The doping risks of modern sports supplements: UKAD v. Williams, Warburton

By Tom Rudkin David Herbert written for and published by LawInSport.com on the 09 March 2015. View the original article here.

The recent decision\(^1\) of the National Anti-Doping Panel\(^2\) (NADP) in the case of Welsh athletes Gareth Warburton and Rhys Williams has brought the issue of sports nutrition products firmly into the public conscience.

The two athletes were suspended for six and four months respectively after urine samples collected by UK Anti-Doping (UKAD),\(^3\) during testing in the summer of 2014, were found to contain metabolites of certain anabolic steroids. These metabolites are "Prohibited Substances\(^4\)" the presence of which constitutes a violation of Rule 32.2(a) of the International Association of Athletics Federation Anti-Doping Rules\(^5\) (which are identical to the UK Athletics Anti-Doping Rules).

To clarify the regulatory background, the rules applicable to Williams and Warburton's case were the previous versions of the IAAF Anti-Doping Rules (dated 1 April 2012) and the UK Athletics Anti-Doping Rules, which were linked to the WADA Code 2009 ("the 2009 Code"). This was because the charges were brought prior to the WADA Code 2015 ("the 2015 Code").

\(^2\) Information on the National Anti-Doping Panel, https://www.sportresolutions.co.uk/services/national-anti-doping-panel
\(^3\) UKAD homepage, www.ukad.org.uk
\(^5\) IAAF Anti-Doping and Medical Rules, the current version is available to download at http://www.iaaf.org/about-iaaf/documents/anti-doping
Code
g
6
6
coming into force on 1 January 2015 and before the resulting implementation of current versions of the IAAF and UK Athletics IAAF Anti-Doping Rules. Nonetheless, the 2015 Code still had implications when it came to deciding the appropriate levels of sanction.

The pair’s periods of suspension were held by the NADP to have commenced on the relevant dates in July when charges were brought (and from which time they were provisionally suspended). As a result, they are both now free to compete again. Nonetheless, following the positive tests and the provisional suspension, both were forced to miss the Commonwealth Games in Glasgow and the period up until the final decision by the NADP, which was released in January 2015. They also incurred significant related legal costs, with Rhys Williams in particular stating, “it’s cost a ridiculous amount of money to clear my name”.

In both cases, the NADP was satisfied that the source of the prohibited substances was an energy drink called Mountain Fuel: Xtreme Energy. Importantly, the prohibited substances in question were not listed anywhere as being contained in the Mountain Fuel product. In other words, the substances were not supposed to be components of the product and are likely to have entered it via contaminated raw materials and/or manufacturing equipment. The product could therefore be described as “contaminated”. Indeed, the concept of a "contaminated product" is now defined in the the 2015 Code, which explains that this is a:

“product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search”.

The Mountain Fuel product was found to fall within the remit of the new definition in the 2015 Code and this was important with regard to the length of suspension imposed.

Whilst the eventual suspensions were more lenient because of the NADP’s ability to apply provisions in the 2015 Code relating to contaminated products, it is unsurprising that the athletes argued that they were victims in the whole episode. It was accepted by all involved that they had not intended to use the Mountain Fuel product for any prohibited performance-enhancing purpose and UKAD also noted during the hearing that “they are victims”.

Nonetheless, as was also pointed out during the hearing, anti-doping in sport operates by way of the principle of "strict liability": Article 2.1 of the 2015 Code states that it is their "personal duty to ensure that no Prohibited Substance enters [their] body" and "it is not necessary that intent, Fault, negligence or knowing Use" be demonstrated. As such, sportsmen and women are responsible for the substances they ingest whether or not they intend to ingest them.

The rationale behind anti-doping measures is clear: to promote doping-free sport as well as health, fairness and equality for all who participate in sport. Clearly, regardless of intention, it is important that prohibited performance-enhancing substances do not undermine the integrity of sporting competition.

---

7 UK Athletics IAAF Anti-Doping Rules, available to download at http://www.britishathletics.org.uk/anti-doping/rules/
9 Mountain Fuel homepage, http://mountainfuel.co.uk/2014/01/05/xtreme-energy-fuel/
10 Ibid at 1, see para. 80
11 World Anti-Doping Code 2015, p. 11
Athletes are personally responsible for their supplement intake

The risks associated with sporting supplements are well-known already. The perception is that supplements are widely used in sport for a variety of purposes such as recovery, increasing endurance or muscle growth. This can largely be attributed to the ever finer margins between success and failure in sport and the increasing pressure to be, say, as strong or as fast as possible. But the risk that they contain prohibited substances or are contaminated with such substances is continually present. Generally, a number of sportsmen and women have been suspended due to positive tests caused by supplements (albeit not always contaminated). These include Asafa Powell (the Jamaican 100m sprinter), Marin Cilic (the Croatian tennis player and reigning US Open Champion) and the young Scottish rugby player Sam Chalmers, who has since spoken out about the risks associated with supplements as well as the pressure he felt under to "be bigger" and the importance of not giving into such pressure.

As regards contamination, research conducted by the HFL Sport Science laboratory in 2013 found that 10% of products within a survey of some of Europe's top supplement brands were contaminated with steroids and stimulants. And an earlier survey funded by the International Olympic Committee in 2001 found that close to 15% of over 600 products were contaminated. Needless to say, these are significant proportions.

UKAD's website has an entire page dedicated to the subject of supplements, highlighting the real risk of supplements containing prohibited substances, whether as a result of contamination or not. Anyone considering using supplements is encouraged, first, to assess "the associated risks and make informed decisions about the products they opt to use" and to "remember strict liability". Importantly, they are also reminded that "it is not possible to provide a 100 per cent guarantee that any supplement is totally free of contamination." Similar messages are included on the websites for a number of sports governing bodies including the Football Association, the Rugby Football Union, the Rugby Football League, UK Athletics and the England and Wales Cricket Board.

15 "Sam Chalmers banned from rugby for two years over steroid use", BBC Sport website, 13 September 2013, last viewed 9 March 2015, http://www.bbc.co.uk/sport/0/rugby-union/24082242
The key message promoted by all these organisations is that using any supplement will always carry with it some degree of risk. With strict liability in mind, the responsibility (to oneself as much as anyone else) to analyse the risk of supplements is clear for anyone considering using them.

**Fault vs intention**

The need for comprehensive research before a supplement can be safely used is reflected in the Warburton and Williams decision. Both athletes argued in the first instance that the NADP should make a finding of "no fault or negligence" and that they should not receive any suspension. This concept was provided for in Rule 40.5(a) of the version of the IAAF Anti-Doping Rules that was applicable to their case. If such a finding were made then, in accordance with the rules, there would be scope for no suspension to be imposed.

However, although the NADP accepted that both athletes had not intended to cheat and had carried out some degree of research into the Mountain Fuel product, they were held to be at fault and/or negligent in some respects. In particular, whilst both Warburton and Williams were deemed to have been aware of the inherent risks in taking supplements, neither had sought advice from any of the relevant governing bodies (such as the IAAF, Welsh Athletics or UK Athletics) or from UKAD. Nor had either athlete sought medical advice in respect of the Mountain Fuel product or conducted private testing on the product being used (though it should be noted that the Court of Arbitration for Sport has previously commented that it would not be "reasonable to attribute anything other than minimal fault" to athletes for failing to incur the expenditure and time of private testing\(^{24}\)). The enquiries they did make of the product manufacturer were also held to be insufficient by the NADP.

Finally, but very importantly, the product in question was not listed on the Informed Sport website\(^{25}\). Informed Sport is a quality assurance, risk-minimisation programme for sports nutrition products, whereby companies that produce supplements can choose to pay for their products to be registered with Informed Sport and have batches of their product tested for prohibited substances at the LGC laboratory. A search facility on the website indicates which batches of the registered product have been tested and found not to contain any prohibited substances.

In the case of Gareth Warburton, he had not referred to the Informed Sport website, something which the NADP stated he "could and should" have done\(^{26}\). Meanwhile, Rhys Williams did check the website and found that neither the product nor the batch was listed. He asked Mountain Fuel to explain this and they claimed that they had not been willing to pay the £4,000 fee, which they said was required in order to have the products tested. However, they stated that the products had gone through an identical manufacturing process as those listed by Informed Sport. Whilst careful not to question Mountain Fuel’s integrity, the NADP found that Williams "should not simply have relied upon [the] explanation"\(^{27}\).

**Length of suspension**

---


\(^{26}\) Ibid at 1, see para. 77

\(^{27}\) Ibid at 1, see 105(e)
As noted above, Warburton and Williams received six and four month suspensions respectively. Whilst the 2015 Code provides for suspensions of four years, under the 2009 Code (which was in force when the charges were brought) the standard period for a first violation (as was the case here) was two years. However, although the NADP held that there was some degree of fault and/or negligence on the part of both athletes, they also felt that this was not "significant" under the terms of Rule 40.5(b) of the IAAF Anti-Doping Rules (which was derived from Article 10.5.2 of the 2009 Code). In particular, both athletes had at least conducted some research into the supplement and they had also had previous negative tests whilst using the product in question. Importantly, though, the NADP observed that these negative results did not entitle the athletes to assume that the supplement would "forever be 'safe' to use". Under the 2009 Code, Article 10.5.2 provided that the minimum sentence if the athlete could establish "no significant fault or negligence" would be half the otherwise applicable period. As such, under the 2009 Code, the best Warburton and Williams could have hoped for was a one year ban.

However, the decision of the NADP was taken after 1 January 2015, when the 2015 Code came into force. It was therefore incumbent upon them to construe the IAAF Anti-Doping Rules in accordance with the new Code. Under the 2015 Code, Article 10.5.2 stipulates that:

"In cases where the Athlete or Other Person can establish No Significant Fault or Negligence and that the Prohibited Substance came from a Contaminated Product [as was the case here], then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault".

As such, lighter sentences than under the 2009 Code were at the NADP’s discretion, leading to the eventual lengths of suspension imposed. This is consistent with the 2015 Code’s increased focus on intentional anti-doping rule violations, for which the position for first offences is a four-year suspension. Indeed, the very presence of a new provision relating specifically to contaminated products highlights the understanding within WADA and the anti-doping world that this is a prevalent issue and that, at least to some extent, athletes are victims in such cases.

In terms of the length of suspensions imposed, it is certainly arguable that they were on the lenient side, despite the acknowledgement on both sides that the athletes were victims. It would be fair to say that a number of stones were left unturned in the research conducted by the athletes (including the fact that the Informed Sport website, which provides the best risk reduction mechanism available, was either not used at all or was used but the information it provided was disregarded in favour of an assurance from the product manufacturer).

One has to wonder what the level of fault or negligence would have to be, for instance, to justify a one-year suspension in a contaminated supplement case. In so far as the difference between the sanctions is concerned, whilst both athletes made a prompt admission of the charge, Rhys Williams had declared the supplement in question on his Doping Control Form, something which the commentary to the 2015 Code refers to specifically as a potential mitigating factor when it comes to assessing the degree of fault or negligence involved.

Alternatives to supplements – the future

---

28 Ibid at 1, see, para. 102
29 Ibid at 1, see para. 119
As noted above, there can be no guarantee for sportsmen and women that the supplements they use are free from prohibited substances. Even the Informed Sport website, whilst recognised widely as a key risk minimisation process for athletes, cannot (including by its own admission) be regarded as a 100% guarantee of safety. Whilst still to be tested, it is conceivable that if a positive sample resulted from a product listed on the Informed Sport website, it would be unlikely to result in a period of suspension. Nonetheless, even if this were the case, the principle of strict liability dictates that an anti-doping violation would still have been committed and, where the sample had been collected in-competition, it would result in the disqualification of the performance where the sample was taken. It should be noted that at the time of writing we are not aware of any positive tests resulting from Informed Sport registered products.

Of course, the risks of supplements do need to be balanced against the benefits they can provide. However, in reality, whilst claims about the benefits of supplements may be very appealing and suggest a convenient and easily accessible "short-cut" to the "winning edge", it has been suggested that the truth in many cases may be somewhat more banal. Sources of information should be made available to promote good nutrition and hydration so that nutritional needs can be met by a balanced and varied diet, tailored to the particular requirements of the individual seeking to excel in their chosen sport.

Only once the possibilities of good nutrition have been exhausted should consideration be given to the use of supplements to address those shortfalls. But any such consideration must involve a clear understanding of the risks associated with supplements (and the best ways of reducing those risks) and the fundamental principle of strict liability, which makes all those who strive for sporting success ultimately responsible for what they ingest into their bodies.

Copyright Notice

This work was written for and first published on LawInSport.com (unless otherwise stated) and the copyright is owned by LawInSport Ltd. Permission to make digital or hard copies of this work (or part, or abstracts, of it) for personal use, professional training and/or classroom use is granted free of charge provided that such copies are not made or distributed for profit or commercial advantage, and provided that all copies bear this notice and full citation on the first page (which should include the URL, company name (LawInSport), article title, author name, date of the publication and date of use) of any copies made. Copyright for components of this work owned by parties other than LawInSport must be honoured.