a whole justified are more interesting. The court, in discussing the motivation behind preventing doping in sport, explained:

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21. See *World Anti-Doping Code*, *supra* note 4, at art. 10.3 (making some allowance for specified substances that are particularly likely to be unintentionally ingested because they are common in over the counter medicinal products, where an athlete testing positive for such specified substances sought no competitive advantage).

22. Case T-313/02, *Meca-Medina v. Comm'n*, 2004 ECJ CELEX LEXIS 407 (Sept. 30, 2004).

23. Case C-519/04 P, *Meca-Medina v. Comm'n*, 2006 ECJ CELEX LEXIS 373 (July 18, 2006).

24. FINA, The International Swimming Federation.

25. The level found for Meca-Medina was 9.7ng/ml, and for Majcen it was 3.9 ng/ml. The legal limit is 2.0 ng/ml.

26. *Meca-Medina*, 2006 ECJ CELEX LEXIS 373, para. 45.

27. *Id.* paras. 54-55.

The general objective of the [anti-doping] rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.<sup>28</sup>

There are very clear similarities between these comments and those produced by the Court in *Gasser v. Stinson*,<sup>29</sup> almost twenty years before. The overarching aim of protecting sport from doping violations legitimizes placing certain restrictions upon sports competitors. However, what is of greatest interest in this case is the nature of the substance at its center—nandrolone, a performance-enhancing substance. The court does cite athletes' health as an issue for consideration in assessing the status of doping rules, but, as noted above, it cited with equal emphasis issues related to maintaining the competitive balance of sporting activities. While eradicating performance-enhancing substances achieves all the aims cited above, eliminating *non*-performance-enhancing drugs achieves at best only the health objective in full and those objectives related to the ethical values of sport in part. What then might the outcome be if the same competition rules were challenged following a positive test for a non-performance-enhancing substance? From the perspective of the stated aims of the system of doping control, such a ban may be disproportionate and, considering the grave consequences, unlawful. Beloff concluded on the case:

While the ECJ had no doubt that anti-doping rules pursued legitimate aims, i.e. the preservatives of equality of arms on the field of play, and the health of the sportsmen off it they held too that the means used in pursuit of those aims must be proportionate. . . . The swimmers did not, however, suggest that the two-year suspension was excessive. So their appeal failed. They established a new principle, but failed to bring themselves within it. They won the war, but lost the battle.<sup>30</sup>

Quite obviously, as Beloff continues,<sup>31</sup> the result of this case may raise questions about the status of mandatory bans, but perhaps more significantly, a further challenge may occur where a ban has been instituted following violation of doping policy via use of a non-performance-enhancing substance.

## V. RECREATIONAL DRUGS: INCONSISTENCIES & RECENT CASE LAW

This Article raises the question of the continued insistence of sporting authorities in maintaining current measures against recreational substances. However, while such measures persist, it is desirable, if equity is to be maintained, that common penalties are applied across different sports. Several recent cases demonstrate such consistency is lacking. This issue was raised by Jason Keyter,<sup>32</sup> following his positive test for cocaine and subsequent two year ban from his sport. Keyter complained: "They [the IRB] have been

28. *Meca-Medina*, 2006 ECJ CELEX LEXIS 373 at ¶ 43.

29. *Gasser v. Stinson*, (Q.B.D. June 15, 1988) (LEXIS, England and Wales Reported and Unreported Cases).

30. M. Beloff, Editorial, [2006] *ISLR* 81.

31. *Id.*

32. A former United States Rugby Union international.

totally inflexible. . . . A West Ham<sup>33</sup> player [Shaun Newton], who admitted having a drug problem, only got a seven-month suspension,<sup>34</sup> was able to carry on training, be paid and offered rehab and regular retesting. I can't even train with Esher."<sup>35</sup>

A cursory glance at the figures provided by UK Sport<sup>36</sup> provides some evidence of the inconsistency across different sports. For example, of the thirteen positive results involving cocaine since 2003-04, seven have related to footballers. Four of those received bans of six months; one of seven months; one was ordered to reappear before the tribunal at a later date and one was banned indefinitely for what was his third offence. In none of the cases were the players named. In contrast, Gurbhej Nijar, a power lifter, received a two year ban; James Mortimore, a rugby union player, was banned for two years; an anonymous rugby league player also received a two-year ban; Graham Wagg, a cricketer, received a fifteen-month ban; and an unnamed ice-hockey player was banned for eighteen months—all for testing positive for cocaine. Without knowing the full facts of each case, it is difficult to draw any firm conclusions. At the very least it appears there may be some cause for concern regarding a lack of consistency in bans and, perhaps more importantly, the practice of naming some who fail tests while others remain anonymous. Mackay comments on the issue:

An English professional footballer has tested positive for cocaine three times in 18 months but will avoid a life ban. The teenager is instead to be sent for rehabilitation.

In any other Olympic sport, a competitor can expect to receive a life ban after the second offence. This latest incident coincides with the news that another unnamed player has been banned for six months after testing positive for cocaine.<sup>37</sup>

Interestingly, the punishment given to the unnamed teenage footballer was that which has been recommended by the IOC Athlete's Commission . In drawing attention to further inconsistencies in this area, MacKay continues:

The FA's approach to doping is best summed up by the case involving the goalkeeper Billy Turley who, when playing for Rushden and Diamonds, tested positive for the anabolic steroid nandrolone – which earned the 1992 Olympic 100 metres champion Linford Christie a two-year ban. Turley was given a warning and then a six-month ban when he subsequently tested positive for cocaine. In any other Olympic sport he would have been banned for life and the

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33. An English Premiership association football club.

34. See *The ARU Panel's Verdict*, printed in SYDNEY MORN. HERALD, July 25, 2006, available at <http://www.smh.com.au/news/sport/the-aru-panels-verdict/2006/07/24/1153593265714.html> (Australian rugby union star Wendall Sailor received a two year ban for the same offence).

35. Marc Souster, *IRB Ruined My Career, says Banned American*, TIMES (London), Oct. 18, 2006, at 81, available at <http://www.timesonline.co.uk/article/0,,377-2409120,00.html> (internal citations added).

36. UK Sport, *Drug-Free Sport*, [http://www.uk sport.gov.uk/pages/drug\\_free\\_sport/](http://www.uk sport.gov.uk/pages/drug_free_sport/) (UK Sport is the organization responsible for athletic drug testing throughout the United Kingdom).

37. Duncan Mackay, *Footballer Tests Positive for Cocaine Three Times*, GUARDIAN (London), Nov. 1, 2005, at Sports 4, available at <http://football.guardian.co.uk/print/0,,5322829-103,00.html>.

sports minister Richard Caborn asked the FA to explain why the ban was not more severe.<sup>38</sup>

The reason that the ban was not more severe may be because football had not, at that stage, adopted the WADA Code. Football authorities cited concerns—previously dismissed—as reasons football players should not be subject to the same rules of doping control as other sports participants. Magnay explained:

FIFA does not want the drug agency to have overriding powers in doping cases and wants to deal with any cases in-house. It has long complained that the mandatory doping sanctions are too severe for football's highly paid professional players and could pose an illegal constraint on their employment.<sup>39</sup>

As has already been shown,<sup>40</sup> this argument appears to be without foundation, certainly for performance-enhancing substances. Perhaps the true issue is FIFA's concern over retaining authority throughout all aspects of the sport, including doping control. Football is arguably the one sport that wields as much power and influence as the Olympics. Consequently, what we may be witnessing in FIFA's reluctance to fully implement the WADA Code<sup>41</sup> is the genesis of a power struggle rather than concern over the legality of any prospective ban. In recognition of football's failure to observe the WADA Code, new policies are being established to deal with the discrepancies cited in this Article. Reportedly, proposals have been put before the Football Association Council<sup>42</sup> to introduce a mandatory ban for players testing positive in competition for performance-enhancing or recreational drugs.<sup>43</sup> While this step is progressive, and will go some way toward removing the inconsistencies evident between the treatment of offenders from football compared to other sports, it does not go far enough. The move will only affect those testing positive following competition, leaving those testing positive in an out-of-competition setting unaffected. As a result, some anomalies and resultant injustices will remain.

An interesting practical point is made concerning the testing of athletes for recreational drugs. Graf-Baumann writes:

Recent years have shown a constant increase of positive tests for recreational drugs. While this finding reveals rather a social than a doping problem in the sense of the word, an important legal aspect has to be considered too: the consumption of marihuana presents a severe offence against the law in some countries especially in Africa and Asia, even if consumed abroad. Here, the publications for a positive result may lead to serious consequences for the

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38. *Id.*

39. Jacquelin Magnay, *Soccer Faces Red Card for Athens Drugs Code Penalty*, SYDNEY MORN. HERALD, May 19, 2004, at 6, available at <http://www.smh.com.au/olympics/articles/2004/05/18/1089694343082.html>.

40. See Gasser v. Stinson, (Q.B.D. June 15, 1988) (LEXIS, England and Wales Reported and Unreported Cases); Case C-519/04 P, Meca-Medina v. Comm'n, 2006 ECJ CELEX LEXIS 373 (July 18, 2006).

41. See generally Advisory Opinion Concerning WADA Anti-Doping Sanctions, CAS 2005/C/976 & 986, FIFA & WADA (Ct. Arb. Sport 2006).

42. The law-making body of Association Football.

43. David Bond, *Drug Offenders Will Face Two-Year Bans*, DAILY TELEGRAPH (London), Nov. 21, 2006, at Sport 7, available at <http://www.telegraph.co.uk/sport/main.jhtml?xml=/sport/2006/11/21/sfndru21.xml>.

respective player including a prison sentence. Anti-doping bodies should therefore carefully reconsider the unconditional ban of recreational drugs.<sup>44</sup>

Graf-Baumann was referring specifically to football on this occasion. However, the point is common across all sports and provides another consideration for authorities involved in doping control policy, specifically regarding the practice of naming violators of doping regimes. The spectre of criminal sanctions is well-known from such incidents as the *Festina* scandal,<sup>45</sup> and more recently, the *BALCO* affair.<sup>46</sup> Arguably, sports governing bodies place an intolerable burden on athletes for behaviour concerning what are essentially purely private matters. We expect more of them than we do of ourselves—and for no clear reason.

## VI. CASE STUDY: *INTERNATIONAL RUGBY BOARD V KEYTER*

Against this background, this Article turns now to examine the recent case of *International Rugby Board v. Keyter*,<sup>47</sup> adjudicated by the CAS in September 2006. The case raises a number of interesting questions in relation to the liability of athletes for doping offences. CAS reaffirmed its hard-line approach to drugs in sport, demonstrating a reluctance to depart from the traditional test of strict liability to determine the guilt of a competitor, despite the fact that the accused, Jason Keyter, claimed to have ingested the banned substance innocently. In itself, this reaffirmation may not seem out of the ordinary for many sport lawyers, who will be quick to observe that a finding of guilt has been the verdict more often than not in cases involving banned substances. Notwithstanding this, there are some substantive components of judgment that are somewhat controversial.

### A. *The Facts*

The defendant, Keyter, an ex-American International Rugby Union player, was playing for Esher Rugby Football Club in the English National Division Two. After a Rugby Football Union<sup>48</sup> (RFU) Division 2 match with Moseley Rugby Football Club on October 22, 2005, he was selected at random for an in-competition doping control urine test. The sample was collected in a manner conforming with the applicable rules and regulations issued by both the International Rugby Board (IRB), and the National Anti-Doping Organisation for the United Kingdom.<sup>49</sup> The sample was subsequently sent to the Drug Control Centre of Kings' College London, a center accredited by the WADA. Keyter's

44. T. Graf-Buamann, *Medicolegal Aspects of Doping in Football*, 40 BR. J. SPORTS MED. (Suppl. I) i55, i57 (2006).

45. 'Festina Affair': *The Timeline*, BBC SPORT, Oct. 24, 2000, [http://news.bbc.co.uk/sport1/low/other\\_sports/988530.stm](http://news.bbc.co.uk/sport1/low/other_sports/988530.stm) (providing a chronology of the scandal surrounding the doping charges leveled against the French Festina cycling team).

46. *Drug Scandal has "Tainted" Sport*, BBC SPORT, August 8, 2005, <http://news.bbc.co.uk/sport1/hi/athletics/4741353.stm> (the BALCO scandal centred on a laboratory in San Francisco which manufactured a designer steroid specifically to aid sprinters in an attempt to break the 100 metres world record).

47. *Int'l Rugby Bd. v. Keyter*, CAS 2006/A/1067 (Ct. Arb. Sport 2006).

48. The Rugby Football Union is the governing body of rugby union in England and is affiliated to the International governing body the International Rugby Board (IRB). Mr Keyter's club Esher are affiliated to the RFU.

49. *Keyter*, CAS 2006/A/1067 para. 2.1.

urine sample tested positive for Benzoyllecgonine.<sup>50</sup> At the request of the defendant, a second sample confirmed the finding of the first test.

The player was asked to attend a disciplinary hearing where he pled guilty to the doping offence, but claimed the prohibited substance had entered his body without his knowledge through a “spiked” drink.<sup>51</sup> At first instance, the Disciplinary Panel confirmed the finding of a prohibited substance as unchallengeable. However, based on evidence submitted in support of the player’s good character, on the balance of probabilities, he was given the benefit of the doubt. The Panel accepted that the banned substance had entered Keyter’s body without any significant fault or negligence on his part. He was subsequently banned from participation in all RFU competitions for twelve months, with the ban running from November 15, 2005 to November 14, 2006. The decision of the panel was subject to review by the IRB<sup>52</sup> under Regulation 21,<sup>53</sup> which deals with doping control in the rugby union. Regulation 21.20.6 states that if a player wishes for their “B” sample to be tested then this will be conducted at their own expense, which may be seen as a disincentive to challenge the “A” sample finding therefore raising the possibility of a player being found guilty due solely to a positive finding against a single sample.<sup>54</sup> In accordance with IRB Regulation 21, the IRB Anti-Doping Advisory Committee (ADAC) remitted the case to a post-hearing review panel, appointed by the RFU, which on March 16, 2006 upheld the decision of the original disciplinary panel. But the ADAC was not satisfied with the outcome, and under authority from Regulation 21.27 prompted the IRB to appeal to the CAS—with an eye toward extending the ban imposed on Keyter from one year to the mandatory two. On October 13 2006 the CAS upheld the appeal by the IRB and enforced a ban of two years on Keyter to run from November 15, 2005 to November 14, 2007, effectively ending the veteran player’s professional career. In reaching this decision, the central question addressed by the CAS was the extent to which the exceptional circumstances defence<sup>55</sup> applied in cases of this kind, and correspondingly whether or not the original panel was justified in reducing Keyter’s ban from two years to one.

#### B. *The Arguments for Extending the Ban*

The IRB insisted that, pursuant to IRB Regulation 21.22.1, the player receive the mandatory two-year ban. It was pointed out that the defence of exceptional circumstances,<sup>56</sup> under which the length of a ban may be reduced, should only apply in two situations: where the athlete can establish that he bears no fault or negligence for the violation, and where he bears no significant fault or negligence for what happened.

50. A cocaine metabolite.

51. *Keyter*, CAS 2006/A/1067 para. 2.6.

52. The International Rugby Board is the governing body of rugby union worldwide.

53. International Rugby Board [IRB], *Regulations Relating to the Game*, Regulation 21.20.5, 2006.

54. Former Olympic Champion Marion Jones was the most recent athlete whose “A” sample tested positive but whose “B” sample was negative. This led to her being cleared of all charges as a positive reading of both samples, (if tested), is necessary for a doping violation to be established. Gene Cherry, *Jones Cleared of Doping, ‘B’ Sample Negative*, GUARDIAN (London), Sept. 6, 2006, available at <http://sport.guardian.co.uk/breakingnews/feedstory/0,-6063442,00.html>.

55. *World Anti-Doping Code*, supra note 4, art. 10.5; *Regulations Relating to the Game*, supra note 53, Regulation 21.22.4.

56. *Regulations Relating to the Game*, supra note 53, Regulation 21.22.4.

The precise nature of how this test operates is somewhat unclear: is it just one or the other, or do both limbs of the test operate independently in a hierarchical fashion? Based on the submissions in the case, it seems the IRB and the CAS adopt the latter view. If the athlete meets the criteria in the first limb, clearly there can be no liability irrespective of the second. If, however, the athlete cannot establish total lack of fault or negligence, the second prong is triggered offering a potential escape route and at least some relief from the harshness of strict liability and the evidentiary difficulties in establishing no fault or negligence. There must be careful monitoring. An overly strict construction may render the principle meaningless, whereas an overly lax one might allow the exception to swallow the rule. The benefits of strict liability are certainty and consistency. The justifications for such a hard-line approach are: first, that it is needed to clean up the image of sport; second, to protect its ideals such as fair play; third, to rid it of cheats; and fourth, to dispel the “win at all costs” ethos. The question is: how has the CAS interpreted the exceptional circumstances defence in contemporary sport? This is a question best answered through a careful analysis of the Jason Keyter case.

### C. Discussion: Legal Analysis

#### 1. Proof of How the Substance Entered the Body

In the case of Jason Keyter, the exceptional circumstances defence was defeated without any real need to analyze the presence or absence of fault or negligence, or significant fault or negligence. The defence was barred on a slightly different footing and, in a sense, fell at the first hurdle. The CAS stated that prior to any discussion of whether Keyter did not know or suspect—or could not have reasonably known or suspected with the exercise of utmost caution—that he had used or had been administered a prohibited substance, it was first necessary to establish how the toxin actually entered his body.<sup>57</sup> Proof of the latter is needed before any consideration of the former, thus proof of *both* is needed to establish no fault or negligence. In the proceedings before the RFU Review Panel, the respondent maintained that he was unsure how the cocaine entered his body, hypothesizing it had been ingested via a “spiked” drink.<sup>58</sup> While the RFU Review Panel accepted this as plausible, unfortunately for Keyter, the CAS disagreed. The player submitted no evidence with respect to the alleged night or of the actual drink which he argued that strangers had given him. He could not even confirm that he was present at the stated nightclub on the evening in question. Notwithstanding any of this, the CAS suggested that a spiked drink was only one possible explanation for how the cocaine found its way into the player’s body, and that there was a host of possible alternatives as to how this may have happened. All things considered, it is perhaps unsurprising the CAS concluded that the uncorroborated nature of Keyter’s evidence did not discharge his burden of proof and, on the balance of probabilities, he could not satisfy the court as to how the drugs came to be in his sample. The CAS was not persuaded that the occurrence of an alleged ingestion of cocaine through a spiked drink was more probable than its non-occurrence.<sup>59</sup> As such, the defence of exceptional circumstances was not established and thus there existed no grounds to serve as a basis for reducing Keyter’s mandatory two-year ban. Despite the clear statements of principle in relation to this aspect of the case—upon which its outcome clearly hinged—one

57. *Int’l Rugby Bd.*, CAS 2006/A/1067, para. 6.8 (Ct. Arb. Sport 2006).

58. *Id.* para. 6.9.

59. *Id.* para. 6.11.

may be forgiven for feeling a degree of sympathy towards the player, particularly given the fact that the initial decision of the RFU Review Panel was based on testimony of the player's excellent character. While this was acknowledged by the CAS, the CAS nonetheless refused to recognize it as a mechanism to overcome strict liability or, more importantly, to satisfy the burden of proof.<sup>60</sup>

The CAS would have been justified in ending its analysis of the case at this point. However, it went on to consider the scenario, assuming Keyter had been able to prove how the substance entered his body. This discussion focused on the requirements needed to establish no fault or negligence as well as the residual inquiry of no significant fault or negligence.

## 2. No Fault or Negligence

Once an avenue of entry of a prohibited substance has been established, he could first be able to avail himself of the exceptional circumstances defence if he could establish that this happened through no direct fault or negligence on his part. The first component of the exceptional circumstances test—as articulated by IRB Regulation 21.22.4—is extremely difficult to satisfy. Indeed, this may be one of the reasons why a second element was introduced. There will not be many situations where an athlete can claim he was totally blameless, or that his conduct did not involve any negligence whatsoever on his part. The problem does not center on the issue of direct fault, but rather on the interpretation of negligence. It can be established with relative ease whether or not any direct fault can be attributed to the athlete in question. Nonetheless, if negligence is given its ordinary meaning, that of 'carelessness,' it is possible an athlete could never meet the criterion needed to discharge strict liability, and invoke the exceptional circumstances defence under the first heading. If one looks hard enough there will always be something that could be described as careless behaviour on the part of the accused that could defeat the first limb of the test. Where does the regulation draw the line? The guidance given by the IRB states that the first category applies where the player "did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he has used or had been administered the prohibited substance."<sup>61</sup> Yet this guidance is not that helpful, particularly in relation to the notion of "utmost caution." What does this mean and what is to be expected of athletes?

Considering the presence or absence of fault and negligence, irrespective of whether it is direct or significant, is a difficult question in its own right. In the *Keyter* case, if the question been addressed properly, it would have created more difficulty than it actually did. However, as this was a hypothetical issue they may not have given it as much attention as they should have—with the result that key issues were glossed over. It may be fairly straightforward to determine direct fault, but it is not as easy to define negligence in this context. There are also blurred lines of distinction between the two components of the test. At what point does no *significant* fault or negligence become no fault or negligence whatsoever? In *Keyter*, the CAS took a pragmatic approach. It may be that it overlooked some very important questions which, in the very near future, may demand further clarification.

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60. *Id.* para. 6.12.

61. *Id.* para. 6.13.

The CAS suggested that even if it were true that Keyter was telling the truth about the events in the nightclub, it was evident that the player had failed to exercise any—let alone the utmost—caution.<sup>62</sup> Thus, he failed both components of the test: “no fault or negligence” and “no *significant* fault or negligence.” This failure was based mainly on evidence that the player had consumed an excessive amount of alcohol including nearly half a bottle of vodka, at least one glass of champagne, and at least one cocktail containing a mixture of champagne, vodka, and Red Bull.<sup>63</sup> As such it was fairly easy to establish that the player was drunk, and the CAS concluded that behaving in this manner was inconsistent with the exceptional circumstances defence. It is justifiable to argue that Keyter carried at least some blame, since some degree of carelessness may fairly be attributed to his conduct. This conduct ought to defeat the first limb of the test, but when considered carefully, is it enough to deny him the second limb? Should he have been able to avail himself of the exceptional circumstances defence based on the argument that he was not significantly at fault or significantly negligent?

### 3. No ‘Significant Fault or Negligence’

One of the inherent difficulties with the second component of the exceptional circumstances defence resides in its definitional ambiguity. What amounts to no significant fault or negligence? The emphasis has to be on the construction of significant. The guidance provided by the IRB suggests that where a player establishes that his “fault or negligence, when viewed in the totality of the circumstance and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping violation,” the player meets the standard.<sup>64</sup> This is interesting when viewed in the context of the *Keyter* case. Arguably Keyter’s carelessness, when viewed in the totality the circumstance, was not significant in relation to the anti-doping violation, particularly given the fact that the violation sprung from an allegation of a “spiked” drink, something clearly beyond his immediate control—and perhaps not even otherwise contemplated. The CAS thought differently. The CAS suggested, albeit hypothetically,<sup>65</sup> that his conduct in attending the bar, and subsequently getting drunk, amounted to behaviour that defeated the defence of no significant fault or negligence. This was justified on the ground that getting drunk—and possibly not realizing or remembering what was going on—was not an exceptional circumstance which could excuse an athlete from his fault or negligence. The CAS concluded that accepting such a result would create a dangerous loophole that could be easily exploited.<sup>66</sup> Therefore, it seems that the crux of the decision was based on the finding that the player was drunk. While this behaviour alone is enough to defeat the first leg of the defence, it ought not automatically invoke an absolute barrier to the second component of exceptional circumstances. This pivotal part of the inquiry should hinge on a thorough consideration of the surrounding circumstances of the particular case. If these issues are overlooked, the application of exceptional circumstances may be so harsh as to render the defence meaningless, imposing an unrealistic set of expectations on athletes.

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62. *Keyter*, CAS 2006/A/1067 para. 6.14.

63. *Id.*

64. *Id.* para. 6.13.

65. Although this was a tough call by the CAS, it was nonetheless a hypothetical call, and one that never had to actually be made—insofar as it was irrelevant to the actual outcome of the case. This lack of significance may be one of the reasons why it did not receive the analysis it deserves.

66. *Keyter*, CAS 2006/A/1067 para. 6.15.

#### D. Discussion: Wider Implications

##### 1. The Nature of the Banned Substance

That Keyter tested positive for Benzoyllecgonine, a cocaine metabolite included on the WADA Code prohibited substances list, merits some comment.<sup>67</sup> Keyter's solicitor, quoted in the Times, considered the drug itself to be of some importance to his client's case. He commented: "Cocaine is generally looked on not as a supplement to enhance sporting performance as a steroid would be . . . . Rehabilitation would be the right process to adopt for first offenders."<sup>68</sup>

There are two fundamental issues explored in that short statement from Keyter's solicitor. First, cocaine may not have performance-enhancing qualities and as such it should be treated differently from substances that may have very clear performance-enhancing qualities.<sup>69</sup> Second, the treatment of Keyter by the IRB and how such treatment may have been different had he been a professional footballer punished by the Football Association or FIFA.<sup>70</sup>

The precise impact of cocaine on performance is difficult to assess. Shepel and Geiger writing for the Sports Medicine Council of Manitoba in 1998 commented:

Is cocaine performance enhancing? For over 2000 years, members of South American Indian tribes have chewed coca leaves to reduce fatigue, decrease sensations of hunger, and prolong periods of heavy physical labor. Because cocaine produces euphoria, increased perception of mental and physical abilities, increased self-confidence, heightened alertness, increased energy, and increased risk taking behaviour, athletes may be under a false impression that cocaine increases athletic performance especially in sports where heightened aggression is integral to the game.<sup>71</sup>

Increased aggression may be a desirable attribute in many different sports, particularly a physical contact-based sport such as rugby union and therefore it may be argued that cocaine, in that setting, may have performance-enhancing qualities. However, this argument has little merit; Shepel and Geiger continue on the specific physiological effects produced by cocaine:

Cocaine decreases endurance, increases glycogen depletion and elevates both free fatty acid and plasma lactate levels. These biochemical changes are detrimental to performance at prolonged, maximal levels of exertion. Studies

67. *Regulations Relating to the Game*, supra note 53, at Regulation 21, Schedule 2, 2006 (mirroring the WADA prohibited substance list); World Anti-Doping Agency [WADA], *The World Anti-Doping Code: The 2006 Prohibited List International Standard*, § S6, Sept, 19, 2005.

68. Souster, supra note 35, at 81.

69. Such opinion has recently been expressed by the United Kingdom Sports Minister, Richard Caborne. *Sport 'Social Drugs' Ban Queried*, BBC NEWS, Dec. 12, 2006, [http://news.bbc.co.uk/1/hi/uk\\_politics/6171777.stm](http://news.bbc.co.uk/1/hi/uk_politics/6171777.stm).

70. Federation Internationale de Football Association—the governing body of football worldwide.

71. P. N. Shepel & Dr. J. D. Geiger, *Considerations for Cocaine Use in Sport*, SPORTS MEDICINE COUNCIL OF MANITOBA (1998), available at <http://66.102.9.104/search?q=cache:9jngULMdvIkj:sportmed.mb.ca/web/pdfs/Considerationforcocaineuse.pdf+%22because+cocaine+produces+euphoria%22&hl=en&ct=clnk&cd=1&gl=uk>.

carried out to test whether cocaine can improve performance in endurance activities have at best concluded that no performance enhancement is attained by taking the drug. Clearly, cocaine can make a person feel like they are exerting a maximal effort, but research has shown that cocaine smokers have lower oxygen consumption (VO<sub>2</sub>), heart rates, and aerobic capacity. Thus, cocaine users may only perceive that they are performing well. Possibly, the most important point to remember is that the combined effects of exercise and cocaine are more than additive (i.e. synergistic) in terms of nervous system and may produce a dangerously high state of excitability under which fatal cardiovascular events can occur.

Wadler similarly comments on the effects of cocaine on athletic performance:

The few studies that exist suggest that little to no performance gains are incurred from cocaine and its amphetamine-like properties. Cocaine is notable for distorting the user's perception of reality; for example, an athlete may perceive increased performance and decreased fatigue in the face of actual decreased performance in both strength and endurance activities. An increase in heat production combined with a decrease in heat loss associated with cocaine abuse impairs the body's ability to regulate its temperature during physical activity.<sup>72</sup>

The impact of cocaine on athletic performance must at best be neutral, and is more likely to be negative.

The WADA Code does make some allowance for the ingestion of substances which may be viewed as non-performance-enhancing or substances commonly available in medicinal products. Article 10.3 specifically refers to such substances:

The Prohibited list may identify specified substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or are less likely to be successfully abused as doping agents. Where an athlete can establish that the use of such a specified substance was not intended to enhance sport performance the period of ineligibility found in Article 10.2 shall be replaced.<sup>73</sup>

However, despite evidence concerning the nature of cocaine and its metabolites, the substance remains on the WADA Code prohibited list, rather than the specified list.<sup>74</sup>

The WADA Code, in Article 4.3.1.2, specifically refers to player health reasons as a criterion when deciding whether a substance should be placed on the banned list or not. It states: "Medical or other scientific evidence, pharmacological effect, or experience that the Use of the substance or method represents an actual or potential health risk to the athlete."<sup>75</sup>

Case law has reinforced this motivation as a legitimate aim of doping control in sport, and it can be effected by both the eradication of non-performance-enhancing substances, as well as those that actually enhance performance. The Union Cycliste Internationale (UCI), the governing body of cycling, has explicitly adopted measures aimed at prioritizing the

72. Gary Wadler, *Cocaine*, ESPN, Sept. 6, 2006, <http://espn.go.com/special/s/drugsandsports/coca.html>.

73. *World Anti-Doping Code*, *supra* note 4, art. 10.3 (first offence would be a maximum of a one-year ban, second offence a mandatory two-year ban and for a third offence a mandatory life ban).

74. *The World Anti-Doping Code*, *supra* note 67.

75. *World Anti-Doping Code*, *supra* note 4, art. 4.3.1.2.

safety of cyclists in their doping control programme. In the CAS hearing between former world champion Tyler Hamilton and the United States Anti-Doping Authority, the CAS commented:

Elite riders such as the Appellant are subject to a UCI programme designed to ensure the health of riders and the overall safety of the sport. As part of this programme the UCI has adopted Sporting and Safety Regulations which involve the collection of blood samples from licensed riders on the morning of a race for analysis of certain blood parameters including hematocrit, haemoglobin and reticulocyte percentage. If a rider's blood parameters are higher than the thresholds established by UCI, the rider is considered medically unfit and is not allowed to compete for a period of time. These health tests do not involve analysis of a B sample and the results of these health tests are therefore not considered positive for anti-doping purposes. Nevertheless these results are considered by UCI in the administration of its anti-doping program and the sport overall.<sup>76</sup>

While such a concern for the health and well-being per se of the participants is laudable—and is a theme which will be returned to later—it is nevertheless reasonable to suggest refocusing doping control. Such a refocus should be made on those who are found guilty of taking substances which, although prohibited (such as cocaine), are not performance-enhancing. Presently, the WADA Code asserts clearly in its introduction that health and fairness are two of the rights it seeks to protect. It states: “The purposes of the World Anti-Doping Program and the Code are: To protect the *Athletes*’ fundamental right to participate in doping-free sport and thus promote health, fairness and equality for athletes worldwide.”<sup>77</sup>

Although the eradication of performance-enhancing substances achieves all three of the purposes cited above, the fight against non-performance-enhancing substances engages in just one of those fights. The focus placed on eradicating performance-enhancing substances, and therefore retaining the competitive balance and integrity within sport, is entirely consistent with other rules within sport that have analogous aims. These may include those which confront issues such as corruption,<sup>78</sup> the rules against common ownership of sports teams,<sup>79</sup> and the specific and rigidly-enforced equipment regulations which prevent significant variation by manufacturers and participants from a general norm.<sup>80</sup>

76. Hamilton v. U.S. Anti-Doping Ass'n, CAS 2005/A/884 para. 35 (Ct. Arb. Sport 2006).

77. World Anti-Doping Code, supra note 4, art. 1 (purpose, scope, and organization of the WADA Program and Code).

78. The recent match-fixing investigation in Italy which resulted in Juventus being relegated, and the decision to suspend champion jockey Kieron Fallon from all racing in the United Kingdom pending his criminal trial for race fixing, are both examples of the seriousness attached to corruption in sport. It is established case law that one of the few circumstances where the CAS is empowered to retrospectively alter the result of a sports event is if there has been corruption or bad faith. Segura v. Int'l. Ass'n of Athletic Fed'ns, CAS OG 2000/013 para. 17 (Ct. Arb. Sport 2000). Eight members of the Chicago White Sox in 1919 were banned for life from baseball for throwing the World Series; more recently, former Cincinnati Reds star Pete Rose was banned from all baseball activity for life for allegedly betting on games in which he was involved.

79. The Football Association, *Rules of the FA Challenge Cup Competition 2006–07*, Rule 24 (dealing with the issue of “dual interests and association” in the FA Cup).

80. For example, the R & A Rules of Golf deals specifically with the size of clubs permitted. The R & A Rules Limited and the United States Golf Association, *Rules of Golf and the Rules of Amateur Status*, Appendix II (Sept. 2003). Regulations governing the size of cricket bats are regulated by the MCC Official Laws. Marylebone

The division of competitors in combat sports—such as boxing and judo via weight category—is a further example of attempts to retain the closest possible balance between competitors. Taken to extremes, the handicap system in horseracing is driven solely by a desire to minimize competitive differences—therefore maximize betting revenue. The central selling of media rights is viewed as being crucially important in English football, ensuring that all Premiership clubs receive a substantial sum of money from the current deal (which runs through the end of the 2006-07 season worth £1.02 billion over three years).<sup>81</sup> Such selling helps to retain some form of competitive balance. Looking abroad, college draft<sup>82</sup> in the United States is yet another example of rules implemented to retain some identifiable competitive parity throughout the appropriate sports league. While the fundamental aim of all governing bodies is to retain competitive integrity within their respective sports through a wide range of policies, assuming the moral lead over the issue of health protection, specifically in reference to recreational drug taking, may be less familiar and perhaps less justifiable.

There appears to be little substantive reason as to why governing bodies should concern themselves with the personal lives of their participants. Non-performance-enhancing substances might be viewed as purely private matters which may require a moral assessment rather than a punitive sporting sanction. It is suggested that sports organisations should be focused on sporting issues rather than moral regulation, which diverts precious resources from the fight to maintain the integrity of fair competition, which perhaps should remain the primary aim of such organisations.<sup>83</sup> The IOC Athlete's Commission has questioned the wisdom of pursuing substances which may be viewed as recreational drugs. In March 2000, the Commission commented:

While the IOC has a strong interest in preserving the fairness of Olympic competition, and while it has strong grounds in sport ethics for seeking to eliminate doping, it is on far riskier ground if it seeks to mandate moral rules unrelated to sport. It is not clear why the rules for eligibility should include all recreational drugs used in all countries. If sports federations or the IOC wish to take a stand against recreational drug-use (or tobacco, or alcohol abuse, or other social problems), then this should be done through codes of conduct and education, rather than rules that govern eligibility for sport competition.<sup>84</sup>

However, despite advocating such a commonsense approach, many athletes who test positive for recreational drugs are treated in the same way as those who systematically attempt to cheat both their opponents and the watching public by taking performance-enhancing substances. The inconsistent approach across different sports also exacerbates the

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Cricket Club, *The Laws of Cricket*, Law 6 (2000 Code 2d ed. 2003).

81. Dan Sabbagh, *NFL Backs Out of Challenge to Sky on TV Football*, *TIMES* (London), Nov. 18, 2005, at 52, available at <http://business.timesonline.co.uk/article/0,,9071-1877647,00.html>.

82. The team with the worst record from the previous year selects first and so on down to the number one team from the previous year selecting last. Once all teams have selected once, the first round is over and the second round begins in the same manner. This system of "rounds" continues until all available players have been selected.

83. UK Sport reported that the year ending March 31, 2006 saw 7,968 tests conducted across fifty sports. There was a failure rate of 1.3% across these tests. A substantial number of these failures were due to the presence of substances which may be looked upon as non-performance enhancing, in the athlete's sample. Of the eighty-three positive tests in 2005/6, twenty-two of those were caused by Cannabis, Marijuana, Cocaine or Hero. UK Sport, *Testing Programme*, [http://www.uk sport.gov.uk/pages/testing\\_programme/](http://www.uk sport.gov.uk/pages/testing_programme/).

84. International Olympic Committee Athlete's Commission, *The Athlete's Anti-Doping Passport*, March 22, 2000, cited in ADAM LEWIS & JONATHAN TAYLOR, *SPORT: LAW AND PRACTICE* 911 (Reed Elsevier Ltd. 2003).

sense of injustice for those who suffer a two year ban for consumption of these recreational substances.

In terms of the first broad aim of the code, there is much to suggest it is failing to achieve its stated aims and, furthermore, that perhaps these aims need refocusing. In so doing, moral regulation might be eschewed and the focus of the code directed toward matters of a purely sporting nature. The second broad aim of the code is stated: "To ensure harmonised, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping".<sup>85</sup> This aim of harmonisation is similarly far from being fulfilled at both national and international levels, and that being the case it may be suggested that it is perhaps time for a refocus of the rationale behind the code.

## 2. An Unrealistic Expectation for Sports Participants

The main reason for the IRB's desire to extend Keyter's ban was, in all probability, to simply make an example of him. It asserted that a professional rugby player ought to have heightened awareness of situations which may lead to doping violations.<sup>86</sup> This is all well and good, and is a stance that should be encouraged among all sports governing bodies; however, the expectations have to be realistic, fair, and reasonable. In the long-run, it falls on the CAS to consistently interpret regulations. In *Keyter* they did not. Consider some of the questions which have been left unanswered. What if Keyter was out in the nightclub but unintoxicated? Is the fact that he placed himself in an environment where there is a mere opportunity for someone to spike his drink enough to defeat the no significant fault or negligence defence? On the one hand, the player should guard against such threats. Arguably, there is some fault or negligence adduceable from the very fact he attended the nightclub. On the other hand, the player still has to be able to live his life. To say he is significantly at fault under these circumstances seems very harsh.

What if Keyter had not been drunk but had nonetheless accepted a drink from strangers in a nightclub? Does this mean he is automatically negligent? The IRB pointed out that accepting a drink from strangers in a nightclub is dangerous.<sup>87</sup> This may well be, but is accepting drinks from other people enough evidence to routinely impose strict liability on every occasion? It would once again prove to be a difficult burden of responsibility to discharge if this were always the case. Sports personalities are frequently offered drinks by people that they do not know very well. Does this mean they should never accept a drink from anyone for fear of it being spiked? Moreover, what counts as a stranger in this context? Is it someone the player has never seen? Could it include someone they have seen on a few occasions but do not know very well? At the extreme, a very distant family member whom the player has only seen once could perhaps be added to this category, and very few people would refuse drinks from family members, distant or otherwise. If they accepted a drink from a very distant relative who, for whatever reason, saw fit to spike it, would the CAS conclude that this family connection was so tenuous it was akin to stranger and thus that the athlete was careless in accepting a drink from someone they did not know

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85. *World Anti-Doping Code*, *supra* note 4, art. 1 (purpose, scope, and organization of the World Anti-Doping Program and Code).

86. *Int'l Rugby Bd. v. Keyter*, CAS 2006/A/1067 para. 4.6 (Ct. Arb. Sport 2006).

87. *Id.*

well enough? This is one example of an awkward situation which may give rise to certain difficulties for those who wish to avail themselves of exceptional circumstances.

Finally, a lot of the analysis in the *Keyter* case was based on the fact that the player was quite obviously drunk. The evidence suggested he was heavily intoxicated but, again, is drunkenness alone enough to negate exceptional circumstances? Surely there cannot be a blanket rule which suggests a player is significantly at fault or significantly negligent every time they have something to drink. Drunkenness is subjective, difficult to define, and dependent upon the varying thresholds of different players. Assume an individual has a few drinks—short of intoxication—should they be held responsible if they become the victim of a spiked drink? For all intents and purposes, their drink may well have become contaminated without any direct knowledge or grounds for suspicion on their part. To what extent, if indeed any, does the alcohol which has been voluntarily consumed come into play here? It would seem nonsensical to impose strict liability in this situation, but given the hard-line approach taken by the IRB and subsequently the CAS, is this not the overarching intention? It will be interesting to see if other sports governing bodies follow suit.

For the defence to operate effectively, it becomes absolutely essential to view the conduct in the totality of the circumstances. When viewing the conduct of Jason Keyter on the whole, there are arguments on both sides. He was perhaps irresponsible in getting so drunk, but—presuming he was telling the truth—his guilt ends there. If he had accepted a drink in good faith, and not known or suspected anything about it, then it is perhaps going too far to hold him accountable solely for placing himself in an environment where his celebrity status had the potential to be exploited. The judgment itself may have signalled both the IRB's and the CAS's disapproval for professional athletes 'living it up.' Glamorous and extravagant lifestyles spell doom for the majority of superstars, and sports administrators are likely all too aware of this. However, this should not be used as an excuse to overlook exceptional circumstances when it is appropriate to invoke the defence. Each case must be considered carefully and on the merits to ensure the courts do not overlook justice in the service of a hard-line approach to the war against drugs in sport.

## VII. CONCLUSION

The undoubted harshness of the principle of strict liability has long been suggested as being crucial in the fight against doping in sport. For example, Lord Coe commented in 2004: “[W]e cannot, without binding reason and cause, move one millimetre from strict liability – if we do, the battle to save sport is lost.”<sup>88</sup>

Unquestionably, the application of such a principle has led to injustice.<sup>89</sup> However, it has been suggested that such harsh application is effectively the lesser of two evils and that the fight against doping in sport justifies such a harsh approach. The existence of the defence of exceptional circumstances<sup>90</sup> is designed to mitigate the severity of strict liability. The application of this defence leaves very little opportunity for athletes to establish their innocence, and even where they are able to do so, the result is not the reversal of the guilty

88. Sebastian Coe, *We Cannot Move from the Strict Liability Rule*, DAILY TELEGRAPH (London), Feb. 25, 2004, at Sport 5, available at <http://www.telegraph.co.uk/sport/main.jhtml?xml=/sport/2004/02/25/socoe25.xml>.

89. See *Baxter v. Int'l Olympic Comm.*, CAS 2002/A/376 (Ct. Arb. Sport 2002) (Scottish skier Alain Baxter lost his Olympic bronze medal after he tested positive for a banned stimulant ingested via a nasal spray taken to remedy congestion). Similarly, Torri Edwards tested positive for an entirely innocent ingestion of a banned substance included in the glucose tablets she was taking and was unable to establish a defence under *exceptional circumstances*. *Edwards v. Am. Arbitration Ass'n.*, CAS OG 2004/03 (Ct. Arb. Sport 2004).

90. *World Anti-Doping Code*, *supra* note 4, at art. 10.5.

verdict but merely a reduction of the tariff. While this may promote certainty, it is some distance from promoting equity and fairness. One of the principle justifications promoting strict liability is to ensure fair competition. When viewed from this perspective, its persistence becomes more difficult to justify since currently it is applied to non-performance-enhancing substances. As has been seen, there remains inconsistent application of anti-doping provisions throughout the world of sport, and where such inconsistency remains, the harshness of strict liability is drawn into sharper focus particularly when applied to recreational substances such as cocaine, heroin, and marijuana. It is at this stage such justification for the application of the principle ends. The Sports Minister of the United Kingdom has recently commented: "We are not in the business of policing society. We are in the business of rooting out cheats in sport. That's what WADA's core function is about . . . I would also look very seriously at the list, to take off what I believe are some of the social drugs."<sup>91</sup>

It is a sentiment that needs to be implemented as WADA policy sooner rather than later. The case of Jason Keyter<sup>92</sup> illustrates not just the injustice attached to strict liability, but also the difficulty associated with establishing exceptional circumstances, and further the inconsistency demonstrated across different sports not just with regards to performance-enhancing substances but more starkly with reference to recreational substances. There is little justification for retention of the current policy concerning substances which do not enhance performance. The moralistic energy spent pursuing athletes who test positive for such substances would be better spent combating artificial aids which really do destroy the concept of a level playing field. Control of recreational substances is better dealt with via treatment, education programmes, and, if necessary, mechanisms of the state. Governing bodies in sport need to concern themselves solely with sporting issues rather than interfering in issues which should remain the domain of the criminal law.

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91. Richard Caborne Testifying, Social Drugs in Sport Queried, [http://news.bbc.co.uk/player/nol/newsid\\_6170000/newsid\\_6172500/6172543.stm?bw=bb&mp=rm](http://news.bbc.co.uk/player/nol/newsid_6170000/newsid_6172500/6172543.stm?bw=bb&mp=rm) (last visited December 13, 2006).

92. IRB v. Keyter, CAS 2006/A/1067 (Ct. Arb. Sport 2006).