PROCEDURAL FAIRNESS IN DOPING DISPUTES

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I. INTRODUCTION

In *Bryan v Maloney*[1] Brennan J (as he was then) stated that:

> the law of negligence should be capable of application in solicitors' offices. It should not have to await definition in litigation.

It is perhaps utopian to suggest that the rules of procedural fairness may become capable of consistent application by sport administrators without intervention from the courts. As the monetary stakes in sport have increased so have the conflicts between athletes and the organisations that govern them. Upholding the validity of a positive drug test result is an example of one such conflict. The purpose of this paper is to discuss the application of the rules of procedural fairness to disciplinary tribunals governing doping disputes.

When a decision is to be made that will deprive a person of some right, interest or legitimate expectation, the common law dictates to that person an opportunity to show why adverse action should not be taken and ensures that the decision maker is genuinely open to persuasion. The three rules of procedural fairness are formally stated as:

1. the *audi alteram partem* rule (the right to a fair hearing);
2. the rule *nemo debet esse judex in propria causa* (no one can be judge in his or her own cause);
3. the no evidence rule.

These rules of procedural fairness reflect the minimum standards of basic fairness that are required to be observed. As Deane J said in *Australian Broadcasting Tribunal v Bond*:[2]

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1 (1995) 182 CLR 609 at 653.

2 (1990) 170 CLR 321 at 367.

> a duty to act...in accordance with the requirements of procedural fairness or natural justice excludes the right to decide arbitrarily, irrationally or unreasonably. It requires that regard be paid to material considerations and that immaterial or irrelevant considerations be ignored. It excludes the right to act on preconceived prejudices or suspicions.

A denial of procedural fairness is an error of law,[3] which deprives the tribunal of jurisdiction in the instant case and is capable of rendering the subject decision void.[4]

There are two lines of inquiry essential to an analysis of the role of procedural fairness in doping disputes. The first line is whether the rules of procedural fairness apply to disciplinary tribunals governing doping disputes. The second line concerns a comparison of the requirements of procedural fairness with the procedures that have been adopted.

II. APPLICATION OF THE RULES OF PROCEDURAL FAIRNESS TO DISCIPLINARY TRIBUNALS.

Since the landmark case of *Ridge v Baldwin*,[5] it is clear that the rules of procedural fairness are applicable to every tribunal invested with the power to adjudicate upon matters that affect the rights, interests or legitimate expectations of an individual. Given that the sanctions for a doping offence include a life suspension from competition, repayment of financial assistance and the termination of sponsorship and advertising arrangements,[6] the decision concerning a doping offence by a disciplinary tribunal necessarily attracts the rules of procedural fairness.

Indeed, all anti-doping regimes grant the athlete who records a positive result, an infraction notice and the right to a hearing before any final decision concerning ineligibility from competition is made.

III. ADEQUACY OF THE PROCEDURES ADOPTED.

Australian courts have long asserted that there can be no immutable set of rules which govern the procedure to be adopted by all authorities in all cases.[7] Instead, the rules have a flexible quality, with the content dependent upon factors such as the nature of the inquiry, the urgency of the matter, rules under which the tribunal is acting, and the likely consequences for the claimant.[8]

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3 *Escobar v Spindaleri* (1987) 7 NSWLR 51; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

4 *Ridge v Baldwin* [1964] AC 40; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

5 [1964] AC 40.

6 Contracts between athletes and sponsors invariably contain a provision which automatically terminates the contract where the athlete tests positive for a prohibited substance or method.

7 *Mobil Oil Australia Pty Ltd v Commissioner of Taxation* (1962) 113 CLR 475 at 501 per Justice Kitto.

8 *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 per Tucker LJ; *Kioa v West* (1985) 159 CLR 550.

A. The Right to Be Heard

The first requirement of procedural fairness is that the person accused should know the nature of the accusation made, as it is pointless to afford a right to be heard, whilst denying any knowledge as to what the hearing concerns.[9] As previously mentioned, when an athlete's A sample discloses a doping offence, notification is made to the athlete of the infraction, along with notice of the opportunity to be present for the testing of the B sample, and the right to a hearing.

International and national sporting organisations with jurisdiction to determine doping disputes have adopted the following three stage process to disciplinary proceedings:[10]

1. an immediate suspension, prior to the analysis of the athlete's B sample;
2. the opportunity for a hearing before the relevant tribunal;
3. ineligibility from competition.

Despite claims that the procedure of suspending an athlete before a hearing must be changed,[11] it is not contrary to the rules of procedural fairness.[12] The courts make temporary orders, often without hearing the party affected, to prevent irreparable damage or to preserve the status quo until a full inquiry can be conducted. It is fair then, that the courts do not require tribunals to refrain from emergency action in circumstances where they would resort to it.[13] Although instant suspension followed by disciplinary proceedings may sometimes cause injustice in the individual case, it has been recognised as necessary in the wider interests of sport.[14]

Perhaps the most salient issue concerns the public announcement of an athlete's positive result at stage one, that is before the athlete is given the opportunity to respond and in most cases before the B sample has been tested. This occurred for Paul Henderson, an Australian track and field athlete who is currently disputing a positive result to the anabolic steroids nandrolone and norethandrolone.[15]

In *Re Pergamon Press*,[16] the Court of Appeal held that if an authority proposes to make express public criticism of an individual it must first furnish them with an outline of the charges to be made and give them the opportunity to

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9 *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 at 1588 per Lord Morris

10 Rule 59 *IAAF Official Handbook*, 1998-1999; DC 8.3.4 - 8.3.9 *FINA Doping Control Rules*, 1999.

11 On the basis that the procedure is in direct conflict with the *Amateur Sports Act* 1978 (US) and that test results are not perfect: H Hatch, "On Your Marks, Get Set, Stop! Drug Testing Appeals in the International Amateur Athletic Federation" (1994) *Loyola of Los Angles International and Comparative Law Journal* at 565-567

12 *Box v Director-General, Department of Transport* [1994] 2 Qd R 463

13 J Forbes, *Disciplinary Tribunals*, 2nd ed, Federation Press, Sydney, 1996 at 104

14 *Modahl v British Athletic Federation Ltd*, (Unreported, House of Lords, Hoffmann LJ, 22 July 1999)

15 L Evans and S Roach, "Olympian to fight dope test" *Sydney Morning Herald*, 22 May 1999, p 57. It is important to note that Rule 8.3 of the *IAAF Procedural Guidelines for Doping Control* states that an athlete is only to be suspended after confirmation of the B sample.

16 [1971] Ch 388.

respond. It is submitted that by exposing an athlete to public criticism at stage one of the disciplinary process the responsible authority is in breach of this rule.

Furthermore, the High Court in *Annetts v McCann*[17] held that the parents of the deceased had the right to be heard by the coroner because they had a proper interest in the proceedings and because, in granting them representation at the hearing, the coroner had created a legitimate expectation that he would not make a finding adverse to their interests without first hearing them. It is arguable that in granting an athlete the right to a hearing before a decision is made, the relevant sporting organisation has created a legitimate expectation that the athlete will not be subject to adverse publicity prior to the hearing.

It is unfortunate that a defamation action can not be initiated given that it is not known for certain who released Henderson's drug test result to the media.

B. The Rule against Bias

The second requirement of procedural fairness is the rule against bias. As Lord Hewart CJ said, "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[18] Thus, a hearing before a tribunal with a closed mind is no hearing at all.[19]

Both the 'reasonable apprehension' test and the 'actual' bias test are relevant in determining whether a decision-maker is disqualified from dealing with a particular matter in a domestic tribunal. In *Dale v NSW Trotting Club Ltd*,[20] the NSW Court of Appeal asserted that the test of actual bias should be confined to events prior to the hearing, whilst the conduct of the hearing itself should be subject to the reasonable apprehension test.

The 'actual' bias test requires proof that an adjudicator was actually prejudiced against the claimant.[21] Proof of the adjudicator's state of mind will only be possible if they have been uncommonly clumsy and publicly expressed their prejudice. This is not an infrequent occurrence.

A claim of actual bias against two members of the disciplinary committee of the British Athletic Federation (BAF) was recently upheld by the English Court of Appeal.[22] In 1994, Diane Modahl, a middle distance athlete, returned a sample with a testosterone/epitestosterone ratio of 40:1, which is well in excess of the permitted ratio of 6:1. After a hearing before the BAF she was found guilty and received a 4 year ban from competition. Modahl's appeal to the IAAF Independent Appeal Panel was successful, and the finding of the BAF set aside. The Panel held that there was a reasonable doubt as to whether the laboratory test on her urine sample was reliable. The BAF accepted the Panel's decision

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17 (1990) 170 CLR 596.

18 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 356 at 259.

19 Note 13 *supra* at 210.

20 [1978] 1 NSWLR 551 at 559 per Samuels JA and at 560-1 per Mahoney JA. At 555 per Hutley JA (in dissent), His Honour saw no valid distinction between bias arising before the hearing and bias allegedly arising at the hearing, and considered that the complexity of the two different standards should be avoided.

21 *Maloney v NSW National Coursing Association Ltd* [1978] 1 NSWLR 161.

22 *Modahl v The British Athletic Federation Ltd*, (Unreported, Court of Appeal, 28 July 1997) <http://www.casebase.com.uk>.

and she was reinstated. Modahl then commenced proceedings against the BAF alleging that her suspension and the initiation of disciplinary proceedings were in breach of the contract between herself and the BAF. It was not disputed that the rules of the BAF constituted the terms of the contract. On the issue of bias, Modahl alleged it was an implied term of the contract that she would have a fair and impartial hearing both at the BAF disciplinary hearing an the Independent Appeal Panel. The particular instances of bias concerned one member publicly stating that he presumed all athletes charged with doping offences were guilty and that the disciplinary committee simply acted as a 'rubber stamp'. The other member of the committee was a senior official of the IAAF. A spokesman of the IAAF had expressed the opinion that Modahl was guilty of the offence charged prior to the decision of the committee. It was then reasonable to infer that the member held similar views to the spokesman.

The Court of Appeal acknowledged that no clear rule exists on the question of whether a right of appeal *de novo* can cure any defects in procedural fairness appearing at an original hearing.[23] The correct approach to be taken will depend on the rules of the private body, although in most situations it will be the fairness of the process as a whole which is the decisive consideration. In this instance, suspension of an athlete is automatic. The suspension precedes the hearing before the disciplinary committee. There can be an appeal to the IAAF Independent Appeal Panel, with the issues considered *de novo*, only after the hearing before the disciplinary committee. There is no power to suspend the automatic suspension pending a hearing. Thus, the three stage disciplinary procedure was held not to be adequate to deal at a later stage with any defect at an earlier stage.

It seems that the IAAF have not heeded the words of the Lord Justices. When the disciplinary committee of the BAF exonerated Linford Christie in September 1999, Istvan Gyulai, Secretary-General of the IAAF, announced that the committee had applied the wrong test when defining the doping offence and as a consequence the IAAF would intervene and reverse the decision.[24]

The 'reasonable apprehension' test denotes a substantial possibility of the risk of bias as discerned by the disinterested observer.[25] In Butch Reynolds' case, the US District Court of Ohio found that the hearing of the IAAF International Appeal Panel, was not conducted in accordance with the principles of procedural fairness, and stated that:

> It is this court's conclusion that the IAAF hearing was not conducted in good faith, was not conducted by an unbiased decision-maker, was not in accordance with the IAAF's own rules and regulations, did not accord Reynolds a full and fair opportunity to participate and resulted in a decision that was not fair and impartial but rather was arbitrary and capricious.[26]

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23 *Calvin v Carr* [1980] AC 574; *Panagopoulous v Secretary Department of Veteran Affairs* (Fed Ct Aust).

24 J Goodbody, "British panel clears Christie of taking banned steroid" *The Times*, 7 September 1999.

25 *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HL 759; applied by the HC in *Dickason v Edwards* (1910) 10 CLR 243.

26 *Reynolds v IAAF* (C-2-92-452) US District Court, Sth District of Ohio, Eastern Division, 3 December 1992.

An interesting twist to the usual allegations of bias against members of the disciplinary tribunals occurred recently with Merlene Ottey's hearing. Ottey tested positive to the banned anabolic steroid nandrolone at a grand prix meeting in Switzerland in July 1999. The Jamaican Amateur Athletic Association conducted a hearing with members of the panel acting both as decision-makers and in defence for Ottey.[27] It will come as no surprise to learn that Ottey was exonerated of any doping offence by the panel. It is submitted that this is unfair to Australian athletes who are governed by sporting organisations with strong drug-free policies.

It is interesting to note that the system of appeals for positive drug tests does not provide a remedy of costs or damages. If an athlete seeks declaratory and injunctive relief in public law, there is no entitlement to damages. At best, the original decision will be quashed. It is regrettable that the English Court of Appeal in Modahl's case did not give an unequivocal answer to the question of whether an implied term of a contract to afford procedural fairness necessarily gives rise to an action for damages in every case.

C. The No Evidence Rule

Every grant of disciplinary power predicates that the power will be used if, and only if, there is some evidence upon which a rational decision maker could find that certain essential facts existed.[28] The making of findings and the drawing of inferences in the absence of evidence is an error of law.[29] But, there is no error of law in simply making a wrong finding of fact. Australian courts respect findings of fact and value judgments provided there is some evidence upon which the tribunal could have acted as it did.[30] A court has no jurisdiction to review the findings of a domestic tribunal for the purpose of examining their correctness.[31] The courts may only interfere with a decision if no honest and reasonable tribunal could have made the decision.[32] Thus, the decision of a disciplinary tribunal must be based on evidence that tends logically to show the existence of facts relevant to the doping offence to be determined.[33]

The no evidence rule has the potential to exculpate an athlete, notwithstanding the interpretation of the doping offence as one of strict liability. The sampling and testing procedures are not fool proof, they are susceptible to errors. The fact that an athlete returns a positive sample from a drug test is not conclusive of a

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27 In conversation with Brian Roe, Competitions Manager and Member of the Doping Commission of Athletics Australia, 1 October 1999.

28 Note 13 *supra* at 76.

29 *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 573; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

30 *Australian Telecommunications Commission v Newson* (1985) 61 ALR 521; *Australian Broadcasting Tribunal v Bond* (1990).

31 *Australian Workers' Union v Bowen [No 2]* (1948) 77 CLR 601 per Dixon J at 628, approved in *Australian Football League & Ors v Carlton Football Club & Williams*, (Supreme Court of Victoria Court of Appeal, 25 July 1997) <http://www.austlii.edu.au>.

32 *Dickason v Edwards* (1910) 10 CLR 243 at 258 per Justice Isaacs.

33 *R v Deputy Industrial Injuries Commissioner Ex parte Moore* (1965) 1 QB 456 applied in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 and *Mahon v Air New Zealand Ltd.*

doping offence, although the decision maker is entitled to draw inferences and conclusions from the existence of a positive sample.

Two rules operate to restrict an athlete challenging the validity of the testing procedures. First, the decision maker must be satisfied, on the balance of probabilities, that the procedures in question 'substantially complied'[34] with the procedures set down by the relevant anti-doping regime in order to uphold the offence. The rule operates to avoid challenges on technical points which lack any real merit, assuming that the departure casts no real doubt on the reliability of the finding. However, it has been held that this rule does not allow a tribunal to ignore gaps in the evidence which should be provided in order to enable the tribunal to form the view that the sampling and testing procedures were carried out properly and that there was no reasonable possibility of tampering.[35]

Secondly, the IOC Medical Code contains a presumption that accredited laboratories conduct tests in accordance with the highest scientific standards and thus the results are conclusively deemed to be scientifically correct.[36] In addition, 'minor irregularities' in the sampling and testing of athletes will have no effect on the results, provided the irregularities cannot reasonably be considered to have affected the results.[37]

Challenges to the sampling and testing procedures are difficult to uphold especially when the competence of a laboratory is called into question, or indeed the anti-doping procedures of the relevant sporting organisation. In these situations, the no evidence rule takes back seat to the autonomy of the relevant sporting organisation. Butch Reynolds' case clearly illustrates this point. In 1990 Reynolds tested positive to the anabolic steroid nandrolone at a competition in Monte Carlo and was immediately suspended by The Athletic Congress.[38] The Lafarge Laboratory in Paris was responsible for testing the sample. This laboratory also conducted the testing for the Winter Olympics in Albertville in 1992.

The American Arbitration Association (AAA) exonerated Reynolds, and found that:

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34 "Substantial compliance" is the relevant test per Art V, Chapter VI, *IOC Medical Code*; cll 4 and 9.2 *AOC Anti-Doping Policy*, March 1998; DC 9.1.5 *FINA Anti-Doping Rules*; s 17G(1) *Australian Sports Drug Agency Act* 1990 (Cth). However s 17G(2) requires some procedures to be "strictly" complied with; the IAAF test is one of "real doubt" as to the reliability of the finding of a positive sample: Rule 55(11) *IAAF Official Handbook*.

35 *Capobianco v Athletics Australia*, Doping Control Tribunal, 17 July 1996, per Ellicott QC, cited in T Kavanagh, "Drugs Sport and the Law - Legal Solutions and the Need for an International Arbitral Court: An Australian Perspective" paper submitted in completion of PhD at the University of Technology, Sydney, 1997 at 181.

36 Articles II and III, Chapter X, *IOC Medical Code*. IOC accredited laboratories are used by all sporting organisations, although it is within the IFs discretion to use other laboratories.

37 Article V, Chapter VI *IOC Medical Code*; cl 4 *AOC Anti-Doping Policy*. Minor irregularities are not considered to include the chain of custody of the sample, improper sealing of the container(s), a failure to request the signature of the athlete or a failure to provide the athlete an opportunity to be present or be represented at the opening and analysis of the "B" sample.

38 TAC is the national governing body for track & field in the USA. The organisation is now known as Track and Field USA.

> [TAC's] suspension of Mr Reynolds was improper; that there is clear and convincing evidence that the "A" sample did not emanate from the same person and the "B" sample did not confirm the "A" sample; that there is substantial evidence that neither the "A" sample of the "B" sample emanated from the Claimant; and that the Claimant should be declare eligible to compete.[39]

In addition, an expert witness who appeared before the AAA testified that:

> the laboratory failed to attach proper chain of custody documentation to the urine samples provided by Reynolds, failed to use an 'internal standard' to assist it in interpreting the results, and failed to use a positive quality control. [Furthermore] the 'picture' of naturally occurring steroids should be relatively the same for both samples of urine if, as alleged, they were both supplied by Reynolds [however]...the two samples created extremely different 'pictures'...[thus] the two could not have originated from the same individual.[40]

The underlying issue rested with the fact that an exoneration of Reynolds would have required the IAAF to acknowledge its anti-doping regime was seriously flawed such that it could not distinguish between drug-free and drug-abusing athletes. It was not a simple mistake, such as a broken seal, that obscured the test results. The IAAF would have had to openly criticise the fundamental integrity of its anti-doping program, and in doing so, cast reasonable doubt on the Albertville Winter Olympics.

IV. CONCLUSION

This paper has established that the rules of procedural fairness apply to disciplinary tribunals governing doping disputes. The rules have a flexible quality, indeed they are chameleon like. The application of the rules must not create a burden upon the disciplinary tribunal. Yet a positive test result has the potential to destroy an athletes' reputation and career. Perhaps the rule of thumb for sporting organisations lies in the words of Lord Denning MR:

> They must be masters of their own procedure. They should be subject to no rules save this: they must be fair...[t]he public interest demands it.[41]

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39 Arbitrator's report in *Reynolds v IAAF*, 23 F.3d 1110 (6th Cir,1994): cited in D Mack "*Reynolds v International Amateur Athletic Federation:* The Need for an Independent Tribunal in International Athletic Disputes" (1995) 10 *Connecticut Journal of International Law* 653 at 673, in footnote 91.

40 *Ibid.*

41 *In Re Pergamon Press Ltd* (1971), note 16 *supra.*