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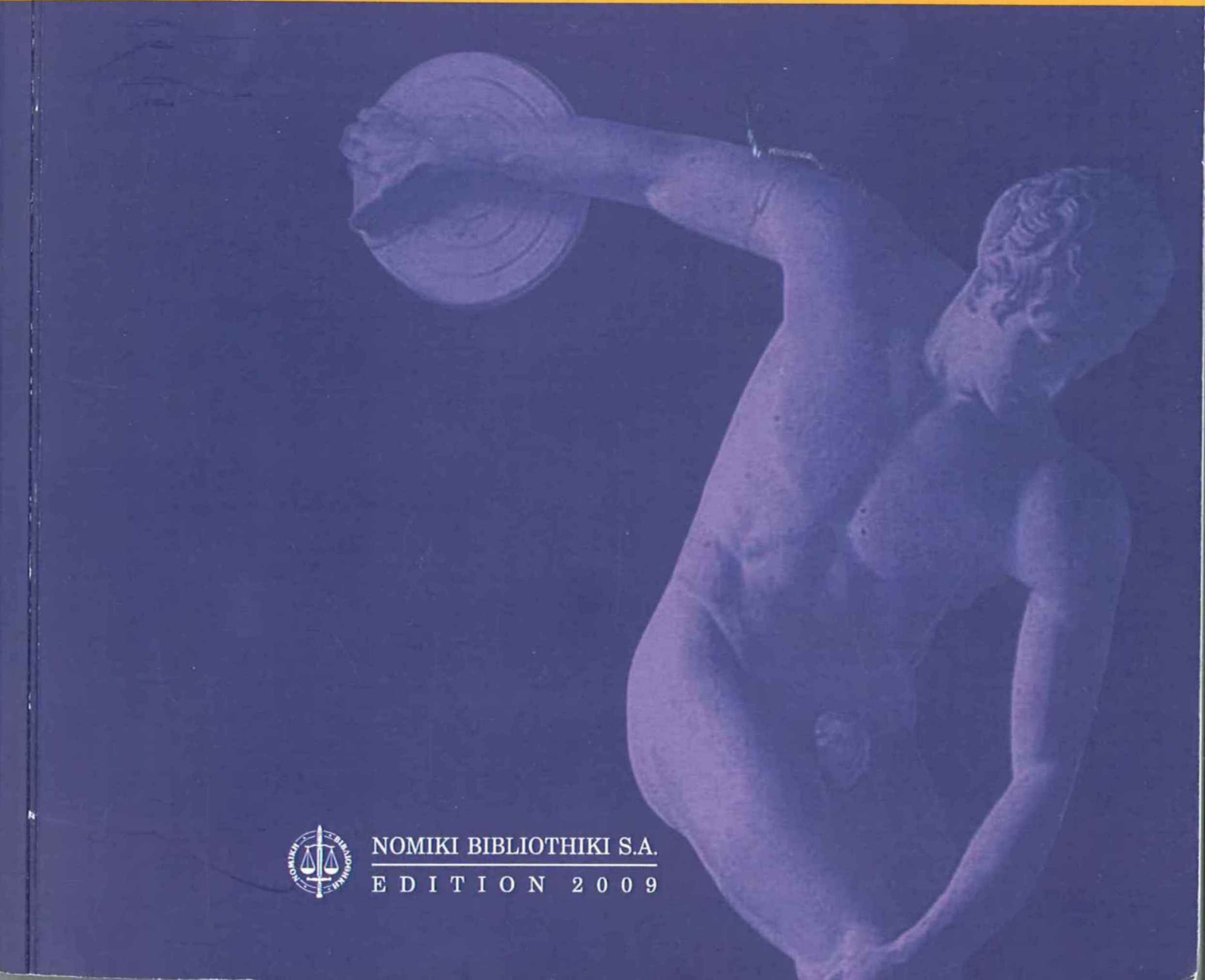

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THE COMPENSATION OF A DOPED ATHLETE

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Abstract. *Athletes are now financial able to employ highly paid lawyers in order to challenge the decision of a sport governing body and to start legal action against the persons who can be responsible for the administration fo prohibited substances. Long-term use of a doping substances can inflict real physical damage like osteoporosis or brittle bones, therefore many cases end up in a litigation. The manufacturer of nutritional supplements can be held liable for these losses in the case of bad labelling of these products. This has been patent in the Bevilanqua case. It is common knowledge that the athletes are not informed about the consequences on their health because the don't know the ingredients of the nutritional substances they take. Bad labelling can trigger product liability for sale of nutritional substances through retailers or the Internet. Alongside the companies that produce nutritional suplements and which constitute legal persons, physical persons can also be held liable for omitting to inform the ahtletes about the effects of illegal drugs. These persons have usually a contractual fiduciary relation with the sportsman and that fact establishes a duty of care. However, in the case of professional sportsmen the duty of care is applicable in a mitigated form. Persons who are not certificated as a coach but describe care themselves as a such should also be held liable for the administration of prohibited drugs to their athletes or teams. The Football Association of Wales v. UEFA has shown that a trainer can also be held responsible for the administration of prohibited drugs. The liability of the sports physician towards the athlete should be treated in the same way. In fact, the sports physician is the one who bears the responsibility to inform the athletes about the ingredients of the nutritional supplements they take and their effects and side-effects. To omit these actions should be construed as a battery or at least as a breach of duty of care. The only defence a supplements' producer, a trainer or a sport phycisian could claim in a doping litigation case could be the contributory negligence and the voluntary assumption of risk.*

Key words. *litigation and doping – physical damages of athletes because of long-term doping – manufacturer's liability for bad labelling of his/her nutritional supplements – duty of care of the coach – medical malpracitce of the sport physician*

Doping was born together with the Olympic games and coexists with the sense of sports. Fighting against doping and protecting the sport ideal is a task that

should be faced by the law. The actual state of the regulations applied by national sport governing bodies and the international court of sports in Lausane has been proved to be draconian. The consequences of the strict legal framework have been literally expressed by Andy Curtis, a World Blind 400m silver medallist:

> I fear failing a drugs test for several reasons, and this fear has been heightened by the recent questionable nadrolone cases. The first is the shame that it would bring upon me and anybody associated with my performance, a stigma which seems to attach regardless of an end finding of guilt or innocence. Secondly, it would prevent me from taking part in the sport that I love ... Thirdly it would mean the loss of my income, which would affect my wife and children. Fourthly, it may affect my ability to secure employment as it would be seen as a black mark against my name, a drug offence being a serious matter in whatever walk of life.[1]

1. Damages of a doped athlete and jurisdiction

The first, third and fourth reason of Curtis' fears seem to be taken into consideration by the English Courts on recent litigation cases. During the last few years the legality of resolutions imposed by governing bodies has been challenged. In the field of professional sports such as athletics, this had led to multimillion dollar law suits such as that of Sandra Gasser, a Swiss athlete who was tested positive and banned for two years by the IAAF. Her endorsements and appearance fees were estimated to be over US$250, 000. The total cost for the IAAF for defending the legal action was more than £100, 000.[2] Even in the amateur game of rugby union, players have been represented by expensive leading legal counsel. If the constitution or the procedures of the national governing bodies are defective then the athletes are now in the financial position to commission highly paid lawyers to exploit those flaws.[3]

It seems strange that although a lot of physical and legal persons are profiting from a victorious athlete nobody shares his damage occurring from a defeat in a doping case. This strong antithesis has been defused through some decisions, in which the liability of other persons, belonging to the athlete's circle, has been

1. Curtis A (2000) 'Running scared: an athlete lawyer's view of the doping regime' O'Leary (ed) *Drugs and Doping in Sport: Socio-Legal Perspectives* (London: Cavendish Publishing), p 117.
2. The American courts initially awarded Butch Reynolds US$27 million in damages and American shot-putter Randy Barnes US$55 million after suspension for a positive drugs test. The information is citated from the article of Gay M (1994) 'Doping control – the scope for a legal challenge' *Seminar on Doping Control*, Sports Council Doping Control Unit.
3. Gray A (2000) 'Doping control: the National Governing Body perspective' O'Leary (ed) *Drugs and Doping in Sport: Socio-Legal Perspectives*, p 11.

declared. The recent decision of the Greek governing body for athletics (SEGAS), which released the olympic gold medallist Kostas Kenteris in 200 m and the olympic bronze medallist Katerina Thanou in 100 m and held their trainer Christos Tzekos to be responsible for their refusal to be tested and punished him with a four year ban of coaching indicates a new era of distributing the responsibility. Kenteris and Thanou subsequently pleased guilty to missing three tests and were duly suspended.

The athlete should not be only the defendant in respect of decisions by his/her sport club, the sponsor or the federation. He/She should also have the opportunity to claim and recover the great losses he/she long term suffers such as the reduction of earning capacity because of the suspension and physical damages resulting from doping like ceasing to menstruate, osteoporosis, brittle bones or even death. The administration of a doping substance may not be only the athlete's fault but also the fault of his/her coach, sport physician, club, sports event organiser or even the fault of the manufacturer of the product which led to a positive test. In these circumstances the athlete should be able to claim these persons in order to recover the enormous damage that he/she suffers by a declaratory doping case.

Sport governing bodies have a decisive role on the imposition of suspensions as a sanction against doping. They are autonomous, self-regulating organisations which derive their authority from contractual/consensual relationships with their members and not from government legislation. Because of this private character of the sports governing bodies and the contractual relationship with their members, the supervision of their decisions by the High Court arises under private law and therefore a judicial review is denied.[4] This is a reason for the reluctance of the English courts to review the decisions and interpret the regulations of the sports governing bodies. They have on many occasions said, in the words of Sir Nicholas Browne-Wilkinson VC:

> 'Sport would be better served if there was not running litigation at repeated intervals by people seeking to challenge the decisions of the regulating bodies'[5]

For this reason the only way to challenge the decisions of sport governing bodies remains the recourse to international federations or arbitration courts. This is

4. The process of judicial review is available against public but not private activities, in which latter category the courts place domestic sporting activities. Par consequence 'there is no relief which the court can provide on application for judicial review until the law is either changed by a higher court or by statutory intervention' as Woolf LJ warned at the Divisional Court level in the All England Review [1991] *Sport and the Law*, pp 313-314. Cf. also Grayson E (2000) Sport and the Law 3 (ed), pp 410-411, 413.

5. *Cowley v Heatley* (1986) The Times 14 July.

patent both on foreign and domestic cases. In the Gary Hall case for example the homonymous swimmer succeeded in canceling his 3 months suspension for consuming Cannabis before both the District Court of Arizona[6] and another federal court. However, Hall could not start to compete on an international level before the completion of the suspension, since both decisions were not accepted from the International Arbitration for Sport in Lausanne[7] and FINA. The same reluctance to challenge the decisions of sport governing bodies arose in the equine doping case of *R. v. Disciplinary Committee of the Jockey Club*[8]. In this case his Highness Aga Kahn illustrates the unwillingness of domestic courts to extend the judicial review to the decisions of the sport governing bodies.[9]

Even though national and international sport governing bodies seems to have the sole authority to impose suspension and other sanctions for doping use, compensations issues in respect of doping may and must be judged by domestic courts as all litigations cases do. Therefore there are the ordinary English courts, which will normally examine the claims referred above.

2. When the Nutrition and Medicines of the Athlete are doped

Although Sport Panels like IAAF have rejected defences including spiked drinks, eating natural foods such as beef that contains steroids and taking food supplements that contain prohibited substances, it can sometimes be the reason why an athlete can be found doped. Where that reason is verified the responsibility for the use of prohibited drugs should be transferred from the athlete to the manufacturer of drugs and the organizer of sport events. Further, in this paper is analysed when a breach of duty on the part of the manufacturer can be proved and therefore the physical or economic damage resulting from the administration of doped drugs may be compensated.

2.1. Liability of the Nutritional Supplement's and Medicine's manufacturer

Ron Maughan, the consultant of the British Olympic Team in the recent Athens Olympic Games, reveals that in a sample of 634 nutritional supplements sold in the European Union 15% included prohibited substances without having

6. Case no. 2153, 12.1.1998, US District Court, District of Arizona.
7. IAS 98/218, 27.5.1999.
8. [1933] 2 All ER 853.
9. See further for the judicial review of these decisions Bailey D (1998) `Doping Control in the United Kingdom – The Regulatory and Legal for Framework´ in Vieweg, K, `Doping. Realität und Recht´, p. 335-339.

them on the label.[10] Hence, bad labelling and the lack of warning for the use of a medicine can lead to fatal subsequences for an athlete's health and career. Due to the negligence of the producer of medicines a professional athlete can take the risk of consuming a banned substance even by using decongestants purchased. Knowing which substance is and which is not prohibited can only help if the ingredients of the products are clearly listed on the packaging.[11] A panel of scientists commissioned by UK Sport issued a report in January 2000, expressing their concern about inadequate labelling of sports supplement products.[12] In September 2001, an IOC-commissioned study reported that a quarter of 600 over-the-counter nutritional substances had been tested positive for containing prohibited substances not mentioned on the packaging.[13] The World Anti-Doping Agency has identified this as an area where coordinated governmental action is required in order to enforce strict liability obligations on manufacturers of such products.[14] It should be required that packages be marked with a warning, especially when the product is involved in competitive sport.

The importance of this warning was shown recently in the Alain Baxter case, as he was stripped by IOC of his Olympic bronze medal, since he was tested positive for the prohibited substance methamphetamine.[15] Baxter explained that he had unwittingly inhaled the substance by using a Vicks nasal spray, which he had bought across the counter in a chemist in Salt Lake City, USA. The case was that a similar spray sold in Europe does not contain metamphetamine (whereas its American equivalent does).

The *Bevilanqua case* (1996) constitutes an example of bad labelling too. In this case, the Panel of IAAF rejected Bevilanqua's argument that he had taken health pills containing the drug without it being listed on the label. The remark that the Panel made in order to justify the responsibility of the athlete doesn't seem persuading: "those health pills were not everyday food that one consumes".[16] This implies that it is at least negligent for the athlete to take supplements without

10. Maughan R (2004) 14 Intern 'Sports Nutrition and exercise Metabolism' p 493. A summary of this article is available on www.medline.cos.com (last visited 30.9.2005).

11. This is especially so since a claim that the substance was not listed is not accepted as a defence to doping charge: *Aanes v FILA*, CAS 2001/A/317, award dated 9 July 2001, p 23.

12. UK Sport Nandrolone Report and 19-Norsteroids Fact Sheet (January 2000).

13. IOC: 20 per cent of supplements contain nandrolone (2001).

14. Potential regulation of the supplements industry was debated in Parliament on 23 April 2002. See *Hansard*, 23 April 2002, col 46WH.

15. *Baxter v. IOC*, CAS 2002. A brief summary of the case in Lewis A and Taylor (2003) '*Sport: Law and Practice*', p 955. Cf. also A Ross 'Alain Baxter – Unfinished Business', 2005.

16. Tarasti, L 'When can an athlete be punished for a doping offence?' paper presented to the IOC Conference on Doping in Sport, Lausanne, February 1999, Fn. 28.

establishing that they are drug free and it is in accordance with IAAF Rules and Regulations, r 55.4[17]. The bad labelling of athletes' supplements constitutes a definitive fact which shifts the burden of proof of breach of duty or negligence on the manufacturer's side.

There has been much debate surrounding these supplements following the recent nadrolon cases, and this has focused on the safety of these products, their possible regulation and tests on their usefulness. *Barnes*[18] summed up the situation nicely when he stated that, these supplements, 'are not medicines, they are not licensed, they are not controlled, you don't always know quite what are you getting'. *Goodbody*[19] reported in a similar vein that the Government, in January 2000, had commissioned an inquiry into these supplements, which concluded that 'users of inadequately labelled products are at risk of unknowingly ingesting a banned substance. We recommend that the sports community maintains a high level of awareness of the possible hazards of using some nutritional supplements and herbal preparations'. *David Hemery*, the former president of the UK Athletics, has stated that there are needs to be a high level inquiry into the effect of these products and how much they help'.[20] Unfortunately in the last five years there were no steps in this direction and therefore there is still a danger being tested positive by innocently ingesting a ginseng product, like the World Champion Linford Christie in the Olympics of 1988 did.

The statement of Andy Curtis is astonishing:

> My greatest fear regarding adulteration of products comes from the health food market, as I tend to use alternative health food remedies to prevent colds. One book recommended such products as vitamins, garlic, zinc, lozences, etc. However, although all these looked to be *prima facie* 'legal', there was a substance present on one of the products called Echinacea, which I have never heard of, and I thought it could possibly be a similar substance to ginseng which has previously landed athletes in trouble ...
>
> If I were to rely upon the listed ingredients on the product and then innocently ingested a prohibited substance, I would be banned. If I tried to take action against the manufacturer for negligence, I would only have a case if it had caused me physical harm, for instance, if I was allergic to a substance which caused me an allergic reaction. The only financial remedy I would have against them would be in contract, possibly for instance of misrepresentation

17. 'It is an athlete's duty to ensure that no substance enters his body'.
18. Barnes S (2000) 'Obsession that drives athletes over the edge' *The Times*, 9 February, p 54.
19. Goodbody J (2000)'Moorcroft calls for supplement testing' *The Times*, 10 February.
20. (2000) *Athletics Weekly*, 23 February.

> which would get my money back for the product, but no consequential loss. If I had failed a drug test for a substance which could later be shown to be in the product I would have an action against the manufacturer for negligence if that statement had been untrue and I had relied upon it to my detriment.[21]

Andy Curtis refers to product liability, which offers a good remedy for the damages an athlete can suffer because of false labeling or instructions on a medical product. Liability for medicinal products may arise by virtue of contract, tort or statute.

2.1.1. Contract Law Remedies

Historically the boundaries of liability for injurious products largely derive from the law on their express or implied warranties. The doctrine of 'privity'[22] (until 1932) screened negligent manufacturers from claims for injury by ultimate consumers. Since, under this doctrine, the seller of a defective product is, at common law, contractually liable only to the buyer, in practice contract has limited relevance to claims for harm against the manufacturer caused by medicinal products.[23] However, it is uncommon that athletes and trainers order their nutritional supplements and drugs via the Internet[24] a contractual relationship between the athlete and the manufacturer is established.

Even though a contract exists between the athlete and the manufacturer, it can be void at common law, if the drugs are unlawful or the manufacturer is unlicensed to supply such drugs. Such unlawful actions constitute a criminal offence under ss 4 and 5 of the Misuse of Drugs Act 1971 and s 7 of the Medicines Act 1968. The Misuse of Drugs Act 1971 distinguishes Class A, B and C drugs with-

21. Curtis A (2000) 'Running scared: an athlete lawyer's view of the doping regime' O'Leary *Drugs and Doping in Sport*, pp 112-113.

22. The case *Tweddle v Atkinson* [1861-1873] All ER Rep 369 is generally considered to be the classic authority for the doctrine of privity in modern English law.

23. Dunlop *Pneumatic Tyre Co v Selfridge & Co* [1915] AC 847; *Daniels and Daniels v White & Sons Ltd and Tarband* [1938] 4 All ER 258; *Woodar Investment Development Ltd v Wimpey Cosntruction UK Ltd* [1980] 1 WLR 227 (HL). The Contracts (Rights of Third Parties) Act 1999 has little or no application to claims for personal injury resulting from defective medicines. Contrast the relaxation of the privity rule in the US Uniform Commercial Code s 2-318, extending the seller's liability for the breach of warranty to other members of the purchaser's household (including guests); *Henningen v Bloomfield Motors Inc* 161 A 2d 69 (1960), *Greenman v Yuba Power Products Inc* 377 P 2d 897 (1963) and 402 of the Restatement (Second) of Torts (1965) and Restatement (Third) of Torts Products Liability (1998), s 2.

24. It is patent that many performance enhancing drugs such as Nadrolon can be bought via Internet throughout the world. See Krähe C (2000) 'Beweislastprobleme bei Doping im internationalen Sport – am Beispiel des Olympic Movement Anti-Doping-Codes in Fritzweiler' *Doping – Sanktionen, Beweise, Ansprüche,* Burghausen-München, p 39, 45.

out defining the effect of the contravention of the statute (schedule 3).[25] There is no lawful excuse for the possession or supply of Class A and B drugs. In relation to the principle *ex turpi causa non oritur actio* a contract defining the supply of such drugs should be regarded as automatically void for both contract parties by the courts. That is not the case for Class C drugs. The possession of such drugs is unlawful only in the absence of a valid prescription.[26] This means that the intention of the legislature is only to ensure the proper use of these drugs and not to forbid their distribution.

Beyond these prohibitions and restrictions of the Misuse of Drugs Act 1971 it should be underlined that the athlete usually wants to know what a medicine contains. In case the manufacturer has not given full information for the contract the athlete can bring an action on contract and sue for damages. Besides the athlete would be normally induced to purchase illegal, bad-labeled drugs because of fraudulent misrepresentation that the medicine is legal. It is because of that misrepresentation that he/she has a remedy for reliance loss (damages arising from his/her trust in the false or misleading label of the drug).

In addition, as long as correct labeling and instructions for use constitute a warranty in a sale, the infringement of these obligations leads to a breach of contract and consequently to a financial compensation for all damages. In this context the economic and speculative losses of a disqualification and long-term suspension due to unintentionally taking doping substances should be covered by the manufacturer of a bad-labeled medicine contracted via internet with the athlete.[27] Usually the drugs are bought from an intermediate seller and because of the rule of privity a claim against the manufacturer would be rejected from the courts. Therefore remedies against the manufacturer deriving from contract law can be demanded only in a sale via internet. On the other hand it is always though avail-

25. A wide selection of performance enhancing drugs was scheduled to be regulated under the Misuse of Drugs Act in 1996. For further information see News Release 082/96, London: Home Office and Press Release H/93/766, 1993, London: Department of Health. Cf. in respect of anabolic steroids Lowther J 'Criminal For actual reports of the Advisory Council on the Misuse of Drugs visit the Home Office site www.homeoffice.gov.uk/drugs/misuse/index.htm (last visited at 30.9.2005).

26. Cf. in respect of anabolic steroids Lowther J 'Criminal Law Regulations of Performance Enhancing Drugs: Welcome Formalisation or Knee Jerk Response?' O'Leary Drugs and Doping in Sport. Socio-Legal Perspectives (2001), pp 228-232. For proposed changes to the Misuse of Drugs Act visit the Home Office Site www.homneoffice.gov.uk/documents/cons-2005-drug-reps/cons-drugs-misuse-280705 (last visited at 28/1/2009).

27. Compare the Modahl Case, where her claim for economic loss resulting from her 4-year suspension was rejected. *Modahl v BAF* (1996) unreported, 28 June (QBD); (1997) unreported, 28 July (CA); (1999) *The Times*, 23 July (HL) and (2001), unreported, 12 October, (EWCA).

able to the athlete who buys drugs from a pharmacist to claim against the seller, who may have in his own possession a claim against the manufacturer.

The above mentioned legal framework applies to blood doping too. Blood doping is a performance enhancing method a rich in erythrocytes blood transfusion. It is usually used by long-distance runners. Bodily fluids such as blood and semen are defined by the English Courts as 'goods'[28] and blood has been deemed a 'medicinal product' within the European Community Directive on Products Liability (85/374) and the Consumer Protection Act 1987.[29]

2.1.2. Tort Law Remedies

The Medicine Act 1968 and the Misuse of Drugs Act 1971 reflect the reaction of the English Legislature to the thalidomide tragedy.[30] The protracted litigation over thalidomide proved to be a catalyst for proposals during the 1970s both in

28. The point was conceded in *A v National Blood Auhtority* [2001] 3 All ER 289, 307 (Hepatitis C). See further Bell AP (1984) 'The Doctor and the Supply of Goods and Services Act 1982' 4 LS, 175, 178.

29. Under the Medicines Act 1968, a 'medicinal product' is 'any substance or article (not being an instrument, apparatus or appliance) ... for use wholly or mainly for a 'medical purpose', that is to treat, prevent, or diagnose disease; to ascertain the existence, degree, or extent of a physiological condition; for contraception; to induce anaesthesia, or otherwise prevent or interfere with the normal operation of a physiological function: s 130(1), (2). And see Codified Pharmaceutical Directive (EEC) 2001/83, Art 1. Some biological, surgical, dental, and ophthalmic materials, which were medicinal products within the Act or its subordinate legislation are now controlled under the CPA. They include IUDs and contact lens fluids. See Council Directive (EEC) 93/42 and the Medical Devices Regulations 1994, SI 1994/3017. In vitro diagnostic medical devices are covered by Council Directive (EC) 98/79, given effect to by the In Vitro Diagnostic Medical Devices Regulations 2000, SI 2000/1315. The Medical Devices Regulations 1994, SI 1994/3017 are amended by the Vitro Diagnostic Medical Devices Regulations 2000, Sch 1. Cosmetics may be defined by the Medicines Control Agency as 'medicinal products' by virtue of their remedial or curative functions. See Medicines Control Agency, *A Guide to What is a Medicinal Product* (London 2002). On judicial review of classification, see *Rc Medicines Control Agency, ex p Pharma Nord (UK) Ltd* [1998] 3 CMLR 109. And see Longley D (1998) 'Who is Calling the Piper? Is there a Tune? The New Regulatory Systems for Medical Devices in the United Kingdom and Canada' 3 Med L Int 319.

30. Hastily conducted research and unsystematic clinical trials, mainly carried out by doctors who had continuing commercial dealings with the company, were followed by sweeping assertions of non-toxicity, which were repeated in the promotional literature of distributors in other countries, such as Distillers in the United Kingdom. Even accepting that the methods of Chemie Grunenthal, the German manufacturers, were not representative of the industry as whole, many countries drew the moral that health is too serious a matter to be left entirely to pharmaceutical companies. For Thalidomide was an extreme illustration of risks inherent in unregulated drug production.

the United Kingdom[31] and in Europe.[32] This introduced strict liability for injuries caused by defective products. The culmination of this activity was the European Community Directive on Product Liability (1985), [33] as implemented in England by Pt I of the Consumer Protection Act 1987.[34]

Product Liability, though, was much earlier established by the English Courts, in the landmark case of *Donoghue v Stevenson*[35]. This case opened eventually for consumers a door to pursue the manufacturer directly a case could be mounted against him for negligence. The justification of this thesis lies in the loss spreading capacity of the defendant. A manufacturer will treat expenditures incurred meeting injury claims by third parties as part of the inescapable overhead of his operations – a cost item that will enter into the calculation of the supplements' price. It seems fair to put the burden of the damage's recovery to the manufacturer. He can afford it by efficiently channeling the cost, whether the athlete does not.[36]

The duty of care includes not only acting properly but also assisting somebody escape injury.[37] On these terms a manufacturer should not only care about the quality of his/her product, and supply of its proper labeling but also about the supply of proper instructions of use, including warnings about risks.[38] The number of people affected by omissions of the manufacturer in this respect is not important in proving a duty of care. Lord Denning has suggested that a product which is safe for most people should be considered dangerous 'if it might affect other users who

31. The Law Commission and the Scottish Law Commission, Liability for Defective Products (Cmnd 6831, 1977); Royal Commission on Civil Liability and Compensation for Personal Injury (the 'Pearson Commission') (Cmnd 7054, 1978) vol 1, para 1216.

32. EEC Draft Directive on products liability [1976] OJ C241 (first draft), [1979] OJ C271 (second draft); Strasbourg Convention on Products Liability in Regard to Personal Injury and Death (1977).

33. Directive (EEC) 86/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29.

34. As amended by the Consumer Protection Act 1987 (Product Liability) (Modification) Order 2000, SI 2000/2771. The Consumer Protection Act (CPA) does not apply to damage caused by defects on products supplied before 1 March 1988: CPA, s 50 (7); CPA (Commencement No 1) Order 1987, SI 1987/1680.

35. [1932] AC 562, 599, *per* Lord Atkin.

36. *Calabresi* would have objected this argumentation because of the adverse effects on public health that such a statement might have. Distributing the costs of compensation for a dangerous or bad labeled drug to the safe ones results to increase of the prices of the latter. This would raise the cost of all drugs and – following Calabresi's thesis – to that extent deter their use: a result that might lead to decrease of medicines sales.

37. *Donoghue v Stevenson* [1932] AC 562, at p 580.

38. *Devilez v Boots PPPure Drug Co Ltd* (1962) *Cartwrigth v GKN Sankey Ltd* [1972] 2 Lloyd's Rep 242, 259 (CA); 106 SJ 552.

had a higher degree of sensitivity than normal, so long as they were not altogether exceptional'.[39] Under this point of view a performance enhancing medicine, for example, requires a warning notice on its label that its ingredients constitute a prohibited substance no less because only a small number of potential users (professional athletes) are interested on that information.

Nevertheless, lack of or bad labeling can be regarded not only as an omission but also as a defect of the medicinal products. 'Failure-to-warn' claims are now the most common form of litigated product cases in the US.[40] Since the manufacturer is required to make available such information as will enable to be used safely, [41] any warning must be readily intelligible and commensurate with the risks. Hence, it should be taken for granted that there is no duty to warn of a danger, which is either patent or a matter of common knowledge.[42] That means for example that a product, on whose label is mentioned the existence of nandrolone or testosterone and the fact that these substances constitute anabolic steroids should be considered as sufficient. It is common knowledge that anabolic steroids constitute one of the best-known groups of prohibited substances for an athlete and that they have fatal consequences for his health.

Otherwise, where there is a total failure to warn there is little scope for defences such as contributory negligence or *volenti*, since the user will normally have been unaware of any danger.[43] The proposal of former clerks for the Court of Arbitration for Sport *Anne Benedetti* and *Jim Bundting* should be put into effect:

'In the future it may also be appropriate for the regulation of the supplement industry to require producers to maintain stores of each batch produced for a period of two years to resolve potential claims of athletes. This may also be in the best interest of the producers in order for them to ensure they are able to avoid future civil liability.'[44]

39. *Board v Thomas Hedley* [1951] 2 All ER 432, 432 (CA) *per* Denning LJ. See also *Griffiths v Conway (Peter) Ltd* [1939] 1 All ER 685.

40. Staphleton, J, *Product Liability* (London, 1994) 252.

41. *Kubach v Hollands* [1937] 3 All ER 907; *Holmes v Ashford* [1950] 2 All ER 76 (CA); *Devilez v Boots Pure Drug Co* (1962) 106 SJ 552.

42. *Farr v Butters Bros & Co* [1932] 2 KB 606 (CA); *Devilez v Boots Pure Drug Co* (1962) 105 SJ 552; cf. *Deshane v Deere & Co* (1993) 106 DLR (4th) 385 (Ont CA). See also Miller and Lovell, *Product Liability* (1977) p 239. For declination of the above mentioned principle in the US see eg *Micallef v Miehle* Co 39 NY 2d 376 (1976).

43. See for further information on marketing defects such as warnings, instructions and allergic reactions Grubb and Laing, *Principles of Medical Law*, Oxford 2004, pp 1000-1002.

44. Bennetti A and Bunting (2003) 'There is a New Sheriff in Town: a Review of the United States Anti-Doping Agency' 2 I.S.L.R., p 30 and note 94.

2.1.3. The assessment of the damage

The law of tort covers pecuniary loss such as medical costs, the impairment of earning capacity and physical damage, because of an injury or the athlete's death caused by the administration of a badly labeled doping substance. Here, under the term 'impairment of earning capacity' is meant the incapacity of taking part in sport events resulting only from the injury and the long-term suspension consequential to a decision of sport governing body. A claim of negligence for purely economic loss such as the profits the athlete would have made during the suspension, is expected to be rejected.[45] A further disadvantage of the tort law remedies lies on the fact that they don't recover the economic loss, whereas contract law provides remedies for the recovery of any foreseeable economic loss, such as the damage that a professional athlete might suffer because of the unintentional administration of doping substances which have led to his suspension.

A producer's liability may arise by statute only under the Medicine Act 1968, the Misuse of Drugs Act 1971 and the Consumer Protection Act 1987, since in England – in contrast to other European countries[46] - there are no specific penalties for those who supply athletes with drugs. It should be, though, underlined that according the Medicines Control Agency in relation to the European Directive 65/65/EEC[47] and the Misuse of Drugs Act 1971[48] performance enhancing drugs such as Prozac™ and creatine can be classed as medicinal products as long as they possess 'significant' pharmacological effect.[49]

2.2. Are the Regulatory Authorities immune?

It seems rather improbable that any actions might lie against the relevant public bodies. Cases like *Dorset Yacht Co. v. Home Office*[50] and *Anns v Merton London*

45. See generally for economic loss on law of torts in Flemming J (1995) An Introduction to the Law of Torts (Oxford), p 60-66.

46. Greece, Belgium, France and Italy impose criminal penalties, including imprisonment, on those who supply athletes with drugs and sometimes even (Greece and Belgium) on the athletes who use them, provided knowledge and intend are shown. See Law 1646/1986, Arts 7-9 in Greece, Law of 2 April 1965 of the French Community of Belgium and Art 43 (Decree of 27 March 1991) of the Flemish Community of Belgium. Cf. also Beloff M J *Editorial* [2005] ISLR, issue 1, p 1.

47. MCA, *Guidance Note: A Guide to What is a Medicinal Product*, 1995, London: MCA.

48. See Pt 1 of Shec 4 of the Misuse of Drugs Act 1971.

49. For the definition of 'medicinal product' in relation to anabolic steroids see Lowther J (2001) 'Criminal Law Regulation of Performance Enhancing Drugs: Welcome Formalisation in Knee Jerk Response?' O'Leary *Drugs and Doping in Sport: Socio-Legal Perspectives*, pp 234-237.

50. [1970] A.C. 1004.

B.C.[51] confirm the English Courts practice to reject any disposition to review the 'discretion' entrusted to a public authority as distinct from the practical execution of its programmes. The reason for judicial unwillingness to review the authority's decision is that it is constitutionally entrusted to the authority subject to political or administrative but not judicial sanctions. In short, it would violate the separation of powers.[52] Thus, neither the Licensing Authority of the medicines and the Committee on the Safety of Medicines nor the Medicines and Healthcare Products Regulatory Agency would ever be held liable for performing improperly their tasks, as long as the above mentioned precedents do not change.[53]

2.3. Liability of sports governing bodies

In the context of doping control, sports governing bodies must ensure that in the implementation of their rules and regulations, they do not breach their various private law obligations owed towards those who are subject to these rules. There are a number of potential causes of actions which may be relevant in the context of the doping control. These include:

a) Breach of Contract. If there is a breach of the contract between the sport governing bodies and their members like the addition of a new substance to the list of the prohibited supplements without informing the members of the sport or the incorrect application of the rules, an individual would have a cause of action against the relevant sports governing body in contract and could seek injunctive relief, declarations and/or damages

b) Negligence. The procedures of doping control have a duty of care to ensure that they avoid acts or omissions which may cause loss or damage to those who are subject to those rules. In the event that there is a breach of that duty which causes loss or damage, an aggrieved individual may seek monetary damages resulting more from the physical incapacity of participating at sports event than from a long-term imposed suspension, as above mentioned.

c) Defamation. Sports governing bodies exercising sensitive doping control practices and policies, could conceivably be exposed to a claim for damages under the tort of defamation in the event that a statement by a governing body representative (whether oral or written) was made unjustifiably and was such that it lowered the reputation of the athletes who was the subject of that statement in

51. [1978] A.C. 728.

52. For the duty of care of public authorities in England and the U.S. see in short Flemming J (1995) An Introduction to the Law of Torts, pp 60-68.

53. For the legal responsibilities of these regulatory bodies see further Grubb and Laing (2004) Principles of Medical Law, pp 1006-1010.

the minds of right thinking people in society in general. Sports governing bodies might however allege that there is a public interest in the dissemination of reports and/or decisions of sports governing bodies to public meetings and inquiries and therefore qualified privilege should be allowed.[54] That kind of privilege was also allowed in the *Russel v Duke of Norfolk*[55] trial, in which the Court of Appeal considered a racing trainer's licence which was found to have been withdrawn after a properly conducted inquiry by the sport's ruling body, the Jockey Club. It decided that a drug had been administered to a horse named Boston Boro, trained by James Russel, which ran in the John O'Gaunt Plate at the Lincoln Spring meeting of 1947. The decision was to the effect that the trainer was guilty of negligence for not preventing the drug's administration. When the decision was published in the Racing Calendar, the above negative conclusion was omitted. It thereby allegedly created a contrary implication, namely, that the plaintiff himself was a party or privy to the most serious inference of active administration of the drug. The libel action failed on two conventional grounds: (a) publication was privileged, and (2) the plaintiff had consented to it contractually via the Rules of Racing by which he was undoubtedly bound.

Although defendant's claim is unlikely to succeed, Grayson points out in Sport and Law that:

'If similar, circumstances arisen today a claim against the publisher of the Jockey Clubs rules for negligent misstatement would be justified under the Civil Law of negligence (as distinct from the Jockey Club rules), based on the landmark decision of the House of Lords in Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] Ac 465.'[56]

d) Restraint of Trade. The justification of the penalties, which the sports governing bodies impose to their members for use of prohibited drugs, is based on two principles: protection of the sport by ensuring a fair play and protection of the athlete by safeguarding his/her health. These two reasons should however no

54. Sports governing bodies constitute private bodies and therefore an absolute privilege for them should not be taken into consideration. See shortly and generally Flemming J (1995) An Introduction to the Law of Torts, p 202. Cf. the case of the seven times winner of Tour de France Lance Armstrong being suspected of having taken performance-enhancing drugs *Armstrong v Times Newspapers Ltd* and others [2004] EWHC 2928 (QB). See para 80-107 of the same case for the application of Reynolds criteria in relation to the qualified privilege argument. Cf. for the US law Miller, L K, 'Defamation: Judicial Scrutiny of a Sport Plaintiff's Rights', (1996) 6 J Legal Aspects Sport, p 145-153.

55. For failed sporting libel actions cf. *Seymour v Reed* [1927] AC 554 and *Wingy v O'Connell* [1927] IR 84.Per Asquith LJ [1949] 1 All ER at 118, TLR at 231. See also the leading case on issues of privilege and damages *Chapman v Lord Ellesmere* [1932] 2 KB 431.

56. Grayson E (2000 Sport and the Law, 3 ed, p 398.

way harm the life of the athlete or the spectacle of a sport. That could happen if the foreseen penalties are extremely severe and impose long-term suspensions. In that case an unreasonable restraint of trade should be taken into consideration by the English courts, since a long-term suspension in certain sports can impact on a persons' ability to trade and/or pursue his/her livelihood. That was probably the reason for which the duration of a suspension has been reset on the four years penalty, as it was before 1997.

Every English Court when determining whether a clause of a Contract or rule of a sports governing body is in restraint of trade will consider i) if the athlete is involved in a recognised trade and ii) if the relevant clause within the rules or contract restrains the sportsman or woman in his/her trade. If the answer is positive, then the restraint will be unenforceable unless it is reasonable. Lord MacNaghten in the case of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company*[57] stated:

„The public has an interest in every persons' carrying on his trade freely; so has the individual. All interference with the individual liberty of action is trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and indeed it is the only justification if the restriction is reasonable, that is in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public".

Pursuant to the above dictum, the Court will assess: i) if the restraint is reasonable between the athlete and the governing body and ii) if the restraint is reasonable in the public interest. Once the athlete has identified that a rule is a restraint of trade, the burden switches to the sports governing body to prove in all the circumstances, the reasonableness of the particular restriction. In the event that a Court considers that the particular rule goes further than is reasonably necessary to protect the legitimate interest of the sport, the Court may declare a rule void and unenforceable and/or damages to the complainant.

In two cardinal, for the doping issue, cases (*Gasser* and *Wilander*)[58] the English courts considered the applications of the plaintiff athletes whether the doping control programme of their sport governing bodies constitutes an unreasonable

57. (1894) AC 535.

58. Sandra Gasser v Stinson et al (1988) QBD 14 June 1988 and *Wilander and Novacek v Tobin and Jude* (1997) 1 Lloyds Rep. 195. For an analysis of the restraint of trade argument on both cases see Bailey D (1998) 'Doping Control in the United Kingdom – The Regulatory and Legal Framework' Vieweg, K, *Doping. Realität und Recht,* p. 342-348.

restraint of trade. In both cases the Courts spurned the allegation that a strict liability offence combined with a mandatory sentence leads to an unreasonable restraint of trade and therefore concluded that the combination of these measures against doping should remain enforceable under the English law. However, some cases like *Newport AFC Ltd v FA of Wales Ltd*[59] and *Greig v Insole*[60] demonstrate that both a disciplinary tribunal purporting to impose long periods of suspension and a governing body which creates restrictive conditions to work is acting in restraint of trade.

3. Liability of the coach

3.1. Damages of the athlete which may result from negligent coaching

Coaches or trainers may be liable in damages for injury suffered by their subjects as a result of nutritional supplements administrated negligently or in breach of contract.[61] During or after a great sport performance serious injuries or even death might result if the athletes are not advised correctly by their coach or physician. Death cases like that of the German Runer Katerina Grabbe and the Canadian World and Olympic Medallist Flo Joe indicate that the advice of the coaches about nutritional supplements should be given correctly and with great care.[62] Even though an administration of a false drug does not lead to injury, it may well result in a reduction of earning capacity of a sportsman/sportswoman.

In relation to these facts it seems clear and obvious that in certain circumstances a coach will owe some duty of care to his protegees. The precise ambit of that duty will vary greatly depending upon various factors. It is not possible to formulate a 'one size fits all' duty that all coaches owe to all those that they coach. It is submitted that the relative experience or expertise of the coach and the protegee, as well as their respective ages and the nature of their relationship will be highly relevant in determining the scope of any duty of care, whether the coach was negligent and whether there was contributory negligence. In some circumstances, there may be a contractual relationship between the injured claimant and his coach (or the employer of the coach).

The legal liability of a coach might arise either in contract or tort, or both. By the Supply of Goods and Services Act (1982), s 13 there is implied a term in contracts for the supply of service that the supplier will carry out the service with reasonable care and skill, where the supplier is acting in the course of business. Business

59. (1994 144 NLJ 1351) [1995] 2 All ER 87.

60. [1978] 1 WLR 302.

61. Gardiner J (1993) 'Should Coaches Take Care?' 1 Sports and the Law Journal, p 11.

62. *Ibid*, p 12

includes a profession and the activities of any government department or local or public authority. The section would, therefore, apply to any paid coach, whether employed privately or at a sports, health and fitness centre. Support for this proposition is found in the case of *Thake v Maurice*.[63] As far as a sports paid coach is concerned, the contractual claim seems to overlap with the negligence claim.

3.2. Contract Law Remedies

A properly drawn contract should define the rights and duties of the contracting parties and the coach can, therefore, limit the extent of his liability by, say, excluding liability for any particular result. In some such circumstances, a coach may have contractual duties to supply nutritional supplements that do not arise out of his role. This would be important for the coach of a professional sportsman in which the former might be fixed with knowledge of the sportsman's desire to improve his performance in order to increase his earnings (the second limb of *Hadley v Baxendale*[64]).

Where there is a contract under which the coach is retained by a potential claimant, it is submitted that the preferred route is an action for breach of contract. Examples of terms of general application that might be implied would include terms that the coach will not instruct the participant to take substances that are likely to cause injury to the participant without warning the participant of the risk of such injury.[65]

The more experienced the participant, the less onerous will be the role of the coach. To take athletics as an example, one would not expect the coach Trevor Graham, to have to tell Justin Gatlin what he should eat and drink during training or before a competition. It is obvious, that Gatlin has reached the point to be experienced enough to regulate his own nutritional programme under the advice of sport physicians. On the other hand, the British football team should be carefully instructed about what to eat and drink and the coaches of the team should carefully apply potential guidance, which was given by the British Football Board in relation to nutritional supplements. Such guidelines are usually not "mandatory", in the sense that the BFB has no power to enforce compliance, but is designed to avoid actions for negligence. The existence of guidelines is, however, powerful evidence of negligence against a coach who fails to follow them. If a young person refuses to follow the nutritional habits of the team the coach may not allow him

63. [1986] 1 All ER 497.

64. [1843-60] All ER 46.

65. Cf. Kevan T, Adamson D and Cottrell St (2002) Sport Personal Injury: Law and Practice (London), pp 130 –131.

to participate[66] and will be likely to be found to have been negligent if he does allow him or all the team to take supplements otherwise than in accordance with the guidelines.

3.3. The basis and extent of a duty of care

An action in negligence is available against a much wider group than paid coaches and arises from *Hedley Byrne v Heller and Partners*[67] and a string of later cases as *Chaudhry v Prabhakar*[68], which have widened the scope of liability for, in effect, negligent advice.[69] The issue for the Plaintiff who complains of injury resulting from negligent coaching is as to whether a sufficient relationship arises between the proposed Plaintiff and the Defendant to establish a duty of care. The essential feature which gives rise to such a duty is the level of reliance by the subject upon the expertise and/or experience of the coach. This will be most obvious when the subject is a child or a novice to the sport in question and the coach is an experienced specialist. Such a duty certainly exists between schools and pupils[70] or a football manager and a player, where the coach may have actual disciplinary authority over the participant. When an injury or a disqualification occurs because of negligent advice of the coach such as to give nutritional supplements which include substances which are prohibited or dangerous for the health of the athlete substances, the coach will be vulnerable to an action for damages.

The power that a coach has in the above mentioned relationship – whether it exudes from disciplinary authority, the ability to exclude a participant from a team or event, or merely because the participant trusts the judgment of the coach – might explain why the participant is willing to undertake an activity that might otherwise appear foolhardy. This "power dynamic" in the relationship needs to be taken into account by a court in considering a defence of *volenti non fit injuria* or contributory negligence. The statement of a power lifting sportsman demonstrates the level of this power:

> 'I don't use (recreational) drugs or drink or smoke and if my coach says steroids will make me stronger I will use them'[71].

66. See the coach of the Mexican National team, which excluded two of his athletes of the World Championship in Germany 2005 because they did not followed his instructions and the sleep habits of the team.

67. [1964] A.C. 465.

68. [1989] 1 W.L.R. 29.

69. Gardiner J(1993) 'Should Coaches Take Care?' 1 Sports and the Law Journal, p 12.

70. *Van Oppen v Bedford Charity Trustees* [1989] 1 All ER 273.

71. Fuller R and LaFountain J (1987) 'Performance-enhancing drug use in college athletics: a different form of drug abuse' Adolescence, p 119.

The liability of a coach in negligence is theoretically based upon an assumption of responsibility. From this point of view, one can decide whether and to what extent a coach has assumed responsibility for each aspect of the safety of the participant. The coach can be said to assume responsibility for the safe instruction and assistance of the participant in the areas of nutrition too. The taking of creatin, for example, a well-known and broadly used protein, should be combined with the use of other substances, necessary for its proper absorption of the body. The taking of all these substances should arranged at certain times during the day. Many athletes are usually given a schedule plan in order to tick every one of the nine or more daily boxes, which corresponds to the administration of the equivalent pill. Consequently, it is patent that the administration of nutritional supplements is included in the technique of a coach. The participant relies upon the expertise and experience of the coach not only to make the required improvement to the ability of the participant but also to do so safely.

While the vast majority of sports have schemes whereby coaches may be trained and officially recognised, not all instruction will be carried out by qualified coaches. It is beyond doubt that if a person has the title of a coach, it must be that he holds himself out as a person on whom a participant can rely, even if that participant knows that the coach is not accredited. Clearly a coach would be liable in negligence if he wrongly claimed to have certificates and experience and due to his incompetence a participant has taken inappropriate or excessive nutritional supplements.

The Court of Appeal has, however, imposed liability for negligent statements of non professionals too.[72] That is the case where the Captain or "manager" or other senior players pass on tips to less experienced players. It is natural particularly in team games for young participants to rely upon such advice. This may lead to difficult situations in terms of liability – for instance it would be a question of fact whether a senior player at a small amateur cricket club was in any way 'holding himself out' as a person on whom a young player could rely, where that senior player wrongly and repeatedly told the youngster to take as many amphetamines as he could in order to improve his performance. In such cases the Defendant has represented to the Plaintiff that he has relevant experience and ability and is prepared to assist the Plaintiff in acquiring expertise. The principle established in Hedley Byrne – that a duty of care arises where a party is asked for and gives gratuitous advice on a matter within his particular skill or knowledge and knows or ought to have known that the person asking for his advice will rely on it and

72. For the acceptance of a 'special' duty of care of persons whose profession is to provide information or advice in Australia and U.S. cf. *M.L.C. v Evatt* [1971] *Esso Petroleum v Mardon* [1976] Q.B. 801. A.C. 793 and *Shaddock v Parramatta C.C.* (1981), 55 A.L.J.R. 713.

act accordingly – is not difficult to apply to the relationship between club mates, particularly of different age and experience.[73]

If individuals (amateur sportsmen) allow themselves to be thought of as 'coaches', whether of novices or first teams, then the standard applied to them will be the standard which one would expect from a coach, not a man in the street with no particular expertise. This may seem a little harsh but is supported, in my view, by *Chaudry v Prabhakar*[74]. If as in this case the advice of a friend justifies an existence of a duty and imposes an objective standard, the standard is, of course, higher for someone who describes himself as a coach. The standard expected of him will be the standard of the ordinarily competent coach, with all that that implies.[75]

It would be unreasonable for anybody claiming to be an athletics coach to seek to avoid liability by saying that he was not aware of the possibility of injury caused by overdoses of kreatin or of disqualification based on a salbutamol[76] positive test. It is the coach's responsibility to keep himself up-to-date with developments in nutritional supplements and to be aware of the prohibited substances and their side effects. Now that the possible link between weight loss and osteoporosis is becoming apparent any coach assisting a female athlete to lose weight will need to take care, or he will risk being sued.

The other side of the coin is, of course, that if a coach follows current accepted practice he will be fulfilling the standard of care and should be flame-proof. The message for would – be coaches is to ensure that they attend an appropriate coaching course and register in whatever scheme their particulars sport association has in order to obtain the benefits of insurance. The message for sport people is to ensure that their coaches are properly registered and insured.

In conclusion, it is not enough, at least in sports where injuries caused by the improper administration of nutritional supplements might occur, for coaches to plead ignorance or to attempt to argue that coaching is a subjective art and that they cannot be blamed for unfortunate consequences. Objective standards of current practice can and, I predict, will be applied, and coaches will need to register with their sports associations, keep themselves up-to-date with the application of modern guidelines, and, for their own complete protection, keep records of coaching sessions and their nutritional suggestions to their athletes. So long as they

73. For gratuitous undertakings cf. Flemming J (1995) An Introduction to the Law of Torts, pp 43-44.

74. [1988] 3 All ER 188.

75. Gardiner J (1993) 'Should Coaches Take Care?' 1 Sports and the Law Journal, p 13.

76. Cf. Striegel H and Vollkommer G (2004) 'Die Legitimation von Dopingsanktionen. Eine kritische Darstellung am Beispiel von Medikamenten zur Asthmatherapie' Sport und Recht, pp 236-238.

have evidence that they have coached an athlete correctly they will, of course, be protected against a claim from an athlete who has ignored advice.[77]

4. The liability of the sports physician

If the advice of the coach on nutritional supplements might be considered as a proximate cause for physical damage to the athlete, then is plausible to regard the link between the misleading advice of a sports physician and the physical damage suffered by the athlete as reasonable, proximate and causal. The great importance that the sport physician has for the physical integrity of the athlete is patent. After an injury to or the death of an athlete, the first person is going to be asked for the cause of the accident will be his sports physician.

In the *Football Association of Wales v UEFA* case, in which a main issue was the administration of Bromantan from the captain of the guest national Russian team, named Egor Titov, the importance of the sport physician was demonstrated. In a postscript to the case, it was reported on the BBC website[78]:

> 'Spartak's former chief doctor Antyom Katulin said last month one of his aides had prescribed Titov a food supplement containing bromantan without the player's knowledge. Katulin was fired by the club shortly after Titov was banned.'

If there was an injury of Titov also, because of the administration of bromantat, then that would have been a cause for negligence against Katulin. The requirements for such an action would have been fulfilled since: a) there was a duty of care and information towards the athlete b) there was a failure to attain the requisite standard of care c) there was an injury to Katulin's reputation d) there was a reasonable proximate causal link between the breach of duty and the harm and e) there was no prejudicial conduct by the athlete.

A duty of care of the physician towards the athlete is indisputable. A sports physician is not an ordinary physician. He is a doctor specialised on athletes' physiology, nutrition and injuries and as a professional sport physician should be knowledgeable in these matters. He/she should certainly not lag behind other ordinary assiduous and negligent members of his profession in knowledge of the side-effects of new nutritional supplements or similarities by new substances with already prohibited old ones. This special duty of care was conceded in the

77. Gardiner J (1993) 'Should Coaches Take Care?' 1 Sports and the Law Journal, p 13. For some criteria of assessing liability of the coach see Kevan T, Adamson D and Cottrell St, (2002) Sport Personal Injury: Law and Practice, p 133 –134.

78. Cf. Charlish P (2004) Football Association of Wales v UEFA Only Dopes Don't Cheat, I.S.L.R. issue 3, p 73-75.

cardinal case *Bolam v Friern Hospital Management Committee*[79]. The special duty of care is demanded only from persons whose business or profession it is to provide information or advice of a kind calling for special skill and competence.[80] The sport physician belongs to that group. Thus, he should know and inform his patient that anabolic agents such as stanozolol and testosterone increase strength and endurance but can lead to aggressive behaviour, impotence kidney damage and breast development in men and the development of male features, facial and body hair in women. The case of *Wilsher v Essex Area Health Authority*[81] has shown that the standard of care from an inexperienced practitioner is not the same as that of his experienced counterpart. It is unavoidable that such a doctor should 'learn on the job'[82]. In consequence, the conviction of two young and relatively inexperienced doctors for the manslaughter of a patient to whom they had incorrectly administered cytotoxic drugs was greeted with concern in medical circles and was, in due course, quashed by the Court of Appeal.[83]

The fiduciary relationship between doctor and patient[84] gives rise to a duty of information towards the athlete not only about the effects of the nutritional supplements but also the medicines he has been prescribed. Consequently, a sports physician, who prescribes an asthma spray containing salbutamol, should inform his patient that this substance has similar effects to the prohibited reproterol.[85] Cases of Court of Arbitration for Sport (CAS) such as *USA Shooting and Quigley v. Union Internationale de Tir,* [86] and *Cullwick v FINA*, [87] demonstrate that an athlete may take banned substances like ephedrine and salbutamol present

79. [1957] 1 W.L.R. 582 at 586.

80. Flemming J (1995) An Introduction to the Law of Torts, p 62.

81. 1988 AC 1074.

82. Mason JK, Smit RA, Laurie GT (2003) *Law and Medical Ethics*, 6th ed (London) Lexis Nexis Butterworths, p. 293.

83. *R v Adomako* [1993] 4 All ER 935, (1993) 15 BMLR 13, sub nom *R v Holloway, R v Adomako; R v Prentice and Sulman* [1993] 4 Med LR 304. See Dyer C (1993) 'Manslaughter Verdict Quashed on Junior Doctors' 306 BHJ 1432.

84. Law Horsleyv McLaren [1972] S.C.R. 441. See also above Note 72. Cf. *Sidaway v Board of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871; Barlett, P, 'Doctors as fiduciaries: equitable regulation of the doctor-patient relationship' [1997] Med L Rev 193 and Stauch, M, Wheat, K, Tingel, J, *Sourcebook in Medical Law* London 2002: Cavendish Publishing, p. 43-44. Cf. for U.S.

85. Cf. Striegel H and Vollkommer G (2004) 'Die Legitimation von Dopingsanktionen. Eine kritische Darstellung am Beispiel von Medikamenten zur Asthmatherapie'(SpuRt) p 237-238.

86. CAS 94/129 Reeb, M (ed), Digest of CAS Awards 1986-1988, p 187. For further comments in this case cf. Beloff M J (2001) 'Drugs. Laws and Versapacks' O'Leary (ed), *Drugs and Doping in Sport: Socio-Legal Perspectives*, p 43-44.

87. CAS 96/149, presided over by the author.

in certain medication prescribed for asthma and bronchitis. A duty to inform the athlete about the risks, that the administration of medicines, nutritional supplements or the use of blood doping includes, can be derived from a contract between the parties, even if it is not mentioned. The omission to inform the sportsman constitutes a breach of contract and the athlete may well claim against his physician both for his injury resulting from doping substances and for the damage he suffers because of his disqualification and suspension. If there is no contract or such a duty cannot be implied from the existing contract between sport physician and athlete, a duty to inform the athlete about the substances prescribed arises in tort because of the special relationship between the parties. That was held by the House of Lords in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd*[88]. Economic damages cannot be claimed in the law of tort.

Another important issue on every medical treatment and therefore on the treatment of the athlete is the acquisition of his consent. Non consensual medical treatment entitles the athlete to sue for damages for the battery which is committed. An action for battery is appropriate where there has been no consent at all. It is also possible to base a claim on the tort of negligence, the theory being that the doctor has been negligent in failing to obtain the consent of the athlete.

A claim based on negligence is apt when the plaintiff has given his consent to an act of genera nature to that which is performed by the defendant but there is a flaw in this consent and, as a result, there has been no consent to certain features of the act of which he was unaware. That means that if the medicines and nutritional supplements are prescribed by the doctor of the club and there is no contact between him and the athletes, because the drugs are being distributed through the coach an action of battery could come into consideration. If, however, the athlete was informed that he has been given beta blockers but he was not warned about a potential reduction of heart rate and dangerous low blood pressure, an action of negligence should be accommodated. When there is a failure to disclose risks, the aggrieved patient is, in essence, claiming: 'You did not inform me of the risk which was eventuated; but for your failure, I would not have consented to the procedure; you have failed in your duty of care and, as a result, I have sustained injury'.[89]

88. See also for an existing fiduciary relationship *Nocton v Ashburton* [1914] A.C. 932.

89. However, I would like to mention at this point the critic of an article by Robertson, G, 'Informed consent to medical treatment' (1981) 97 LQR 102: 'The requirement of informed consent to medical treatment has been used as a cloth from which courts slowly have begun to fashion a no-fault system for compensating persons who have suffered bad results from medical treatment'. See *Smith v Tunbridge Wells Health Authority* [1994] 5 Med LR 334; *Mc Allister v Lewisham and North Southwark Health Authority* [1994] 5 Med LR 343 and *Newell and Newell v Goldenberg* [1995] 6 Med LR 371.

In most of the cases the athlete cannot be treated without his consent. That applies to a new method of doping too: the blood doping. I can't imagine a case in which the athlete changes blood without his consent. There can be a possibility that he was not well informed of the consequences of such a doping like the transmission of HIV infection. The litigation relating to the transmission of such infection through contaminated blood products may arise in respect of breach of a statutory duty under the National Health Service Act 1977 and in negligence. In terms of the Act, the National Blood Authority would normally be the producer of the 'product' but the hospital, or even the individual doctor, responsible for its transfusion will be the supplier.[90]

Another method of enhancing performance including many risks, which should be set out to the sportswoman is the pregnancy abortion method. Pregnancy, like blood doping, enhances athletic performance by approximately 10 percent, since chorionic pregnancy (HCG), a hormone produced during pregnancy, stimulates the production of testosterone on woman and induces a strengthening or anabolic effect on the body.[91] Therefore pregnancy is being used by female athletes as a new way of cheating.[92] They become pregnant to reap the beneficial physiological changes to their bodies, and then they have an abortion either before or after competition to rid themselves of their unwanted fetus. While competing during pregnancy is considered safe in the first three months, players cease to gain performance benefits after fourteen to fifteen weeks. Risk increases after the first three months of pregnancy. The role of the sports physician is of great importance in pregnancy cases. There is no doubt that he has a duty to inform the female athlete about the risk of such a performance enhancing method and that the most probable damage the sportswoman can suffer is either a failure to conceive a child after multiple abortions or a wrongful birth. The causal link between the duty of care of the physician and this kind of damage is patent.

5. Defences

Even though the usual tortious defences are rarely used in producers' or doctors' liability, they are dealt with briefly. All the above mentioned potential defendants on an athlete's action for damages resulting mainly from doped nutrition, might invoke two arguments to defend themselves. The first is the partial defence of contributory negligence, which no longer fully defeats the claim but

90. Mason JK, Smith RA and Laurie GT (2003) *Law and Medical Ethics*, p. 303.

91. McGovern C (2002) Brave New World, *Alberta Report*, Feb 4, at p. 56.

92. Cf. the case ISU v. Anzhelika & Skating Union of Belarus, CAS 2005/A/997.

merely reduces the damages and the second defence constitutes the voluntary assumption of risk.

There are doping cases, in which negligence can be imputed to the plaintiff: an athlete contributes to his damage for example, when he administers on his own initiative, products advised against by the supplier of his nutritional supplements, or buys via the Internet supplements beyond the one suggested by his coach or sports physician. Further, contributory negligence can arise in a situation where an athlete has not disclosed information and as a result of not knowing this, the clubs' doctor has prescribed drugs which damage the patient. In respect thereof contributory negligence can be relevant and recoverable damages may be reduced to such extent as the court thinks just and equitable having regard to the claimant's share of the responsibility for the damage.[93] The controlling criterion of these apportionment is rather the plaintiff's share of 'responsibility' than the 'fault' for the doping accident.[94] The Canadian case of *Robitaille v Vancover Hockey Club Ltd* (1979)[95] is one of the rare examples of the success of this defence in sports law. The success of the defence would depend upon the requests of the plaintiff made by the defendant, and whether it was reasonable for the plaintiff to know that that particular information was covered in the request. A hockey player was found to have contributed to the damage caused by negligent treatment by not seeking further medical advice when his symptoms became more serious.

Usually, however, the suggested defence will be the athlete's voluntary assumption of the risk. This kind of defence which once enjoyed great vogue but nowadays seems rather obsolete is still commonly called by English lawyers *volenti non fit injuria.* Although English courts have lent no countenance to the defence it is the view of the author that a classical area of the law where voluntary assumption of risk may have a great application is in the doping issue. A voluntary assumption of risk can be easily accepted in cases of experienced athletes who are usually well informed about the risk of nutritional supplements or blood and abortion doping. These kind of athletes usually agree to absolve the coach and/or the sport physician from the duty of taking care for them, so that, if harm happens, they cannot be regarded as negligent, and the athletes cannot recover.

6. Conclusion

Even though a lot of physical and legal persons are profiting from a victorious athlete nobody shares his damage occurring from a defeat in a doping case. This

93. See Law Reform (Contributory Negligence) Act 1945.

94. Flemming J (1995) An Introduction to the Law of Torts, p 134-138.

95. 19 BCLR 158.

strong antithesis can be diffused by spreading the liability for damages resulting from a positive doping control. The persons that can be potentially liable are the supplement's manufacturer, sport governing bodies, the coach and last but not least the sports physician of the athlete. The liability of supplement's manufacturer derives mainly from bad labeling on his products. Under this term is meant the omission of listing the substances including on a nutritional supplement. A long-term imposed suspension and a dissemination of reports and decisions of sports governing bodies can establish their liability for restrain of trade, negligence and defamation. In case that a coach gives false instructions to an athlete by suggesting the taking of prohibited substances, contract and law remedies are available to the injured or suspended athlete. The extent of the required care of the coach should be lessened by well-experienced athletes, who are usually familiar and well informed about their nutritional supplements. Last but not least the sports physician can also be liable for not informing the athlete about the ingredients of the medicines, that he/she prescribes. In that case the common practice of sport physicians to prescribe inhalants against asthma including prohibited substances like ephedrine and salbutanol can lead to a breach of duty of care and lead to a compensation of the athlete in a litigation case.

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