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**Analysis of application of strict liability principle in anti-doping cases and
match fixing cases**

Venu Vijendhar

ABSTRACT

Since the inception of civilisation, human societies have developed keen interest in various entertainment activities and sports being one such activity. The amusement the sport offers to the audiences is the reason for its high demand currently. Sports have helped, not only individuals to satisfy their quest for amusement and recognition, but also has ensured overall health of citizens. With the benefits that sport provides, it has its fair share of negative side as well. Practices of doping and match fixing have become a common phenomenon in modern sports and has become the centre of debate amongst the thinktanks as to how such practices are to be avoided. The author, in this paper has thrown light on how such practices undermine the spirit of sport. Furthermore, the author has analysed laws, rules and ordinances that govern the actions of athlete while participating in sports. In cases where an athlete is found to have violated laws pertaining to anti-doping and match fixing, he is subjected to be held liable post the application of strict liability principle. The author has further discussed the methods by which the strict liability principle can be applied in sports. Moreover, the author has given an analysis as to what could be the implications if an athlete is found to have violated laws in anti-doping cases and match fixing cases if he pleads 'no fault' and what could be the extent of burden of proof in above circumstances in order to avert the liability. Finally, With the help of doctrinal mechanism, the author has analysed the relevant codes contained in World Anti-Doping Code (WADC) drafted by World Anti-Doping Agency.

Keywords: *Anti-Doping cases, Match fixing cases, Sports, Strict liability Principle, World Anti-Doping Code, World Anti-Doping Agency, No Fault.*

INTRODUCTION

Sport is a phenomenon in the modern society. With attributes which relates to complex movements in Human body, capability of the human mind and body to co-ordinate with each other to produce a satisfying result. Sports have been an essential part of various civilisation throughout human history, from the time of Gladiators fighting in the Amphitheatres and Olympics being held in major cities, to current times wherein sports sustain a Billion Dollar industry. Since ancient times the purpose of sports has been to ensure development of the youth, social inclusiveness, a tool to resolve conflict, a tool to ensure a healthy lifestyle and a tool to combat racism¹. Various stakeholders have emerged who seek to gain control over sports industry all over. Hence the participants are entering this industry with different purposes some with an objective to make enough income to support their family financially and others to gain non-monetary benefits such as, fame, reputation and social status. These objectives drive the individuals to participate in sports. Participants aspiring for such incentives get caught easily by politically superior power who seek to control the game. Entering the sports arena by itself may not lead the individuals to the use of performance enhancing drugs or to get involved in the match fixing activities.

With regard to doping, Doping is a practice, wherein the participants in the sporting activity consume performance enhancing drugs². It is one of the practices that undermine the very purpose of sports. It discourages the honest participant's hard work and passion. Such practices have widened the scope of law with regard to sports as well. Since then, various categories of unethical practices that undermine or go against the traditional practices of sports have been identified and listed. Hence, Sports law could be considered as interplay of legal matters that one comes across in professional sports³. The question that needs to be ascertained is to what extent an individual when caught for using performance enhancing drug is liable? Furthermore, one of the biggest concerns in the sports industry is the issue of match fixing. For example, in India, Cricket is such a sport which continues to dominate the sports industry. In such case, the administrative control over such sport has been gone from a privately owned body to a business that attracts various

¹ National Sports Development Code of India 2011,

² Del Crookes, *what does 'doping' mean in athletics and why do athletes take banned substances?* BRITISH BROADCASTING COMPANY, (May 05, 2020, 15:45 PM), <http://www.bbc.co.uk/newsbeat/article/33755488/>.

³ Shivshankar Sharma & Pranav Menon, *A comparative study of the applicability of Strict liability: Critiquing Anti-Doping Policies; Examining 'Illicit crowd chanting' and Match Fixing*, MANUPATRA, (May 05, 2020, 16:39 PM), <https://www.manupatrafast.com/>.

investors⁴. The reason for such drastic change was introduction of the IPL (Indian Premier League) which saw surge in controversies and once such controversy is the match fixing scandals. For the convenience of the readers the author would like to discuss the topics of concern under the following categories: a) understanding the concept of strict liability and the application of strict liability in anti-doping laws b) need for strict liability in sporting offences c) liability of an athlete in cases of match fixing.

CONCEPT OF STRICT LIABILITY AND ITS APPLICABILITY IN SPORTS LAW.

There are situations when an individual is held accountable for the harm even if he is not negligent in causing the same, or he had no intent to cause harm. In such cases, the law recognizes 'No fault' liability⁵. Under 'No fault' liability even if the defendant did not deliberately cause the harm, he will be made liable as per this rule⁶. In every legal system prevailing around the world, it is evident that anti-doping jurisprudence has not made the mark. The application of principle of the rule of strict liability is seen by various sporting authorities as a tool to eradicate practices that corrupt the purpose of sport. However, there are instances of doping which might lead to affect an athlete, his livelihood and his reputation⁷. Hence, there is a need for a transparent and a fair system which can be utilized by sporting authorities to investigate such allegations. The question that need to be answered is how does an athlete become bound by anti-doping provisions? For Participating in a sporting act, an athlete affiliates with a sporting federation... It could be fair to assume that, such athlete contracts with such sporting federation. By the virtue of contracting with the sporting federation, an athlete is conforming to its rules, regulations and bylaws and carries out performances according to the code prescribed by the federation⁸. The following explains the law that governs anti-doping regulations.

⁴ *Gaming Indian Sports: Can we rescue sports in India from the vice grip of politicians and capital?* ECONOMIC AND POLITICAL WEEKLY (May 05, 2020, 15:11 PM), www.jstor.org/stable/23527379.

⁵ DR. R.K. BANGIA, *THE LAW OF TORTS* 324-325 (Allahabad Law Agency 24th ed. 2017).

⁶ *Rylands v. Fletcher*, (1868) L.R. 3 H.L. 330.

⁷ SHIVSHANKAR SHARMA & PRANAV MENEON, *supra* note 3.

⁸ Annelize du Pisani, *A contractual perspective on the strict liability principle in the World Anti-Doping Code*, DE JURE, (May 06, 2020, 5:35PM), <http://www.dejure.up.ac.za/index.php/volumes/46-volume-4-2013/36-volumes/46-volume-4-2013/217>.

LEGAL REGULATIONS ON ANTI-DOPING

Instances of doping is not modern phenomenon, this phenomenon dates back to the time of Ancient Greece. Wherein, from the practise of ingestion of Mushrooms to usage of different potions from extracts of plant seeds was common⁹. This practise seemed to undermine the true spirit of sport. The reason for the stringent rules and regulation against usage of the performance enhancing drugs is to hold the true spirit of the competition. It was in the year of 1999, International Olympic committee established World Anti-Doping Agency¹⁰. This agency was seen as a tool to safeguard intelligible approach towards anti-doping effort. Although there existed various sporting organizations, there was lack of active commitment to the cause. It was in 1988, Olympic movement gave birth to Anti-Doping court. It laid down two circumstances wherein it can be constituted that there has been usage of performance enhancing drugs, firstly, usage of substances that harms athlete's health or enhances performance and secondly, evidence of usage thereof, evidence of usage in a forbidden manner, evidence of drugs presents in the athlete's body¹¹. There was need for more dynamic approach and hence in the year of 1999 in Lausanne and in the year of 2003 in Copenhagen, the International Olympic council held conferences with participation of over 80 Governments from around the world which helped in establishing World Anti-Doping Agency (WADA)¹². The World Anti-Doping Agency regulates the document of World Anti-Doping Code, it looks into various activities such as, research regarding doping, training of an athlete, it further facilitates by recommending any changes in provisions of code, facilitates by updating the substances that are banned from usage¹³.

This code applies to Olympics and Olympic sports, further, this code applies to National sporting Authorities once a particular Government endorses its objectives¹⁴. The code set out is regarded as a guiding principle and it is utilised as a framework which is incorporated ad verbatim by sporting authorities in numerous Governments¹⁵. Hence, the framework set out by the World Anti-Doping Code is fundamental and consistent across all the national sporting authorities. This

⁹Mark Stuart, *The war on Drugs in sport? A perspective from Athens Olympics.*, THE PHARMACUETICAL JOURNAL, (May 07, 2020, 11:52 AM), http://www.pjonline.com/pdf/articles/pj_20040904olympic.pdf.

¹⁰ Saul Friedman, *Contador, Cows and Strict Liability*, SPORTS LAW EJOURNAL, (May 07, 2020 ,12:12 PM), <https://publications.bond.edu.au/slej/16>.

¹¹ SAUL FREIDMAN, *supra* note 10

¹² Suraj Sharma & Shujoy Mazumdar, *A critical appraisal of concept of strict liability WADA code*, SSRN, (MAY 07, 2020, 16:24PM), <https://dx.doi.org/10.2139/ssrn.1909645>.

¹³ Vidya Narayanaswamy, *Regulating Doping in sport*, SPORTS@LAWNK, (MAY 07, 2020, 18:45), <https://lawnk.wordpress.com/2011/07/02/regulating-doping-in-sport/>.

¹⁴ VIDYA NARAYANASWAMY, *supra* note 13

¹⁵VIDYA NARAYANASWAMY, *supra* note 13.

fight against practise of doping has led to formalisation of new rules and regulations for clarification of certain stakeholders of the sport. For instance, ‘Non-Analytical’ rule, this rule states that, liability falls on an athlete if evidence related to anti-doping rule violation has come into limelight even though there is no positive doping control test¹⁶. Furthermore, When an Athlete and his support staff or management agree to participate in any international sporting event hosted by a sporting authority affiliated with WADA, such athlete and management staff must comply with the rules of WADA and should submit to doping control test¹⁷. There are number of sports authorities established around the world which have accepted the norms of WADA, however there are specific bodies which do not comply with the doping ideals set by WADA, such as AFL (American Football League), ICC (International Cricket Council) and FIFA (THE Federation Internationale De Football)¹⁸. India adopted the World Anti-Doping Code and established National Anti-Doping Agency (NADA), this establishment is empowered with main authority to impose anti-doping rules, supervision of the consequences of drug examinations and directing hearings¹⁹.

APPLICATION OF STRICT LIABILITY PRINCIPLE IN ANTI DOPING CASES.

According to application of Strict liability in anti-doping cases, it is essential that an athlete is found violating anti-doping code or there is evidence of performance enhancing drugs found in an athlete’s body²⁰. As per the strict liability principle, an athlete is responsible if he is detected of violating anti-doping code or evidence of prohibited substance is found in the body. Article 2 of WADC is considered as one of the primary pillars in finding out the guilt of an athlete. As per Article 2.1 of WADC, athletes are supposed to submit their in-competition blood and out-of-competition blood with urine tests samples to any laboratory accredited by WADA²¹. Even though, under this principle, question of no fault or negligence arises, the founders of the code considered this was the best way to fight against the practice which undermines the spirit of the sport. If an athlete’s test is positive for usage of drugs/prohibited substances or athlete violates

¹⁶ *Id.*

¹⁷ Roshan Gopalkrishna, *Sentence Construction – recent case on doping bans*, SPORTS@NKLAW, (May 07, 2020, 22:07 PM), <http://lawnk.wordpress.com/2011/10/22/sentence-construction-recent-case-on-doping-bans/>

¹⁸ Paul Horvath, *Anti-Doping and Human Rights in Sports: The Case of AFL and WACA code*, Monash University Law Review, (May 07, 2020, 22:22 PM), <http://www.austlii.edu.au/au/journals/MonashULawRw/2006>.

¹⁹ The Anti-Doping Rules, National Anti-Doping Agency, India, (Revised as per the 2009 WADA code)

²⁰ SAUL FRIEDMAN, *supra* note 10.

²¹ WORLD ANTI-DOPING CODE. art. 2.1.

anti-doping code, then there shall be imposed two years ban or life time ban²². The violation arises whether or not there was intention on the part of the athlete or negligence or otherwise the athlete was at fault. There was a revision in provisions of the WADC, the main intention was to ensure that on the application of strict liability principle there would be fair and reasonable result. Those revisions clarified the position of an athlete when he claims to be a victim of ‘inadvertent doping’, that is it clarified that even if there was evidence of usage of prohibited substances the athlete has no intention of using them²³. In such cases, sanction imposed can be eased by stating or demonstrating that the athlete was not at fault²⁴. Article 10.5 of WADC contains a critical provision, that help an athlete to escape from the circumstances/result of test wholly or partly by establishing no fault or negligence that led to evidence of prohibited substances in athlete’s system²⁵.

With regard to above provisions, there were many who were concerned about the fairness of the same and there were other who were concerned about human rights violation. To answer above issues, WADA set up panel of three experts which answered that both strict liability principle and automatic disqualification principle does not violate any human right, because fault or negligence potentially committed will be considered while reducing sanctions²⁶. As given under, *Alain Baxter v. IOC*²⁷, there are different levels of unfairness but WADA approach is consistent. Hence, if an athlete wants to argue his case, he has to put forth evidence regarding the fact that he/she is at no fault or no significant fault for the presence of prohibited substance present in the system.

ANALYSIS OF BURDEN OF PROOF IN ANTI-DOPING CASES.

Decision given in *Alberto Contador Velasco v. RFEC*²⁸ provided that, even though prohibited substances were found in athlete’s body, athlete’s attempt to prove no fault. There have been several cases where, athletes have claimed absence of fault even though there was evidence of presence of prohibited substance in athlete’s body. The above case is an excellent example of how high the burden of proof has become in these cases. In this case, Alberto Contador was subjected to anti-doping test after subsequently winning the 2010 Tour de France cycling competition. Test

²² WORLD ANTI-DOPING CODE. art. 10.2.

²³ WORLD ANTI-DOPING CODE. art. 10.4.

²⁴ WORLD ANTI-DOPING CODE. art. 10.5.

²⁵ WORLD ANTI-DOPING CODE. art. 10.5.

²⁶ Prof G Kaufmann-Kohler, “et al”, *Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law*, WORLD ANTI-DOPING AGENCY, (May 08, 2020, 18:57 PM), <https://www.wada-ama.org/en/resources/legal/conformity-with-international-law>.

²⁷ *Alain Baxter v. IOC*, (CAS 2002/A/376, 15 October 2002).

²⁸ *Alberto Contador Velasco v. RFEC*, (CAS 2011/A/2384)

results proved that substance called clenbuterol was present in Contador's system. He was temporarily suspended before the hearing before the panel constituted by relevant national federation²⁹. Alberto Contador argued that the substance might have entered his body after ingesting meat which contained the banned anabolic agent. Further, he put forth various reports that, there have been instances when meat industry has faced the issue of meat being contaminated by anabolic agents. The panel in its decision agreed to the plausibility of that fact but the panel was not satisfied and it stated there was no relevant standard of proof as to how the anabolic agent entered the body³⁰. Further Contador presented arguments wherein he stated that the anabolic agents might have entered his body through dietary supplements, however the panel found it unsatisfactory because according to the case of Guillermo Coria, an Argentinian tennis player was found ingested with prohibited substance, he argued the anabolic agent might have entered through dietary supplements, the panel found that argument unsatisfactory and awarded two year ban on Coria³¹. The panel in Contador's case ascertained that there was enough evidence to satisfy the requirements of article 10.5 of WADC and sanctioned ban of athlete for a year.

NEED FOR STRICT LIABILITY IN SPORTING OFFENCES.

In this paper, the author has repeatedly laid down that doping is an offence which is contrary to ethics of sport. Issue of doping changes the nature of sport; it alters the capacity of human body and demeans the spirit of fair game. Hence it is high time in sports for the need of stringent laws with regard to anti-doping. It is essential that the application of strict liability principle has merit in it. That is, it should deter the potential offenders and violators from involving themselves from such acts. In the world of sports, if no such principle exists then there would be an acute surge in number of doping cases. As per WADA and WADC, the understanding of spirit of sport consists, a) to ensure a fair playing field, b) to protect the health of athletes, c) to ensure that athletes are considered as role model in healthy way³². The WADA and WADC draws its inspiration from Olympic charter with regard to ethics and spirit of sport³³. The most important reason for banning

²⁹ SAUL FREIDMAN, *supra* note 10.

³⁰ Contador award, para 317.

³¹ Jeffery Gold, *Coria Settles lawsuit in steroid case*, USATODAY, (May 10, 2020, 14:50 PM), https://usatoday30.usatoday.com/sports/tennis/2007-06-20-1620130766_x.htm.

³² 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*, (May 10, 2020, 18:46 PM), http://www.wada-ama.org/rtecontent/document/Legal_Opinion_Conformity_10_6_complete_document.pdf.

³³ Matthew Hard, *Caught in the Net: Rights of Athletes and the World Anti-Doping Agency*, SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL, (May 10, 2020, 18:53 PM), <https://gould.usc.edu/why/students/orgs/ilj/assets/docs/19-3%20Hard.pdf>.

performance enhance drug is to ensure the competition is not extended to unacceptable extent³⁴. Hence, these evolution of law, purpose of law results in fairness of code which ensures a firm fight against doping in sports³⁵.

CONCEPT OF MATCH FIXING AND THE APPLICATION OF STRICT LIABILITY IN CASES OF MATCH FIXING.

Corruption is the common place in this age and it has entered in the field of sports. One such corrupt practise which threaten the spirit of sport in Match fixing. Match fixing is a condition where a particular team in order to win or in order to financially gain from the gambling on the outcome of the match, might make other team loose or bribe the referees or umpires to announce biased decision³⁶. Match fixing exists across all sports³⁷. Particularly in India many have fallen prey to it. Since then there has been a need for stringent laws in India. As per the Author, the practise of match fixing is an act of cheating towards government and towards millions of fans of the sport. In Addition, in the sport of cricket, the International Cricket Council (ICC) has agreed to share data with Malta Gaming Authority (MGA) to help prevent cases of match fixing and corruption within the sport.

One of the controversial decisions given by court of arbitration of sport involved ten players and two clubs which dealt with application of strict liability in cases of match fixing³⁸. The facts of the case involving Metalist kharkiv and Karpaty lviv pertains to events that arose in a contest, where the score 4-0 was in favour of Metalist kharkiv. The reason this contest led to a controversy is because Karpaty has the evidence of match fixing and did not report to the authorities. This led to proceedings which took place in Ukraine and Switzerland³⁹. The football federation of Ukraine and football federation of Switzerland looked carefully into the circumstances. The Court of Arbitration and the Control and Disciplinary Committee concluded the match was fixed and

³⁴ Thomas Cox, *The International War Against Doping*, VANDERBILT JOURNAL OF TRANSNATIONAL LAW, (May 10, 2020, 19:16 PM), <https://vanderbilt.edu/wp-content/uploads/sites/78/CoxFinalReviewComplete.pdf>.

³⁵ *Q&A: World Anti-Doping Code Review: Consultation Process & Major Envisaged Changes*, WORLD ANTI-DOPING AGENCY, (May 10, 2020, 19:22 PM), http://www.wada-ama.org/rtecontent/document/QA_Code_Consultation_En.pdf.

³⁶ Ian Preston & Stefan Szymanski, *Cheating in Sports*, OXFORD UNIVERSITY PRESS, (MAY 11, 2020, 15:36 PM), <https://www.jstor.org/stable/pdf/23606863>.

³⁷ John Holden, *Match Fixing and Other Manipulations in Sports Betting: A Primer*, LEGAL SPORTS REPORT, (May 11, 2020, 15:40 PM), <https://www.legalsportsreport.com/20922/match-fixing-primer-sports-betting/>.

³⁸ John Drayton, *Metalist's Champions League expulsion confirmed after CAS dismiss appeal against match-fixing*, MAIL ONLINE, (May 11, 2020, 19:01 PM), <https://www.dailymail.co.uk/sport/football/article-2395936/>.

³⁹ Olena Perepelynska, *CAS Confirmed Strict Liability Principle in Match-Fixing*, SAYENKO KHARNEKO, (May 11, 2020, 19:08 PM), <https://sk.ua/publications/1549/>.

Consequently both the clubs were barred from admission in UEFA Champions league⁴⁰. Hence, it is evident that in such organised sport, issues of match fixing will be seriously dealt with. In this case, the authorities applied the principle of strict liability which barred both the clubs from UEFA Champions League even though the game was rigged by individual players.

CONCLUSION.

The clarity with regard to the application of strict liability principle in sports is a grey area and it has the potential to result in a damaging consequence to a sport itself⁴¹. Due to the above stated reason, there are critics who question the applicability of strict liability principle in sports. WADC is often criticised for ruining careers of athlete and creating imbalance of power between WADA and athlete⁴². Hence, it has been suggested that athlete should be part of drafting the list of prohibited substances, which will help athletes create awareness and prevent liability from punishment. Further, as per WADC, it is stated that if athlete is found responsible for anti-doping violations then the support staff and coaches are liable to face sanctions as well however when directly applied it is not sufficient defence in stating that athlete placed ample trust in staff and coaches⁴³. The reason why coach and support staff are also held liable for act done by athlete is because, as per author, coaches and support staffs are considered to be backbone of each and every athlete, they should encourage athlete against anti-doping practices.

With regard to above stated views, it is essential to have consistency and uniformity in application of strict liability principle. Therefore, the authorities should make sure that the laws are not impartial or impractical⁴⁴. Authorities should strive to bear the burden of cleansing sports of performance enhancing drugs and illicit practices such as match fixing. There is no law in reality which does not have its fair share of loop holes and WADC is no exception. Which is the reason why athletes, in spite of stricter application of code, manage to defend themselves and number of innocents fall into the trap. Therefore, there is a need for continuous and stricter application of strict liability principle to ascertain clarity and understanding which shall help prevent violation of laws. In cases of match fixing, the need of the hour is to ensure that confidence of fans in sports

⁴⁰ OLENA PEREPELYNSKY, *supra* note 39.

⁴¹ Ryan Connolly, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused*, VIRGINIA SPORTS LAW ENTERTAINMENT LAW JOURNAL, (May 13, 2020, 11:08 PM), http://www.rconnollylaw.com/VaSE_Doping_Article.pdf.

⁴² *Id.*

⁴³ *Torri Edwards v. International Amateur Athletic Federation*, (CAS/OG/003 (2004)

⁴⁴ *Aanes v. Federation Internationale de natation*, (CAS 2001/A/317)

is not lost. It is important to boost the image of sports in a country. Hence, the applicability of strict liability in match fixing cases is reasonable and due to which the team management staff keeps an eye over every athlete and keeps track of the interactions between athletes and bookies. For example, in India, the demand for sports has skyrocketed since the inception of the Indian Premier League. This however, attracted several negative characteristics to the game. Bookies got involved and in pursuit of making money, they resort to match fixing. For example, Raj Kundra the owner of Rajasthan Royals was alleged to have made contact with the bookies⁴⁵.

The world of sport is dynamic and currently it has been commercialised. The competitiveness, the fairness and the true spirit of sport seems that as if they are on the verge of getting lost. Therefore, some sort of vigilance is required and the same is ensured by the application of strict liability principle in a practically fair manner.

⁴⁵ Press Trust of India, *IPL 7: Rajasthan Royals Trying to Recover After Spot-Fixing Scandal*, NDTV SPORTS, (May 14, 2020, 13:30 PM), <https://sports.ndtv.com/indian-premier-league-2014/ipl-7-rajasthan-royals-trying-to-recover-after-spot-fixing-scandal-1518815>.