

THE LESSONS OF WARNE

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While Shane Warne is no ordinary person, one must begin to wonder at the tumult of the past two weeks. One...no...two fluid (diuretic) tablets and the nation is in crisis if media coverage is any reliable measure. At first there were feelings of shock and dismay over the superstar's indiscretion, along with concern for the chances of defending the World Cup without the potent spin bowler. Next were calls for Warne's head from numerous sporting heavyweights and anti-drugs campaigners. We heard from them that the ACB Anti-Doping Policy had loopholes, Warne could escape proper punishment and that should not be allowed to occur because Australia must set an example to the world. But there was no escape. Warne was banned, but for one year, not two. Some said Warne had it coming, but many commentators thought the punishment tough and his peers in international cricket said he was no cheat. An appeal was being considered, then the revelation about the second tablet and the double chin. If there is a war on drugs in sport, surely this has been its Battle of the Bulge.

The dust is settling and Federal Minister for Sport, Senator Rod Kemp, has asked that a current review of Australia's anti-doping approach include an assessment of the Warne case. Since events have passed by faster than a Brett Lee delivery going through to the keeper and with a major international conference to be held next week in Copenhagen to discuss the adoption of a World Anti-doping Code, it is a good time to reflect and make some sense of the Warne drama. This has been the most important drugs case in Australian sport partly for the reason that it has raised squarely many of the toughest issues faced by those who shape our anti-doping stance. What then are some of the lessons of Warne?

First, we must never forget our goals in banning drugs in sport and always act in a manner consistent with reaching them. The most often identified goals are about ethics and safety. Performance-enhancing drugs give those who use them a head start over their opponents and are inconsistent with a pure contest of natural ability and skill. Put simply, the user is a cheater. If abused, drugs can endanger the health of athletes. (There is controversy among commentators about the merits of the war on drugs, but I will leave that for another time in order to concentrate on whether Warne has been treated in accordance with the stated goals.)

Second, the "strict liability" approach usually found in the anti-doping policies of Australian sport must be tempered by exceptions essential to make the policies fair and just. Over the past decade the wording of policies has become increasingly tight so that, basically, if the prohibited substance is detected in the athlete's body there is guilt.

However, that can deliver real injustice. What of legitimate medical

treatment with drugs that happen to be prohibited in sport, especially when there is a health emergency? Occasionally people have illnesses that can cause them to test positive without any drugs being used. Should an athlete be held responsible if an experienced sports medicine doctor says it is OK to take a drug when it is not? These are just some of the real cases that have troubled the experts. The response has been to allow for "exceptional circumstances". How they are defined is debatable.

One clause in the ACB's Anti-Doping Policy's exceptional circumstances defence came in for criticism on the grounds that it was "soft" and it was described pejoratively as a "loophole". The Policy says that if *Warne* could prove (not the ACB disprove) that he "held an honest and reasonable belief in a state of facts which, if they existed, would mean that he did not commit a doping offence", then no offence is committed. (In order to protect the interests of other players, if the player testing positive happens to receive a performance boost for a particular event, any award or record can be taken away.) This defence was no soft option for *Warne's* legal team and he failed to convince the ACB Anti-Doping Committee that he was the innocent victim of such a mistake. However, one thing is certain. This so-called "loophole" reflects a legal principle that originates in the rulings of the High Court of Australia and is well recognized as fair and just. Sometimes law-makers exclude honest and reasonable mistake for offences such as drink driving, but the drunken driver kills innocent people and these circumstances are not comparable with sport. Nevertheless, the ACB clause is rare in anti-doping policies, so is the ACB out of step or showing the way?

Recall the goal of fair play. Recently, the Court of Arbitration for Sport (the body that handles the IOC's anti-doping cases) was forced by strict liability rules to deprive a UK athlete of a bronze medal won at the Salt Lake City Olympic Games notwithstanding that it was well and truly satisfied that he was a "sincere and honest man who did not intend to obtain a competitive advantage" and that it was "very unlikely" that the stimulant to which he had tested positive had delivered any performance advantage at all. (The athlete used the USA version of a Vicks inhaler which contained a very mild form of a prohibited stimulant that the UK version lacked.) What kind of message about fair play does that decision send? An ACB type clause would probably have saved this athlete.

On the other hand, we hear claims that unbending strict liability is necessary to rule out the possibility of athletes escaping on frivolous grounds such as too much sex, spiked toothpaste and steroid-contaminated meat and that is why the ACB Policy's "loophole" is undesirable. The response is that such claims both consign innocent athletes to infamy and assume that the eminent tribunals now available to hear drug cases cannot pick a porkie. Frankly, that beggars belief.

Another argument is that athletes must take responsibility for whatever they ingest. While that is good practical advice to avoid testing positive and often serves to discourage the making of frivolous claims, we should be careful to ensure that it does not override the goals of fair play and safety as

the real foundation of responsibility.

The ACB Anti-Doping Committee said Warne's failure to check with the likes of the team doctor before taking a prescription medicine meant that any mistake he made was not reasonable. From a health perspective Warne's action was not sensible (despite no harm eventuating), and diuretics are banned because they can interfere with the detection of other banned drugs like anabolic steroids even though diuretics do not themselves improve performance.

So that is the case for saying the guilty verdict is consistent with the identified goals of the war on drugs and with principles of justice, although Warne's breach probably falls into the category of considerable foolishness rather than evil intent. Those who ask why there is guilt when evil intent appears absent are met with the argument that strict liability in combination with a fair complement of exceptional circumstances is the only workable solution. Otherwise, every athlete testing positive would be claiming they did not know how the drug came to be there and they did not mean to take it.

Present government policy of insisting upon mandatory long-term suspensions needs to be reviewed to grant tribunals flexibility to do justice in individual cases. The usual suspension for diuretics is two years. The ACB Anti-Doping Committee invoked a clause which enabled it to vary the period down to 12 months on the basis of evidence from the ACB's Anti-Doping Medical Advisor, the well credentialed sports physician, Dr Peter Harcourt. This clause has its origin in the Australian Sports Commission's model anti-doping policy. Harcourt reported that there was no direct evidence of Warne having taken anabolic steroids which the diuretics might "mask" (although the possibility that they had been taken could not be ruled out conclusively), Warne did not require anabolic steroids to facilitate rehabilitation from his shoulder injury, the recovery was consistent with normal rehabilitation and anabolic steroids will not give a performance boost to a player such as Warne whose performance is determined by skill rather than strength. Also taken into account was the impact of suspension on Warne, but the Committee downplayed that factor's relevance and in any event it may be something that the clause does not allow it to consider.

The Australian government has pushed the professional, non-Olympic sports to adopt the Olympic movement's model for penalties, which is, in the case of anabolic steroids and diuretics, a mandatory 2 year minimum for a first offence and life for a second. This pressure followed the AFL's 16 match suspension of Justin Charles in 1997 for having taken an anabolic steroid, a penalty considered inadequate. The government's aims are to discourage performance-enhancing drug use through hefty punishments and to achieve consistency across sports. This is also part of a move to "harmonise" anti-doping rules internationally and an issue for consideration in Copenhagen next week.

However, the mandatory penalty approach does not take into account the impact of the punishment upon the offender. The opposite applies for courts when sentencing. For example, they may consider a person's capacity

to pay a fine. In anti-doping cases, excluding a professional player in a team sport for two years will cause large monetary losses and may end a career because skills must be continually practised in a team environment. Excluding a weightlifter for the same period may have relatively little effect because the lifter earns a livelihood elsewhere and can still maintain the necessary elite skills for the much less frequent major events.

Furthermore, tribunals should be freed of the constraints of mandatory penalties so they can reduce penalties in recognition of guilty pleas, genuine expressions of remorse and commitments to engage in spreading anti-doping messages.

Warne was fortunate to benefit from the clause entitling moderation of the suspension based on the medical evidence. The relevant clause is widely worded and the Tribunal was in large measure within its rights to act as it did. Whether the government will seek to tighten the corresponding clause in the Australian Sports Commission's model policy to further the mandatory penalty approach remains to be seen. However, the clause can serve numerous valuable purposes and any change should be viewed cautiously, especially if it enlarges present difficulties with the unequal treatment of offenders.

As an all time superstar of cricket, and a controversial personality to boot, Shane Warne was going to be an especially awkward target for a serious doping charge. The ACB has confirmed its determination to take a firm stand on drugs in sport. In fact, it threw the book at Warne (a fair one by most comparisons) and he has received a heavy punishment for his indiscretion. While Warne has announced his intention to cop it sweet, he has good reason to complain about the media treatment of the case before the hearing, but the media has been a two-edged sword in his career. Perhaps that is the biggest lesson of all.

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