

A COMPARATIVE STUDY OF THE APPLICATION OF STRICT LIABILITY PRINCIPLES IN SPORTS: CRITIQUING ANTI-DOPING POLICIES; EXAMINING 'ILLICIT CROWD CHANTING' AND MATCH FIXING

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Sports are an integral part of our lives and are constantly looked at for encouraging the values of competition, integrity and team work in our lives. In the modern day and age with the increase in the various forms of sports played and the application of various scientific and technological principles come more complications than we could have ever imagined. With mammoths amount of money riding on these sports, winning has become all the more important. The reason athletes, teams and their managements are resorting to more unethical means of finishing on top, making sure no means (how much ever illicit or disdainful) are left unexplored. These gives rise to questions of regulating such behavior of these sportsmen and women. How should the questions of doping and using banned substances be addressed from a legal perspective? What are the bodies at the international and domestic sphere to address these issues? The principle of strict liability and its application to these above-mentioned questions are some of the issues which have been addressed in this paper. The researchers during the course of this study would like to make a comparative study on how are principles of strict liability applied differently in cases of doping, illicit chanting by the crowds and how are the managements of teams often held vicariously liable with no fault or

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negligence when their players are accused of match fixing, the latter becoming ever important specially after the recent allegations on spot fixing on some cricketers and their managements.

I. INTRODUCTION

Since the inception of Olympics more than a century ago, the human race has gained impetus in not merely actively playing sports but also passively watching it for means of entertainment. Apart from the frenzy, patriotic fervor and passion generated by sports, the economic activities surrounding and emanating from it, has facilitated numerous calls for its stricter regulation and conduct. For example, Cricket in India, despite not being the national sport, commands popularity of almost entire of its population. However, sports regulation at the national level in India has two primary barriers: *first*, for addressing any sports law reform, it must be undertaken by the state legislature;¹ *second*, the interference of any national government in the conduct of any Olympic sport is not agreeable as per the International Olympic Association.²

Sports law can be characterized as a range of legal issues which may be encountered both in amateur as well as professional sports. Such issues may overlap with concerns surrounding labour law, competition law, antitrust law, contracts, tort or criminal law between players, agents, sporting bodies or government regulators. This nascent but emerging interdisciplinary field requires appropriate knowledge concerning the rules of every game, functioning of professional leagues and other sports related statutes.³ With the advancement in technology and the lucrative monetary nature for

¹ INDIA CONST. list II, entry 33; Mentions sports in the State list, along with activities such as theatre, entertainment and amusement.

² Vidushpat Singhania, *Sports Law Reforms in India: Agenda for 2014*, LAKSHIKUMARAN & SRIDHARAN ATTORNEYS available at <http://www.lakshmisri.com/News-and-Publications/Publications/articles/Corporate/sports-law-reforms-in-india-agenda-for-2014>.

³ DARREN HEITNER, *HOW TO PLAY THE GAME: WHAT EVERY SPORTS ATTORNEY NEEDS TO KNOW* (2014).

participation in sports, athletes nowadays are willing to put ethics aside to gain a competitive advantage or enhance their physical performance over others.⁴ In order to prevent such 'cheaters' from engaging in anti-sporting practices, there was a requirement for certain legal presumptions to be developed that ran against the ordinary notion of culpability which is prevalent in criminal law.⁵

Among several such governing regulations for sports, lies the principle of 'strict liability' which is applied in cases of certain sporting offences. Although this principle applies to scenarios around betting and match fixing as well, the primary focus of this piece will be to analyse its applicability in cases of doping by athletes and critique the same, then making a comparative study with the application in the other branches of sports. For the convenience of the reader, the authors would like to divide this piece into five parts: a) understand the concept of strict liability and vicarious liability; b) Application of strict liability principle in anti-doping laws c) Need for strict regulation of sports law violations; d) Inconsistencies in applying these principles by courts; e) Suggest changes to pave way for a balanced approach for dealing with sporting offences; and f) strict liability, illicit crowd chanting and match fixing.

2. STRICT LIABILITY PRINCIPLE AND VICARIOUS LIABILITY

The general elements of strict liability entails that a legal obligation is cast upon a person, without a fault of the person having to be proved. This can be reformulated to mean that a person who causes danger to another is entitled to do so, but must take into account the potential obligation to compensate

⁴ Vidya Narayanaswamy, *Regulating Doping in Sports*, SPORTS@LAWNK, July 2011 available at <http://lawnk.wordpress.com/2011/07/02/regulating-doping-in-sport/>.

⁵ Frank Oschütz, *Harmonization of Anti-Doping Code Through Arbitration: The Case Law of the Court of Arbitration for Sport*, 12 MARQ. SPORTS L. REV. 675 (2002) available at <http://scholarship.law.marquette.edu/sportslaw/vol12/iss2/7>.

⁶ Janno Lahe, *Regulation of Strict Liability in the CFR and the Estonian Law of Obligations Act*, XVII JURIDICA INTERNATIONAL (2010), http://www.juridicainternational.eu/public/pdf/ji_2010_1_167.pdf.

for no-fault damage.⁶ This rule was evolved in the case of *Rylands v. Fletcher*, where it was held that no *mens rea* was required in order to prove liability.⁷ Thus, there is no finding of fault, which can be in the nature of negligence or tortious intent. Similarly this rule was later extrapolated in other common law jurisdictions as well. More so, even civil law jurisdictions like France also have similar principles. In France, until the end of the 19th century, fault as a pre-requisite to liability was not questioned until 1896, when a French court ordered the payment of compensation to the widow where no liability on part of the factory was proved with regards to the accident which took place.⁸ Similarly, this was introduced in other jurisdictions like Germany as well in 1838 with the passing of the Prussian Railways Act.

Like most legal systems, anti-doping jurisprudence is not perfect. A strict liability system, while promoting integrity among athletes, can lead to injustices at the individual level. Although the principle of strict liability, where the burden lies on the sportsperson to ensure that his/her body is not intoxicated with banned substances, is seen by the international sport body as an effective measure to clean up sports, authorities must be mindful of the serious repercussions that inevitably arise of such a system. The livelihood and reputation of sportspersons can be greatly hampered by the levying of doping allegations and therefore, it is incumbent on the authorities to encourage a fair, trustworthy and transparent system.⁹

Strict liability also has overlapped with vicarious liability, which is usually an area dominated by fault based liability; as making an innocent party pay for the damages of another may appear unjust on the face of it, on perusing the legal system of the common or civil laws however, we can see it is necessary.¹⁰

⁷ [1868] UKHL 1.

⁸ *Supra* note 6.

⁹ 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*, 5(2) VIRGINIA SPORTS AND ENTERTAINMENT LAW JOURNAL (2006).

¹⁰ PAULA GILKER, VICARIOUS LIABILITY IN TORT A COMPARATIVE PERSPECTIVE (2013).

Therefore there exists some special relationships between parties where one party for no apparent fault of its own has to compensate as it is vicariously held liable for the acts of another, this is found in the legal orders of England and Wales, Australia, Canada, France, Germany and others such as United States, New Zealand and Spain.¹¹ In the context of sports law also, such a vicarious principle will be examined in the later sections.

Further, every athlete, by participating in sport and/or by affiliating himself to a sporting federation accepts its constitution, bye laws and regulations of such a federation and rules of that sport. This embodies to constitute a contract between the athlete and the concerned federation and thus, must comply with the terms and conditions by virtue of an institutional affiliation. This association thus automatically entails compliance of anti-doping provisions by virtue of membership, accreditation or participation in such sports organizations or sports events subject to the code.¹²

3. STRICT LIABILITY IN ANTI-DOPING LAWS

Legal Regime for Anti-Doping

The use of performance-enhancing substances in sports is not merely a recent phenomenon. As far back as 3,000 years ago in Ancient Greece, naked athletes would reputedly step up to the starting line after ingesting anything from mushroom and plant seed extracts to stimulating potions.¹³ However, the present regime for doping control in the international arena, finds its

¹¹ *Id.*

¹² Annelize du Pisani, *A contractual perspective on the strict liability principle in the World Anti-Doping Code*, DE JURE, available at <http://www.dejure.up.ac.za/index.php/volumes/46-volume-4-2013/36-volumes/46-volume-4-2013/217-a-contractual-perspective-on-the-strict-liability-principle-in-the-world-anti-doping-code>.

¹³ Australian Sports Drug Agency, *History of Drugs in Sport*, available at <http://www.asda.org.au/media/history.htm> (on file with the Virginia Sports and Entertainment Law Journal); Mark Stuart, *The war on drugs in sport – a perspective from the Athens Olympics*, 273 PHARMACEUTICAL J. 320 (2004), http://www.pjonline.com/pdf/articles/pj_20040904olympic.pdf.

roots in the modern Olympic movement. Anti-doping principles, like any rules of a competition, are sports rules governing certain conditions under which any sport ought to be played in its true spirit.

The fight against anti-doping in sport gained traction following the criminal investigation conducted during the Tour de France scandal in 1998 and the Salt Lake City Olympics in 2002, which exposed systematic drug use among the participants.¹⁴ It seemed like international sporting authorities such as the IOC were soft on drug use and there was no active commitment on part of other sporting organizations to fight against doping in sport. The decision by the Olympic Movement Anti-doping Court in 1999, however, laid down the foundation of the anti-doping regulations. It expounded that doping in sports constitutes two circumstances: a) the use of an expedient (substance or method) which is potentially harmful to an athlete's health and/or capable of enhancing their performance; or b) the presence in the athlete's body of a prohibited substance or evidence of use thereof or evidence of the use of prohibited method.¹⁵

Apart from clarifying what constitutes doping, the need is felt for a more dynamic approach to tackle the menace of doping in sports. This was remedied when the International Olympic Council conducted World Conferences on Doping in Sport in Lausanne (1999) and Copenhagen (2003), to create a robust framework preventing athletes from engaging in doping tendencies.¹⁶ These conferences involved participation among all major sports federations and around 80 government bodies to ensure uniform application of regulations against doping in sports. The outcome of these conferences was creation of World Anti-Doping Agency (WADA) as the

¹⁴ Saul Friedman, *Contador, Doping and Strict Liability*, Sports Law e-Journal, art. 16 (2012).

¹⁵ International Olympic Committee, *Olympic Movement Anti-doping Code*, Lausanne: IOC (1999).

¹⁶ Sooraj Sharma & Shujoy Mazumdar, *A Critical Appraisal of the Concept of Strict Liability in WADA Code*, National Seminar on Recent Development in Sport, ILI New Delhi (2011).

principal institution to regulate the concern of doping in sports and effectively curb it. One of their key activities include the monitoring of World Anti-Doping Code (WADC), a document which seeks to harmonize regulations regarding anti-doping in sports, scientific research concerning doping, education and training of athletes, keeping track of developing technologies in sports to suggest revisions to the code, updating the list of prohibited substances in sports, etc.¹⁷

The WADC is the fundamental and universal document upon which the World Anti-Doping Program in sports is based. The Code applies to the Olympics and Olympic sports and by virtue of government's endorsement to its objectives, compliance is also sought from national sports authorities.¹⁸ It plays a crucial role in harmonizing and coordinating actions, by setting out rules which governments will implement on ratification of the International Convention against Doping in Sport. Apart from setting out mandatory rules, which need to be incorporated verbatim by sporting bodies in various governments, the Code also sets out rules which are considered guiding principles.¹⁹ Such a framework ensures the fundamental regulations of anti-doping are consistent across national sporting bodies around the world, while the other sections of the Code accommodate for slight substantive amendments that may be necessary in different contexts and in different jurisdictions.

It works in conjunction with five International Standards aimed at bringing harmonization among anti-doping organizations in various areas: testing, laboratories, Therapeutic Use Exemptions (TUEs), the List of Prohibited Substances and Methods, and for the protection of privacy and personal

¹⁷ Vidya Narayanaswamy, *Regulating Doping in Sports*, SPORTS@LAWNK, July 2011 available at <http://lawnk.wordpress.com/2011/07/02/regulating-doping-in-sport/>.

¹⁸ Paul Hovrath, *Anti-Doping and Human Rights in Sport: The case of AFL & the WADA code*, 32 (2) MONASH UNIVERSITY L. REV. (2006).

¹⁹ *Supra* note 17.

²⁰ World Anti-Doping Code, available at: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/>.

information.²⁰ This harmonization works to address the problems that previously arose from disjointed and uncoordinated anti-doping efforts, such as, among others, a scarcity and splintering of resources necessary to conduct research and testing, a lack of knowledge about specific substances and procedures being used and to what degree, and an uneven approach to penalties for athletes found guilty of doping. The adoption of the Code led to several significant advances in the global fight against doping in sports, including the formalization of certain rules as well as the clarification of stakeholder responsibilities. Additionally, the Code introduced the concept of 'non-analytical' rule violations, meaning that a sanction can be applied in cases where there is evidence that an anti-doping rule violation occurred but where there is no positive doping control test.²¹

A participant, which includes not only the athlete but his support personnel as well, when agreeing to participate in any international or national event of a body affiliated to the WADA, undertakes to conform to the norms of WADA, and submits to testing conducted by it.²² Anti-doping provisions and rules have now become mandatory in the athlete participation forms and the rules of membership for the various sports governing bodies. Participants under the code are obliged to adopt and implement policies and rules against doping that conform to the Code, and assure that all members also fulfill the same. These sport specific rules and procedures must be understood as distinct and must not be limited by any national requirements and legal standards applicable to criminal proceedings or employment matters.

The near universal acceptance of the WADC thereafter, has facilitated in enshrining principles of anti-doping into governing legislations for sports in most countries. However, there are several sporting bodies like the AFL

²¹ *Id.*

²² Roshan Gopalakrishna, *Sentence Construction – Recent case on doping bans*, Sports@NKLaw, October 2011 available at <http://lawnk.wordpress.com/2011/10/22/sentence-construction-recent-case-on-doping-bans/>.

(Rugby), FIFA (Football), ICC (Cricket), etc. that do not claim complete adherence to the code, despite national support for curbing anti-doping tendencies.²³

Further, the UNESCO has facilitated the development of the first truly global anti-doping instrument i.e. the International Convention against Doping in Sport, and has played a crucial role in actively promoting its implementation by supporting governments in the development of national anti-doping programs.²⁴ It has also contributed heavily to development of anti-doping education and prevention programs aiming at promoting sporting values and increasing awareness among the young athletes on the moral, legal and health consequences of doping activities.

In India, the National Anti-Doping Agency (NADA) has formally adopted the WADC to pursue efforts to eradicate doping in India. It is the entity designated by India as possessing the primary authority to adopt and implement anti-doping rules, direct the collection of samples, the management of test results and the conduct of hearings, at the national level.²⁵

Understanding of Strict Liability under Anti-Doping laws

The principle of strict liability, enshrined in Article 2 of the WADC, is one of the primary pillars in ascertaining guilt in cases of doping among athletes. Prior to the codification of this principle in the WADC, it was widely prevalent, both in CAS cases as well as majority of existing anti-doping rules.²⁶ The principle is applied in situations where urine/blood samples collected from an athlete have produced adverse analytical results. Under

²³ *Supra* note 18.

²⁴ NANCY MCLENNAN, TOGETHER AGAINST DOPING, UNESCO (2012).

²⁵ The Anti-Doping Rules, National Anti-Doping Agency, India (Revised as per 2009 WADA Code).

²⁶ International Olympic Committee Anti-Doping Code (1983) was prevalent prior to the WADA.

this regime, the question of fault or negligence only comes into play in the determination of the sanction. The drafters opted for this system because they believed it to be the best way to fight doping in an effective manner.

As per this principle, an athlete is responsible for what is detected in his bodily specimens and an anti-doping violation occurs whenever 'a prohibited substance is found' in an athlete's sample.²⁷ The mere presence of a prohibited substance or its markers in any bodily specimen will also entail strict liability on part of the athlete. This offence also includes situations of attempted use of prohibited substances or applying a prohibited method for consumption of such substances. The violation occurs whether or not the athlete intentionally or unintentionally consumes such a substance or was negligent or otherwise at fault.²⁸ This rule creates a personal duty upon the athlete for ensuring no prohibited substance enters his/her body, at any cost. When an athlete commits an anti-doping violation by testing positive for a sample in connection with an in-competition test, this automatically leads to disqualification of the individual's result obtained in that competition, including forfeiture of any medals, points or prizes.²⁹ This rule helps to establish fairness for the other athletes in the competition.

Any refusal or failure to provide for any compelling justification to submit to sample collection after notification as authorized in applicable anti-doping rules or otherwise evading sample collection will also entail responsibility on part of the athlete.³⁰ The violation of applicable requirements regarding athlete's availability for out-of-competition testing including failure to provide whereabouts information and missing tests which based on reasonable rules, also constitutes violation as per the code.

²⁷ Q & A: *Strict Liability in Anti-Doping*, WORLD ANTI-DOPING AGENCY, http://www.wada-ama.org/Documents/News_Center/News/QA_Strict_Liability.pdf.

²⁸ Article 2.1 WADC; PAUL DAVID, A GUIDE TO THE WORLD ANTI-DOPING CODE: A FIGHT FOR THE SPIRIT OF SPORT (2011).

²⁹ *Supra* note 9.

³⁰ *Supra* note 5.

Further, the burden and standards of proof in such cases is specified in Article 3 of the WADC. The initial burden of proof to establish the athlete has indulged in doping tendencies is placed upon the relevant anti-doping association which is conducting the tests of prohibited substances.³¹ However, this standard can be easily established since a positive result for a prohibited substance satisfies that burden. Further, it is assumed that any WADA accredited laboratory is presumed to follow proper procedures for conducting sample collection and analysis. The WADC states that only a 'comfortable satisfaction' of evidence must be shown before a hearing body to establish guilt. The standard for an athlete to rebut any presumptions or establish any fact or circumstance is based on the balance of probabilities principle. However, owing to the application of the strict liability principle, once tested positive, it is extremely difficult to shift the burden of proof from the athlete, due to no requirement of intention or defense of negligence available to him.

If an athlete is found guilty of any of the aforementioned violations, sanctions may be imposed under Article 10 of the WADC. The punishments entailed range specifically with bans and periods of ineligibility from ongoing or future competitions for a minimum period of 3 months and maximum of two years for athletes following a positive drug test.³² In situations wherein the athlete can prove that such a violation was not intended to enhance performance, the requisite ineligibility period may be amended ranging from merely a warning and monetary reprimand without any disqualification from future events till a maximum ineligibility of one year. However, the code is extremely strict concerning the cases of repeat offenders, wherein in case of 2nd and 3rd violation athletes may be imposed with lifetime bans.³³

³¹ *Supra* note 16.

³² P Charlish & R Heywood, *Anti-Doping Inconsistencies snare American star*, 8(1) TEXAS REV. OF ENTERTAINMENT AND SPORTS LAW, 79 (2007).

³³ Roshan Gopalakrishna, *Doping in Professional Cycling: Legends of the Fall or the Fall of Legends?* Sports@NKLAW, February 2012, available at <http://lawnk.wordpress.com/2012/02/22/doping-in-professional-cycling-legends-of-the-fall-or-the-fall-of-legends/>.

Recognizing the need for balance between the goals of anti-doping and athlete's rights, the WADC does offer a chance to reduce or waive the period of ineligibility based on truly exceptional circumstances.³⁴ As relates to subsequent sanctions, the athlete has the possibility to avoid or reduce sanctions if he or she can establish to the satisfaction of the tribunal how the substance entered his or her system, demonstrate that he or she was not at fault or significant fault or in certain circumstances did not intend to enhance his or her sport performance. However, the burden of proof in such cases shifts on the athlete to prove why an exception must be made to absolve him of his liability. The guidance note within the WADC clearly suggests that this principle merely applies to reduction of sanction and not for determining the occurrence of an anti-doping violation and cannot be exercised in a vast majority of cases.³⁵

The WADA is constantly involved in updating and amending the 'prohibited substances list' on an annual basis. This list is categorized into four categories namely (i) Substances and methods prohibited both in and out of competition; (ii) Substances and methods prohibited in competition; (iii) Substances and methods prohibited in any particular sport; and (iv) Specified substances.³⁶ Further, for any substance to be included in the prohibited drug list enlisted by the WADA, it must satisfy two of the following requirements: *a*) the substance or method has the potential to enhance sport performance; *b*) the utility of the substance or method will have actual or potential impacts upon the health of the athlete; *c*) the agency believes that the use of substance or method violates the spirit of the sport which the code seeks to preserve.³⁷

³⁴ *Supra* note 16.

³⁵ Guidance Note, World Anti Doping Code.

³⁶ *Supra* note 18.

³⁷ *Id.*

In circumstances wherein the first requirement i.e. seeking performance enhancement, is fulfilled requires much more serious intervention and liability than the other two standards. For example, the most common drug used for enhancing performance is steroids has a stringent prohibition in both scenarios of competition and otherwise. However, recreational drugs such as amphetamines, cocaine, heroin, and cannabinoids would fall under the second category and thus, must have lesser punishment. However, the application of the strict liability principle uniformly across all prohibited substances often negates the categorization of these substances.

If the medication an athlete is required to take to treat an illness or condition happens to fall under the Prohibited List, a Therapeutic Use Exemption (TUE) may give that athlete the authorization to take the needed medicine.³⁸ The purpose of the International Standard for Therapeutic Use Exemptions (ISTUE) is to ensure that the process of granting TUEs is harmonized across sports and countries.

4. APPLICATION OF STRICT LIABILITY PRINCIPLE

It was in one of the first doping cases examined by a CAS Panel where the arbitrators first qualified the provision in the International Equestrian Federation (FEI) laws providing for automatic disqualification from an event as being a case of 'pure strict liability'.³⁹ As long as only a disqualification was at stake, the arbitrators have always felt prepared to apply the strict liability regime without any alteration.⁴⁰ Despite being in complete violation of natural justice principles of athletes and possibility for restraint of trade, the strict liability standard was upheld for meeting the high objectives and practical necessities in the fight against doping in sports.⁴¹

³⁸ Therapeutic Use Exemptions, *available at* <http://www.wada-ama.org/en/Science-Medicine/TUE/>.

³⁹ G. v. International Equestrian Fed'n, CAS Award No. 91/53 (1992).

⁴⁰ Leipold v. Federation Internationale des Luttes Associees, CAS No. 2000/A/312, slip op. at 11 (Oct. 22, 2001).

⁴¹ C. v. Federation Internationale de Natation Amateur, CAS Award No. 95/141 (1996).

Despite providing for a straight out regime to deter doping in sports, with more increasing regularity, the application of the strict liability principle is being challenged. This is primarily owing to the inconsistent application of 'exceptional circumstances defense' to reduce sanctions. Although the presence of this exception is desirable, but frequent application of this idea in disputes is undermining the notion of strict liability for curbing doping in sports. On one hand, it appears that the defense is invoked quite readily in situations where it should have not been granted and on the other, it has been subject to strict interpretation, thereby violating rights of athletes and creating unrealistic expectations among competitors.

The arbitration panel in *Mariano Puerta v. ITF*⁴² stated that the problem with a 'one size fits all' solution is that there entail scenarios wherein it might be discriminatory and in this remorseless war against doping in sports, there may be occasional innocent victims.

The reality of the strict liability standard in practice can be lost when discussing lofty concepts such as proportionality and fundamental rights.⁴³ Any strict liability standard will invariably capture instances with low levels of culpability, so presenting cases will cover the following discussion on athletes' rights. The issue of proportionality rests on a characterization of the offense and the effect of the sanction relative to the objective of the regulation; presenting cases that cannot be characterized as instances of cheating will be useful in assessing how well international courts have accounted for accidental violations.⁴⁴ Cases often arise from unknowingly ingesting contaminated supplements and medications.⁴⁵ Other cases bring

⁴² *Mariano Puerta v. ITF*, CAS Award No. A/1025 (2006).

⁴³ Houben Jannica, *Proportionality in the World Anti-Doping Code: Is There Enough Room for Flexibility?* THE INTERNATIONAL SPORTS L. J. No. 1-2 (2007) http://www.wada-ama.org/rtecontent/document/Legal_Opinion_Conformity_10_6_complete_document.pdf.

⁴⁴ Matthew Hard, *Caught in the Net: Rights of Athletes and the World Anti-Doping Agency*, 19 SOUTHERN CALIFORNIA INTERDISCIPLINARY L. J., 533 (2010).

⁴⁵ Arbitration CAS 2002/A/376 Baxter/International Olympic Committee (IOC), award of 15 October 2002.

into question the bureaucratic shortcomings of anti-doping and how this risk is placed wholly on athletes. In cases as unsettling as these, one cannot help but wonder how a non-governmental organization can disqualify and suspend an athlete for such trivial violations.

5. NEED FOR STRICT LIABILITY PRINCIPLE IN SPORTS?

It has been stated at numerous occasions that doping practices have at all times been contrary to the fundamental principles of ethics in sport.⁴⁶ It artificially amends the physical conditions of athletes who claim to evaluate their natural differences of performance against each other. Doping is an issue, which is able to change fair competition into a spectacle for the mere amusement of the spectator.

For an effective anti-doping regime to exist, there must be a legal principle that allows that regime to efficiently operate and punish athletes that engage in prohibited conduct. Adherence to a negligence standard would likely prove unworkable for anti-doping officials.⁴⁷ A merit of the strict liability principle lies in not the actual application of the principle but the lacuna which it otherwise fills up. It is argued that in the absence of such a principle, the burden of proving the use of dope in the athletes would go up. The panel in *USA Shooting & Quingley v. UIT*,⁴⁸ while upholding the strict liability principle clearly stated that a requirement of intent for consumption of prohibited substances would invite costly litigation and an overwhelming burden of proof on sporting federations, which may cripple their efforts to fight doping in sport. Acknowledging that this principle might be unfair in individual cases, the CAS stated, however, that in the vicissitudes of fair

⁴⁶ Communication of the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - Plan for the Community contribution to the fight against doping in sport - Statement by Ms Reding in consultation with Mr Byrne at 3.

⁴⁷ Brent Hadley, *Doping and Sport: Guilty and Never proven Innocent*, Embry-Riddle Aeronautical University (2007), <http://www.lunarpoodle.com/dopingandsport.pdf>.

⁴⁸ CAS 94/129, *USA Shooting & Quigley v. UIT*, award of May 23, 1995.

competition such acts cannot go unpunished under law, even though accidental in nature.

The broad rationale for the WADA and the Code is (1) to ensure a level playing field, (2) to ensure the protection of the athletes' health, (3) to ensure the social and economic standing of the sport, and (4) to provide role models.⁴⁹ The WADA draws on the Olympic Charter to delineate the spirit of sports: Ethics, fair play and honesty, health, excellence in performance, character and education, fun and joy, teamwork, dedication and commitment, respect for rules and laws, respect for self and other participants, courage, and community and solidarity.⁵⁰ The spirit of sport element rests on three premises: that (1) there exists a trans-historical entity of 'sport'; (2) which rests on a fair and level playing field; and (3) embodies "healthy, ennobling, and virile activity."⁵¹

The most appropriate justification for banning Performance Enhancement Drugs for competitive reasons is their ability to transform the nature of competition by reducing the challenge of the game to an unacceptable extent.⁵² These innovations reflect firmness and fairness which the Code ought to promote in a bid to strengthen the fight against doping in sports.⁵³

6. CRITIQUE OF PRINCIPLE OF STRICT LIABILITY

a) Inadvertent Occurrences

Critics of the application of the principle of strict liability to cases of doping argue that such a presumption could lead to unfair results for the athletes,

⁴⁹ Gabrielle Kaufman-Kohler & Antonio Rigozzi, *Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes*, (Nov. 13, 2007), http://www.wada-ama.org/rtecontent/document/Legal_Opinion_Conformity_10_6_complete_document.pdf.

⁵⁰ *Supra* note 44.

⁵¹ *Id.*

⁵² Thomas Cox, *The International War Against Doping*, VANDERBILT JOURNAL OF TRANSNATIONAL LAW (2014).

⁵³ World Anti-Doping Agency, *Q&A: World Anti-Doping Code Review: Consultation Process & Major Envisaged Changes*, http://www.wada-ama.org/rtecontent/document/QA_Code_Consultation_En.pdf.

wherein the athletes were subject to inadvertent doping and had no intention to increase or enhance their performance. Therefore, a positive result may not highlight the fault of the athlete. Instances where such a scenario could occur include acting on the advice of the team doctor, an error made by the prescription dispenser or a pharmacist, a reasonable belief that the item in question was in fact not prohibited, and in extreme cases, athletes could become easy targets for being 'set up', meaning that interested parties could spike the food or drinks of the athlete, leading to inadvertent consumption without any knowledge. Thus such a principle makes it easy for the athletes to become sitting ducks, targets for third parties, who could plant one instance of a prohibited substance to tarnish the record, pasts and future of an athlete.⁵⁴

b) Procedural Issues

The idea of due process is absent in anti-doping hearings where procedural rights are not respected in the name of expediency, convenience and without the real consent of working athletes.⁵⁵ Working athletes will lose their livelihood if they do not consent to anti-doping rules and therefore, the consent is 'non-voluntary'. Likewise, the consequence for working athletes of imposed sanctions and public shaming can be a loss of their livelihood. In its quest for reducing doping tendencies among athletes, such a regime qualifies as an unreasonable restraint on trade for earning a livelihood, besides being an invasion of their rights of privacy.⁵⁶

Also, athletes can expect little relief from their respective domestic courts if the established arbitration process proves inadequate. There are few appeals an athlete can make to a domestic authority, so the checks on doping law

⁵⁴ *Supra* note 12.

⁵⁵ *Supra* note 49.

⁵⁶ JAN WILLEM SOEK, *THE STRICT LIABILITY PRINCIPLE AND THE HUMAN RIGHTS OF ATHLETES IN DOPING CASES* (2006).

remain with the international athletic organizations and challenges under international law.⁵⁷

Strict liability within the anti-doping framework assumes that scientific testing for prohibited substances is effective. A false positive from these new tests could have severely damaging consequences to anti-doping programs, presenting somewhat of a paradox to anti-doping authorities.⁵⁸ Without tests that can actually detect doping, the strict liability principle has no use. Conversely, unreliable tests that detect cheaters but produce false positives will undermine the use of strict liability and weaken the current regulatory system.

c) Impossible Standards

Of all the arguments against doping that have been put forward, the argument that the use of doping substances endangers the user's health is used the most. The majority of international federations concentrate on safeguarding the mental and physical health of athletes in their particular branches of sports. Recent scandals involving clenbuterol in the foods in China and Mexico highlight the difficulties that athletes face in ensuring that "no prohibited substances enter his or her body". It is simply impossible to expect that athletes are able to control every step of the food and pharmaceutical processing chain.⁵⁹ The case of Ryan Napoleon, an Australian swimmer, who was sanctioned for taking an asthma medication that was wrongly labeled by a pharmacist is another recent example.

The use of dietary supplements by athletes is a concern because in most countries manufacturing and labeling of supplements may not follow strict rules, which may lead to circumstances where a supplement containing an

⁵⁷ Matthew Hard, *Caught in the Net: Rights of Athletes and the World Anti-Doping Agency*, 19 SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL, 533 (2010).

⁵⁸ *Id.*

⁵⁹ *Supra* note 14.

undeclared substance that is prohibited under anti-doping regulations.⁶⁰ However, the WADA's stand on supplements is clear – taking poorly labeled dietary supplements is not an adequate defense in a doping hearing. Athletes are required to be fully aware of the dangers of potential contamination of supplements and of the significant effect of the principle of strict liability. Since the WADA does not engage in the preparation of any commercial materials, the testing of dietary or nutritional supplements is not conducted prior to its use by athletes.

d) Other criticisms

The strict liability principle has been criticized for ruining the careers of many athletes, who were not necessarily maliciously involved in doping. The principle creates a power imbalance between WADA and athletes, by automatically creating a negative presumption upon the latter. An alternative suggested by *Blumenthal* seeks to shift the burden from the athletes, by allowing pharmaceutical experts to testify in cases to clarify the probability that a doping violation was committed with the intent to enhance the athlete's performance.⁶¹

Perhaps beyond the purview of the Code review, athletes need to have a voice in the drafting of the 'prohibited substances' list, which will create awareness regarding such substances and prevent liability from sanctions.⁶²

It is important to note that athlete support personnel, including doctors, coaches and support staff, are also subjected to anti-doping policies and can be sanctioned if they are involved in any anti-doping rule violation. When

⁶⁰ Paul Horvath, *Anti-Doping and Human Rights In Sport: The Case Of The AFL And The WADA Code*, 32(2) MONASH UNIVERSITY L. REV. (2006), <http://www.austlii.edu.au/au/journals/MonashULawRw/2006/16.pdf>.

⁶¹ *Supra* note 49.

⁶² *Palmer and Hoffman, WADA Code Review, 2012*, EU COMMISSION, http://www.wadama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/WADA-Code-Review-2015-1st-Consultation-Part-1-Article-06-Analysis%20of%20Samples.pdf.

practically applied, it is not an adequate defense to state that the athlete placed complete trust in the physician and/or coach.⁶³

As a coach, it is his duty to remind athletes to take complete responsibility prior to ingesting or using any substance, even if done unintentionally. They must encourage positive athlete values and behavior to foster anti-doping attitudes. Further, medical personnel must be aware of their obligations towards sportsmen and not use prohibited methods or substances merely for gaining fitness or added advantage over other athletes.

It is however, often groused that a principle like the strict liability, which has application in civil law should not be made applicable to the domain of privately regulated activities. The Court of Arbitration for Sports has recognized that this is a clear transportation of civil (tort) law concept of strict liability.⁶⁴ Authors have also held that the remedies by the private contractual law, even though finding wide application in the doping law, are more likely than not 'fall wide off the mark'.⁶⁵

7. INCONSISTENCY IN THE APPLICATION OF THE WADA CODE

Although the Code is supposed to be applied uniformly, there is large deviation which occurs in the execution of the code, enforcement is largely the responsibility of the International Federations and the National Anti-Doping Organizations. However, each organization is responsible for testing the athletes at the competition it holds, the example being that IOC is supposed to test the athletes in the Olympic competition. It is therefore, a task for the Court of Arbitration of Sports and the WADA body to bring in uniformity and conformity with the WADA code.

⁶³ Torri Edwards v. IAAF, CAS/OG/003 (2004).

⁶⁴ CAS Award Number 98/222 (1999-08-09).

⁶⁵ JANWILLEM SOEK, THE STRICT LIABILITY PRINCIPLE AND THE HUMAN RIGHTS OF ATHLETES IN DOPING CASES 220 (2006).

In this two cases will be examined which will bring to light some of the inconsistencies which arose on the implementation of the WADA Code. The first case is concerned with that of Alberto Contador, a Spanish cyclist who was one of the few athletes to win the 'grand tours' of France, Italy and Spain. During the 2010 Tour de France, he however tested positive for Clenbuterol, which was a substance which could be used as a fat-metabolizing agent.⁶⁶ Contador did not deny the positive finding but attributed it to the consumption of contaminated meat.⁶⁷ Clenbuterol presence is completely prohibited by the WADC and does not have a limit to which it can be tolerated, therefore Contador was provisionally suspended by the Spanish Cycling Federation (RFEC). The RFEC concluded in the course of the hearing that Contador had committed a doping violation but that he had no fault or negligence, which meant a one year suspension as well as stripping him of the Tour de France title.⁶⁸ This was in contrast to the WADC penalty, which would mean stripping him off his Tour de France title along with a two year suspension. Contador decided to fight the RFEC accusations and was successful in proving that the meat had indeed contained the substance and that Contador was without fault or negligence. This was because he had been successful in proving the source of the contaminated meat. Thus, the disqualification which was provided under the code was ignored by the REFC.

This did not go well with WADA which decided to appeal the decision citing that Contador had not met his burden of proof. The CAS's gave a decision which was opposite to the one given by the REFC, holding that Contador had not sufficiently proved that contaminated meat was more likely than other sources from which the clenbuterol could have originated.⁶⁹ This is because

⁶⁶ Gordon S. Lynch, *Beta-2 Agonists*, in PERFORMANCE ENHANCING SUBSTANCES IN SPORT AND EXERCISE 47, 51 (Michael S. Bahrke & Charles E. Yesalis eds., 2002).

⁶⁷ Juliet Macur, *2nd Failed Test Puts Heat on Contador*, N.Y. TIMES (Oct. 4, 2010), <http://www.nytimes.com/2010/10/05/sports/cycling/05cycling.html>.

⁶⁸ Contador, Case No. 2011/A/2384.

⁶⁹ *Id.* ¶ 512, at 92-93.

clenbuterol was banned for use on the livestock in Europe and the contaminated cases were rare and too far in between. Moreover, evidence related to the fact that the supplier of the beef had indeed fed the cattle with clenbuterol was hard to prove. Consequently, the Spanish cyclist was stripped of his title and became ineligible for the standard two-year period associated with the first time doping offense.

Another case is that of Dwain Chambers, who was handed over a lifetime ban from representing Britain in the Olympics by the British Olympic Association (BOA), which had in place a by-law which prohibited any athlete with a doping record to represent Great Britain in the Olympics.⁷⁰ This BOA regulation was in *pari materia* with an *apriori* rule of the IOC which mandated a lifetime ban from the Olympics for any athlete convicted of doping; which had been struck down by the CAS, for levying a harsher fine than that prescribed under the WADC.⁷¹ Chambers had been a British sprinter who had clocked in the fastest time in the 100 meter dash at Sydney for a European, but was implicated in the Bay Area Laboratory Cooperative scandal where he was tested positive for a designer steroid. According to the erstwhile IOC rule and the BOA bylaw, Chamber was banned from the Olympic for life.

Prime facie, it seemed like the BOA by-law clearly was in violation of the WADC, which mandated a two year suspension. In stark contrast to the Contador case, the BOA had enacted a more stringent punishment to protect only clean athletes from competing in Olympics. In light of the WADC, and the overturning of the IOC rule, it seems unlikely that the BOA's bylaw would be upheld, which is why the CAS held that the bylaw, effectively was a double sanction and that it could not preempt the uniformly adopted WADA code for meting out punishments.⁷² Therefore, we can see that substantive changes

⁷⁰ British Olympic Association (BOA), Case No. 2011/ A/2658.

⁷¹ United States Olympic Comm. v. Int'l Olympic Comm., Case No. 2011/O/2422, ¶ 8.37, at 32 (CAS 2011).

⁷² British Olympic Ass. (BOA), Case No. 2011/A/2658.

implemented by the governing body which counteracted the purposes of the WADA and CAS to have a uniform approach and system.

8. THE FUTURE OF ANTI-DOPING: CLARITY, TRUST AND CERTAINTY

The legitimacy of a sport's anti-doping isn't a dichotomous issue, with a clear villain and a winner; rather it is a grey aspect, which can have damaging consequences to the sport itself.⁷³ Trust is crucial for the smooth functioning of any sport and in this regard the efficacy of a doping mechanism depends both on the ability of administrators to run the system in a just and fair manner; and on the athletes to maintain their level of integrity and the faith their fans place in them. In addition to trust, there should also be a need for clarity, consistency and certainty in the rules.

a) Sports bodies practice what they preach

Sporting bodies should ensure that the rules that they promulgate in the best intentions of the sport are duly followed by them and not besmirched by vested interests. Abiding the rules not only results in greater consistency in the system but rather ensures people's trust in the system that the authorities orchestrate. Ambiguity in the anti-doping mechanism came to light, when in August 2005, accusations were levied at the seven-time Tour de France champion Lance Armstrong. A French newspaper published a story about the research performed on Armstrong's urine sample from seven years; although the data suggested that Armstrong had taken EPO, there was no indication that proper chain-of-custody procedures were followed, that there was proper specimen storage and handling or a B-sample was permitted that would ensure Armstrong the retesting rights that any accused would normally have. Instead of denouncing the newspaper's tactics as untenable and assigning fault to the laboratory with regard to its breach of anonymity, WADA's Chairman, Richard Pound implied support for the

newspaper's accusations which other notable sport organizations, namely USA Cycling described as 'completely without credibility'.⁷⁴ The International Cycling Union (UCI) also condemned WADA for not ensuring that its own guidelines should be followed. Such a failure of an anti-doping organization's leadership to validate its own regulations cannot be repeated if the organization strives to promote trust and legitimacy in the system.

b) Ensuring clarity and consistency

The onus lies on the authorities to oversee that anti-doping law is not a source of ambiguity and instead is impartial and based on the principle of *nullum crimen sine lege certa*.⁷⁵

Similar to most arbitration panels, CAS is not bound by prior arbitration precedents nor is it obliged to follow the principle of *stare decisis*. However, in the past decade there has been a certain consensus in the CAS panel to follow the precedents of previous tribunals except when there is strong reason to not do so in the interest of justice;⁷⁶ this body of case law has been referred by many as *lex sportiva*.⁷⁷ While this recent inclination of CAS to rely on precedents has furthered the cause of consistency and clarity of anti-doping rules, disagreements among CAS panels still occur. To improve the predictability of anti-doping laws, simple advisory opinions can be formulated to help guide athletes and arbitration panels along with developing a 'supreme' panel to conclusively resolve such contentions.

CAS must continue in its endeavour to maintain the clarity of anti-doping rules and consistency in their application so that an athlete who is already

⁷³ *Supra* note 9.

⁷⁴ USA Cycling Strongly Backs Armstrong, ASSOCIATED PRESS (Aug. 27, 2005) available at <http://msnbc.msn.com/id/9050722/>.

⁷⁵ Aanes v. FILA, CAS 2001/A/317, Award of 9 July 2001, Digest of CAS Awards III.

⁷⁶ A.C. v. FINA, CAS 96/149, Award of 13 March 1997.

⁷⁷ Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sport Disputes*, 35 VAL. U. L. REV. 379 (2001).

burdened by strict liability principle doesn't get further aggrieved. Without this trust, the outcomes of doping cases will be blanketed in doubt and the integrity of the sport as a whole will suffer.

9. STRICT LIABILITY FOR THE CLUBS IN CASES OF 'ILLICIT CHANTS'

The paper tracing the principle of strict liability and its relations with doping cases would also like to mention some other instances of the application of strict liability to other facets of sports. Chanting by fans is common in most of the arenas where sports are played live or in the stadium in front of audience. Usually instances are seen where the team which is playing at 'home' (meaning at the stadium/city/country) where they are based have the confidence of the crowds. This is not exhaustive though, a team can enjoy the crowd support even in third party neutral venues, and this is seen as an integral part of the sports culture. It is not of surprise then that some venues have earned the reputation for being host to notorious fan bases, Turkish club Galatasaray SK's former home stadium, the Ali Sami Yen in Istanbul has earned the sobriquet 'Hell', because of the atmosphere it has in the past.⁷⁸ In this scenario, it is although true that chanting by fans has its own merits of making the sport more competitive, racial chanting, violence by fans, threats to players and managers are posing new questions about the depth to which such standards can stoop.

In 2011, UEFA (Union of European Football Associations), fined the Scottish football club Celtic FC for indulging in pro-IRA (Irish Republican Army) chants by its fans in the match against French club Stade Rennais.⁷⁹ The Scottish club was found culpable under the strict liability approach of the UEFA where the clubs are liable for the conducts of the players, officials, members, supporters and any other persons exercising a function at a match

⁷⁸ Roshan Gopalakrishna, 'Illicit Chanting' and Strict Liability, (Apr. 27, 2012) *available at* <http://lawnk.wordpress.com/2012/04/27/illicit-chanting-and-strict-liability/>.

⁷⁹ *Id.*

on behalf of the members association or club.⁸⁰ This responsibility was present as UEFA's rules outlaw the "*use of gestures, words, objects or any other means to transmit any message that is not fit for a sports event, in particular if it is of a political, offensive or provocative nature.*"⁸¹ The UEFA statute, thus empowers it to implement any measure appropriate to fulfil its objective, in spite of the fact that there is no definition of 'illicit chanting' anywhere in the UEFA rules. Thus, the Scottish club had to bear strict liability for the actions of their supporters, even though the club itself was not at fault. This is to be contrasted with the fact that in 2006 UEFA had stated that pro-IRA chants were actually a nationalist issue, similar to Basques and Catalans in Spain and were therefore not prohibited.⁸²

In a similar case in PSV Eindhoven v. UEFA,⁸³ the Dutch club PSV was fined and given a severe warning for racist behaviour by their fans during a Champions League match against Arsenal in 2002. The same club PSV had been found in breach previously for failing to prevent behaviour by its fans, the club PSV went on to challenge the strict liability which was upheld by the CAS, although it held that the club had not infringed any rule as it had made adequate security arrangements.

Feyenoord Rotterdam v. UEFA,⁸⁴ addressed the issue of the consequences of strict liability when the supporters of the club are not officially recognised to be so. Feyenoord fans resorted to violence against the French club Nancy and within the stadium. Feyenoord claimed that the fans in questions were not official supporters as they were not given tickets through the official channels of the club, were not transported to the stadium by the club, or could not be identified from their looks as fans of Feyenoord. The CAS

⁸⁰ Article 6 of the UEFA Disciplinary Proceedings.

⁸¹ UEFA's rule under Article 11.2 (e).

⁸² *Supra* note 78.

⁸³ CAS Award Number 2002/A/423.

⁸⁴ CAS Award Number 2007/A/1217.

aligned with UEFA in holding that supporter was an undefined term, the reasonable and objective observer should be able to determine who is a supporter of the club.⁸⁵

In another case, a lapse of the security personnel to adequately screen spectators, which led to racist and discriminatory behaviour by its fans during a UEFA league match was attributed to the club Athletic Madrid.⁸⁶

It is therefore not surprising that after the 2010-11 Season the Scottish Premier League enacted the Offensive Behaviour at Football and Threatening Communications (Scotland) Act, 2012 to address sectarianism and offensive behaviour in the sport. This would give additional tools to the police and the prosecutor to crack down on sectarian songs and abuse during football matches and the internet. As stated the Act will only criminalize behaviour likely to lead to public disorder which expresses or incites hatred, is threatening or is otherwise offensive to a reasonable person. Many other governing bodies of sports (like The ICC's Anti-Racism Code) have also adopted stringent measures to check racism in sports, it remains to be seen whether these policies also have the same underpinning of strict liability as is present in other codes like the UEFA.

10. STRICT LIABILITY AND MATCH FIXING

The highly controversial decision by the Court of Arbitration for Sports that dealt with the case of match fixing involving ten individual players and two clubs, namely the Metalist Kharkiv and Karpaty Lviv witnessed the application of principle of strict liability in an instance of match- fixing.⁸⁷

The facts of the instant case pertained to the match between the two clubs- Metalist and Karpaty that took place on 19th April, 2008 and witnessed a

⁸⁵ *Supra* note 78.

⁸⁶ Club Atletico de Madrid SAD v. UEFA, CAS Award Number 2008/A/1688.

⁸⁷ CAS Issues its decision in the case of FC Karpaty and FC Metalist, http://www.tas-cas.org/d2wfiles/document/6999/5048/0/Media20Release20_English_20Metalist.pdf.

score of 4-0 in favour of Metalist. The irregularities arising out of the match gave rise to a series of proceedings in Ukraine and Switzerland.⁸⁸ Karpaty, in spite of evidences of such fixing did not report this to the authorities, and merely used it in a dispute with the player concerning payment of his salary. The Football Federation of Ukraine, as a party to the dispute received the digital evidence which was used to institute charges of match-fixing between the clubs.

The Control and Disciplinary Committee (CDC) declared the match was fixed and several sanctions were levied as against the clubs, its officials and the concerned players. The CDC, furthermore, did not consider the Ukrainian defense of presumption. Match fixing was held to constitute wider infractions than bribery that was indictable under Ukrainian law. The Appeal Committee, confirming the decision, changed and reduced the sanctions imposed by CDC.⁸⁹ Upon further appeal by the clubs to the CAS, match-fixing was confirmed and the tribunal applied the principle of strict liability upon the clubs, the officials and the players for the conduct of the individual players.

This decision was consequential in the UEFA Champions League that had a policy barring the admission of clubs involved directly or indirectly in instances of match fixing. Pursuant to the CAS decision, FC Metalist was barred from UEFA competitions. An appeal to this decision was overturned by the Deputy President of the Appeals Arbitration Division and the UEFA decision was upheld. Though the decision before the Swiss Supreme Court is pending, the UEFA clearly upheld the CAS decision of holding the club liable for the individual acts of players.⁹⁰

⁸⁸ Olena Perepelynska, *CAS Confirmed Strict Liability Principle in Match-Fixing*, available at http://cisarbitration.com/2013/08/26/cas-confirmed-strict-liability-principle-in-match-fixing/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=inter-article-link.

⁸⁹ *Id.*

Hence, the application of this principle of strict liability has been witnessed in cases against match-fixing that held clubs liable for the acts of its individual players indulging in match fixing since such illegal acts may have serious consequences in the arena of organized sport.

11. CONCLUDING REMARKS

The application of strict liability in the war against doping has been with its costs, it has burdened international athletes for the sake of preserving competition in the international arena. Cleansing sports of performance-enhancing drugs is an uphill task with inherent complexities and competing justices. Such a virtuous task often entails sacrifices and it should be the duty of the people in charge to assure that these sacrifices are reduced to the fullest extent possible.

The blanket submission to the code, is not without complications, there are plenty of genuine reasons for the athletes to have some defense to their side, to plead non-guilty to doping. The very lists that defines what substances are considered for the purposes of the WADA code, needs revision too, to be better updated and allowing to exclude other cases of supplements, and other substances found in common medication. It is, therefore, particularly burden on for athletes who might not have unequal bargaining power against international bodies like the WADA. Therefore, till this balance of power is restored to a stage of equilibrium, such an application will continue to see more innocent victims for the larger picture of preserving integrity by the athletes.

However, in application of this very principle, in cases of illicit chanting by the fans or match fixing different results can be witnessed. This is because if team has an official fan base, who they facilitate in the procurement of tickets, transportation and encourage to actively cheer for the aforesaid team, the team should be held strictly liable for any messages which can be

transmitted orally or otherwise which are offensive or provocative. It would only seem fair, that the other team should not be allowed to suffer in terms of lost confidence, or moral, especially in cases where the other team is playing in a 'away from home' venue.

Similarly, in cases of match fixing, in today's changing world, where the upper echelons of the sports teams managements are decision makers and are privy to the information which is being exchanged between the athletes and bookies, the application of the strict liability principle seems just and fair. Indeed if one peruses the Indian Premier League scandals which rocked the country recently– Rajasthan Royal's team owners Raj Kundra was also alleged to be involved in the same⁹¹, and in another instance Chennai Super Kings (CSK) Team Principal and BCCI president N. Sreenivasan's son-in-law Gurunath Meiyappan was involved with the bookies, after which team CSK immediately disowned him for fear of termination of the franchisee from the league⁹² – do more to dent the image of sports in the country and belittle the confidence of the fans.

For sports to exist as we know, ensuring vigilance remains paramount otherwise the modern day sports industry will become a commercialized product, bereft of fairness, and competitive spirit and strict liability will indeed play a vital role in that part.

⁹¹ IPL 7: Rajasthan Royals Trying to Recover After Spot-Fixing Scandal, PRESS TRUST OF INDIA, NDTV.COM, (May 7, 2014) available at <http://sports.ndtv.com/indian-premier-league-2014/news/223910-ipl-7-rajasthan-royals-trying-to-recover-after-spot-fixing-scandal>.

⁹² Alok Deshpande, *CSK's Meiyappan arrested*, THE HINDU, (May 25, 2014) available at <http://www.thehindu.com/todays-paper/csks-meiyappan-arrested/article4748705.ece>.