

## ‘Pool of Responsibility’: A new approach to doping prevention

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**Abstract.** Doping has been an issue for the greater part of a century. Current anti-doping policies involve punishment and chemical testing aimed at a single individual. Doping scandals show that it is rarely the fault of only an individual athlete, particularly in a team scenario. Coaches, sports scientist and other athletes may all contribute to an athlete’s decision to dope. A novel solution has been formulated, a ‘pool of responsibility’; the idea that responsibility for doping is borne by all team-members not just the individual athlete. Case studies and examples from organisational and legal literature were used to justify the concept.

**Keywords:** sports, policy, liability, cycling, armstrong, self-managed teams

**Acknowledgements:** The author would like to acknowledge the feedback and comments received from Professor Maciej Henneberg, Professor Frank Rühli, Professor Rick Sarre and Professor Paul Babie.

There has been considerable debate for the better part of a century with regards to the most effective and efficient manner in which to prevent doping. Early debate centred around penalties based on competition bans. These eventually formed the basis for the anti-doping systems used today, a system based on punishment (fines and bans) and restrictions. Yet, the problem of doping and ways in which to combat it remains to this day. There is still much debate, on exactly what can be done to prevent doping. Yet to this day the notion of a response through punishment persists, as has been seen in cases such as the ‘Festina Affair’ (Christiansen 2005), ‘Operation Puerto’ (Cycling News 2013), and the US Postal Cycling Team Investigation (USADA 2013a). In each of the above cases, and with many other major doping scandals, it was not only a single team member found to be doping, but rather it was a team-wide issue. In such situations it would seem logical to assume that additional external factors are involved in the decision to dope. These may be peer pressure, coach pressure, manager pressure, medical/scientific advice or just pressures of the sporting arena. If this is the case, then punishing only the athlete involved is not only unfair but also short-sighted. Moreover, it can be said that this also works against the prevention of doping. The purpose of this paper is to propose a novel approach to anti-doping legislation; a new concept which takes into account the realities of group decision-making and the pressures on an individual’s decision to dope or not. This paper will present the concept termed ‘pool of responsibility’, the idea placing the responsibility of doping in a team on all members of the team. This will be explored through use of case study examples and arguments from legal and organisational sources. This paper will, begin with a background to the arguments for the existence of anti-doping legislation and a critical analysis of these arguments, so to better set the scene to present the concept.

## 1. ANTI-DOPING ARGUMENTS: A CRITIQUE

It is prudent to begin with the underlying question: What is the point of anti-doping policies?

There are three primary arguments used to explain, and perhaps, to justify anti-doping policies; 1) fairness, 2) equality and 3) athlete health (WADA 2009). Yet, there is evidence that indicates that there are, in fact, two additional plausible explanations for the existence of anti-doping policies, they are 4) appearance and perceptions and 5) revenue. To begin, it is prudent to attempt to present and assess each explanation in order to provide an appropriate background to enable the presentation of the proposition of a ‘pool of responsibility’.

### 1.1. Fairness and Equality

First of all, there is the fairness argument. The notion is that the introduction of doping agents by only some athletes in the sporting arena would create a situation that means the remaining athletes are not able to compete in a fair playing field. Each athlete should be able to compete without needing to dope and still be able to compete at the same level. However, the WADA *Code* (2009), UNESCO *Convention against Doping in Sport* (2005) and the IOC *fight against doping* (2014), all fail to define exactly what is meant by ‘fairness’ in sport. Nor do they apply the concept. It has been suggested by Lenk (1972) that in the context of sports, fairness takes on two different forms, ‘formal fairness’ and ‘informal fairness’. The former refers to athletes complying with the rules (letter of the law) and the latter refers to voluntary acts or sportsmanship (spirit of the law). Lumer (1995) defined it as ‘the moral norm for sports’. However, Kuchler provides the most useful statement for fairness as applicable to sport. He states:

*‘[W]hich in the situation of agon takes the opponent as a partner, in contest keeps the sense of playfulness, pays attention to keeping the rules and to equal chances, does not value victory higher than anything else, gives the right attitude towards victory and defeat, spurs on to exerting all one’s energies, refuses dishonourable and unequal advantages, helps to overcome endured injustice, in all these situations and questions can decide generously and grateheartedly’* (Kuchler 1969: 156).

In each example there is a tendency to refer to intangibles and the true spirit of human morality and sport.

The second explanation is equality. The concept of equality is the right of all athletes to play on a level playing field (Loland 2002; Kayser–Mauron–Miah, 2007), and, as such, the rules of sports are the means to this end. Rawls (1971) and Lenk (2007) both argue equality in a similar vein, and speak of ‘equality of opportunities’. Similarly, König (1995) uses the phrase ‘same chances to win’ when discussing equality in sport. These are all noble concepts, and no doubt, the various anti-doping policy creators had concepts like these in mind when forming the legislation. However, if one now assesses the realities of the fairness and equality in the actual sporting world, a very different view can be seen.

Firstly, it has been suggested by Lumer (1995: 12) that if one were to use football as an example of the realities of fairness, then

*“[I]f sportsmen have (tacitly) agreed on competing for a prize under certain conditions which exclude fouls and if then one of them plays foul, thereby increasing his chance of winning, this is a form of fraud.”*

But, as detailed by Pilz (1988), in professional football, deliberate fouls are universally considered necessary for victory. If a player does not engage in this practice, they are not considered to be good players, and, as such, fouling is actually a trained skill. Despite the fact that fouls are against the letter and spirit of the law, and are unfair, they still occur and are accepted by both players and spectators alike. Moreover, one can refer to athletes from developed nations versus developing or third world nations. It would be unfair to assert that all athletes have the same opportunities to compete, train and develop irrespective of the place of origin. Even if one discounts the effects of nutritional disadvantages during childhood development, there is still the issue of economic equality and access to the same facilities and resources upon becoming an athlete. Athletes from Nepal, for example, do not have the same opportunities to train and compete, or have access to the same level of coaching as athletes from the United States. Even in a less extreme case, an athlete from Slovenia (despite being a member of the European Union) may not be given the same opportunities to train nor have the same access to resources as an athlete from Great Britain. The reality is that sport is an economic endeavour and a business. It costs money to train and compete and not every country has the same resources available, nor does every country contribute the same resources to developing their national athletes. This also differs from sport to sport. For example, a rugby player from Austria would never have equal opportunities to become a world class player same as an athlete from New Zealand or even Ireland, especially if they wanted to remain in the home nation to develop. More specifically, and relating to doping, there is an inequality with regards to access to medicaments and pharmaceuticals. As has been demonstrated with USADA’s investigation (USADA 2012) into doping at US Postal as well as the development of Tetrahydrogestrinone (THG), athletes with direct access to pharmaceutical companies are at a significant advantage. There is also the separation of female and male athletes, disabled and able bodied athletes and age segregation in sports. If a player is of equal skill, should it matter if they are male or female, young or old etc. should they not be allowed to compete without having to fight for that right? Under current sporting regulations in many sports, there are rules that restrict those which can compete in certain organised events. Cycling for example is separated into male and female tours (see *Tour de France* vs. *le Tour de Femme*). Furthermore, such realities are found in able and disabled competitions (see *Olympics* vs. *Paralympics*). To elaborate further, one can refer to the case of Oscar Pistorius, a disabled athlete who after a 5 year fight, successfully won the right to compete with able bodied athletes in the Olympics (Moreton 2012). What is more, with the case of Pistorius, he was required to win the case to actually compete in sports at all due to his prosthetic legs (which some deemed to give him an unfair advantage) (*Pistorius v. IAAF 2008*). Another such example can be seen in the case of *PGA Tour, Inc. v. Martin (2001)*. In this case the court found that the PGA could not exclude Casey Martin from golfing events due to his disability (a heart condition that prevented him from walking between holes). Furthermore, reasonable steps should be taken to ensure the inclusion of disabled athletes in able bodied events. Whilst in these examples the plaintiff successfully won the right to compete, there is still the issue that it is not automatically allowed. So the question remains: is this complying with the ideals of fairness and equality, let alone basic human rights?

## 1.2. Athlete's Health

The final primary argument for the existence of anti-doping policies is the concept of athlete's health. There have been numerous pieces of research that have demonstrated the harmful effects of certain substances used for doping (Beastall–Gibson–Martin–1995; Kohler–Thevis–Schänzer–Püschel 2008). Similarly, it is argued in each piece of anti-doping legislature, that one of the primary reasons for anti-doping policies is in order to protect the health of athletes due to the negative health effects of doping agents. There is significant evidence demonstrating the harmful consequences of some doping products (Beastall–Gibson–Martin 1995; Kohler–Thevis–Schänzer–Püschel 2008). There is little debate on the serious health side effects (including death) of well-established doping agents such as steroids (Kicman–Gower 2003; James–Gower 2004) and Human Growth Hormones (Bengtsson–Eden–Ernest–Odén–Sjögren 1988; Haupt 1993). However, there is still, some debate about exactly how harmful some doping agents truly are. There tends to be contradictory evidence in the cases of some banned doping agents as to whether they have the effects claimed. There is much debate about the inclusion/exclusion of some agents in the banned list (Korkia 1999). Some agents such as beta-2 Agonists would seem to not have the same negative health impacts on users. In fact many of the doping agents used by athletes today, and historically, originally were used for medical purposes, and many still have health applications. It seems that the problem, in many cases, is not the use of the medicaments but rather the abuse. This may have something to do with the apparent modern social phenomena of 'popping pills'. It could be argued that, in the modern era, people may see pills as the cure for everything, and what is more, this carries over onto the apparent belief that 'more is better'. For example, if one pill helps provide a 20% improvement then 5 must provide a 100% improvement. It would seem that there is little sense that more is not always better, and so abuse occurs. Therefore, perhaps the source of some of the negative health issues are not the agents themselves but rather the type and style of usage. Moreover, there is the rather considerable debate about Therapeutic Use Exemptions (TUE) (Kaufman 2005; Orchard–Fricker–White–Burke–Healey 2006). If the agents are banned (with the assumption that they are damaging for human health), then an athlete acquires a TUE are these agents still harmful? If so, then it is fine if the athlete is harmed, and if not then are they in fact not harmful, or only in some cases? One can refer to the before mentioned use of beta-2 Agonists as an example. It is a common agent for the management of asthma, yet it is also a banned substance. Numerous athletes use beta-2 Agonists to help with asthma (one such example being Alessandro Petacchi, who despite having a TUE was banned for 'too much use' of salbutamol). If this was harmful for human health, (which as outlined previously there is no evidence to support) why then is its use so widespread as a means to manage asthma in the general population? It seems more likely that the agent is not banned for health reasons but rather an uncertainty as to its performance enhancing possibilities.

## 1.3. Appearances, Perceptions and Revenue

There are two additional arguments to be discussed here, with regard to the existence of anti-doping policies. These are rarely considered but would seem to be almost as plausible as the primary justifications for the existence of anti-doping legislation. These arguments are appearance and perceptions, and revenue. These two concepts, whilst different, do indeed tie in with one another.

Appearance and perceptions refer to the idea that anti-doping, as it is currently structured and implemented, (chemical testing and punishment) is largely ineffective in so far as to actually be effective in detecting and subsequently eliminating doping. This is supported by researchers (Kayser–Mauron–Miah 2007) as well as officials, retired and banned athletes (Cycling News 2010a: 2012). As such, this raises the question: if this is the generally accepted belief now, then is the purpose of anti-doping simply to give the appearance of a fair, equal and honest competition? Do sporting officials and policy makers, knowing the ineffectiveness of anti-doping policies, only continue to use them so as to put the spectators' minds at ease? To elaborate, one can refer back to the International Association of Athletic Federations (IAAF) initial introduction of anti-doping in 1928 as well as the IOC's first anti-doping legislation. Both policies were introduced knowing that they did not have any testing available or at least no effective testing (WADA 2010). As such, one could say that the purpose of the legislation was twofold, 1) to try and scare athletes to not dope, and 2) to try to convince spectators that they should keep watching because the sports were 'clean'. It can be argued that this also relates to the latter concept of revenue. If the aim of anti-doping is to simply give the impression of fairness, equality and honesty in the minds of spectators, is this simply to ensure continued viewership and thus sustainable revenue. Do sporting officials believe that spectators want some level of fairness in sports and without it they would simply turn off (it remains to be shown if this idea is true, do spectators even care?)? If this is the case, then perhaps it explains the inclusion of ineffective anti-doping policies.

## 2. 'POOL OF RESPONSIBILITY': A NOVEL APPROACH

There have been numerous opinions and differing ideas on what the best way to solve the doping problem is. Some have suggested simply increasing the penalties for doping (WADA 2012), others have suggested that changes are needed in the psychology of the athletes (Petróczi–Aidman 2008; Ehrnberg–Rosen 2009; Hermann–Henneberg 2013). Others still have suggested that major changes are needed to the way in which sports are run and structured (Cycling News 2010; 2011).

The fact that anti-doping testing is not working well with regards to effectiveness or rather as a deterrent is illustrated by WADA's recent decision to increase the length of doping bans from 2 to 4 years (WADA 2012) with the aim of increasing the deterrent effect of the penalty. In law enforcement this practice is usually performed when detection of a wrongdoing is ineffective. Some research, however, has claimed that increasing the penalty of an infraction will have no impact on the criminal behaviour (Tsebelis 1990). There are some who doubt if this practice is even effective in criminal matters. As Arizona pitcher Brad Ziegler stated when discussing penalties for doping in sport,

*“There are 32 states that have the death penalty for murder, and murders happen in those states every single day. It's not going to stop people from committing the crime, even if you have a death penalty”* (Ziegler 2014).

Does simply increasing the length of ineffective penalties truly work, there is much debate, but it would seem that in some cases the answer is simply no.

## 2.1. The Concept

The solution being offered here has been termed the ‘pool of responsibility’. The suggestion here is that policy-makers should incorporate the notion of a ‘pool of responsibility’ at the national level. What this means is that accountability and responsibility for anti-doping initiatives would need to be taken by sporting organisations and athletes on a national level. Such responsibility would need to be borne not only by the athlete caught doping but would then need to be extended to include those directly associated with the athlete. This may include, but not be limited to, coaches, medical practitioners, teammates, sports scientists etc. This may, at first, appear to be a somewhat controversial solution, especially given the historical events involving group responsibility. Yet similarly controversial legal doctrines have become commonplace throughout the world. One such example can be seen with the Market-share liability doctrine in US tort law (Geistfeld 2006).

Given the realities of the sporting world, it is difficult to demonstrate a specific case where the actions and decisions of an athlete are truly independent and without influence and involvement from others. Numerous studies have demonstrated that, when it comes to decisions with regard to doping by professional athletes, the decision is, to some extent, influenced by teammates, coaches and medical practitioners (Lentillon-Kaestner–Carstairs 2010; Neeraj–Maman–Sandhu 2011; USADA 2012; Morente-Sanchez–Zabala 2013). As such, it would only be fair that if others are involved, responsibility should be shared by others, such as, teammates, coaches, medical practitioners and sports scientists to name but a few.

Exactly who is to be held accountable may differ from case to case, and as such any legislation would need to allow for such flexibility in applying liability to other individuals. However, certain legal minimums of relationship to the accused, role in the accused decision to dope, role in the accused sporting life, influence ‘level’ and situation specifics about the doping would need to be determined before implementing any such legislation.

With reference to this theme of relationship to the accused, it seems reasonable that this be taken into consideration when looking at doping cases and the ‘pool of responsibility’. More specifically, what if it can be shown that the athlete and the medical practitioner, sports scientist or coach had a particularly close relationship, one of trust? If the athlete relied upon the person (particularly a medical practitioner or sports scientist) when discussing supplements for ingestion, would it not be reasonable to expect that person knows what they are doing and would not provide the athlete with illegal substances. Under current anti-doping legislation the concept of strict liability applies the athlete needs to know what they are ingesting. It is well known that *ignorantia legis neminem excusat* (ignorance of the law is no excuse), but if the athlete, in a position of trust, reasonably relied upon the other, it would seem to be reasonable that the individual that betrayed that trust, at the very least, also be held liable for the decision of the athlete to dope.

## 2.2. The Organisational Arena

Such policies and practices are widely used throughout the global business world. It is not only common place to have systems of group responsibility incorporated into business operations but, in fact, it is arguably the preferential choice when it comes to organisational sustainability and success (Reed–Lemak–Meroc 2000; Curry–Kadasah 2002). These are not the only environments where one can see systems in place which require greater group responsibility; the military is another such example. Specifically one can refer to the concept of ‘Organizational Responsibility’ as coined by Crawford (2007: 198). This idea holds that

individuals in bureaucratic institutions such as the military do not act alone; there are others up the chain of command that are also involved. There have been numerous examples of scholars comparing sports to war (Dupre 1987; End-Kretschmar-Campbell-Mueller-Dietz-Uhler 2003; Mangan 2003).

There are, however, further possible advantages to the introduction of a 'pool of responsibility'. To further justify the concept of the 'pool of responsibility', one can refer to organisational literature. Numerous studies have shown the positive impacts group responsibility and accountability have on the decision-making and the overall productivity of teams and groups (Cohen-Ledford 1994; Guzzo-Dickson 1996). This is of importance for obvious reasons, the most obvious of which is productivity, which, in turn provides numerous benefits with regards to organisational success, which is a primary measure of performance in a sporting team. Furthermore, by extension, this is also a key determinate for staff retention and organisational sustainability. These studies demonstrate the importance of autonomous or self-managed teams and the role self-policing has had on positive group cohesion (Terborg-Castore-DeNinno 1976) and group norms (McGrath 1984). Standing alone, the concepts of high group cohesion and strong group norms may re-enforce a doping culture. However, when these are moderated by group responsibility and accountability, the combination of these concepts may create an environment promoting ethical decision-making, thus reducing the likelihood of doping. This would need further investigation to determine if this reality could be realised in the sporting world as it is with the rest of the organisational world. Would it not therefore be feasible and reasonable to implement such policies in sports; each athlete would be required to share the responsibility to the group and to themselves. Given the arguments for the concept, the answer would appear to be yes. Moreover, the benefits of high group cohesion will provide avenues for improving and sustaining performance of the team. This approach would, on this argument, encourage greater desire on behalf of the sporting team to provide increased organisational support, in an attempt to prevent widespread ramifications of doping. The benefits of organisational support to the employee are vast but include aspects such as increased motivation (O'Driscoll-Randall 1999), loyalty/commitment (Shore-Wayne 1993) and performance (Randall-Cropanzano-Bormann-Birjulin 1999), all of which may aid in reducing an athlete's willingness to dope for fear of group ramifications and loyalty/commitment to the organisation. Whilst this would be based on the individual's personal motivations, it does potentially appeal to the athlete's sense of morality; when the consequences of one's actions are limited to one's self, individuals may be more willing to take risks. Similarly, Breivik (1992) analysed doping in sport with reference to the prisoner's dilemma. The prisoner's dilemma is basically the idea that in real life situations two individuals, even if it might be in their own interests to do so, may not cooperate. That is to say self-interest, the pursuit of individual reward and the belief that they will be at a disadvantage if they do not act. An athlete's decision to dope or not is influenced by their perceptions on the actions of other athletes. If they choose not to dope they may feel that they will be at the disadvantage; if they do they are more likely to get benefit. This concept is well supported by a number of athletes following receiving a ban for doping, that they felt they needed to dope in order to be competitive because everyone else was also doping (Cycling News 2008, 2010b). As such the concept of a 'pool of responsibility' removes this 'prisoner's dilemma' issue.

Somewhat similar is the concept of duress under law. It is the concept that an individual performed an act (illegal in nature which they would not normally) due to threat or other similar pressure (normally violence) against the person in question. Specifically related to

the case of doping, one can refer to contract law. Duress in contract law can take the form of economic duress (Hale 1943). It can be therefore argued that in sports doping case, there may be situations where athletes are pushed into doping. This pressure may come from coaches, managers etc. and as such under such law, it would seem reasonable that the athlete have the defence of duress. As such the pool of responsibility concept is further reinforced. In such cases where it can be proven that another person is forcing the decision making of the athlete, it would seem only fair that they are held liable and so should be punished.

### 2.3. The Case Studies

An analysis of cycling in the context of a 'pool of responsibility' can be performed. In the event that a single cyclist was detected to have taken a banned substance and subsequently banned, the consequences would also be extended to other riders on the team and also include coaches, medical practitioners and sports scientists in the team. Exactly what these consequences would be would have to be determined, but for example, it would include some form of ban for the others involved also. Depending on the sport and the number of athletes involved, the level of responsibility would need to be increased to the national level simply because anything less and perceived benefits of doping may remain greater than the perceived consequences of being caught, and as such will not result in a change an athlete's actions. These two concepts, a) athlete's perceptions, and perhaps more significantly b) the cost-risk-ratio are two of the greatest barriers to successful anti-doping legislation. To elaborate, under the legislation guiding many current sport disciplines, the consequences of a positive test for doping agents are limited to the individual involved. The consequences to the organisation, be it national associations, or be it the employer, are limited. Cycling can be used again as an example. Under current *Union Cycliste Internationale* (UCI) legislation (UCI 2012a; UCI 2012b) the consequence to the team for a doping infringement is firstly disqualification of the team from the event itself (part 14 s327) (seemingly applied randomly) and, secondly, a loss of the world tour points collected by the athlete (part 2, s 2.15.040). There is no responsibility taken by the team members, coach, or other persons involved in the team. No tour points are deducted from the group of riders who should have been looking out for other members of the team to ensure that they did not use a banned substance. The Alberto Contador Vendasco case provides us with an example. The impact to Saxo Bank (his team) was simply that the ban placed upon Contador resulted in a loss of the points collected during his ban. The team did not lose its pro team licence. It could be said that, given the importance of Contador to Saxo Bank (the fact that he was the captain and the 'protected' rider), one would expect his suspension to bring significant detrimental impacts to the team. Yet the reality is that even in this case, the impact of his suspension was far less widespread than one would necessarily think. Saxo Bank still has a pro team licence and, in fact in 2013, obtained a new major sponsor/owner, Tinkoff (Cycling News 2013b). Furthermore, perhaps it could be said that had the concept of a 'pool of responsibility' been in place during the Lance Armstrong era in cycling (and thus the rule applied to the US Postal cycling team), there is a strong possibility that Lance Armstrong would not have been able to avoid detection for as long as he did, or perhaps this concept may have even prevented doping at the team level altogether.

Yet another case which demonstrates the ineffectiveness of individual responsibility on anti-doping legislation and penalties, (and realistically with the anti-doping legislation itself) can be seen with baseballer Jhonny Peralta. Peralta was implicated in the Biogenesis



scandal, and as a result of his complicity received a 50 match ban. This in itself seems somewhat insignificant given the percentage of the baseball season this represents (less than 1/3 of a single season), hardly impacting the playing career of a professional baseballer. What is more, Peralta, upon returning to the sport is reported to be now earning more than \$50 million US over 4 years. In fact, the end result, in this case, shows that there is significant advantage to be had by engaging in doping. If you are not caught then you have a successful and lucrative career, and if you are caught then you have a successful and more lucrative career upon your return. This thought seems to be shared by a number of other baseball players. Brad Ziegler commented “*It pays to cheat... Thanks, owners, for encouraging PED use*” (Ziegler 2013). David Aardsma said “*Apparently getting suspended for PED’s means you get a raise. What’s stopping anyone from doing it? #weneedtomakeachange,*” (Aardsma 2013). As a result of the controversial situation involving Peralta, the Major League Baseball Players Association made changes to its Joint Drug Agreement. The new changes were in a similar vein to the WADA changes; increased penalties, as well as some additional restrictions following players’ return after the ban (MLBPA 2014). The problem here is that the consequences of the ban are still limited to the individual. It remains to be seen if there are additional incentives to discourage doping from the team and coaches’ perspective.

A new approach to anti-doping policy with regards to policing and deterrence is needed. Given the current realities of doping in professional sports, the question remains, what new regime is required to combat doping?

Table 1: *The number of individual athletes needing to be held responsible if a single athlete is detected doped—based on current WADA figures.*

<b>Sport</b>	<b>Number of co-responsible athletes if tests are at current level</b>
Air Sports	32
Archery	68
Baseball	50
Bobsleigh	625
Cycling	84
Football	208
Rowing	435

Table 1 depicts the ‘pool of responsibility’ calculated as an inverse of actual adverse analytical findings. The concept of the ‘pool of responsibility’ indicates how many other individual athletes would need to take responsibility for doping if one were to be discovered by a test, provided the current testing regime of anti-doping was to remain. These indications are such, that should anti-doping testing remain unchanged (that being chemical testing solely), one would all but expect some potential dopers to slip through the cracks. As such, legislation may need to be developed to accommodate the reality that anti-doping policies as they currently stand fall short of catching all abusers.

The situation which exists in sports today is basically the opposite to the concept of a ‘pool of responsibility’, basically an ‘inverse pool of responsibility’. As it stands today,

teams, coaches, sponsors, managers etc. pressure athletes to 'achieve at all costs'. This sometimes results in doping at which point the responsibility is borne solely by the athlete in question, the other involved parties disclaim any responsibility. This can be an effective strategy in sports, as doping detections only occur occasionally, whereas the 'benefits' of having a doped athlete can bring significant financial and promotional prestige to the team. Therefore, if each athlete is significantly doped (and the chances of detections are still small), and the responsibility is confined to the individual in question, the benefits again outweigh the consequences. This creates the perfect environment to promote a culture of doping. Such realities have been realised in a number of US sports such as baseball as outlined above.

#### **2.4. The Legal Arena**

The concept of individuals taking responsibility when wider responsibility is more appropriate is well documented in policing and governmental literature (Wakefield–Fleming 2009). The term 'responsibilization' refers to the concept that bodies, such as government agencies, pass off responsibility or tasks and duties to individuals. Examples include police taking on a range of security and protection roles that were not originally their responsibility, or individuals being asked to look out for their own safety when it should be ensured by other bodies such as police (Wakefield–Fleming 2009). This appears to be the case in sports. Athletes have the sole responsibility for doping infractions, even in cases where more appropriately wider responsibility is both beneficial and fairer given the realities of sports. There are a number of issues with the responsibilization approach to policing doping. These include a) individualising problems with systematic origins (Wakefield–Fleming 2009), and b) blaming of victims (Wakefield–Fleming 2009). To elaborate firstly, athletes are made solely responsible for doping irrespective of whether or not external factors are influencing them. One such example can be seen in the Lance Armstrong case, where as it was claimed by athletes, cycling had an inherent and pre-existing culture of doping (Albergotti–O'Connell 2012). As such, external factors clearly play a role. Secondly, given this, athletes may well be deemed to be victims of an out of control system, as such they themselves, the victims to some extent, are therefore held responsible. Such is the state of professional sports, especially given the concept of strict liability, which is applied in cases of doping. Introducing a policy of group responsibility and reducing the concept of responsibilization would not only theoretically reduce this likelihood of such occurrences and thus prevent doping, but would help eliminate some of the unfairness inherent in the sporting world.

A 'pool of responsibility' approach provides a great incentive for the team as a whole to prevent such events occurring again, and the lack of such incentive may in fact limit the level of organisational support provided to combat doping. One may think that the consequences of a major doping scandal would have a series of intangible impacts on the team (such as a loss of reputation in the face of spectators, fans and potential investors). In reality, as the Contador case demonstrates, the popularity of a team (in this case Saxo Bank) and the athlete, following such scandals, appears to be potentially even higher. It is not always off putting to potential investors. Similar effects have been realised with the case of other cyclists including Valverde, Vinokurov, Basso, etc. These effects of increased popularity are seemingly realised in cases where there appears to be ambiguity regarding the athlete's intent to dope, yet irrespectively, sanctions are imposed. Spectators may feel sorry for such athletes and as such their popularity apparently increases, like with the cases outlined above. This in turn would result in a lower desire to abstain from doping as there is

little consequence with significant gains. Again, what is the point of anti-doping policies? Are they simply to boost revenue (sports are seen as fair and therefore resulting in a greater number of spectators), or rather to protect the health of athletes and the fairness of the sport? It would appear that in the case of some people it is the former rather than the latter. What is more, as demonstrated in the above cases, real world issues associated with sports law, anti-doping policies and punishment for infringements, often result in decisions that appear to be somewhat hypocritical or varying, depending on the athlete. This may, in many cases, be causing more problems in sport than they are rectifying.

The notion of extended responsibility is not an alien concept in law. Under US law there is a legal doctrine known as a Toxic Tort. As Henderson defines it “Toxic torts are defined as those in which persons assert causes of action seeking compensation for one or more adverse health effects resulting from exposure to one or more toxic substances” (Henderson 1990: 69). In essence the responsibility of the injury caused to the plaintiff is borne by the defendant, for example pharmaceutical companies. This law dates back to 1973 with the landmark case *Borel v. Fibreboard Paper Products Corp* and subsequently saw the extension to include pharmaceutical companies in *Daubert v. Merrell Dow Pharmaceuticals Inc*. Difficulties usually arise in such cases due to two reasons. Firstly, in such cases, the plaintiff is required to demonstrate a causal link between the injury and the exposure. This often proves difficult, as there is often a plethora of other factors which may also be argued as either being possible attributors to the injury or simply it is difficult to prove such a causal link. Secondly, a number of issues arrive with the assessment of scientific evidence in addition to the assessment of the testimony of the expert witnesses (Foster–Bernstein–Huber 1993). No doubt there is contradictory scientific evidence relating to the exact consequences and relationship between the pharmaceutical (or chemical) and the supposed injury. Whilst this may indeed present an issue in civil cases involving exposure to potential chemicals, this may present less of a problem in doping cases. This can be demonstrated by the ample evidence outlined previously with regards to the harmful effects of some doping agents. In fact, one of the primary arguments for the existence of anti-doping legislation is for the protection of human health (UNESCO 2005; WADA 2009).

In a similar vein to the above outlined legal doctrine, one can find in US law, two additional related legal concepts, *alternative liability* and *market-share liability*. Both of these doctrines see a shift in the concept of strict liability, a broadening of the concept (Harvard Law Review 1981). In these situations the burden of proof switches from the plaintiff to the defendants. In the case of *alternative liability*, multiple defendants can be held liable even if only one was responsible for the injury. In such situations it is the responsibility of the innocent defendant, in a group of defendants, to prove they did not cause the injury (*Summers v. Tice, 1948*). Similarly, *market-share liability* shifts the burden of proof away from the plaintiff and onto the defendant. In this doctrine, manufactures, particularly pharmaceutical companies, may be held jointly liable, even if only a single defendant caused the injury in question (Sheffet 1983). What makes this doctrine so different from a normal tort is that the plaintiff need not know from which defendant the injury originated (*Sindell v. Abbott Laboratories 1980*), liability is then apportioned to manufacturers according to their market share. There are, however, naturally some conditions that must be met in order for the principle of *market-share liability* to be upheld. Firstly, a substantial representation of the market must be in the court (the defendants). Secondly, the products must be interchangeable. Thirdly, the defendants in question would need to be active in the market in the timeframe outlined in the case. Finally, the plaintiff’s

inability to assign liability to a specific manufacturer must not be their own fault. If one were to then apply this to a doping situation it can be demonstrated that it would be feasible. A substantial representation of those involved in the sporting arena and directly relating to the athlete accused of doping could be obtained. This may include any or all of the following; the coaches, managers, medical practitioners, sports scientists, pharmaceutical companies and team mates etc. The second and third point would be obvious. The fourth could relate to the athlete trusting the doctor or sports scientist to do no harm, or just listen to the coach without knowledge of the product injected/used etc. In any case it demonstrates that systems of increased responsibility and liability already exist and are accepted as legally binding principles. As such, the extension of this notion to the sporting area does not seem such a big stretch. Moreover, there were two statements made in the court's ruling in the *Sindell* case which would seem to be particularly apt and appropriate if applied in a sporting situation,

*"... defendants are better able to bear the cost of injury resulting from the manufacture of a defective product"* (*Sindell v. Abbott Laboratories 1980: 600*),

*"... as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury"* (*Sindell v. Abbott Laboratories 1980: 600*).

Moreover, perhaps it can be said that the introduction of such a system of anti-doping in sports, may also increase the sporting stakeholder's willingness to actively prevent doping, similar to the suggestion by Sheffet (1983: 38) in the *Sindell* case, 'such a policy will increase manufacturers' incentives to produce safe products'.

### 3. 'POOL OF RESPONSIBILITY': THE APPLICATION

In practice the application of the theory of a 'pool of responsibility' could potentially take on many different forms or structures. Obviously there would need to be a level of flexibility in its initial formation. With the introduction of a 'pool of responsibility' it is possible that the bans for athletes found to be doping could remain at current WADA levels (4 years), and simply supplemented with additional consequences. Therefore, whilst there are potential alternatives available the suggestions for the application on the principle of a 'pool of responsibility' are as follows:

1) Always apply UCI rule part 14 s327, if an athlete is found to be doped on a team then the whole team needs to be disqualified from the event, not just the athlete in question, without exception.

2) Uniformity in sentencing and punishment is needed; ambiguity and unfair decisions result in greater long-term problems with regard to doping.

3) Athletes in the team for the last year should be excluded from competition for a period. This period may be shorter than the detected athlete, but must still be a period that would impact their sporting life, so no benefit is gained by doping.

4) All coaches who were responsible for the training of the team, for the last year before the positive doping detection should face a suspension, for at least as long as the athlete in question. If it can be shown that the coach abused the position of trust they were in with the athlete, and/or influenced the athlete to partake in doping, then the coach in question should receive a ban at least double that of the athlete.

5) All medical practitioners who for the year prior to the positive doping detection, who advised athletes in the team, should face suspension. Again, if it could be shown that they abused the position of trust they had with the athlete, and/or advised or influenced the athlete to dope they should also face deregistration from the medical profession.

6) All sport scientists responsible for advising the team for the year prior to the positive doping detection, should face suspension. Again, if it could be shown that they abused the position of trust they had with the athlete, and/or advised or influenced the athlete to dope they should also face a lifetime ban.

As such, the realities of sports are such that decisions athletes make to engage in doping rarely are void of others influence or participation. The recommendations take into consideration these realities, and as such those influencing the athlete need to be taken into consideration when doping punishment is dealt. Current anti-doping legislation is largely ineffective as it stands, this fact is demonstrated by reference to the fact that punishments are simply being increased to try and combat it. If it is to remain it needs to be supplemented with additional penalties, to make the athletes think twice about doping before they partake. The plethora of organisational literature and examples demonstrating the importance and benefits of group responsibility and autonomy, demonstrate the usefulness of a 'pool of responsibility' to anti-doping policies. The evidence is significant enough to justify the incorporation of a 'pool of responsibility' into the current anti-doping legislation. It should prove to be more effective when coupled with the current approach. A 'pool of responsibility' would appear to be the most effective solution given the current anti-doping systems (chemical testing and punishment). The benefits of such a system should aid in preventing doping scandals before they are revealed only years after the occurrences.

## CONCLUSIONS

Overall it has been demonstrated that the concept of wider group responsibility; a 'pool of responsibility' is neither an alien nor illegal concept. Whilst it is considered by some to be controversial, it can be found to be used in the military, wider business world and in numerous manifestations in the legal arena. It is well documented by athletes, officials and researchers that the factors influencing doping are not as simple as the notion of strict liability would have one believe. In most doping cases, external players influence and in many situations directly contribute to an athlete's decision to dope. Factors such as pressures of the sporting world, coaches and peer pressure, 'suggestions' by medical practitioners and sports scientists etc. As such does it not seem reasonable that the responsibility and liability of an athlete found to have doped is not borne solely by them? For is this not an unfair outcome given the sporting realities. Furthermore, it has been demonstrated that there are numerous examples from the business world that show the plethora of benefits that can be realised from a group responsibility system. One could hope that in the best case scenario it may eliminate doping and continues to maintain the sustainability and excitement that is sport.

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