

# ‘Strict Liability’ and Legal Rights: Nutritional Supplements, ‘Intent’ and ‘Risk’ in the Parallel World of WADA

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Much of the discussion about the legal relationship between athletes and anti-doping regimes has focussed on the application of what is invariably, although somewhat loosely, referred to as the ‘strict liability principle’, and this paper is concerned with the application of this principle in the context of nutritional supplement use (for more general discussion of its application see Charlish, 2012; Anderson, 2013). The principle’s significance lie in the fact that domestic courts worldwide (for example those of England and Wales in *Korda v ITF*, The Times 4 February 1999), the Court of Justice of the European Union (*Meca-Medina v Commission* [2006] 5 CMLR 18) and the Court of Arbitration for Sport (*USA Shooting and Quigley v Union Internationale de Tir CAS 94/129*) have accepted that the relationship between an athlete and the governing body is contractual and that even if there is no written agreement between the parties, the existence of that contract can be discerned from the parties’ dealings with one another. As part of this contractual relationship, athletes are deemed to have accepted the provisions of the WADA Code, both in terms of the substantive provisions of what substances are banned and the sanctions that can be imposed for violation of the rules. The procedural provisions that deal with the conduct of anti-doping tribunals and the potential right of appeal to the CAS are also incorporated into this contract.

It is this contractual relationship which binds the athletes to the strict liability principle, for it is a fundamental tenet of the WADA Code and likewise forms part of the contract that athletes are deemed to ‘sign’ when they participate in a competition that is amenable to a WADA-mandated

testing regime. The strict liability principle means the athlete is responsible for any prohibited substance which is found in their sample and regardless of whether the athlete intentionally, carelessly or recklessly consumed that substance. Consequently, it is not necessary for the anti-doping authorities to establish any fault on the part of the athlete before an anti-doping violation can be deemed to have occurred: the mere fact that the substance is present in the athlete's sample is enough to attract a sanction.

While accepting that in all likelihood very severe sanctions will be imposed upon athletes who are not at fault for their anti-doping violation, both the CAS and the domestic courts have upheld the application of strict liability. In *USA Shooting and Quigley* the CAS did so on the ground that:

It is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations – particularly those run on modest budgets – in their fight against doping....The high objectives and practical necessities of the fight against doping amply justify the application of a strict liability standard

(paras 15, 16).

However, the potential unfairness to athletes that strict liability creates has been recognised in the field of anti-doping, and in consequence the principle has been significantly modified, to such an extent that it is no longer appropriate to speak of strict liability in the true sense. The WADA Code now provides that with both 'prohibited' substances and 'specified' substances, it is possible for athletes to avoid the full implications of strict liability and reduce what would normally be a mandatory sanction if strict liability principles were invoked. In respect of prohibited substances,

the full implications can be avoided if the athlete can first show, on the balance of probabilities, how the prohibited substance entered their system *and* can then go on to establish, to the comfortable satisfaction of the anti-doping panel, that they bore either i) no fault or negligence or ii) no *significant* fault or negligence for its presence. ‘No fault’ leads to the sanction being entirely eliminated, while ‘no significant fault’ leads to a considerable reduction but not its complete removal. With respect to specified substances, which are characterised as those where there might be a credible non-doping explanation for the substance’s presence, the period of ineligibility can be reduced or eliminated if the athlete can establish to the doping panel’s comfortable satisfaction i) how the substance got into their system, and ii) that there was no attempt to improve their sporting performance. Prohibited substances include steroids and human growth hormone, and because there is no credible non-doping explanation for their presence they cannot be ‘specified’.

The purpose of this paper is to show that, notwithstanding this ‘modified’ strict liability principle, the categorisation as ‘prohibited’ of certain substances that nutritional supplements may contain, and the way in which supplement-related violations have been dealt with by national anti-doping agencies and by the CAS, mean that even this ‘modified’ approach offers very little comfort to athletes who test positive as a consequence of using them. Almost every anti-doping violation at the Sochi 2014 Winter Olympics was ascribed to nutritional supplement use, supplement-related cases frequently arise before the CAS and domestic anti-doping tribunals and the degree of publicity that is now given to the risks associated with them means an athlete who chooses to use one and then commits an anti-doping violation (either because the athlete failed to ascertain the contents, or because the product had become contaminated during the production process) is not able to use lack of knowledge or absence of intent as a particularly strong defence. As a broad rule of thumb, an anti-doping violation inadvertently committed through use of a nutritional supplement

is currently likely to attract a sanction of between fifteen and eighteen months' ineligibility, assuming the panel accepts that the athlete had no intention to cheat by using the product they did.

### **Nutritional supplements, random tests and the unavoidable risk**

Prior to April 2009, the United Kingdom's Special Commissioners of Income Tax were responsible for hearing appeals against decisions taken by the UK Inland Revenue Service relating to people's taxation assessments. Pursuant to those powers, in February 2008 they handed down their judgment in *Emms v HMRC* [2008] WL 371110, which was an appeal in respect of the tax liabilities of a professional rugby union player and, specifically, whether he could offset the cost of his nutritional supplements against the tax monies he owed.

The tax payer in question, Simon Emms, was a rugby union prop forward, who played for Llanelli and later for Bath (historically, two of the strongest teams in the domestic game). Rather like that of a Special Commissioner of Taxation, his was a highly specialist position that would be beyond the skills of most ordinary people. The role of prop forward demands considerable weight and physical strength and requires its practitioners to undergo specialist training in order to cope with the unique risks and the physical demands of the position – particularly the risk of neck and spinal injuries which may occur as a result of collapsing scrums. Players who are not trained and are thus 'unqualified' as props are unable to play in that position and, at all levels of the game, this can result in referees ordering uncontested scrums and clubs forfeiting matches if they don't have enough players with the necessary skills and strength. Given the importance of his role in the team, it was not at all unusual that, while at Llanelli, Emms had been under a contractual obligation to 'undertake such training, whether on an individual basis or during club training sessions to achieve and maintain the fitness levels reasonably and properly required from time to time by the (club) fitness adviser.' Players who did not meet the fitness criteria were fined and subjected to a fitness

improvement programme. At Bath, his employment contract had gone a stage further: it contained a similar term, with the added proviso that the club could treat a player's 'failure to maintain the high standard of physical fitness' as an act of gross misconduct justifying instant dismissal.

The training regime and diet that Emms had agreed with his coaches required him to consume 4500 protein-laden calories a day, which is about 50% more than the recommended intake for a moderately-active man in his twenties. He was unable to reach those levels through his 'normal' food intake of three large meals a day and several daily snack breaks. Consequently he enhanced his diet through daily consumption of a nutritional supplement which contained the protein equivalent of two chicken breasts, and various multi-vitamins in addition. A dispute arose when his self-assessed tax returns for a three-year period asserted that the costs incurred for the purchase of additional foods and his nutritional supplements (totalling between £2500 and £3900 a year) were deductible from his earned income and were thus not liable for income tax. The tax authorities contended that the expenditure did not qualify as a deduction from earnings because it was not incurred 'exclusively and necessarily' in the performance of his employment duties as required under the Income Tax Act 1988, s. 198 and rejected his submission. Emms appealed to the Special Commissioners, but his appeal was unsuccessful.

In the course of that appeal, Emms had argued (at para 22) that 'all professional rugby union prop forwards incur expenditure on additional food, nutritional supplements and medicines to achieve the required level of fitness.' Although the Commissioners rejected his appeal, agreeing with the assessors that their use was not 'exclusive and necessary' in the way that (for example) work tools or safety equipment might be, his case and the earlier one of *Ansell v Brown* [2001] WL 535716 (which contained very similar issues of fact and law) help us explore the twin concepts of 'intent' and 'risk' in the context of the use of nutritional supplements. In neither *Emms* nor *Ansell* had the employer club explicitly required the player to use nutritional supplements as a term of the

employment contract, but the existence of a contractual term purportedly giving the employer the right to dismiss those who didn't reach agreed targets of weight and fitness indicates that, while in no way being encouraged to use prohibited substances, players were expected to use whatever means were necessary to get to where they needed to be; and, if not expressly then by implication, that would include using supplements. Their use has long been an accepted necessity in collision sports like both codes of rugby or American football, and even in disciplines where muscle bulk is not a pre-requisite their consumption appears to be an integral part of many participants' dietary regimes. The rapid rise in the number of supplement-related cases at the Court of Arbitration for Sport (CAS) is testimony to this, as is the fact that at the Sochi 2014 Olympics all but one of the reported positive tests apparently arose from supplement use (Alcolizer, 2014). Like Emms', those cases indicate that their use is not merely accepted, but an implicitly expected, aspect of the elite athlete's career obligations.

The testing authorities at Sochi invoked the mantra that anti-doping work is increasingly 'intelligence-led' rather than being an entirely random process; but Emms' case and the myriad supplement cases to be heard by CAS and domestic anti-doping tribunals in recent years show it does not take a great deal of 'intelligence' to work out that elite athletes are likely to use them. It is hard to envisage a softer target for an intelligence-led anti-doping agency than the publicly-available transcripts of a court judgment in which an elite athlete has acknowledged that those in his sphere of employment are regular and heavy users of nutritional supplements. Professional forwards use them in order to meet their contractual obligation, and employers certainly do not condemn their use. Thanks to the anti-doping courses they attend, athletes will have been made aware of the possibility of supplement contamination and the risk of violating their sport's anti-doping strictures as a consequence; but they use them with the intention of enhancing their performance, whether to meet the explicit obligations of an employment contract or to make them

more competitive on the field of play for the benefit of themselves and their team. Athletes who use supplements – like those who drink water, use painkillers or have diets created for them by a nutritionist – do so with the intention of enhancing their performance.

In *Ansell*, counsel for the player had said that the hearing was ‘a test case for those rugby players who incur expenditure on supplements which are necessary for them to achieve the fitness, size and physique required of the top-class players’. Given the current state of knowledge about the risks of supplement contamination and the provisions of the WADA Code, it is hard to believe that players now would be quite so open about their supplement use. And while it would be unwise to read too much into a handful of positive tests, the results from Sochi 2014 and the supplement-related decisions emanating from the CAS certainly do not indicate that their use by elite athletes is declining. The sheer volume of supplements freely available and the number of their potential contents on the WADA banned list likewise continues to increase. In the 2010 Commonwealth Games, Damola Osayemi (who won the women’s 100m hurdles) and another Nigerian sprinter, Samuel Okon, tested positive for methylhexaneamine, which had been added to the WADA banned list in 2009 (it was reclassified at the beginning of 2011 so that it could be used with a therapeutic use exemption certificate), but it has recently started appearing in nutritional supplements and is alternatively marketed as MHA, DMAA, Geranamine and Forthan. Two weeks after the Nigerians’ suspension it was reported that nine Australian athletes (including Commonwealth Games participants, rugby league players and Australian Rules footballers) had tested positive for the same substance (BBC, 2011). Over the following three years there were myriad other cases of positive tests for MHA being ascribed to nutritional supplement use, including three of those athletes who tested positive at the 2014 Winter Olympics (BBC, 2014).

The volume of cases of inadvertent doping through nutritional supplement use confirm that the risk associated with those products is genuine, and while Emms’ case is of little moment to

anyone other than UK tax lawyers now, it does show that athletes' use of supplements can be attributable to genuine workplace demands just as much as it can result from advice offered by other athletes or coaches, or from a unilateral decision on the part of the athlete. Whatever its background, every new case of supplement contamination renders increasingly untenable other athletes' contention that they did not know of the dangers; in WADA parlance, you were either aware of the risks or you should have been. The small number of supplement-related positive tests that have emerged from both codes of rugby is either a testament to the testing authorities' not pursuing such soft targets or is evidence that supplement contamination is not as widespread as many commentators and anti-doping educators fear. But even if the latter applies and the statistical risks can be overstated, Sochi 2014 shows that the ramifications of testing positive as a consequence of using contaminated supplements are grave. Perhaps the risks are statistically small, but if virtually every athlete in a particular discipline is using them, an unknowably small percentage will be consuming contaminated ones and, eventually, positive tests will occur. There is no such thing as a 'guaranteed safe' nutritional supplement. And there is no refuge to be found in the WADA Code, which has been drafted – and increasingly interpreted by the CAS and other doping tribunals – in a way that now makes it impossible for those who use contaminated supplements to avoid a very significant suspension because of the 'no fault' and 'no significant fault' provisions. If you use a nutritional supplement your 'intent' is to enhance your performance, and you either know – or can be reasonably expected to know – that there are 'risks' in doing so.

### **The 'risks' with nutritional supplements**

In 2006, the nutritional supplement industry was said to be worth over \$60 billion worldwide, and there is credible research suggesting that in some sporting disciplines their use is ubiquitous (while there are no figures to substantiate the point, it is not at all fanciful to suppose that 100% of



professional and elite amateur rugby union prop forwards use them). While some products indicate on their labels that they contain banned substances, anything that ‘promotes muscle growth’ should clearly be avoided, as should virtually everything ending in ‘ine’ others – including those freely available online or in high street supermarkets, sports goods shops, ‘health food’ stores and leisure centres – make no mention of the potential presence either of relatively well-known proscribed substances or of more obscure contaminants that are also banned. While a manufacturer can be expected to comply with domestic legal requirements on product labelling and content as best they can, it would be dangerous for them to definitively declare the absence of banned substances because they cannot say with certainty that their product has avoided any risk of contamination at the manufacturing stage. No sensible, professionally-advised, supplement manufacturer would ever advertise their product as ‘Guaranteed WADA Compliant’, not least because taking the steps necessary to guarantee its compliance would price the product out of the market - assuming it were even possible to do so.

The prohibited substances which can contaminate supplements but which might not appear on labels include ‘prohormones’ – special anabolic androgenic steroids – which are prohibited both in- and out-of-competition under the WADA Code but which can find their way into supplements during the manufacturing process without anyone knowing. This category includes the prohormones of nandrolone (norandrosterone) and testosterone, and since these are not ‘specified substances’ for the purposes of the WADA Code it is not open to an athlete to argue that there is a credible explanation for their positive test and that there was no performance-enhancing intent (WADA, 2009). Further, because some banned substances are not capable of being produced endogenously (i.e., the body cannot produce them naturally) there is no minimum ‘threshold’ as there is for those substances which the body does produce, such as nandrolone itself. Nandrolone is particularly notorious because there is credible evidence that one can test positive for it without having ingested

or injected it with a performance-enhancing intent (*Meca-Medina v Commission* [2006] 5 CMLR 18), in 1996 the IOC introduced a minimum ‘threshold’ below which the presence of nandrolone does not constitute a doping offence (Kohler and Lambert, 2002). But deliberately or inadvertently ingesting nandrolone can yield a positive test – i.e., a result above the IOC threshold - up to ten days after ingestion (Geyer, 2008).

In the absence of evidence that they had been sabotaged by a rival competitor (the burden of proof in that respect being on the athlete), those who test positive (including positive test for substances where levels are above any permitted threshold) can only hope to reduce the sanction by showing there was ‘no significant fault’ on their part rather than arguing ‘no fault’ on the ground that the substance had somehow manifested itself ‘naturally’. But the CAS awards confirm that because the risks of hormone and prohormone contamination of supplements are now so well-established and so well communicated to the athletes, they are probably always going to be deemed ‘significantly at fault’ if they choose to run the risks inherently associated with supplement use. If they implicitly or explicitly felt compelled to use them in order to meet the terms of an employment relationship, and if they were using them under the direct supervision and instruction of a team physician, then perhaps an employed athlete could hope to establish they were not ‘at fault’ or ‘significantly at fault’, and this appears to be a potential issue with a doping dispute involving Australian Football League (‘Aussie Rules’) club Essendon at the time of writing (Warner, 2014). But this would not apply in respect of a coach or physician who has been directly contracted by the athlete (the physician of a tennis player or a golfer for example), because in those circumstances the athletes would be deemed responsible for the actions of those they have allowed into their ‘inner circle’.

The concerns here do not arise from systematic, deliberate attempts on the part of unscrupulous manufacturers to mislead their customers, but from inadvertent contamination at the

production stage or the failure of athletes to read and understand what it says on the packaging. While, even in the absence of spurious claims as to WADA compliance, it might still be possible to argue that manufacturers have been negligent and breached the duty of care they owe to their customers or are otherwise liable under domestic product liability or labelling laws, no pecuniary remedy could ever compensate for the time away from competition and the career taint which inevitably follows a doping sanction. The concern is not one that can be obviated by scrupulous adherence to domestic food labelling regimes by the brand owners; it is of those involved in the manufacturing process either making other products using the same equipment without proper cleansing in between, or of the raw materials being adulterated, perhaps deliberately, by those who are involved still earlier in the preparation or transportation stages. The consumption of nutritional supplements thus contaminated is as capable of leading to a positive test (Geyer et al, 2004) as are situations where athletes either wilfully ignore what is stated on the label or simply do not take sufficient steps to establish that the name which is used on that label is another name for a product which is banned. For example, the WADA Code does not mention 'geranium', which is just a user-friendly name for methylhexanamine, and ingestion of a product carrying the former name is far more likely to occur than is reckless consumption of a product explicitly noted as containing the latter, or the product not being mentioned at all due to a deliberate subterfuge either by the company whose name appears on the label or by those otherwise involved in its manufacture. Further, the risks of athlete ignorance are not confined to athletes based in countries with a comparatively less robust regime of manufacturing standards and neither is there evidence that they hail from countries or disciplines with a less rigorous anti-doping regime. Similarly, there is no evidence that the risks are particularly acute with products purchased over the internet and which may be expected to have a particularly dubious provenance; substances purchased from 'reputable' manufacturers and outlets have far more frequently been the source of doping violations. Being located in a jurisdiction which

has a comparatively extensive regulatory framework does not provide an athlete with any reason to believe that their chosen supplement will be WADA compliant; food safety law is not at all concerned with the strictures of the WADA Code, and compliance with the former should not lead to any sense of security in respect of the latter.

By way of example, in the United States the Dietary Supplement Health and Education Act 1994 legalised the over-the-counter and internet sale of various androgenic steroids which are now prohibited or restricted under the WADA Code. In effect, the Act allowed steroids to be marketed as nutritional supplements so long as they did not claim to detect, prevent, or cure disease, and so long as those restrictions were adhered to they would escape the US food and drug Regulations which applied to those substances which supposedly had medicinal properties. Although the perceived regulatory gap which ostensibly made the purchase of steroids too easy was subsequently filled by the Anabolic Steroid Act 2004 (there are similar provisions in many other jurisdictions), several studies into the continued mislabelling of nutritional supplement products had been carried out prior to that legislation coming into force. Those studies indicated that, whether by accident or design, manufacturers often failed to mention that their products contained steroids, declared them under unapproved names, or inaccurately indicated the concentrations of those products (Green et al., 2001). Despite the new regulatory frameworks which have emerged in the US and other jurisdictions over the past decade, there is still a clear potential for athletes to fail WADA-mandated tests because of contaminated nutritional or weight-loss supplements (Young, 2014) or their own failures to carry out appropriate checks. While mislabelling/no-labelling may amount to a violation of domestic laws and might provide a civil remedy of sorts for an athlete who fails a test as a consequence of using them (perhaps in the form of damages or compensation for loss of product endorsement or other revenue), any such remedy will provide limited comfort.

Much of the relevant scientific research is rather dated now, but it appears that difficulties continue to arise notwithstanding the application of legislative frameworks to the supplement industry. And while there is a perception of particular problems with products manufactured in China, Cyprus and other jurisdictions with a comparatively limited regulatory framework – and which are, of course, freely available to purchase over the internet – the problems have never been exclusive to those jurisdictions where there is less regulation of the manufacturing and sales processes (Geyer, et al, 2004; 2008). Van der Merwe and Grobbelaar (2005) indicated that 7% of products then available in South Africa were either mislabelled or contaminated with prohibited substances, while in 2001 an IOC study of 634 nutritional supplements available in 13 countries suggested 15% contained prohormones which were not listed on the product label. Perhaps more extensive domestic regulation and a wider understanding of the risks will result in fewer positive tests, but athletes who fail tests as a consequence of using nutritional supplements do not inevitably come from those countries where there is a less rigorous internal regulatory regime.

### **Nutritional supplements and the WADA Code: the impossibility of exoneration**

While there may be potential, if rather limited, remedies available under domestic laws, athletes who test positive as a consequence of nutritional supplement use will be far more interested in what Article 10.4 and 10.5 of the WADA Code have to offer. The former provides that where an athlete can show how a ‘specified substance’ entered their body *and* can show there was no intent to either enhance their performance or to mask the use of a performance-enhancing substance, their sanction can be reduced to whatever level the tribunal considers appropriate. A ‘specified substance’ is not one which is deemed ‘less serious’ by definition; rather, it is one where there is the possibility that a credible non-doping explanation for its presence can be proffered. If the tribunal does not accept the explanation, the four-year sanction for which the 2015 Code makes provision will normally apply.

Article 10.5 provides that an athlete can be entirely exonerated if they can show there was ‘no fault or negligence’ on their part or, alternatively, they can elicit a reduction to no less than one-half of the sanction that would otherwise be applicable if they can show ‘no significant fault or negligence’; put another way, an athlete who falls into the latter of the Article 10.5 categories is still destined to serve a ban of at least two years. Only a finding of ‘no fault or negligence’ carries the possibility of an athlete resuming their career without any penalty at all. The difficulty of securing this particular Holy Grail is explored in *WADA v West* below, which indicates that it might only be achievable if one can show (for instance) sabotage by a rival. Sabotage by a coach, physician or spouse will not suffice because athletes are responsible for those to whom they allow access to their food and drink. Perhaps the most celebrated victim of the nutritional supplement provisions is Alberto Contador, whose positive test for Clenbuterol was said by CAS to be most likely due to supplement contamination rather than from a blood transfusion or contaminated meat products, or as a result of deliberate ingestion by the athlete (*UCI v Alberto Contador Velasco CAS* 2011/A/2384). This was despite the fact that clean test certificates had been produced for samples of each supplement he acknowledged he had used in an effort to refute any contention that he had been at fault in his use of those supplements – in the eyes of the CAS, the fact that the athlete had chosen to use a supplement removed any possibility of a finding that there had been no fault at all.

### **Key Cases: Wallader and Hardy**

While Contador’s experience has commanded infinitely more attention, the experiences of Rachel Wallader (*UKAD v Wallader* 29 October 2010) are more likely to strike a chord with most athletes who are likely to fall foul of anti-doping regimes. Wallader, a 21 year-old student, was banned for one year in October 2010 after she tested positive for methylhexanamine (MHA). Her ban was reduced on appeal to four months after UKAD accepted that she had taken that substance

inadvertently in a nutritional supplement – but the publicity given to supplement-related cases since that time means it is inconceivable that an athlete would receive such comparatively lenient treatment now. She had listed the supplement she was using on her anti-doping form and had fully co-operated throughout the disciplinary procedure. The UK Anti-Doping Panel had accepted that she had been at fault, but found there had been no significant fault and it was therefore appropriate to impose a one-year ban (the minimum which could be imposed under Article 10.5 of the WADA Code) rather than the two-year ban which (prior to the 2015 amendments) ordinarily applied in respect of non-specified substances such as MHA.

Wallader had argued that, as a full-time student balancing study, training and travel to competitions, she had needed to use supplements to boost her dietary intake; her coach, Geoff Capes, had obtained sponsorship from the manufacturers (under which they provided free sachets of ‘Endure’, one of their supplements, to his athletes). Capes testified that ‘he discussed the ingredients with the supplier, which is a responsible and reputable firm, and received a clear assurance that they were all legal’ (para 21) and in 2009 Wallader, (who had received a box of six sachets) carried out her own checks of the listed contents against the WADA Prohibited List then in force (WADA, 2011) and referred to UK Sport’s resources and those of the IAAF. The issue of whether the contents were ‘legal’ rather misses the point – the concern was whether the supplements accorded with the WADA Code, not with the UK’s drug misuse legislation – and in that respect Wallader’s difficulty was that both of the resources she referred to clearly warned of the dangers posed by nutritional supplements. Although in its ruling the Panel confirmed that ‘the ingredient 1,3-dimethylamylamine, which is listed as an ingredient on the box packaging on Endure, is a synonym for MHA’ (*UKAD v Wallader*, para 30) it also stated that when Wallader started to use the supplements

neither 1,3-dimethylamylamine, nor MHA, was listed as a prohibited stimulant under Section S6(a) of the WADA Code. These are specified substances in the 2014 Prohibited List (WADA, 2014), but it would have required some medical knowledge to discover that 1,3-dimethylamylamine was a stimulant which would be considered to be a stimulant equivalent to those identified in Section S6 ... an athlete without medical or scientific expertise would have no such knowledge (UKAD v Wallader, para 30).

Hence the initial one-year sanction.

In her appeal against that sanction, Wallader pointed out that after the Anti-Doping Panel made its initial decision the status of MHA changed under the WADA code, with the effect that from January 1<sup>st</sup> 2011 MHA became a S6(b) specified stimulant. This means that athletes who tested positive after that date were able to invoke Article 10.4 of the Code in respect of those substances, and thus seek to provide an explanation as to how the substance had been ingested and to persuade the tribunal that there had been no performance-enhancing intent in the hope of reducing their sanction to, as a minimum, a reprimand. Wallader argued, and UKAD accepted (at para 5), that the principle of *lex mitior* (which means that if the law is amended subsequent to the offence, the less severe provision should be applied and is reflected in Article 25.2 of the WADA Code) allowed the athlete to take advantage of a subsequent change in the applicable law which was beneficial to her and she was thus able to invoke the Article 10.4 provisions. On the basis of what the Tribunal called her 'clear and consistent' testimony and the corroborating evidence, it determined that she had not been aware that the supplement had contained MHA and there was no intent to enhance performance ('she cannot have intended that a supplement used to give a short-term energy boost would enhance her performance in competition two days later' (para 36)).



However, the take-home point is that Wallader had indeed ‘intended to enhance’ her performance. That certainly does not mean she had intended to cheat, but Simon Emms’ tax case clearly shows that one would only use supplements if performance enhancement was one’s intention – and athletes certainly do not take anything with the intention of ‘diminishing’ their performance. Despite all the steps she had taken to establish the contents, it was not open to the Tribunal to find that Wallader’s was a case of ‘no fault’ (which would have led to her exoneration) because by 2010

the dangers of taking supplements (had) been made clear by the anti-doping authorities, and athletes who (use them) are running a risk ... Any athlete who takes a supplement without first taking the advice from a qualified medical practitioner with expertise in doping control places herself at real risk of committing a rule violation. Only in the most exceptional circumstances could such an athlete expect to escape a substantial sanction if a Prohibited Substance is then detected.

(Paras 46, 47).

In the wake of the *West* case discussed below, some will argue that consulting a qualified medical practitioner who gave unsound advice is not enough to result in a ‘no fault’ finding: if the athlete chooses to go to somebody who advised them badly, they leave themselves open to the argument that they are still at fault for using them at all. Commenting on the case, Wallader’s lawyer, Walter Nicholls, said ‘the advice to be given to athletes needs to be revised and updated to emphasise the dangers of taking supplements. The only real solution is not to take them at all’ (BBC, 2010). Sadly, it appears some of Geoff Capes’ other athletes were slow to learn the lessons of Wallader’s case; in 2010 two of them were banned for two years after refusing to submit to random tests (arguing that

the public toilets at Loughborough University where their samples would have been provided were ‘too dirty’). Capes himself was stripped of his UK Athletics coaching mentor role, although he was not charged with any doping violations (Hart, 2010).

### **WADA v Hardy**

Wallader’s case bears fleeting comparison with the CAS ruling in *Puerta v ITF CAS 2006/A/1025* and to a lesser extent with *WADA/ITF v Gasquet CAS 2009/A/1926; 2009/A/1930*, but a more worthwhile comparator lies in the dispute involving the American swimmer Jessica Hardy (*WADA v Hardy and USADA CAS 2009/A/1870*), which also concerns the unforeseen implications of nutritional supplement use but perhaps with a greater degree of fault on the part of the athlete than had been ascribed to Wallader. Here, a one-year ban was imposed by an American Arbitration Association Panel (McArdle, 2014) after Hardy tested positive for clenbuterol at the Olympic Trials in July 2008. Hardy had qualified for four events as a result of her performances at the trials, but the timing of the ban meant she missed out on participating at Beijing, where the swimming events took place just one month after the US Trials. Again, her ban of one year reflected the steps she had ostensibly taken to ascertain whether the supplement she was using was compliant with the WADA Code. These included contacting AdvoCare, the manufacturers, with whom she had a contractual relationship. AdvoCare told her that its products were independently tested (although that only applied in respect of one of their products) and their website gave no suggestion that there might be anything untoward about the products (which would hardly be surprising, unless a company was deliberately seeking to drive itself out of business). There was certainly no indication that their products might contain a steroid such as clenbuterol and, for what it was worth, AdvoCare had given her an indemnity in respect of its products (*WADA v Hardy*, para 4).

The AAA Panel which heard her case decided that ‘None of the CAS cases reviewed by the Panel includes the combination of circumstances listed above’ but it went on to say that, in totality, these did ‘add up to “truly exceptional” circumstances.’ While this is certainly not the sense in which WADA Code expects the phrase ‘truly exceptional’ to be interpreted (it being used in this case simply in the sense of a combination of circumstances being ‘unusual’) the AAA Panel was again convinced that Hardy had no ‘intention’ to enhance her performance – once more regarding ‘enhancing’ as synonymous with ‘cheating’. While there had been some element of negligence in the mere fact of her deciding to use supplements, notwithstanding the clear warnings from USADA and other sources about supplements, it took the view that ‘the issue is whether her conduct is below the level of Significant Negligence defined in the FINA doping Control Rules.’ Based on the totality of the evidence before it, in August 2008 the AAA Panel handed down an interim award and ruled that ‘Hardy’s ineligibility period could be reduced to the maximum possible extent under the applicable rules, and (...) an ineligibility period of one year was fair and reasonable (para 4).’

The difficulty here is that the WADA Code does not speak of ‘significant negligence’ but of ‘no significant fault’. Hardy benefitted from FINA’s failure to ensure its internal provisions mirrored those of the WADA Code. Like Wallader, she was not treated unduly harshly but the aftermath of the AAA award was unedifying and reflected badly on the IOC, which sought to ensure that she missed out on London 2012, having already missed the Beijing Olympics. This resulted in an appeal to the CAS where WADA argued:

The circumstances of Hardy’s case are not truly exceptional and ... Hardy’s negligence must be considered to be significant. In support of this allegation WADA underlines that, even though Hardy was aware of the explicit warnings against the potential dangers of food supplements and, as an experienced top-level athlete, she should have

been particularly vigilant, she had chosen to trust blindly a sponsor that commercialises nutritional supplements described as ‘enhancing muscle growth’, even signing an Endorsement Agreement; that she had failed to conduct further investigations with a doctor or any other reliable specialist, in addition to making direct enquiries with the supplement manufacturer; that she could have realised, by a simple search on the internet, that the description of the food supplements offered to her were alarming; that she did not have the supplements tested; that the indemnity clause contained in the Endorsement Agreement indicates that Hardy accepted that her behaviour could be risky.

(Para 35)

Several earlier CAS decisions have turned on the construction of ‘significant’ fault, and while the panel did not consider those rulings expressly (CAS’ wilful refusal to consider its own previous relevant jurisprudence being a consistent and longstanding limitation of its work that is guaranteed to invoke the wrath of lawyers the world over), it did indicate that those decisions offered ‘guidance’ to it and helped establish the proposition that ‘a period of ineligibility can be reduced based on no significant fault or negligence only in cases where the circumstances are truly exceptional’ (para 40). On that basis, and doubtless to the chagrin of WADA, the Panel went on to say that it ‘agrees with the AAA Panel that the circumstances of Hardy’s case are “truly exceptional”’ (para 42). Although it acknowledged that WADA’s argument that she could have taken other steps had merit, CAS made reference to the *Despres* ruling (CAS 2006/A/1025) and determined, rather surprisingly, that ‘Hardy has shown good faith efforts to leave no reasonable stone unturned’ (*WADA v Hardy*, para 43). It also made the somewhat disingenuous point that AdvoCare’s indemnity ‘rather constitutes a sign of reassurance ... that its products were safe and

that the information and reassurance given to her by AdvoCare to her were true and reliable' (para 44). It was never doubted that AdvoCare thought its products were safe but, again, that is scarcely the point. Once the Panel had decided that this was indeed a case of 'no significant fault', it was then a relatively straightforward matter to reiterate the well-established CAS principle that

the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence ... The Panel ... holds the sanction imposed by the AAA to be proportionate to the level of Hardy's negligence.

(Paras 48, 49)

A cursory review of the relevant CAS judgments prior to *Hardy* indicates that the likelihood of WADA succeeding in its application to have the full two-year sanction imposed upon Hardy was always decidedly slim; one struggles to understand why this course of action was ever embarked upon, unless it sensed an opportunity to pull rank over the AAA and exert its authority over US Olympic sports that are compelled to adhere to the Code (in contrast to the US professional sports, for example, which will not care in the least about WADA's world view unless their athletes are selected for Olympic competition and suddenly find themselves subjected to a radically different and far more extensive anti-doping regime (BBC, 2014a)). More nefarious was the fact that the sanction WADA sought had no basis in the FINA Rules: in effect, it sought a two-year suspension that was split into two separate one-year 'chunks' but FINA Rule DC 10.9 provides that any period of ineligibility must commence no later than the hearing date (which was 1<sup>st</sup> August 2008, when the AAA Panel handed down its one-year suspension) and there was no scope in the applicable rules for WADA's request for a two-year suspension from the date of the CAS judgment (with the period of

suspension already served to be ‘credited against the total period of suspension to be served’). This simple matter of regulation interpretation, a proper review of how CAS tribunals had previously evaluated ‘significant fault’ and the circumstances under which a sanction imposed by a domestic tribunal were likely to be overturned were not beyond the wit-and-compass of WADA’s lawyers, but their decision to press on with the case reinforces the perception that WADA brought this case in an attempt to pull rank over the US anti-doping regime in general. An alternative is that it was so concerned by athletes who inadvertently ingest banned substances through nutritional supplements that it felt obliged to challenge any sanction it considered unduly lenient in an attempt to further publicise this aspect of the anti-doping regime and the consequences of breaking it. Whatever interpretation one places on events, it seems clear that US Anti-doping control is on course for further collisions with the WADA Code. Athletes from American Colleges (including another Nigerian, Muizat Odumosu, a former student at the University of Southern Alabama, who won the 400m hurdles in Delhi) have successfully participated in world events such as the Commonwealth Games and others where doping control is carried out in accordance with the WADA code rather than the domestic sports’ alternative versions. North American basketball and ice hockey players who participate at the Olympics will also need to accept that they will be subject to doping regimes that are radically different to whatever ones might be in place under the collective bargaining agreements that regulate such matters at the domestic level; but every case concerning nutritional supplements that is heard by either a domestic tribunal or the CAS renders it more difficult for other athletes to argue that they were not ‘significantly’ at fault for their own violation. The genie is out of the bottle, and unless an athlete can show they were using supplements in order to meet a contractual obligation to an employer, as was implicitly the case with Simon Emms, they are clearly taking a ‘risk’ with the ‘intent’ of enhancing performance.

## Recent developments

Immediately after Samuel Okon's positive test for MHA at the 2010 Commonwealth Games, Mike Fennell, the head of the Commonwealth Games Federation, expressed concern at the number of athletes who were testing positive as a result of supplement use:

At this stage I cannot speak very definitively as to where it's coming from but it appears that it may be coming from the use of supplements. The supplements industry is by and large an unregulated industry worldwide and it is an industry that is a cause of great concern, not only for the fight against doping but also the protection of athletes. There are all sorts of claims as to what is in them and we have found that in many cases the claims are inaccurate. So many (athletes) are misled into using these supplements.

(BBC, 210a)

To characterise it as an 'unregulated industry worldwide' is stretching the point – it is unregulated in many jurisdictions, but not worldwide – but shortly after, in December 2010, Matt Schenck, an American basketball player plying his trade in England, received a three-month ban after testing positive for MHA; again, his ban was relatively low because he was able to show that he had ingested it inadvertently through a nutritional supplement. UKAD also noted that MHA had not been listed as an ingredient in that supplement, and that he had enquired of his coaching staff whether the supplement was appropriate for use in out-of-competition training (*UKAD v Schneck*, 17 December 2010). Travelling in the wake of *Hardy* he was decidedly fortunate, but the recent cases show how naïve it would be for athletes to expect such comparatively lenient treatment in the future. Whatever the merits of WADA's approach to supplement-derived positive tests and CAS'

treatment of them, it is no longer tenable for athletes to argue they did not know what the risks are, or that they were not intending to enhance performance.

This is apparent from CAS' treatment of the subject in *WADA v West and Fédération Internationale de Motocyclisme* CAS2012/A/3029, a case which all athletes' legal advisors should commit to memory. Here, after a telephone conference, a disciplinary tribunal of the FIM sanctioned an Australian motorcycle rider with a one-month suspension after he tested positive for MHA, which had been ingested through an over-the-counter nutritional supplement. The tribunal accepted he had no intention to enhance his performance and found he had no knowledge that the product in question contained MHA. On its appeal to the CAS, WADA sought a full two-year ban and argued that the CAS case law, its own website and that of the Australian anti-doping authority gave ample warning as to the risks of supplement contamination. While it accepted that the rider had never received anti-doping education it emphasised the athlete's personal responsibility and contended that 'taking a poorly-labelled dietary supplement is not an adequate defence in a doping hearing' (para 25). WADA also pointed out that although MHA was not listed as an ingredient the product was clearly labelled as containing 'geranium oil', that there was no medical justification for his using the supplement and that West accepted he had taken it because he wanted a low-sugar stimulant to help him focus on the morning of a race so, by definition, he had taken it with a view to enhancing his performance and therefore the benefits of Article 10.4 of the WADA Code (which assists an athlete who can show there was no performance-enhancing intent, as outlined above) could not be available.

The CAS Panel noted that there was 'complexity' in cases where athletes have challenged the imposition of the mandatory two-year ban, arguing that Articles 10.4 or 10.5 should have been used in their favour. West had no possibility of establishing 'no fault' because he had been careless in the steps he took over his supplement choice (not bothering to check online or with a physician, but



simply asking the store clerk whether it was ‘OK’ even though the product was labelled and advertised as promoting muscle growth). That left him with the possibility of establishing either ‘no significant fault’ as per Article 10.5, or bringing himself within the scope of Article 10.4 by showing there was no intention to improve performance (there being no dispute as to the source of the banned substance). In this regard, and as the CAS has finally, definitely explained, the difficulty is in the difference between taking something to improve performance and taking something in order to cheat. The CAS itself has not been consistent in this regard (see *USADA v Oliviera* CAS2012/A/2645); but even if there is no intention to cheat in terms of breaking the rules or behaving in an ‘underhand way’, Article 10.4 cannot be available as a defence if the athlete intended to enhance his performance, and ‘intended’ falls to be interpreted very broadly. As the Panel said in *West*, ‘the athlete accepts that he took the supplement in order to give himself a “boost” on the morning of his race ... it is simply not believable that enhanced alertness and concentration do not give a competitive advantage’ (para 55). Article 10.4 was therefore unavailable to West, and ‘no significant fault’ under Article 10.4 was similarly unavailable because of his reckless attitude to the supplement’s contents and his failure to take proper steps in respect of them. ‘He did not consult his manager, the (governing body) doctors, a nutritionist or anyone else’; and he did not conduct any internet research or cross-reference the names of substances listed on the product with the governing body or WADA list, which ‘likely would have revealed that the ingestion of Mesomorph (the supplement in question) involved a substantial risk’ (paras 67, 68). His fault was akin to other recent cases of athletes whose attitude to supplements were, at best, gung-ho (see for example *Kutrovsky v International Tennis Federation* CAS 2012/A/2804; *WADA v IWWF and Rathy* CAS 2012/A/2701; *WADA v Judo Board Nederland and de Goede* CAS 2012/A/2747). Although the judgment does not state so explicitly, it seems that West only avoided the full two-year ban (instead receiving an 18 month sanction) because of the extent of his

cooperation with the authorities and the fact that his governing body had never provided appropriate training and education opportunities.

### **Tentative conclusions**

The recent cases (especially those heard by the CAS since 2011) serve as irrefutable evidence that, regardless of which part of the world a product emanates from, who has manufactured it, what domestic legal provisions apply to supplement use or manufacture or what steps an athlete takes (or fails to take) to establish its purity, one can never say with certainty that any product is WADA compliant, or that what is on the label is what is in the container. If flaws in the manufacturing procedure mean that the labelling is silent as to what the supplement really contains, so that an athlete can no longer find out if there are prohibited substances by cross-referring it to WADA's own database or by seeking medical advice, it becomes very difficult to argue that the supplement was the true source of the violation – the burden is on the athlete to prove that it was, to the comfortable satisfaction of the panel. *Contador* shows it is impossible for an athlete to establish the source of the failed test unless the labelling indicates that was the source, or unless there is clear evidence of contamination at the manufacturing stage, and *West* shows that even if the athlete can pinpoint the source by such means, it is then impossible to show they were not at fault for the infringement which followed; either they failed to understand what the ingredients were, or they took a risk by ingesting the supplement in the first place.

In some jurisdictions anti-doping authorities and other interested parties maintain databases which detail ostensibly 'low-risk' supplements, manufactured by companies that perform rigorous quality controls or which are able to guarantee that there is no contact with steroids or other prohibited substances during the production of their nutritional supplements, and these are very worthwhile sources of information (see for example <http://antidoping.nl/nzvt> (Netherlands);

www.koelnerliste.de (Germany); www.informed-sport.com (US and UK)). But these cases show that just because nothing remiss has occurred in the production process before, that is no guarantee that problems will not arise in the future. Those websites might have a role to play, but international and domestic governing bodies' anti-doping advice is increasingly to the effect that those who may be subjected to testing should not use nutritional supplements, or at the very least tread exceedingly cautiously in the face of manufacturers' claims, and that advice should be heeded by all athletes who may be amenable to testing as well as by legal advisors as well as by coaches and other support staff (who, let us not forget, can also be sanctioned under the Code). It is increasingly unlikely that any athlete who fails a test on the basis of nutritional supplement use will be able to argue 'no fault', and in the current climate even a successful argument of 'no significant fault' is still likely to attract a ban in excess of a year. Both Wallader and Hardy missed out on the opportunity to compete at major global events because they chose to use nutritional supplements, and for the better part of two years Hardy was placed in a state of limbo so far as her participation at London 2012 was concerned. The more cases that arise and the more publicity the issue receives through governing bodies, media reports and athlete education, the more difficult it will become to argue that there had been 'no significant fault' in any other circumstance. The recent CAS jurisprudence reflects that state of affairs (see for example *Qerimaj v International Weightlifting Federation* CAS 2012/A/2822). Athletes would do well to avoid all supplement use and players' unions should be willing to argue very forcefully against employment contracts that either explicitly or implicitly pressurise athletes into using them.

Finally, the 2015 changes to the WADA code will not necessarily provide succour. The new Article 10.2.3 provides that:

... the term 'intentional' means that the athlete or other person engaged in conduct which he or she knew constituted an anti-doping rule violation, or knew that there was a significant risk that the conduct might constitute an anti-doping rule violation and disregarded that risk.

While there will inevitably be difficulties in determining what constitutes a 'significant risk' as opposed to a 'risk' or a 'slight risk', for the purpose of positive tests through supplement use there is now an even clearer potential for CAS and anti-doping tribunals to decide that any use of a nutritional supplement inevitably carries with it a 'significant risk', and that by using them the athlete has indeed disregarded the risks associated with them. Such an approach would be consistent with *West* and the lessons to be learned from other recent CAS decisions, and it would avoid the need to decide whether a given supplement falls into the 'significantly risky', 'decidedly risky' or 'just a little bit risky' category. WADA has also said, à propos the 2015 amendments, that 'the ultimate objective of the fight against doping in sports is to protect clean athletes' and parties should seek to ensure this by 'intensifying the fight' (to quote the Johannesburg Declaration) – which sounds all very well, until one appreciates that being a 'clean' athlete is a physical state as well as a mental one; it is not simply the antithesis of 'cheating'. Unless and until there is evidence of a contrary approach to 'risk' being adopted by the CAS the message has to be, once again, that athletes who are likely to be tested should avoid supplements altogether, should they wish to avoid the possibility of being caught in the trap of 'modified' strict liability. The only possible exception is where their use is an express term of an employment contract – an implicit expectation that the athlete will use them, as occurred in *Emms*, might not be enough. If the use of a supplement is directed by a team physician or other person in a position of supervisory authority over the player, the employment contract should say as much. Contracts containing such terms should also include

an express term that the player will not face disciplinary action and potential loss of wages or dismissal in the event of their adhering to that contractual term and subsequently being sanctioned under the WADA Code, and the players themselves should obtain a written undertaking to that effect every time the team physician provides, or every time they purchase themselves, a new supplement batch. The possibility of being required to pay a player who is unable to train, let alone play, for a period of months or even years should be enough to focus the collective mind, and this is an issue that players' representatives should explore forcibly with employers – whether through direct union activity (in the case of the Australian Football League), via social dialogue (in all sports at the European Union level) or through other structures such as collective bargaining negotiations in North American professional sports. The latter currently provides the best examples of situations where athletes are genuinely 'consulted' and cooperated with, rather than simply being told what is going to happen, and athletes' unions with experience of the matter would be only too pleased to offer guidance and support to others.

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