

THE 'COMFORTABLE SATISFACTION' STANDARD OF PROOF: APPLIED BY THE COURT OF ARBITRATION FOR SPORT IN DRUG-RELATED CASES

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Abstract

The common law has developed many principles in relation to evidence, including two standards of proof, one for criminal cases and one for civil matters. Many sporting disputes are now settled by the Court of Arbitration for Sport (CAS) and it utilises a third standard of proof, namely 'comfortable satisfaction', which is defined as lying in between the criminal 'beyond reasonable doubt' and the civil 'balance of probabilities'. Despite stating that it is not bound by the rules of evidence, an examination of CAS drug cases indicates that it operates in a similar way to common law courts in regards to how it uses the evidence presented to it.

I INTRODUCTION

The common law has developed numerous principles in relation to evidence, including who should bear the onus of proof, and to what standard. Principles have developed in regard to the use of direct and circumstantial evidence. The doctrine of presumptions has also developed in order to allow certain evidence to be accepted, unless rebutted. However, within the sporting context, it is the Court of Arbitration for Sport ('CAS') which is now the usual final avenue of appeal in many sport disputes. It is a non-judicial, international body which has made it clear that it does not have to follow the rules of evidence.¹ For example, in regards to standard of proof, what has become accepted under the rules of CAS and other sporting bodies, has

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1 *D'Arcy v Australian Olympic Committee* CAS 2008/A/1574, [40]; *D'Arcy v Australian Olympic Committee* (2008) 3(1) Australian and New Zealand Sports Law Journal 119.

been a ‘comfortable satisfaction’ standard of proof, based upon a phrase mentioned in *Briginsbaw v Briginsbaw* (*Briginsbaw*).²

This article seeks to examine *Briginsbaw*³ in regards to standards of proof and the context of the ‘comfortable satisfaction’ comment made in the case. General principles of evidence relevant to the discussion will be examined. The main purpose of this article, however, is to examine these principles, particularly standards of proof, in a selection of CAS drug cases, to see how closely CAS adopt these common law principles in the conduct of its arbitrations. It will also examine the question as to whether CAS operates more like a common law or a civil system body. The article begins with a brief overview of the common law principles relating to evidence.

II COMMON LAW PRINCIPLES OF EVIDENCE

A *Burdens and Standards of Proof*

Under the common law adversarial system, one of the parties is required to make out his or her case against the other party, with this usually being the party who initiated the proceedings, namely the Crown in a criminal case, or the plaintiff in a civil case. For example, in *Woolmington v Director of Public Prosecutions*,⁴ it was stated that ‘throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt.’⁵ There are exceptions to this, however, and the evidential burden, for instance, rests with the accused if he or she raises the defence of provocation, duress, self-defence, automatism, honest or reasonable mistake.

The main principle in civil cases is that it is the proponent of a proposition who will bear the onus of proof. In *Wakelin v London and South Western Railway*, which involved the case of a man who had been killed at a railway crossing, it was stated that ‘the plaintiff must allege and prove... that the husband’s death had been caused by some negligence of the defendants.’⁶ This fact has to be proved, and if it is not, then the plaintiff’s action will fail ‘for [the] very simple reason that the plaintiff is bound to establish the affirmative of the proposition.’⁷

2 (1938) 60 CLR 336.

3 Ibid.

4 [1935] AC 462.

5 Ibid 481.

6 (1887) 12 App Cas 41, 44.

7 Ibid 45.

Thus, there are established common law principles that determine who has the burden of proof in both criminal and civil cases. The question that then arises is what the standard of proof should be. The basic principle of the common law system is that the standard of proof in criminal cases is beyond reasonable doubt. Where the defendant raises a defence, the lower civil balance of probabilities standard applies. A closer examination, however, shows that it is a little more complicated in relation to civil matters, and that it is in fact a sliding scale that operates, depending on how serious the allegation is.

The leading Australian case in this area is *Briginshaw*,⁸ in which Frederick Briginshaw sought a dissolution of his marriage to Clarice Briginshaw on the grounds of adultery. The High Court (comprising Latham CJ, Rich, Starke, Dixon and McTiernan JJ) had to examine the requirements of the standard of proof under the *Marriage Act 1928* (Vic) and whether the trial judge had wrongly applied beyond reasonable doubt as the standard of proof. Chief Justice Latham noted that the relevant sections were s 80 and 86 of the Act, and that in s 80 the wording was 'satisfy itself, so far as it reasonably can', though in s 86 the wording was 'the court, if it is satisfied.'⁹ He was of the view that the trial judge had not considered 'the evidence according to the relevant and proper standard of proof'¹⁰ and therefore an order for a new trial was warranted. However, in a 4-1 decision, the High Court dismissed the appeal.

Justice Dixon examined the history of the common law in regards to the standards of proof, noting that two different standards of persuasion had developed, and it had gradually become settled in criminal cases that an accused person should be acquitted, unless the tribunal of fact was satisfied beyond reasonable doubt. In civil cases, however, such a degree of certainty was not required and a 'mere preponderance of evidence on either side may be sufficient to turn the scale, but even in civil trials a mere preponderance of evidence was frequently insufficient.'¹¹ Justice Dixon then went on to state:

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was

8 (1938) 60 CLR 336.

9 Ibid.

10 Ibid 349.

11 Ibid 360.

definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proven to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.¹²

Dixon J noted that in a number of cases it had been held that an issue, such as fraud, had to be proven 'clearly' 'unequivocally' or 'with certainty.' However, he pointed out that

this does not mean that some persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon criminal inquest and the reasonable satisfaction which in a civil case may, not must, be based on a preponderance of probability.¹³

Although the common law had developed just the two standards of proof, Dixon J acknowledged that outside of the common law 'there had been some uncertainty as to their recognition or adoption.'¹⁴

It was Justice Rich's judgment, however, where the term 'comfortable satisfaction' can be found, with his Honour almost innocuously including it:

In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering figure to an affirmative conclusion. The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a *comfortable satisfaction* that the tribunal has reached both a correct and just conclusion.¹⁵

Thus, what became established from this case is what is known as the *Briginshaw* test, namely that the more serious the allegation and its consequences, the higher the level of proof required for a matter to be substantiated. The standard is not beyond reasonable doubt, but the more serious the allegation, the more persuasive the proof must be.¹⁶

12 Ibid 362-2.

13 Ibid 362-3.

14 Ibid 363. See also H Bennett, G A Broe, 'The Civil Standard of Proof and the "Test" in Briginshaw: Is there a Neurobiological Basis to being "Comfortably Satisfied"?' (2012) 86 *Australian Law Journal* 258.

15 Ibid 350 (emphasis in italics added).

16 A similar statement is found in *Re H (Minors)* [1995] 1 FLR 643, 659 where it was stated that 'built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.' See also Hodge M Malek, Jonathan Auburn and Roderick Bagshaw, *Phipson on Evidence* (Sweet and Maxwell, 16th ed, 2005) 6-54.

While *Briginsbaw* did not create a third common law standard of proof, despite the use of 'comfortable satisfaction' in one of the judgments, it is this statement that has become accepted in many sports discipline hearings as being the appropriate standard of proof.

B *Other Areas of Evidence*

Another relevant area for discussion is that of presumptions, since presumptions are found in the rules, for instance, of the World Anti-Doping Agency's Code ('WADA Code'). Under common law there are two main senses in which the word 'presumption' is used. The first is that a conclusion must be drawn until the contrary is proved, an example being the presumption of innocence, which means that an accused is considered innocent until the contrary is proven. It is, however, a presumption that can be rebutted. The second sense in which the word presumption is used in law is when a certain fact is proved, the fact finder has to, or may have to, presume another fact. That is, if Fact A is proved, then Fact B has to be presumed.¹⁷ One reason why the common law developed presumptions is to resolve matters, for example, the common law presumption that an older person died first in regards to survivorship in succession. The other reason is to make the evidentiary task easier by redefining the burdens of proof, by stating, for example, that certain machines like breathalysers and speed guns are accurate with the burden of proof then being on the defendant to show that the machine is not accurate.¹⁸

As will be shown, a similar presumption operates in sports drug cases where, while the onus is on the sporting organisations to prove that someone committed a doping offence, there is a presumption that the testing has been carried out correctly, with the onus then being on the athlete to prove otherwise.

The final common law evidentiary principle that needs to be discussed is the distinction made between direct and circumstantial evidence. A fact in issue can be proven by direct evidence, such as analytical results from scientific machines used in DNA testing, or testimonial evidence, that is, assertions made by a witness. Sometimes, however, the fact in issue can only be proven indirectly, that is, by circumstantial evidence which requires the fact finder to draw an inference from the evidence. Usually each piece of circumstantial evidence will not, on its own,

17 See, for example, *Axon v Axon* (1937) 59 CLR 395.

18 This presumption can also be put into a statute. For example, s 95A (8) of the *Evidence Act 1977* (Qld) states that any equipment used for DNA testing is presumed 'to have given accurate results in the absence of evidence to the contrary.'

be sufficient to prove the case, but it is the cumulative effect of the evidence that proves the case. The analogy that is often made is that of the cumulative strength of the strains of rope, or the links in a chain, though in the latter it is to emphasise that the evidence may only be as strong as its weakest 'link'. In *Chamberlain v The Queen*,¹⁹ for instance, it was held by the High Court that with circumstantial evidence, it was the cumulative effect of the evidence that may lead to an inference of guilt and in such cases the jury needs to ask the question as to whether there was a rational view of the evidence consistent with the innocence of the accused.²⁰

What also has to be acknowledged in regards to evidence under the common law adversarial system is the reliance on oral testimony, with evidence from witnesses being important testimony. These common law principles relating to evidence will now be examined in relation to how CAS uses the evidence presented to it in making its decisions.

III EVIDENCE AND THE CAS

A *The CAS and the Common Law*

It should be noted that CAS has made it clear that the Code of Sports Related Arbitration ('CAS Code') is 'a template for contractual dispute settling processes for parties to incorporate by reference into their agreement' and that 'it is not a product of the common law or of common law lawyers.'²¹ CAS has also made it clear that '[b]oth the initial arbitration panel (as with the initial decision maker) and the appeal arbitration panel are not bound by the rules of evidence and may inform themselves in such manner as the arbitrators think fit.'²² These points must therefore be kept in mind when examining CAS decisions, even though CAS has applied standards and burdens of proof, presumptions and also made use of both direct and circumstantial evidence, all of which are found in the common law rules of evidence. While a number of cases have been selected for examination, they have been divided into three main groups, namely, direct analytical evidence, analytical results used as circumstantial evidence, and direct testimonial evidence.

19 (1984) 153 CLR 521.

20 Ibid 536.

21 *D'Arcy v Australian Olympic Committee* CAS 2008/A/1574, [39].

22 Ibid [23].

B *Direct Analytical Evidence*

1 *Samples Contaminated by Outside Sources*

A number of athletes have tried to argue that their positive test was the result of contamination, usually because of eating contaminated food. For example, in *IAAF v RFEA & Josephine Onyia*,²³ Josephine Onyia, a Spanish 100m hurdler, tested positive to methylhexanamine after a race in Lausanne on 2 September 2008. She also tested positive to clenbuterol after the 100m World Athletic Final in Stuttgart on 13 September, 2008.²⁴ Both matters were heard by the Real Federacion Espanola de Atletismo ('RFEA') which found no violation of the Anti-Doping Rules in regards to either sample.²⁵ However, after both decisions were referred to the International Association of Athletics Federations ('IAAF') Doping Review Board, it was decided that an appeal to CAS should be lodged.

The CAS Panel noted that the rules as to the burden and standard of proof were contained in IAAF Rule 33.1 and 33.2. Rule 33.1 stated that the burden was with the IAAF, or other prosecuting authority, with the standard stated in Rule 33.2 as being 'to the comfortable satisfaction of the relevant hearing body, bearing in mind the seriousness of the allegation which is made.' It also went on to define 'comfortable satisfaction' as being 'greater than a mere balance of probability but less than proof beyond a reasonable doubt.'²⁶ Rule 33.4 then set out that 'WADA-accredited laboratories are presumed to have conducted sample analyses and custodial procedures in accordance with the International Standards for Laboratories.' An athlete, however, could rebut this presumption by establishing that a departure from the International Standards for Laboratories had occurred. Under Rule 40.2 and 40.3 an athlete can argue that there were exceptional circumstances, which would mean that the athlete 'bears no fault or negligence for the violation', with the standard of proof required for the athlete in this situation being the balance of probabilities (as set out under Rule 33.3).²⁷

23 *IAAF v RFEA & Josephine Onyia* CAS 2009/A/1805 and CAS 2009/A/1847.

24 *Ibid* [8].

25 *Ibid* [18]-[19].

26 *Ibid* [37].

27 *Ibid* [38], [40], [55]. Note that in *Mark French v Australian Sports Commission and Cycling Australia* CAS 2004/A/651, [10] the CAS Panel stated that in doping cases involving trafficking, or aiding and abetting, given the circumstances, 'a very high standard almost approaching reasonable doubt [is] required for the panel to accept that the offences have been proven.'

Thus, CAS will examine the rules of the relevant international body when examining the merits of the case, with the IAAF Rules having not only adopted the comfortable satisfaction standard, but also making it clear that it constitutes a third standard that lies in between 'on the balance of probabilities' and 'beyond reasonable doubt'. The prosecuting body is also assisted by the presumption that the laboratory procedures were conducted properly, though it is also made clear that this is a presumption which can be rebutted. If the athlete wishes to argue that exceptional circumstances apply then the standard is only on the balance of probabilities. It is suggested that this is consistent with the common law where the defendant will have the lower civil liability, if the burden of proof rests with the defendant.

It was argued by Onyia that the small amount of clenbuterol in the Stuttgart sample could have come from food contamination, with the CAS Panel noting that while a small number of substances on WADA's Prohibited List required a defined threshold for an adverse analytical finding, clenbuterol was not one of them.²⁸ Thus, with a non-threshold substance, the detection of any amount must be reported by the laboratory as an adverse analytical finding and considered by the testing authority to be a potential violation of the anti-doping rules. It was held by the Panel that the athlete had not met her burden of proof, as the 'mere assertion that the low concentration of clenbuterol found could potentially have been caused by the ingestion of contaminated meat', was inadequate. What was required was 'scientific or factual evidence to back up the claim' that she had consumed contaminated meat.²⁹ In regards to the stimulant methylhexaneamine in the Lausanne sample, it was held that while the athlete could rebut the presumption that the laboratory had carried out correct procedures, the athlete had not attempted to do this.³⁰

Adam Seroczynski, a Polish kayaker, finished fourth in the Kayak double (K2) 1000m at the 2008 Beijing Olympic Games, and subsequently tested positive to clenbuterol.³¹ At the International Olympic Committee ('IOC') hearing he claimed that it may have been the result of contamination from food, or from taking supplements.³² The IOC Disciplinary Commission, however, concluded that he had committed an anti-doping offence, and disqualified him from the K2 1000m.³³ Seroczynski then appealed to CAS.

28 *IAAF v RFEA & Josephine Onyia* CAS 2009/A/1805 and CAS 2009/A/1847, [50].

29 *Ibid* [87].

30 *Ibid* [95].

31 *Adam Seroczynski v IOC* CAS 2009/A/1755.

32 *Ibid* [12].

33 *Ibid* [18].

For his defence Seroczynski used an expert witness, Professor Bulska, from the University of Warsaw, who emphasised the low concentration of clenbuterol found in the test sample, and that this created a '50% probability that this was a "false positive result"'.³⁴ The IOC, however, also used an expert witness, Professor Cowan, of King's College, London,³⁵ whose opinion was that Seroczynski's 'statements were not realistic', and that 'it was not only very unlikely that the Athlete was contaminated by the food he ingested but that it was even more unlikely that he would have been the only one'.³⁶ It was then held that Seroczynski had not only failed to rebut the presumption in favour of the WADA-accredited laboratory, but the IOC had proven 'that no departure from those standards caused the Adverse Analytical Finding'.³⁷ The Panel also emphasised that there was no set minimum threshold for clenbuterol, and since the presence of it was proven, Seroczynski was in violation of the anti-doping rules.³⁸ His appeal was therefore dismissed.

Sureyya Ayhan Kop, a middle distance runner, who won a silver medal in the 2003 IAAF World Championships in Paris,³⁹ also raised the defence of contaminated food after she was charged with anti-doping violations, after an out-of-competition test in 2004. She received a two year ban which expired in August, 2006.⁴⁰ The following year she was subjected to an out-of-competition test which revealed the presence of stanozolol and methandienone metabolites, which are prohibited substances, as they are classified as exogenous anabolic androgenic steroids.⁴¹ On 25 January, 2008, the Disciplinary Commission of the Turkish Athletics Federation ('TAF') imposed a life ban on Kop for her second anti-doping rule violation,⁴² though this was reduced to four years by the Turkish Youth and Sport Arbitral Tribunal.⁴³ An appeal was then lodged with CAS.

In her appeal to CAS, Kop argued that she could have been contaminated by meat containing steroids, or from contaminated nutritional supplements. Kop also claimed that as an endurance athlete she would not have benefitted from the taking of steroids.⁴⁴ The Panel, however,

34 Ibid [58].

35 Ibid [44].

36 Ibid [57].

37 Ibid [80].

38 Ibid.

39 *Yucel Kop v IAAF & TAF* CAS 2008/A/1585; *Sureyya Ayhan Kop v IAAF & TAF* CAS 2008/A/1586.

40 Ibid [9].

41 Ibid [20].

42 Ibid [23].

43 Ibid [28].

44 Ibid [67].

held that on the balance of probabilities Kop had not provided concrete proof as to how the prohibited substances had entered her body.⁴⁵ The Panel then held that the Youth and Sport Arbitral Tribunal had erred in only giving a four year ban, with CAS then applying the life ban mandated by the IAAF Rules.⁴⁶

Although drug testing carried out under the WADA Code is primarily aimed at human athletes, equestrian sport, involving the use of horses, could also be a target. It was the testing of a horse that was the subject of *Hanson v Federation Equestre Internationale* ('FEI').⁴⁷ Tony Hansen, a Norwegian equestrian, won a bronze medal in the team jumping event at the 2008 Beijing Olympic Games. The team, however, was disqualified after capsaicin was found in the urine of Hansen's horse, Camiro, with Hansen also receiving a four and half month ban. After the matter had been heard by the FEI Tribunal, the matter was referred to CAS, with the 'single-but-crucial-issue in the dispute' being whether capsaicin, a pain relieving substance, 'had been in the body of Camiro before being detected in its urine or whether it had found its way into the urine sample during or after the process of collection of the sample'.⁴⁸

It was noted by the Panel that '[n]o request had been made for the use of capsaicin on Camiro, and no medication form had been supplied for this substance',⁴⁹ and that it was immaterial whether capsaicin may have found its way into Camiro's body as a result of Camiro having bitten wood 'in a stable impregnated with it, or breathing in airborne particles or eating feed contaminated with it'.⁵⁰ It was further noted that the FEI Tribunal had concluded that the contamination of just two jumping horses out of 84 was '*most unlikely*',⁵¹ with the Panel stating that the presence of a prohibited substance in the sample had been established to its 'comfortable satisfaction'.⁵²

It was then a question as to whether the substance could have entered the sample as a result of the handling during the process of collection, or during treatment in the laboratory, with the Panel noting that there was a presumption of regularity in the testing process and in the custody/analysis.⁵³ It was also noted that in regards to the sample collection, the

45 Ibid [119].

46 Ibid [128].

47 CAS 2009/A/1768.

48 Ibid [1.2].

49 Ibid [9.4].

50 Ibid [12.4].

51 Ibid [12.5].

52 Ibid [14.5].

53 Ibid [16.1].

only evidence relied upon was that of the Norwegian team's groom, Anita Kleppe, who stated that the doping officer, Maxine Leigh, had collected the samples while not wearing gloves, which was 'a departure from good practice.'⁵⁴ The Panel, however, accepted Leigh's oral testimony, given by phone, that she 'was adamant that she had taken all appropriate care with use of gloves and otherwise to avoid contamination of the sample during collection.'⁵⁵ The Panel stated that it was impressed with the clarity of her evidence,⁵⁶ and while this did not mean that Kleppe 'was giving deliberately untruthful evidence', the Panel could not 'prefer her evidence to that of Mrs Leigh and others who corroborated her testimony.'⁵⁷ The disqualification and suspension was therefore upheld by the Panel.⁵⁸

It can appear from reading CAS drug cases that the Panel usually find in favour of the relevant governing bodies. While this may prima facie be true, it should be remembered that these athletes may be relying on weak arguments in what may be a desperate bid to save their careers, with the *Kop* case⁵⁹ being a good example. It should also be noted that in *WADA v ITF & Richard Gasquet*,⁶⁰ CAS found in favour of the athlete, despite the slightly unusual facts raised.

Gasquet, a professional tennis player, ranked in the world's top 10, was in Miami for a tournament in March, 2009. However, after trying out his injured shoulder in training, he decided to withdraw from the tournament. On the night before officially withdrawing, he went out with a few people, firstly to a restaurant called Vita, before heading off to a night club called the Set, and later to a club called Goldrush. At Vita, he and his party socialised with four young women, one of whom was called Pamela. Gasquet spent most of his evening talking to Pamela, though not all the time. At the Set the two had 'kissed mouth to mouth about seven times, each kiss lasting from about five to ten seconds' while later at the Goldrush they had kissed one more time.⁶¹

The next day, 28 March, Gasquet went to the tournament to officially withdraw, but was required to provide a urine sample as part of a random

54 Ibid [16.2].

55 Ibid [16.5].

56 Ibid.

57 Ibid [16.9].

58 Ibid [22.6].

59 *Yucel Kop v IAAF & TAF* CAS 2008/A/1585; *Sureyya Ayban Kop v IAAF & TAF* CAS 2008/A/1586.

60 *International Tennis Federation v Richard Gasquet* CAS 2009/A/1926; *WADA v ITF & Richard Gasquet* CAS 2009/A/1930.

61 *WADA v ITF & Richard Gasquet* CAS 2009/A/1930, [2.12].

drug testing programme; despite withdrawing, he was still considered to have participated in the tournament. When tested on 21 April the sample was found to contain benzoylecgonine, which was a cocaine metabolite, and a very small amount of unmetabolised cocaine. He was then charged with a doping offence under Art C.1 of the Tennis Anti-Doping Programme 2009. On 6 May he underwent a test on a sample of his hair. This test, which would have revealed the presence of cocaine if it had been ingested during a period of around four months before the test and if the quantity of cocaine ingested was approximately 10 mg or more, proved negative.⁶² While Pamela denied having taken cocaine on the night in question, a test on her hair found cocaine and its metabolites ‘within the average concentrations measured in known cocaine users.’⁶³

Gasquet did not dispute the laboratory’s findings, but denied ever having deliberately taken cocaine.⁶⁴ The ITF Tribunal ‘concluded that it was more likely than not that Pamela’s kisses were the source of Gasquet’s contamination,’⁶⁵ and imposed a two and half month ban.⁶⁶ Both the ITF and WADA then lodged appeals to CAS against the ITF Tribunal’s findings.

It was noted that under both Art K.6.2 of the Programme and Art 3.1 of the WADA Code, if the burden of proof has been placed on an athlete (who has allegedly committed anti-doping violation) ‘to rebut a presumption or establish specified facts or circumstances’, then ‘the standard of proof shall be by a balance of probability.’⁶⁷ Thus, ‘for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred.’⁶⁸ What this meant, therefore, was that Gasquet only had ‘to show that one specific way of ingestion is marginally more likely than not to have occurred.’⁶⁹

The Panel agreed that the hair test supported Gasquet’s argument that the amount of cocaine that had entered his body was ‘so minute’ that ‘it must have reflected incidental exposure’⁷⁰ and that he had not ingested ‘this amount intentionally.’⁷¹ It also ruled out intentional or accidental spiking

62 Ibid [2.17]-[2.20].

63 Ibid [2.25].

64 Ibid [2.28].

65 Ibid [2.34].

66 Ibid [2.36].

67 Ibid [5.8].

68 Ibid [5.9].

69 Ibid.

70 Ibid [5.11].

71 Ibid [5.13].

of his drinks,⁷² or that it came from touching contaminated surfaces.⁷³ Despite the fact there was 'no clear evidence that Pamela consumed cocaine during the night in question', the Panel concluded it was 'more likely than not' Pamela had consumed cocaine during that night and that it was 'more likely than not' Gasquet's 'contamination with cocaine resulted from kissing Pamela,'⁷⁴ the Panel being 'satisfied that there is at least a 51% chance of it having occurred.'⁷⁵ Gasquet had therefore met the required standard of proof with regard to the manner of ingestion.⁷⁶ Since it was the Panel's conclusion that Gasquet had acted with no fault or negligence,⁷⁷ the appeals of the ITF and WADA were dismissed.⁷⁸

Thus analytical analysis is going to be needed if the defence raised by the athlete is that the positive test was the result of contamination. However, it has also proven important in cases, such as *Gusmao v FINA*,⁷⁹ where the issue was whether the sample given by the athlete was not, in fact, hers, but that of another athlete.

2 *Substituted Samples*

In *Gusmao v FINA*,⁸⁰ Rebeca Gusmao, a Brazilian swimmer, was tested on 25 and 26 May 2006 during the Brazilian Swimming Championships. These were conducted at a WADA accredited laboratory and showed a result that was 'consistent with exogenous origin of testosterone,' and an elevated T/E (testosterone/estrogen) ratio.⁸¹ The relevant national body, Confederaçao Brasileira de Desportivos Aquaticos ('CBDA'), however, accepted the advice of its medical officer 'that there was insufficient basis to sanction' Gusmao. However, on 17 July, 2008, the Federation Internationale de Natation ('FINA') Doping Panel found that there had been an anti-doping offence from the testing conducted on 25 and 26 May, 2006, with Gusmao being banned for two years.⁸²

In the meantime Gusmao had competed at the Pan American Games ('PAG') which were held in Rio de Janeiro from 13-29 July, 2007. Gusmao was subject to an out of competition test on 13 July, which

72 Ibid [5.14]-[5.15].

73 Ibid [5.17].

74 Ibid [5.25].

75 Ibid.

76 Ibid [5.26].

77 Ibid [5.37].

78 Ibid [5.38]; [5.43].

79 CAS 2008/A/1572; CAS 2008/A/1632; CAS 2008/A/1659.

80 *Gusmao v Fina* CAS 2008/A/1572; CAS 2008/A/1632; CAS 2008/A/1659.

81 Ibid [1.6].

82 Ibid [1.7]; [1.18].

was ordered by FINA. Again the samples showed 'IRMS [Isotope Ratio Mass Spectrometry] results consistent with exogenous origin of testosterone,'⁸³ with Gusmao then being banned for two years from 2 November, 2007; the FINA Doping Panel did not impose a life ban due to the fact that at that time there was still no final decision in regards to the outcome of the testing from May, 2006.

In the context of the PAG Gusmao was subjected to an out of competition test conducted by the PAG Organising Committee, then had to undergo an in-competition test on 18 July. The test from 12 July was negative; though the test from 18 July likewise avoided an adverse analytical finding, it still showed an elevated reading with the report from the WADA accredited laboratory in Rio de Janeiro suggesting that a 'longitudinal evaluation should be performed.'⁸⁴

An independent observer team from WADA had been monitoring the procedures at PAG and it reported to FINA that 'the circumstances of the doping control and the results of the tests gave rise to suspicions concerning' Gusmao's samples. Steroid profiles indicated that the samples taken on the 12 and 18 July came from different persons.⁸⁵ The samples were then submitted for DNA analysis which confirmed that the samples from 12 and 18 July did indeed 'belong to different donors.'⁸⁶ On 3 September, 2008 the FINA Doping Panel found that Gusmao had, under FINA Rule DC 2.5, committed an anti-doping violation in regards to the tampering and was therefore given a life ban, with an appeal being lodged to CAS.

It was noted that under FINA's DC 2.1 the presence of a prohibited substance, such as testosterone, constitutes an anti-doping violation, while DC 2.5 states that any tampering or attempts at tampering also constitute an anti-doping violation. DC 3.2 then sets out a general rule that facts related to an anti-doping rule violation 'may be established by any reliable means' with DC3.1 setting out that FINA needs to prove the violation 'to the comfortable satisfaction' of the Panel. Like the IAAF Rules, this is then defined as being 'greater than a mere balance of probabilities and less than a proof beyond a reasonable doubt.'⁸⁷

In regard to the samples taken on 25 and 26 May the Panel held that FINA had discharged its burden of proof with there being no departures

83 Ibid [1.26].

84 Ibid [1.33].

85 Ibid [1.34].

86 Ibid [1.39].

87 Ibid [4.29].

from the procedures,⁸⁸ with the Panel concluding that the IRMS analysis was 'the established and reliable method of distinguishing the exogenous origin of testosterone.'⁸⁹

With the testing from 13 July, 2007, Gusmao raised a number of procedural departures, with the Panel noting that under DC 3.1 the athlete must prove these 'by a balance of probability.'⁹⁰ Although Gusmao raised a number of procedural departures, it was held that 'the good maintenance of the chain of custody had been confirmed'⁹¹ and no breach of confidentiality had taken place when FINA sent the samples to the Montreal laboratory for IRMS analysis.⁹² It was therefore held that according to the rules of proof set out in DC 3.2, FINA had established the anti-doping violation.⁹³

The appeal also raised another interesting evidentiary issue as Gusmao had been prosecuted by Brazilian Police for making a false statement, which is a crime in Brazil, but the judge had decided not to proceed with the prosecution due to the lack of evidence. Gusmao had then submitted this to show the lack of evidence of her involvement. However, as she did not produce any document to this effect, the Panel was unable to 'attach any evidential value to this information.'⁹⁴ It did, however, make some 'obiter' statements, pointing out that the Panel had to apply the FINA rules, including those on evidence and standards of proof, and that the standards 'sufficient to launch a criminal prosecution under Brazilian law may be different.'⁹⁵ It was also pointed out that a 'Brazilian court, under Brazilian criminal law' had 'applied different rules of evidence and standards of proof on an unknown factual basis' before reaching a conclusion 'that there was not enough evidence to continue criminal proceedings.'⁹⁶ Brazilian law was, however, 'not applicable before this Panel.'⁹⁷ Since Gusmao was considered to have received notice of a previous violation, she received a life ban.

Thus, analytical evidence has been shown to be important direct evidence, to prove that a banned substance was in the athlete's system. However, it is also possible for analytical results to be used as indirect,

88 Ibid [4.10].

89 Ibid [4.7].

90 Ibid [4.17].

91 Ibid [4.19].

92 Ibid [4.18].

93 Ibid [4.27].

94 Ibid [4.42].

95 Ibid [4.43].

96 Ibid [4.46].

97 Ibid.

circumstantial evidence, as was the situation in the case discussed in the next section.

B Analytical Results used as Circumstantial Evidence

In *Claudia Pechstein v International Skating Union*,⁹⁸ Pechstein, a German speed skater, competed in five Winter Olympic Games, winning five gold medals and two bronze medals. During her long career she had been subjected to numerous in-competition and out-of-competition doping tests without any adverse analytical findings. During this period the International Skating Union ('ISU') had collected more than ninety blood samples as part of its blood profiling program, which involved measuring the blood's hemoglobin, hematocrit and percentage of reticulocytes ('%retics'). Reticulocytes are immature red blood cells that are released from the bone marrow. The %retics is a sensitive hematological parameter which provides a real-time assessment of the functional state of erythropoiesis in a person's organism.

The ISU considered the normal %retics values to be within the 0.4-2.4 range, but after a test on 6 February, 2009, just before the ISU World Allround Speed Skating Championships, Pechstein's value was measured at 3.49. Samples taken on the morning and afternoon of 7 February then showed %retics values of 3.54 and 3.38. However, after the Championships, on 18 February, another sample that was taken showed a %retics reading of 1.37. On 1 July, 2009, an ISU Disciplinary Commission ruled that Pechstein had been responsible for an anti-doping violation under the ISU Anti-Doping Rules ('ADR') by using the prohibited method of blood doping. Her results from the World Championships were declared invalid, and she also received a two year ban. Pechstein, together with the national federation, the Deutsche Eisschnelllauf Gemeinschaft ('DESG'), then appealed to CAS.

As to the burden of proof, it was held that the ISU bore 'the full burden to present reasonably, reliable evidence to persuade the Panel'⁹⁹ that a violation had occurred, but this was, however, not a case where there was an adverse analytical finding where a presumption is provided in favour of the anti-doping organisation.¹⁰⁰ The Panel pointed out that it needed to apply Article 3.1 of the ISU ADR which had a comfortable satisfaction standard of proof which, as the Panel pointed out, was 'a test well-known to CAS practice, as it has been the normal CAS standard in

98 *Claudia Pechstein v International Skating Union* CAS 2009/A/ 1912; *Duetsche Eisschnelllauf Gemeinschaft v International Skating Union* CAS 2009/A/1913.

99 Ibid [115].

100 Ibid [116].

many anti-doping cases even prior to the WADA Code.' The Panel also pointed out that several awards had withstood the scrutiny of the Swiss Federal Tribunal which had held that anti-doping proceedings are private law, not criminal law matters.¹⁰¹ The Panel then held that it did

not agree with the Athlete's contention that the standard of proof must be very close to 'prove beyond reasonable doubt' because of the particular seriousness of the allegation against Ms Pechstein. The standard of proof beyond reasonable doubt is typically a criminal law standard that finds no application in anti-doping cases.¹⁰²

Another argument put forward by Pechstein was that the longitudinal profiling amounted 'to a retroactive application of the law' since blood profiling 'only became legally admissible on 1 January 2009 when the current versions of the WADA Code and ISU ADR came into force.'¹⁰³ The Panel, however, held that 'longitudinal hematological profiling' was the same as 'other analytical information' that was valid under the old rules.¹⁰⁴ The Panel then went on to state that it

would have no hesitation in holding that new scientifically sound evidentiary methods, even not specifically mentioned in anti-doping rules, can be used at any time to investigate and discover past anti-doping rule violations that went undetected, with the only restraint deriving from the eight year time limitation and the timely initiation of disciplinary proceedings.¹⁰⁵

In relation to the present case it was held that the blood samples used to acquire Pechstein's 'hematological values and portray her blood profile were properly taken,'¹⁰⁶ and that it was comfortably satisfied there was a reliable chain of custody of the samples.¹⁰⁷ It was also comfortably satisfied that the Advia Machine properly used reliable equipment to analyse Pechstein's blood samples and 'record reasonably accurate hematological values.'¹⁰⁸ It was further comfortably satisfied that the %retics values of 3.49, 3.54 and 3.38 from the samples taken on 6 and 7 February, 2009, constituted 'abnormal values' when compared to those of the general population, other elite speed skaters¹⁰⁹ and her own %retics values.¹¹⁰ The Panel then upheld the ISU case that these high values were due to:

101 Ibid [124].

102 Ibid [125].

103 Ibid [104].

104 Ibid [107].

105 Ibid [109].

106 Ibid [138].

107 Ibid [148].

108 Ibid [161].

109 Ibid [177].

110 Ibid [183].

the exogenous stimulation of her erythropoiesis or, in other words, the artificial stimulation of her body's capacity to produce red blood cells that carry oxygen to muscles and organs, with the evident purpose of reducing fatigue and attaining an unfair advantage over her competitors. In short, blood doping.¹¹¹

The two year ban that had been imposed was therefore upheld.¹¹²

It should also be noted that in its submissions DESG supported Pechstein's case by stating it considered that the evidence did not support an anti-doping rule violation.¹¹³ However, it also acknowledged that 'in principle, blood profiles yield indirect evidence that is vital and desirable as a method to prove blood doping.'¹¹⁴ This in effect summarises what blood profiles are, namely, indirect, circumstantial evidence that there is something unusual about the athlete's results, the inference being that this is the result of blood doping. It is also suggested that there was no rational or reasonable explanation for the levels found in Pechstein's test results to indicate her innocence, which means the case was decided in a manner which would be consistent with a common law circumstantial evidence case.

While most sanctions handed out by tribunals in drug testing cases are the result of the analytical evidence provided by a positive test, some sanctions rely on the athlete appearing to have missed, or refused to undergo, a drug test. In such cases where there is no analytical evidence to prove this one way or the other, the important evidence is often testimonial evidence.

C *Testimonial Evidence*

The case of *WADA v IIHF & Busch*¹¹⁵ involved Florian Busch, a German international ice-hockey player, who had represented Germany in a number of world championships and Olympic Games. On 6 March, 2008 a doping control officer appeared at his house for an out-of-competition test,¹¹⁶ but Busch refused to submit to a sample collection, declaring that

111 Ibid [191].

112 Ibid [214].

113 Ibid [56].

114 Ibid [55].

115 *World Anti-Doping Agency (WADA) v International Ice Hockey Federation (IIHF) & Florian Busch* CAS CAS 2008/A/1564.

116 Note that under the new WADA Code that came into effect in January 2009, all athletes must now nominate a one hour time slot in which they must be available for testing, seven days a week. For a discussion of this aspect of the new code see Adam Pendlebury, John McGarry, 'Location, Location, Location: the Whereabouts Rule and the Right to Privacy' (2009) 40 *The Cambrian Law Review* 63.

'he felt disturbed by too frequent doping tests and [he] criticised the way athletes are selected to be submitted for out-of-competition testing.' He was warned that refusing to take the test could result in possible sanctions, but Busch confirmed his refusal.¹¹⁷ However, after the doping officer left his premises, Busch contacted the German National Anti-Doping Agency ('NADA') and after explaining what had happened, took a test later that day which was arranged by the German Ice-Hockey Federation ('DEB'). This test proved to be negative.¹¹⁸ Since DEB did not consider that refusing a test was the same as testing positive and the fact that the athlete had undergone a test later that day,¹¹⁹ it sanctioned Busch with a public warning, a small fine and 56 hours of community service. This decision was supported by the International Ice Hockey Federation ('IIHF') which allowed Busch to play in the 2008 World Championships.¹²⁰ On 27th May WADA filed an appeal with CAS.

Since the case did not involve reviewing the analytical results of a positive test, it therefore had to rely on witness testimony with each witness being 'examined and cross-examined by the parties' as well as being questioned by the Panel.¹²¹ In his testimony, Busch stated that he 'was annoyed at having been tested a couple of times in the recent past', that the test was taking place in his apartment just after he had met his partner 'under unpleasant conditions, after an unsatisfactory training session in the morning and right before leaving for lunch.'¹²² While the statements were contradictory in regard to what exactly the doping officer had said to Busch, they did establish that he had been informed that 'a refusal would have serious consequences.'¹²³ The statements also established that the failed sample collection had ended by at least 12.50pm, with the evidence of his partner then confirming 'that he was in his apartment together with her all the time between 12.50pm and 5.14pm' and that he did not eat anything and 'might have drunk some mineral water, but did not take any other substance.'¹²⁴ The Panel, however, held that Busch 'could not establish exceptional circumstances whereby he would bear no significant fault or negligence.'¹²⁵ WADA's appeal was therefore upheld and Busch was banned for two years from 22 April, 2009.

117 *World Anti-Doping Agency (WADA) v International Ice Hockey Federation (IIHF) & Florian Busch* CAS 2008/A/1564, [5].

118 *Ibid* [6].

119 *Ibid* [8].

120 *Ibid* [9].

121 *Ibid* [45].

122 *Ibid* [84].

123 *Ibid*.

124 *Ibid* [88].

125 *Ibid* [97].

The case of *FIGC, Mannini, Possanzini and CONI v WADA*,¹²⁶ involved Daniele Mannini and Davide Possanzini, who were professional football players with Brescia, when selected for a doping test after a Serie B match conducted by the Federazione Italiana Giuoco Calcio ('FIGC') on 1 December 2007.¹²⁷ At the end of the game the players were advised as they left the pitch that they had to report immediately to the doping-control station.¹²⁸ The players, however, were intercepted by the team coach and President of Brescia and instructed to go immediately into the dressing room for a team meeting which had been organised as this had been the club's third loss in a row. This meeting lasted for between 10 and 25 minutes,¹²⁹ and while the doping officer was invited into the dressing room, he found that the door was blocked from the inside. The players therefore were not under the visual control of the doping control officers during the time of the meeting,¹³⁰ though the players immediately proceeded to the doping control station at the end of the meeting and provided a blood and urine sample which did not reveal the presence of any prohibited substance. The players received a 15 day ban for non-cooperation with the anti-doping officials, with WADA then appealing to CAS.¹³¹

Testimonial evidence and statements were then relied on to establish what the standard practice was in Italian football in regard to what players needed to do when asked to be involved in a post match drug test. It was then held that when the players stopped off in the dressing room for 10-25 minutes before proceeding to the control station that they did not know that 'this delay and loss of visual control would according to the rules be deemed a failure or refusal to submit to the doping control.'¹³²

Similarly, in *WADA v CONI, FIGC & Nicolo Cherubin*¹³³ four players were selected for a test after a Serie A match between Reggina and Livorno, with Nicolo Cherubin being one of those players. There was

126 *Federazione Italiana Giuoco Calcio (FIGC), Daneile Mannini, Davide Possanzini and Comitato Olimpico Nazionale Italiano (CONI) v World Anti-Doping Agency (WADA)* CAS 2008/A/1557.

127 Ibid [2.2].

128 Ibid [2.5].

129 Ibid [2.9].

130 Ibid [2.10].

131 Ibid [2.11]-[2.12].

132 Ibid 6.22.

133 *World Anti-Doping Agency (WADA) v Comitato Olimpico Nazionale Italiano (CONI), Federazione Italiano Giuoco Calcio (FIGC) & Nicolo Cherubin* CAS 2008/A/1551.

then a dispute between the testing officers¹³⁴ and Cherubin¹³⁵ as to what actually happened in the period immediately after the match, and what directions Cherubin was given as to what he could do and could not do. However, it was clear that Cherubin had gone into Reggina's dressing room where a lively conversation was taking place due to the 3-0 loss the team had suffered which could have resulted in the coach being asked to leave the club. It was also clear that he had taken a shower before going to the control station and taking the test which proved negative.

It was held, however, that '[b]ased on the evidence submitted' the Panel was 'not satisfied to the required standard' that Cherubin 'was told or directed not to leave the anti-doping station in a manner which enabled him to understand that he would be in breach of his duties if he did so.'¹³⁶ The Panel also stated that the evidence given was 'not sufficient to satisfy it comfortably' that Cherubin 'was unequivocally refused permission' rather than just deciding to leave the anti-doping station without obtaining permission to do so.¹³⁷

Thus, while analytical evidence will usually be the most significant evidence in a sport drug test, testimonial evidence given either orally, by written testament, or by phone link up, can also be highly significant in some cases. CAS's need to apply standards and burdens of proof, presumptions, analytical, testimonial and circumstantial evidence, therefore raises the question as to whether CAS operates more like a civil or common law body, a mixture of both, or in a manner that is acceptable to both civil and common law jurisdictions.

IV DOES CAS OPERATE LIKE A CIVIL OR COMMON LAW BODY?

CAS was established in 1984 for the purpose of providing arbitration for national and international sport. This means that it needs to provide a service that is satisfactory to parties from both civil and common law jurisdictions.

The fact that it produces the judgments that have been analysed in this article is an indication, in itself, that it operates like a common law system, since it is the production of written judgments forming future binding decisions that is the cornerstone of the common law system.

134 Ibid [7].

135 Ibid [38]-[40].

136 Ibid [63].

137 Ibid [64].

CAS, however, does not consider its judgments to be binding in the common law sense, as was pointed out in *D'Arcy v Australian Olympic Committee*.¹³⁸

Arbitration awards are binding only by contractual force on the parties and do not create precedents. However, where those awards relate to the interpretation, scope or content of the CAS Code, consideration of certainty and consistency suggest that subsequent panels should not take a different approach to that adopted by earlier panels, unless satisfied that the approach or view of the earlier panel is an erroneous one or is inapplicable because of different circumstances or different contractual language.¹³⁹

Thus, in regard to previous judgments creating precedents, CAS operates in the same way as a superior court in relation to its own decisions. Both CAS and courts are therefore reluctant to depart from their own decisions, and will only do so if it is clear that they should.¹⁴⁰

The use of presumptions is a key component of the drug testing rules and this is clearly compatible with the common law. Another feature of the rules is that there is one standard of proof for the sporting organisation, and a lower one for the athlete, which again is compatible with the common law. It should also be noted that this change in standard of proof favours the athlete. Unlike the common law, however, sport has clearly created a third standard of proof, namely 'the comfortable satisfaction' standard, and has also defined what this means. However, as Justice Dixon noted in *Briginsbaw*,¹⁴¹ the status of standards of proof outside of the common law is uncertain, which indicates that it can be changed by statute in a common law jurisdiction. The author would also suggest that, as the CAS judgments analysed in this article indicate, the comfortable satisfaction standard of proof works very well for sport, particularly as it is clearly defined and then applied in a consistent manner.

What the cases also indicate is that CAS is required to examine the rules of WADA, or an international sporting organisation, to see what these permit, and this codification of the law is a hallmark of the civil system. However, it is also suggested that many common law jurisdictions now place a greater emphasis on the use of statutes. At the same time the civil jurisdictions have begun to realise that the interpretation of the codified law is assisted by having judgments which can then be used as authorities in later cases to ensure consistency in the interpretation of that code. These authorities have been described as

138 CAS 2008/A/1574.

139 *D'Arcy v Australian Olympic Committee* CAS 2008/A/1574, [56].

140 See for eg, *Lange v Australian Broadcasting Commission* (1997) 145 ALR 96, 101; *Street v Queensland Bar Association* (1989) 168 CLR 461, 532.

141 *Briginsbaw v Briginsbaw* (1938) 60 CLR 336.

having 'privileged authority'.¹⁴² The author would suggest that the term 'privileged authority' provides a good description as to how CAS treats its previous decisions. Thus, there is an argument that the common law and civil systems have been coming closer together in recent times which may help to explain why an international sports arbitration tribunal like CAS can satisfy the needs of parties from both systems.

V CONCLUSION

While CAS has stated that it is not bound by the rules of evidence, it is required to examine and apply standards, burdens of proof and presumptions. It is suggested that the manner in which this is done is consistent with that of the common law, with the one minor departure being the establishment of a clear third standard of proof, that of comfortable satisfaction, which is defined as being between the two common law standards. The standard of proof for the athlete is, however, based upon the balance of probabilities, which CAS has defined as being 51 per cent.

Most of the cases heard by CAS rely on direct analytical, documentary or testimonial evidence, which is again consistent with the common law, though in blood profiling cases the analytical evidence is used in an indirect way, that is, as circumstantial evidence. Thus, while CAS is not bound by the rules of evidence, it certainly operates in a way that is little different to how a common law court operates in the admission and use of evidence. It could also be argued that the success of CAS as an international sports arbitration body indicates that it operates in a manner consistent with both the civil and common law systems, and perhaps provides evidence that the common law and civil systems have, in recent times, become closer in how they operate.

¹⁴² MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 8th ed, 2008) 1542.

