

# Considering the Various Anti-Doping Rule Violations and the Level of Proof Required in such Cases

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This article by **Daniel Mohammadpour** was previously submitted as part of PBL3016 and is being published with the author's permission. Sport is a global phenomenon practiced for both competitive and recreational purposes, with legal implications arising in competitive contexts. This paper critically analyses anti-doping violations and the required standards of proof, focusing on preserving the integrity of sports amid evolving innovations and tactics.

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*“From this inhuman pressure doping is born because the athlete feels the imperative of having to be No.1. I believe instead that Sport should be a private pressure. A challenge for yourself.”*

---- Bode Miller ----

The main and fundamental objective of sports communities and federations is to enable athletes to operate within a framework that establishes certain moral and ethical principles which must be adhered to and respected by all athletes in the way they perceive and approach the composition of sportsmanship. The principles of ethical standards and morals are expanded and prospered through the development of educational values which support sound ethical doctrines. Such principles are established through the observance of the rules and laws which support the applicability of ethical principles in all spheres of sport, as well as the importance of social responsibility.<sup>1</sup> As a result of this establishment, athletes would be able to prosper through an environment wherein the rules of sportsmanship are adhered to and gamesmanship is practised, which in turn gives rise to excellence, character-building, respect, honour, and discipline.<sup>2</sup>

Some people practise a type of sport at their own leisure whilst, on the other hand, others engage themselves in a competitive practice and make a commitment to sports in order to achieve great lengths. With this being said, athletes who decide to pursue sport as their career, which leads to competing on both a national and international level, would ultimately subject themselves to certain rules and legal implications. This is where the world of Sport and the Law collide. The term ‘Sports Law’ encompasses a wide spectrum of definitions, however, Timothy Davis best defines Sports Law as ‘the laws, regulations and judicial decisions that govern sports and athletes.’<sup>3</sup> Sports is governed by laws and regulations which enable athletes to be able to compete within the parameters of the values set forth by sport communities and federations, negating the possibility of engaging in any unethical or corrupt behaviour, thereby encouraging the value of the integrity of sports and the adherence to the laws and regulations.

According to Simon Gardiner, doping is ‘the aim of attaining an increase in performance by injection, oral or other means.’<sup>4</sup> Doping has become an increasingly prevalent occurrence ever since sports has made significant strides.

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<sup>1</sup> ‘Maltese Olympic Committee: Homepage’ (*Maltese Olympic Committee*) <<https://nocmalta.org/>> accessed 27 October 2022.

<sup>2</sup> *ibid.*

<sup>3</sup> Christopher Tsiknas, ‘What Is Sports Law?’ (Lawpath) <<https://lawpath.com.au/blog/what-is-sports-law>> accessed 27 October 2022.

<sup>4</sup> Simon Gardiner and others, *Sports Law* (3rd edn, Cavendish Publishing 2006).

As a result, athletes have become so fixated on achieving the greatest outcomes that making use of performance-enhancing chemicals has by some become somewhat of an accepted moral standard, permanently damaging the integrity and the ethical standards which the world of sports seeks to manufacture and strengthen.<sup>5</sup> The oldest known instance of the use of performance-enhancing chemicals in the realm of sports dates back to around 780 BC, when it was recorded that prior to engaging in intense physical activities, the Greeks consumed figs, mushrooms, and strychnine – a stimulant which, when used in small doses, would strengthen muscle contractions and improve physical performance as well as reduce the combat exhaustion whilst engaging in competitive activities.<sup>6</sup> Athletes who were caught cheating in ancient Greece by consuming banned substances in hopes of enhancing their physical performance during the Olympic Games had their names engraved on stones, making their transgression known to the public, and were handed a hefty fine, not to mention the fact that cheaters were exiled from ever entering the stadium of the Olympic Games again.<sup>7</sup> To this day, athletes are so fixated on emerging victorious in front hundreds and thousands of people that they sometimes forget about the true meaning of the spirit of sport.<sup>8</sup>

A correlation can be drawn between Article 3(4) of Chapter 455 of the Laws of Malta<sup>9</sup> and Article 2.2 of the of the World Anti-Doping Code (WADA Code).<sup>10</sup> Both provisions of the law seek to outline and prohibit any acts which taint the facade of sports by correctly emphasising the rules of fair play, as well as to ensure that no organisation or athlete makes unsanctioned use of doping substances. If one had to compare and contrast both provisions, one would find that they essentially refer to the same thing; they hold that all participants which are involved in sporting events are required to adhere to the fair play regulations. All sporting organisations and athletes are required to exert themselves to prevent the unauthorised use of prohibited substances, performance-enhancing drugs, or any other type of doping techniques in a competitive framework. However, with this being said, few sportsmen are fully committed to their craft so as to ensure that no illicit substances make their way into their bodies in an effort to reduce the use of illegal substances. This poses a troubling situation since it suggests that not every athlete considers the ramifications doping has not only on their own bodies but also to how the particular sport is perceived by the public.

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<sup>5</sup> *ibid.*

<sup>6</sup> 'The History of Doping and Anti-Doping' <<https://www.rf.se/globalassets/riksidrottsforbundet-rf-antidoping/dokument/forskning-och-statistik/the-anti-doping-library-anti-doping-history.pdf>> accessed 31 October 2022.

<sup>7</sup> Philip Chrysopoulos, 'Doping in Ancient Greece' (*Greek Reporter*, 21 October 2022) <<https://greekreporter.com/2022/10/21/doping-sports-ancient-greece/>> accessed 31 October 2022.

<sup>8</sup> Edward Caruana Dingli 'Athletes Fundamental Rights in the Anti-Doping Process' (LL.D. thesis, University of Malta 2016).

<sup>9</sup> Sports Act.

<sup>10</sup> World Anti-Doping Code 2021 <[https://www.wada-ama.org/sites/default/files/resources/files/2021\\_wada\\_code.pdf](https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf)>.

Under the World Anti-Doping Code, there are a total of 11 possible anti-doping rule violations. Each violation is punishable differently and can be administered not only to the athletes but also to the athlete's support personnel.<sup>11</sup> The contemplated anti-doping rule violations are:

- 1) The presence of prohibited substances within the body;<sup>12</sup>
- 2) The evasion or refusal of sample collection;<sup>13</sup>
- 3) The use or the attempted use of a prohibited substance by an athlete;<sup>14</sup>
- 4) Whereabouts failures, which are a combination of three missed tests;<sup>15</sup>
- 5) Tampering or attempted tampering with doping control;<sup>16</sup>
- 6) The possession of prohibited substances;<sup>17</sup>
- 7) The trafficking or attempted trafficking of substances;<sup>18</sup>
- 8) The administration of illicit substances to athletes;<sup>19</sup>
- 9) Complicity, which is the aiding or abetting to be involved;<sup>20</sup>
- 10) Prohibited association, which is when a professional sport – related coach, doctor, physio, or trainer serves a dosage of banned substances to the athlete. This is considered to be equivalent to a doping violation, and is subject to disciplinary action;<sup>21</sup>
- 11) Acts which are considered as whistleblowing.<sup>22</sup>

The Anti-Doping Rule Violations, therefore, attempt to minimise any further corruption and vitiation which seek to taint the image of good sportsmanship, however, as times progress, athletes are becoming increasingly more fixated on emerging victorious, even if it means having to make use of the most deceitful methods.

There have been a significant number of instances whereby athletes have violated these provisions of the law. A pertinent case whereby the ethical ramifications of doping were evident was in the judgment of ***United States Anti-Doping Agency (USADA) v Connor Dwyer***.<sup>23</sup> FINA, an International Swimming Federation which manages organisations for swimming events,

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<sup>11</sup> *ibid.*

<sup>12</sup> *ibid* Article 2.1.

<sup>13</sup> *ibid* Article 2.3.

<sup>14</sup> *ibid* Article 2.2.

<sup>15</sup> *ibid* Article 2.4.

<sup>16</sup> *ibid* Article 2.5.

<sup>17</sup> *ibid* Article 2.6.

<sup>18</sup> *ibid* Article 2.7.

<sup>19</sup> *ibid* Article 2.8.

<sup>20</sup> *ibid* Article 2.9.

<sup>21</sup> *ibid* Article 2.10.

<sup>22</sup> *ibid* Article 2.11.

<sup>23</sup> *United States Anti-Doping Agency (USADA) v Connor Dwyer* [2015] Commercial Arbitration Tribunal.

conducted an out- of-competition doping test on American swimmer Conor Dwyer. A total of three samples were collected from the swimmer, each carried out on different occasions. All three tests indicated positive results for an anabolic agent of exogenous origin, which in other words is a Class S.1.1B 'Endogenous Anabolic Androgenic Steroid'.<sup>24</sup> This was consequently in violation of the anti-doping rule in Article 2.1 of the FINA Doping Control Rules.<sup>25</sup>

Following the Olympic Champion's actions, a sanction of a period of ineligibility was imposed on him, and as a result, Dwyer was suspended for a period of 20 months. Hence, all of the results achieved by the athlete up to or after the doping test were declared to be null and void, and therefore, he was disqualified and faced other repercussions.<sup>26</sup> This is in line with Article 3.3 of the World Anti-Doping Code (WADA), which provision of the law stipulates that '*any case of doping during a competition automatically leads to the invalidation of the result obtained, with all its consequences, including forfeiture of any medals and prizes.*'<sup>27</sup>

Another interesting case is the judgment of ***Nigel Levine v The United Kingdom Anti-Doping***.<sup>28</sup> In accordance with the facts of the case, British Olympic sprinter Nigel Levine was banned from the sport for a period of four years due to the fact that he failed a drug test. Levine raced at the 2016 Olympics in Rio and was a member of the British team that won the gold medal in the 400m relay at the 2014 European Championships in Zurich. Nicole Sapstead, CEO of UKAD, held that all athletes are required to adhere to the principles of strict liability and are completely liable for any chemicals which are found in their systems.<sup>29</sup> Levine had tested positive for an anabolic agent called 'Clenbuterol', a prohibited substance which is known to increase the performance of the consumer. Levine had admitted that Clenbuterol was detected in his system, however, he tried to rebut the claims against him by indicating that his supplements must have been contaminated with Clenbuterol without his knowledge. With this being said, sufficient evidence to prove his claim was not produced, and as a result, a ban of four years was imposed on the sprinter.<sup>30</sup>

Another judgment in this regard is ***Rugby Federation Union v Daniel Wells***.<sup>31</sup> The athlete was brought forward by the Rugby Federation Union, as

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<sup>24</sup> *ibid.*

<sup>25</sup> World Aquatics Doping Control Rules, Article 2.1

<<https://resources.fina.org/fina/document/2023/03/24/a6cc85ff-895b-464e-84b1-465065d5bfa4/World-Aquatics-Doping-Control-Rules.pdf>>.

<sup>26</sup> *United States Anti-Doping Agency (USADA) v Connor Dwyer* (n 23).

<sup>27</sup> World Anti-Doping Code 2021 (n 10).

<sup>28</sup> *Nigel Levine vs United Kingdom Anti-Doping* [2008] UKAD.

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*

<sup>31</sup> *Rugby Federation Union v Daniel Wells* [2017] SR/NADP/829

it felt that Wells had violated Article 21.2.1 of the World Rugby Regulations,<sup>32</sup> which is based on Article 2.1 of the WADA Code. Wells was chosen at random to participate in a doping control test, and his results revealed that he had made use of MHA and Ostarine - two banned substances in the sports framework.<sup>33</sup>

The athlete tried to rebut the allegations brought against him by providing proof of the substance which was found in his system. The athlete consumed Varicose. His defence makes the case that he had not only heavily researched the substance, but had also taken it with him so that it could be evaluated properly. Since the Panel suggested using two laboratories, he did not have the necessary funds to personally test it. Rather than cheating, the Anti-Doping Tribunal's decision was based on the fact that not enough evidence was produced to back up his claim, and as a result, the athlete was banned for four years.<sup>34</sup>

When it comes to local judgments, there have been numerous instances where athletes were charged with banned substances, namely the judgment of ***Anti-Doping Commission (Malta) vs Josiah Vella***. Boxer Josiah Vella was found guilty of making use of prohibited substances in August 2018. The athlete made use of a substance which increases muscle mass and burns fat simultaneously; a game changer for those involved in the sports world. The drug even allows for more liberated breathing which, whilst in a boxing match, can help feed the muscle tissue more energy and break down more glucose, which is an essential process in creating fuel for the body, especially when it comes to generating the power necessary for throwing a jab in such sport.<sup>35</sup>

The athlete provided a sample and it was found that there was Clenbuterol in his system. As a result, the National Anti-Doping Disciplinary Panel suspended Vella for four years for violating Article 2.1 of the WADA Code and Article 3(2)(a) of the Anti-Doping Laws. The athlete claimed that he had only made use of the substance to shed some weight before the exhibition match, rather than making use of the substance to enhance his performance. Additionally, Vella also held that he had consumed it in line with the instructions of his personal nutritionist, unaware of the fact that it may carry any legal burdens. Consequentially, the Anti-Doping Commission determined that the athlete would face a three-year suspension.<sup>36</sup> Regulation 20(1) of L.N 104 of 2021<sup>37</sup> requires athletes '*to be knowledgeable of and comply with these Anti-Doping Regulations*'; however, Vella still did not

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<sup>32</sup> World Rugby Regulations <<https://www.world.rugby/organisation/governance/regulations/reg-21>>.

<sup>33</sup> *Rugby Federation Union v Daniel Wells* (n 31).

<sup>34</sup> *ibid.*

<sup>35</sup> Decision of the National Anti – Doping Appeal Panel Case Ref: 02/2018/NADAP Josiah Vella Boxer athlete, Malta Boxing Association)

<sup>36</sup> *ibid.*

<sup>37</sup> L.N. 104/2021, Anti-Doping Regulations, Regulation 20(1).



comply with the stipulated regulation, even though it was his responsibility to do so.

An uncommon instance where an athlete was held liable for his actions for making use of banned substances was the judgment of *United States Anti-Doping Agency v Robert "Bob" Eyer*.<sup>38</sup> The Respondent, an archer, tested positive for Propanol and Carboxy-THC, two substances which, when combined together, give the consumer balance, composure, depth perception, as well as precision as they sharpen the senses in the mind; all great qualities which make an excellent archer. Therefore, this gave him a huge advantage over the other contestants.<sup>39</sup>

With this being said, the archer disagreed with the board and requested another sample to be taken, which yet again resulted in a positive test. As a result, Eyer's actions led to the violation of the provisions of Articles 2.1 and 2.2 of the WADA Code, as well as the relevant provisions contemplated under the World Archery Federation Anti-Doping Rules.<sup>40</sup> Eyer attempted to rebut the claims against him by trying to justify that both the banned substances were provided to him by medical records, and thus, prescribed to him by professional doctors. Nevertheless, the athlete was still handed over a two-year suspension.<sup>41</sup>

It is a well-established rule that whoever alleges must prove, therefore, it is the responsibility of the Anti-Doping Organisation to prove that an athlete has indeed made use of illicit substances and violated the provisions of the law. Given that such allegations which are made are deemed to be serious, the standard of proof lies within the Anti-Doping Organisation to satisfactorily demonstrate that a law has indeed been breached. In such situations, the level of proof required is considered to be higher than a simple balance of probabilities but lower than the proof which needs to be presented beyond a reasonable doubt. However, as provided under Articles 3.2.2 and 3.2.3,<sup>42</sup> the standard of proof shall be by a balance of probabilities when the Code places the burden of proof upon the athlete alleged to have violated an anti-doping rule.<sup>43</sup>

Nevertheless, an athlete can still manage to defend his position by providing the necessary evidence to prove that something other than the consumption of the substance in question led to its presence being detected in the doping results. This is pertinent especially when it comes to the relation of compounds that the human body naturally produces, such as

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<sup>38</sup> *United States Anti-Doping Agency v Robert "Bob" Eyer* [2018] AAA 01-18-0002-1928.

<sup>39</sup> *ibid.*

<sup>40</sup> World Archery, *Book 6: Anti-Doping Rules* <<https://rulebook.worldarchery.sport/PDF/Official/2024-01-15/EN-Book6.pdf>> accessed 31 October 2022.

<sup>41</sup> *ibid.*

<sup>42</sup> World Anti-Doping Code (n 10).

<sup>43</sup> *ibid.*

Creatine, for instance. It has been strongly suggested by numerous professionals that when it comes to the application of these substances, cut-off limits must be established, this way, there would a borderline between the body's production of natural substances and any prohibited alterations. While athletes refute the assumption that the discovery of the substance in the body was the result of their own intentional misdemeanour in order to avoid being punished and have bans and fines imposed on them, it is quite a difficult procedure to establish reliable evidence against negligence, which is why rebutting the assumption has not always been so successful.<sup>44</sup>

In conclusion, it can accurately be said that the penalty for a doping offence in sports cannot be regarded as having the same weight as a criminal offence within the ambit of criminal law, rather it is a disciplinary measure in sports, which is often governed by private law. However, some states have criminalised doping, essentially making the act a criminal offence. When it comes to the mere aspect of proving that an athlete has indeed made use of prohibited substances, the burden of proof lies within the sports organisation that is accusing the athlete, and therefore, it is expected to show evidence that the athlete has indeed made use of the banned substances, as well as establish his/her guilt. Under normal circumstances, the only proof which is required is the discovery of the illegal substance in the athlete's sample. This is regarded as a very powerful piece of evidence against the accused party. In addition, in certain instances, a confession or witness testimony is also substantial proof of a doping offence.<sup>45</sup>

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<sup>44</sup> Klaus Vieweg and Christian Paul, 'The Definition of Doping and the Proof of a Doping Offence' (2002) 1 The International Sports Law Journal <[https://www.doping.nl/media/kb/1982/cms\\_sports\\_5\\_1\\_ISLJ2002-1%20-%202-6%20Klaus%20Vieweg%20&%20Christian%20Paul.pdf](https://www.doping.nl/media/kb/1982/cms_sports_5_1_ISLJ2002-1%20-%202-6%20Klaus%20Vieweg%20&%20Christian%20Paul.pdf)> accessed 31 October 2022.

<sup>45</sup> *ibid.*





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