

MARATHON MUGGING: ATHENS 2004

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 [keywords to follow]

This article looks at the case of the Brazilian marathon runner who was attacked while leading the Athens 2004 Olympic marathon and poses the question of under what circumstances it may be reasonable for the Court of Arbitration for Sport to retrospectively alter the results of sports events.

The men's marathon at the Athens Olympic Games 2004 was won by Stefano Baldini of Italy in a time of 2 hours 10 minutes and 55 seconds. The results also show that Mebrahtom Keflezighi of the United States came second in 2 hours 11 minutes and 29 seconds and that Vanderlei de Lima of Brazil won the bronze medal, clocking 2 hours 12 minutes and 11 seconds. What the record book fails to show, however, is that de Lima had been leading from around the 13-mile mark until he was attacked by a protestor less than four miles from the end (after 36.5 kilometres) of the race, and that following this attack he was caught and passed by both Baldini and Keflezighi.

At the time of the attack, de Lima led Baldini by 28 seconds, and an analysis of the timings and television pictures provided by the appellant (de Lima) in the later hearing before the Court of Arbitration for Sport ("CAS") suggested that had the attack not happened then there were two possible outcomes (both of which were presented as being favourable to de Lima). The first was that¹:

"Based on partial times published on the IAAF/Athens and Athens 2004 official websites, the Appellant was running at a maximum speed of a little less than 3 minutes and 2 seconds per kilometre between kilometres 30 and 40, where the incident occurred. The gold

medallist, Stefano Baldini was running at 3 minutes per kilometre . . .".

Baldini therefore was seemingly gaining on de Lima at a rate of two seconds per kilometre, meaning that it would have taken around 14 kilometres for Baldini to overhaul de Lima. A second analysis, although still favourable to de Lima, was somewhat less helpful. It was reported²:

"A second analysis of the television segment showed that it took Stefano Baldini 14 minutes and 30 seconds to run the distance between the 35th and 40th kilometre marks. It took the Appellant, running over the same segment, 15 minutes and 8 seconds, a difference of 29 seconds.³ Hence, Stefano Baldini was running at a speed of 6 seconds/kilometre faster for each kilometre than the Appellant. The Appellant therefore held that had the attack not occurred, the athletes would have met at the 41st kilometre".

However, these times do not tell the whole story since, as was further pointed out⁴:

"In addition to the time the attack wasted, he [de Lima], had to recover his racing rhythm and his concentration. He had his energetic system blocked by a sudden discharge of adrenalin. . . . The Appellant held that there was an additional psychological impact: At the moment of the accident, the Appellant was out of sight of the racers following him. Due to the attack, Stefano Baldini realised that the Appellant was much closer than he could have imagined. This enhanced his motivation and stimulated his determination, and helped him overtake the Appellant."

In the immediate aftermath of the race, an appeal was launched by the Brazilian team on behalf of de Lima to the competition director. Just 45 minutes after the appeal had been lodged the result was returned. The jury hearing the appeal stated⁵:

"Following an appeal lodged by the Brazilian team for obstruction in the Men's Marathon the Jury reviewed the video of the race. They would like to express their sympathy towards the athlete and regret the unfortunate incident. This shall not happen in the future and the security should be reinforced for road events.

2. *ibid.*

3. A difference seemingly of 38 seconds rather than the reported 29 seconds.

4. fn.1 above, at [15]–[16].

5. *ibid.*, at [6].

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1. CAS 2004/A/727 *De Lima & BOC v IAAF* at [13]–[14].

The IAAF is asking the Greek authority to identify the responsible person and take the appropriate sanctions. The final result cannot be changed."

Following this setback, the Brazilian Athletics Federation launched an appeal on behalf of de Lima to the CAS, requesting that an extra gold medal be awarded to him.⁶ The court, however, turned down the appeal, stating⁷:

"Before a CAS Panel will review a field of play decision, there must be evidence, which generally must be direct evidence, of bad faith. If viewed in this light, each of those phrases mean there must be some evidence of preference for, or prejudice against, a particular team or Individual."

Based on these very strict criteria, de Lima's plight clearly failed to breach that standard. His position was therefore hopeless. The court continued⁸:

"The Athlete is requesting to be awarded a gold medal. He does not request that such gold medal change the results of the race. To award a gold medal without changing the results of the race is, however, beyond the scope of review of the CAS. Had the appealed decision been taken arbitrarily or in bad faith, the remedy would not have been a change of the announced results, let alone awarding a supplementary gold medal without changing the results of the race. The only available remedy would have been to invalidate the race and order it be rerun. There is no regulatory basis upon which the Panel could award a medal alongside the medal already won by Stefano Baldini."

Previous case law has firmly established that only in exceptional circumstances might the decision of a referee on the field of play be disturbed. The referee is in a unique position on the sports field. In *Machin v Football Association*,⁹ Lord Denning M.R. acknowledged the dangers of the court second-guessing a decision taken by the referee on the field of play:

"A referee had a most responsible position . . . The referee was in a most exposed and vulnerable position and that had to be borne in mind in any subsequent inquiry. For it was really an appeal from the referee's finding."

6. "Brazil make marathon appeal", at <http://news.bbc.co.uk>.
7. fn.1 above, at [29].
8. *ibid.*, at [31].
9. *Machin v Football Association*, *The Times*, July 20, 1973, p.21, Court of Appeal.

The Ad Hoc Division of the CAS following the 1996 Atlanta Olympic Games went further in expressly stating a preference for the sanctity of a referee's decision. In refusing to review the disqualification (due to a low punch) of the French boxer Christopher Mendy, the CAS stated clearly that such technical regulations were purely matters for the appropriate federation¹⁰ and further that it was the referee who was in the best position to make such assessments.¹¹ Their rationale centred on the belief that "the game must not be constantly interrupted by appeals to a judge".¹² In other words, there was a concern that such a move to compromise the sanctity of honestly made field of play decisions may open the floodgates.

The Ad Hoc Division of the CAS at the Sydney Olympics did, however, provide for the possibility of interference with the decision taken on the field of play. Following the women's single sculls event, the silver medallist¹³ suggested that the photo-finish equipment used to place her in second place was in error. The CAS, while rejecting her claim, did however "have jurisdiction to determine if equipment is faulty".¹⁴ If such a finding was established then presumably the decision taken on the field of play might be reassessed. It has also been held that where an international federation's own rules deny a match referee the authority to make a particular decision then the CAS will uphold those rules despite opposition from the appropriate governing body.¹⁵ The CAS in this instance reversed a referee's decision to order a rerun of a race after a collision, owing to authority to take such a decision being limited to the race starter only and not the race referee. As Foster pointed out:

"the Court of Arbitration for Sport upheld the original result and declared the referee's decision invalid because he had no power under the rules. In this particular case, the principle that a sporting federation must follow its own rule seems to have trumped any principle of autonomy".¹⁶

Thus it can be seen that there are circumstances, albeit very limited and rigidly-controlled circumstances, in which a decision taken by the match officials may be disturbed.

10. CAS OG Atlanta 1996/006 *Mendy v Association Interantionale de Boxing Amateur (AIBA)*, Digest Vol.1. p.413 at [13].
11. *ibid.*
12. *ibid.*
13. Bulgaria's Romyana Dimitrova Neykova.
14. R. McLaren, "International sports law perspective" (2001) 12 Marq. Sports L. Rev. 515 at p.534.
15. *Canadian Paralympic Committee (CPC) v International Paralympic Committee (IPC)* (2000/A/305); Digest Vol.2 p.567.
16. K. Foster, "Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence", ????

The legality of the decision not to offer de Lima his hoped-for remedy, based on the existing regulations, therefore seems indisputable. However, a question that may be explored is whether any justification might have been identified that would have enabled the court to bow to the request of the Brazilian Federation and award de Lima a second gold medal, effectively altering the final result of the event retrospectively.

There is some limited precedent for a humanitarian approach in dealing with de Lima and a wider remit than cited above, where results in a sport may stand if, for instance, the event is abandoned once a particular period of time has passed. In association football this may occur if there is a crowd invasion of the playing arena. For example r.30.2 of the Football League states¹⁷:

“Duration of Matches. All League Matches shall be of 90 minutes’ duration but any League Match which *from any cause whatever* falls short of 90 minutes’ duration may be ordered to count as a completed fixture or be replayed in full or in part on whatever terms and conditions the Executive shall in their absolute discretion determine and shall be played in compliance with these Regulations and the Football Association Rules respectively and under the Laws of the Game as approved by the International Football Association Board. In the event of conflict between any such Rules, Regulations and Laws as aforesaid, the Football Association Rules shall prevail” (emphasis added).

Clearly an analogy can be identified with the situation which occurred during the Olympic marathon in Athens. De Lima was attacked by a spectator (Cornelius Horan), who invaded the marathon course. His action had far more serious consequences for the participant than is normally the case with football crowd invasions, which rarely lead to confrontations between players and spectators. It can be argued that de Lima’s incident was tantamount to just such a crowd invasion and that in this scenario the governing body (at least in association football) has the discretion to order the result to stand at the point of the invasion, or less practicably to order a rerun of the entire event. Of course the International Olympic Committee (“IOC”) did all that they were legally required to do, in that they considered the matter and at their discretion dismissed the appeal from the Brazilian and in pursuing that action acted without prejudice in the exercise of their discretion, therefore demonstrating clear procedural fairness

17. The Regulations of the Football League Ltd, Session 2004/05, s.5, r.30.2

and upholding the principles of natural justice. Lord Denning M.R., commenting on the importance of procedural fairness in the case *Enderby v Football Association*, which concerned the right to legal representation at a tribunal investigating the award of training licences run by the Jockey Club in the United Kingdom, stated¹⁸:

“It is a matter for the discretion of the tribunal. They are masters of their own procedure: and, if they, in the proper exercise of their discretion, decline to allow legal representation, the courts will not interfere. . . . But I would emphasise that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule” (emphasis added).

Lord Denning M.R. was thus emphasising the need for flexibility in the rules laid down by governing bodies and that as long as there is such flexibility then the members of the associations and governing bodies will be bound by these rules. A fundamental principle of natural justice is the right to a fair hearing, and a rule against bias,¹⁹ and it can be seen that the IOC (as found by the CAS) observed these principles. The CAS, in finding against de Lima,²⁰ stated simply:

“There is no evidence of prejudice against the Appellant, (de Lima) or preference for the athlete who was awarded the gold medal. There are therefore no grounds permitting the Panel to review the decision of the Jury of Appeal. The Appellant has not established that the decision of the Jury of Appeal was tainted by bad faith or arbitrariness.”

The law on which the Panel decision was made was based on the decision in *Segura v IAAF*,²¹ the rationale behind supporting the decisions of officials being stated simply:

“CAS arbitrators do not review the determinations made on the playing field by judges, referees, umpires, or other officials who are charged with applying what are sometimes called ‘rules of the game’ . . . [T]hey are not, unlike on-field judges, selected for their expertise in officiating the particular sport”.²²

18. *Enderby Town Football Club v Football Association Ltd* [1971] Ch. 591 at 605.

19. *McInnes v Onslow-Fane* [1978] 1 W.L.R. 1520.

20. fn.1 above, at [30].

21. CAS OG 00/013 *Segura v IAAF*.

22. *ibid.*, Digest Vol.2 p.680, at [17].

Commenting on the *Segura* decision, the de Lima panel, citing *The Korean Olympic Committee v International Skating Committee*,²³ explained:

“The best example of such preference or prejudice was referred to by the Panel in *Segura*, where they stated that one circumstance where the CAS Panel could review a field of play decision would be if a decision were made in bad faith, e.g. as a consequence of corruption (see Para. 17). The Panel accepts that this places a high hurdle that must be cleared by any Applicant seeking to review a field of play decision. However, if the hurdle were to be lower, the flood-gates would be opened and any dissatisfied participant would be able to seek the review of a field of play decision.”

With no corruption or bad faith apparent, de Lima was left without remedy.

While the hands of the CAS were therefore tied in being unable to offer de Lima remedy based on *Segura*, it may be interesting to examine the question from a different perspective, by identifying (as the rules of association football allow) the extent to which appeals panels or ultimately the CAS may theoretically at least have a discretion, or might be empowered to retrospectively alter the results of sporting events as a result of varying circumstances, such as those presented by de Lima.

The question that must be addressed is therefore what might those “varying circumstances” amount to? It is submitted that if it can be said with reasonable certainty that but for the incident in question an appellant would not have been significantly disadvantaged to the extent that they have been denied position in an event, then where such unreasonable disadvantage has occurred, it may be seen as equitable for the CAS or relevant appeals body to authorise a departure from the *Segura* criteria and retrospectively interfere with the match result. One example may be where there has been a clear error made by a judge(s) in scoring which has had a direct impact on the outcome of an event, such as in the case of Yang Tae Young highlighted later.

Precedent has been set with regard to drug abuse cases. Athletes found guilty of doping offences are routinely disqualified from an event under authority from the World Anti-Doping Agency (“WADA”) Code Art.9,²⁴ the code commenting that:

“When an athlete wins a gold medal with a prohibited substance in his or her system, that is unfair to other athletes in that Competition

regardless of whether the gold medallist was at fault in any way. Only a ‘clean’ athlete should be allowed to benefit from his or her competitive results”.

The end result of any such drug-influenced result is that the guilty athlete will forfeit their position, being replaced by the next “clean” athlete. The WADA Code continues:

“An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event lead to disqualification of all the athlete’s individual results obtained in that Event with all consequences, including forfeiture of all medals, points and prizes.”²⁵

Thus, if an athlete gains an unfair advantage through the use of performance-enhancing drugs, then remedy for a “cheated” athlete is clear. However, de Lima has been as surely cheated as any sports participant who loses to an athlete who has taken performance-enhancing drugs and yet he is left without remedy. Baldini clearly gained an unfair advantage (although through no fault of his own), and yet de Lima is left without remedy, unlike a less overtly disadvantaged victim of doping violations (unwittingly or otherwise), who may have lost a medal opportunity owing to such a doping violation by another competitor. Interestingly the CAS opined in 1998:

“It would indeed be shocking to include in a ranking an athlete who had not competed using the same means as his opponents, *for whatever reasons*”²⁶ (emphasis added).

Clearly de Lima competed in different circumstances from all other participants in the Olympic marathon. All other competitors received an unfair advantage (albeit from their perspective a blameless advantage), over de Lima owing to the actions of Cornelius Horan. More specifically and relevantly, Stefano Baldini and the eventual silver medal winner, Mebrahtom Keflezighi, benefited from this unfair advantage, and yet this scenario apparently does not fall within the definition of “for whatever reasons”, cited above.

If we examine the WADA Code rationale for the application of the principle of *strict liability* to issues of doping control, we can identify one of the most coherent arguments against allowing the appeal from de Lima to succeed. The code cites *Quigley v UIT*:

23. CAS OG 02/007 *Korean Olympic Committee v International Skating Committee*.

24. WADA Code 2003, Art.9, Comment.

25. *ibid.*, Art.10.1

26. CAS 98/208 *Wei v Fina*, award of December 22, 1998, CAS Digest II p.234 at p.248.

“The vicissitudes of competition, like those of life generally may create many types of unfairness, whether by accident or the negligence of unaccountable Persons which the law cannot repair. Furthermore it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors.”²⁷

That the attack on de Lima was unfair is indisputable. Further, it may well be looked upon as one of the vicissitudes of competition, in much the same way as a refereeing error, for example, and therefore in that respect it is something that legal recourse may have difficulty in remedying. The comment above related to the rationale behind strict liability and particularly to banning an “innocent” athlete who has ingested a substance unknowingly. To allow them to retain their position would create injustice on the rest of the field. They would be competing at an advantage having taken (unknowingly) a performance-enhancing substance. This is not necessarily the case with de Lima. He was not requesting the retention of position gained advantageously; rather he was requesting the return of a position he had rightfully gained but had been taken away from him owing in part at least to the negligence of the organisers who had arguably failed to police the event adequately. Rather than being bound by the *Segura* criteria, might it not have been preferable for the CAS to examine the evidence presented concerning the relevant timings of the athletes and then base their decision on this evidence rather than sheltering behind the *Segura* criteria?

If we turn to examine alternative cases that have come before the CAS which may fall within the definitions provided above by Art.9 of the WADA Code and *Wei v Fina*, then a better understanding of the practicalities of the retrospective alteration of event results may be gained.

Perhaps the most obvious example of such a case involved the Scottish skier Alain Baxter, who tested positive for methamphetamine²⁸ subsequent to the men’s slalom competition on February 23, 2002 at the Salt Lake City Winter Olympics, where he won a bronze medal. Following his positive test, Baxter was banned and stripped of his bronze medal, which was then awarded to the original fourth-place finisher.²⁹ Baxter appealed unsuccessfully to the CAS against his ban. The circumstances behind Baxter’s failed test (which were entirely accepted

by the arbitration panel) are a salient lesson to all athletes. The panel reported:

“Mr. Baxter has a well-documented long-standing medical condition of nasal congestion. He has used a non-prescription Vicks Vapor Inhaler for the purpose of relieving nasal congestion as needed over many years. The Vicks inhaler is included in the list of permitted substances issued by the United Kingdom Sports Council. The Vicks inhaler sold over the counter in the United States has a different formulation than the one sold in the United Kingdom. The U.S. version of the inhaler contains ‘levmetamfetamine’ [levmetamfetamine being the amphetamine on the banned list]”.³⁰

It was accepted that Baxter neither sought nor gained any competitive advantage owing to the presence of this amphetamine in his urine sample.³¹ The report goes on:

“The level of substance found in his body is consistent with his taking the medication for therapeutic use. . . . Whether or not Mr. Baxter should have been more careful before taking the medication—by reading the label showing the presence of levmetamfetamine in the product or by consulting with the team doctor before taking the medication—is irrelevant to our decision. Consistent CAS case law has held that athletes are strictly responsible for substances they place in their body and that for purposes of disqualification (as opposed to suspension), neither intent nor negligence needs to be proven by the sanctioning body.”³²

It was therefore held that irrespective of fault the panel had no option but to confirm Baxter’s disqualification.³³ Despite his apparent “innocence” in this violation, the panel also rejected Baxter’s submission that his disqualification was a disproportionate sanction compared to the severity of the violation. The panel concluded:

“Disqualification is the minimum sanction that automatically follows a doping offence, in accordance with Article 3.3 of the OMAC. As noted above, the disqualification of an athlete for the presence of a prohibited substance, whether or not the ingestion of that substance was intentional or negligent and whether or not

27. WADA Code 2003, Art.2(1)(1) Comment, p.9, citing CAS 94/129 *USA Shooting & Quigley v UIT* May 23, 1995.

28. An amphetamine included in the Olympic Movement Anti-Doping Code.

29. Benjamin Raich of Austria.

30. CAS 2002/A/376 *Baxter v IOC* at [1.2]–[1.3].

31. The panel reported that “at the levels found in Mr. Baxter’s body it is very unlikely that the levmetamfetamine had any stimulant effect”: *ibid.*, at [3.16].

32. *ibid.*, at [3.3]–[3.4].

33. CAS 2001/A/317 *Aanes v FILA*.

the substance in fact had any competitive effect, has routinely been upheld by CAS panels. It is reasonable for the IOC to have determined that it may not always be possible to prove or disprove fault or performance-enhancing effect, but that in order to ensure the integrity of results the mere presence of a prohibited substance requires disqualification. Disqualification is the minimum sanction that automatically follows a doping offence.³⁴

Interestingly, the panel did address the notion of fairness and whether Baxter's disqualification violated what they termed "every principle of fairness in sport".³⁵ Unfortunately for Baxter, the sledge-hammer approach of strict liability brooked no argument. While of course it would be unjustifiable to disqualify all those who gained an unfair advantage over de Lima in the Athens marathon, the notion of fairness and morality in such extreme circumstances arguably deserved a more sympathetic hearing.

It is established practice on the part of the CAS that where a sanction imposed by an international governing body on a sports participant for a doping offence for example is too harsh, where the athlete concerned has demonstrated no significant fault or negligence in the resultant positive dope test, the CAS may act to mitigate this sanction under the principle of proportionality.³⁶ It is on this basis that the idea of *exceptional circumstances* exists in the WADA Code. It has been accepted that the very basis of doping regulation, the principle of *strict liability*, is an unforgiving tool that at times can clearly produce inequitable results, and that therefore the clearest way to counteract these harsh realities is to allow the athletes some limited leeway under the WADA Code,³⁷ and furthermore where exceptional circumstances have dictated that a sanction has been eliminated completely then the athlete may have the "failed" test eliminated from their record.³⁸ It has been clearly established therefore that fairness and equity have a central role to play in the sanctioning of athletes in doping control matters, and therefore it may be suggested that the adoption of such principles may be pursued where a clear and obvious injustice has been suffered by an athlete through no fault of their own, as in the case of Vanderlei de Lima, Yang Tae Young and others cited in this article. The problem of course arises because of the complexity and uncertain nature of the eventual outcome of the relevant events from which such injustices arose. It cannot be said for instance

with complete certainty whether de Lima would have finished ahead of Baldini but for Cornelius Horan's unfortunate intervention in Athens in 2004. However, where circumstances demonstrably show with reasonable certainty what the outcome of the event would have been, then similar provision might apply enabling the CAS to retrospectively alter the result of events. Such a provision could go beyond the current restrictive *Segura* criteria, and place greater priority on fairness and equity rather than the current predilection towards purely harsh justice in allowing remedy only where bad faith or corruption has been identified. The difficulty arises of course in identifying when such reasonable certainty has occurred.

An analogous case emerged from the Salt Lake City Winter Olympics, in the pairs figure-skating. In the event, Elena Berezhnaya and Anton Sikharulidze from Russia and the Canadian couple of Jamie Sale and David Pelletier were initially awarded the gold and silver medals respectively, with the Russian pair winning by the smallest of margins. However, it then emerged that one of the judges, Marie-Reine Le Gougne of France, had apparently been pressurised to favour the Russian pair in her voting. This of course granted a clear and unequivocal advantage to the Russians at the expense of the Canadians. In an act of sound common-sense, the IOC authorised a second gold medal, following "a late night deal in a hotel suite",³⁹ to be awarded to the unfortunate Canadian couple, therefore achieving at a stroke justice for them while avoiding penalising the blameless Russian couple. This situation (unlike that involving Vanderlei de Lima) fitted squarely within the *Segura* criteria, displaying very obvious evidence of unfairness and bad faith. It is, however, the case that if we examine this position from the perspective of the end result rather than the journey taken to reach that end result then the two examples bear similar hallmarks. Both the Canadians and de Lima were denied the gold medal (or at least the chance of a gold medal) by external factors for which no competitor was culpable. It is therefore arguably justifiable that de Lima should have been treated in the same manner as the Canadians. However, while it is the case that both ice-skating pairs had finished their routines by the time the interference occurred (the Canadian couple skated first), the same cannot be said for de Lima. His event had yet to reach its conclusion when Horan attacked him, and therefore there was a level of uncertainty as to his true result that was not present with the ice-skaters. One only has to examine the case of Jim Peters at the 1954 Vancouver Commonwealth Games to understand this kind of uncertainty.⁴⁰

34. fn.30 above, at [3.29].

35. *ibid.*, at [3.31].

36. CAS 2000/A/312 *Guillermo Coria v ATP Tour Inc*, decision December 21, 2001.

37. WADA Code, Art.10.5.

38. WADA Code, Art.10.5.1.

39. <http://sports.espn.go.com>.

40. *Observer Sports Monthly*, July 21, 2002, p.2: Peters collapsed in the event barely 200 yards from the finish.

Rather pertinently Jacques Rogge, president of the IOC, said in the aftermath of the ice-skating scandal, "We (the IOC), took a position that is one of justice and fairness for the athletes".⁴¹ While it is commendable in this situation, de Lima may wonder where fairness resides in his position.

There have been similar occasions when competitors have benefited from a decision to retrospectively alter the results of an Olympic event in the interests of fairness and morality. For example, in the 1924 Winter Olympics in Chamonix, Anders Haugen, then 23, placed fourth in the ski-jumping competition. He was awarded his rightful bronze medal 50 years later when a historian discovered an error in judging. The unfortunate original bronze medal winner, Thorlief Haug, was posthumously demoted to fourth place (he had been dead for 40 years).⁴² There had, however, been no suggestion of corruption, prejudice or bad faith, merely an error; in other words, this particular case failed to fit within the *Segura* criteria cited as being crucial in the decision to reject de Lima's appeal.

It must be remembered that de Lima was arguing not for the promotion of one athlete at the expense of another (as occurred with Haugen and Haug), but rather he was requesting the award of a second gold medal, effectively to create two first-place athletes, crucially different therefore from the incident cited above. The essence of sport is surely its competitive nature, and unless there is a dead heat, then it is suggested that central to this essence is the notion of there being one winner, one champion, and if this is the case then the argument presented by de Lima runs into difficulties. However, his suggested remedy is not without recent precedent. Mackay explains:

"In 1993 the IOC awarded a second gold medal in synchronised swimming from the previous year's Barcelona games to another Canadian athlete, Sylvie Frechette. She had been placed second because a Brazilian judge mistyped her score, awarding only 8.7. The intended 9.7 would have given Frechette the gold".⁴³

More importantly for de Lima however, as MacKay continues:

"The IOC's decision did not affect the original winner Kristen Babb-Sprague of the United States, who surprisingly kept her medal".⁴⁴

At one stage he had led by three miles. The course was subsequently found to be 27 miles long rather than the regulation 26 miles 385 yards.

41. <http://sports.espn.go.com>.

42. D. Mackay, "Skating rumpus ends with Canadian gold", *The Guardian*, February 16, 2002, p.16.

43. Mackay, fn.44 above.

44. *ibid.*

The record books therefore show that for the synchronised swimming competition at the Barcelona Olympics, we had two gold medallists, despite the fact that their scores were not tied. It is once again difficult to see how this particular case can fit within the *Segura* criteria which apparently blocked de Lima's appeal. A clear and very definite mistake by an official does not display prejudice and raises the possibility of other appeals where officials have made such clear errors. Similarly in the 1984 Olympic Games in Los Angeles, third place in the Women's 100-metre hurdles initially was declared a dead heat between American Kim Turner and France's Michele Chardonnet. However, officials then decided that the American was ahead at the finish and awarded her the bronze medal. Subsequently, the IOC re-examined the tapes of the finish, and as a result Chardonnet received a second bronze medal three and a half months after the games had finished.

Finding his path to justice blocked by the IOC and the CAS, might de Lima find remedy elsewhere? Once again there is some precedent, this time from the world of trampolining:

"At the 2001 Trampoline World Championship, Irina Karavaeva (Russia) was awarded the gold medal. Later, she realised that a clear error had been made in the judging and that another athlete should have won 'her' gold medal. One month later, Irina Karavaeva made this statement:

'I very much regret the mistake of the judges at the World Championship in Denmark. I consider that it is necessary to correct this mistake and I (have) decided to give the gold medal to my friend Anna Dogonadze from Germany in the spirit of friendship and fair play.'—Irina Karavaeva (2001)

According to the rules of the International Gymnastics Federation (FIG), the official results cannot be changed after the medals have been awarded. But FIG President and IOC member, Bruno Grandi, decided to make an exception to this rule and to correct the judging error. The official results were changed. Anna Dogonadze (Germany) was awarded the gold medal, and Irina Karavaeva (Russia) was awarded the silver medal".⁴⁵

It is, however, asking much of Baldini in particular to forfeit his own gold medal unilaterally, particularly as crucially, unlike in the other examples cited, the event had not finished when the injustice occurred

45. www.olympicstoday.com.

and the final result of the event therefore remained in doubt. Perhaps more relevant to de Lima's case was the decision of the FIG to break their own rules and alter the official results *after* the medals had been awarded.

Within any law-making body there must be scope for the exercise of discretion. Undoubtedly desirable characteristics of the law are certainty and consistency; these are the foundations on which justice is often achieved. Thus the principle of *stare decisis* remains the fundamental cornerstone of the common law, underpinning its development on an incremental basis through the doctrine of judicial precedent. As Lord Denning states: "the law develops by the application of old principles to new circumstances. Therein lies its genius".⁴⁶ He continues to suggest that often the law is viewed as nothing more than the blind application of established rules to developing circumstances. Indeed the perception is often "with the law as it is, not what it ought to be . . . the rule is the thing. Right or wrong does not matter".⁴⁷

Nonetheless, strict adherence to established principles does not always achieve its intended purpose: justice. In some situations refusing to deviate from the script creates anomalies within the law. The law must be certain and consistent, but it must also be flexible and capable of adapting. As Lord Denning once suggested:

"If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice which they should serve, they may find the whole edifice comes tumbling down about them".⁴⁸

There have been occasional examples of late where the courts have been willing to depart from established legal principles in order to give true effect to the right the law is trying to protect. For example, in a medical context, the courts seem to have manipulated the legal rules relating to negligent information disclosure in order to adequately protect the patient's right of autonomy. In the recent case of *Chester v Afshar*,⁴⁹ the House of Lords modified the stringent rules of causation to allow the claimant to recover damages for an injury she suffered as a result of the surgeon's negligent failure to disclose certain risks. The crux of this decision seems to be based on policy considerations regarding justice and fairness taking precedence over traditional legal principles in order to reach a

fair outcome.⁵⁰ This is exemplified by Lord Steyn, who stated:

"I am glad to have arrived at the conclusion that the patient is entitled in law to succeed. This result is in accord with one of the most basic aspirations of the law, namely to right wrongs. Moreover, the decision announced by the House today reflects the reasonable expectations of the public in contemporary society."⁵¹

In the earlier Australian case of *Chappel v Hart*,⁵² Professor Honoré, commenting on the court's ability to manipulate legal rules, suggests:

"Dr Chappel violated Mrs Hart's right to chose for herself, even if he did not increase the risk to her. Judges should vindicate rights that have been violated if they can do so consistently . . . Dr Chappel did cause the harm that Mrs Hart suffered, though not by the advice he failed to give her . . . Morally he was responsible for the outcome of what he did . . . Do the courts have power in certain cases to override causal considerations in order to vindicate a plaintiff's rights? I believe they do though the right must be exercised with great caution."⁵³

Accordingly it seems the civil courts do have the capacity to deviate from traditional legal rules, but this right has to be exercised carefully.

How then does this relate to the sporting world and to what extent can the Court of Arbitration for Sport be likened to the normal courts? Clearly, and to operate effectively, the CAS must have some scope to deviate from its established rules and practices. However, it must be stressed that while these powers ought to exist, they must be used sparingly and only invoked under the rarest of circumstances. Any variation must be the exception rather than the rule and any departure from established practice demands strong justification and reason for doing so. Thus, in relation to information disclosure, the civil courts clearly view autonomy as a right that is worthy of proper protection and seem willing to be flexible in their application of legal rules to achieve this. In contrast, the civil courts seem reluctant, for example, to substitute the ordinary standard of care in negligence with a standard of reckless disregard for injuries that happen in

46. A. T. Denning, *Lord Denning: The Discipline of Law* (Butterworths, London, 1979), p.290.

47. *ibid.*

48. *ibid.*

49. *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134.

50. For discussion see R. Heywood, "Informed Consent through the Back Door" (2005) 56 N.I.L.Q. 266; S. Devaney, "Autonomy Rules OK" (2005) 13 Med L. Rev. 102.

51. *Chester v Afshar*, fn.52 above, at [25];

52. *Chappel v Hart* [1998] H.C.A. 55.

53. T. Honoré, "Medical Non-Disclosure, Causation and Risk: *Chappel v Hart*" (1999) 7 T.L.J. 1 at p.8.

sporting contests.⁵⁴ The perception therefore must be that the reasons for implementing a variable standard of care are not strong enough to justify any departure from established legal principles.⁵⁵

It is submitted that the CAS must be prepared, on some occasions, to handle their decision-making with a certain amount of flexibility. This promotes fairness and natural justice and ensures that these important principles do not fall by the wayside at the hands of certainty and consistency. The objective of both approaches is to achieve justice, yet this is not possible if either is applied too rigidly or haphazardly. In any event the two approaches need not be viewed as diametrically opposed. They can complement each other. Thus all that is needed is a clear and identifiable criterion as to where the CAS may be entitled to exercise a degree of pragmatism in its sporting judgments. This ought not to be too vague, yet in the same breath should not be too precise so as to render it meaningless by limiting the discretion which it is supposed to provide. A classic example would be in the *De Lima* case itself. Here it is clearly not enough to say the CAS can invoke discretion under "varying circumstances". The circumstances in the *De Lima* case would not be strong enough to justify any departure from existing rules. There were too many external facts which may have influenced the final result. However, in contrast, the case involving the Canadian synchronised swimmer cited elsewhere in this note would constitute a situation where some flexibility is needed where, but for the error of a judge, the outcome was certain and the athlete was denied a gold medal as a result of a mistake. Here it is quite correct that the CAS should be able to award a second gold medal retrospectively.

A similarly relevant case which demanded retrospective action arose following the Athens Olympics in 2004. In the disputed action, the American gymnast Paul Hamm was awarded the overall men's gold medal with Yang Tae Young of Korea being awarded the bronze medal. However, Young had been erroneously docked 0.100 from the start value of his routine for the parallel bars, this points value making the difference between first place and third place. Despite suspending three judges in the wake of the debacle, the FIG initially suggested that they were not able to alter the result of the competition. However, in a move seemingly designed to reclaim the moral high ground and to right a very obvious wrong, the President of

the FIG wrote to Hamm, via the United States Olympic Committee ("USOC") suggesting that he might return his gold medal to Young. The letter stated:

"This act,⁵⁶ which demonstrates the highest level of honesty, places you amongst the true Olympic champions. I wish to confirm that your words grant you the highest esteem from the worldwide gymnastics family . . . I wish to remind you that the FIG Executive Committee has admitted the error of judgement made on the Parallel Bars and suspended the three responsible judges . . . As a result, the true winner of the All-Around competition is Yang Tae Young. If (according to you [*sic*] declarations to the press) you would return your medal to the Korean if the FIG requested it, then such an action would be recognised as the ultimate demonstration of Fair-play by the whole world. The FIG and the IOC would highly appreciate the magnitude of this gesture. At this moment in time, you are the only one who can make this decision."⁵⁷

That this letter met with a hostile response from the USOC is an understatement. In a tersely worded statement, they replied:

"The USOC views this letter as a blatant and inappropriate attempt on the part of FIG to once again shift responsibility for its own mistakes and instead pressure Mr. Hamm into resolving what has become an embarrassing situation for the Federation. The USOC finds this request to be improper, outrageous and so far beyond the bounds of what is acceptable that it refuses to transmit the letter to Mr. Hamm . . . It is the opinion of the USOC that Mr. Hamm did exactly what an Olympic champion should do: he performed to the best of his ability, he competed within the rules of his sport, and he accepted his gold medal with pride, honor and dignity."⁵⁸

The USOC concluded by stating: "As stewards of the Olympic movement, we all share a responsibility to protect, not sacrifice, the interests of athletes."⁵⁹ What is immediately obvious from this aggressive response is the inability of the USOC to see the wider picture. At all times their only interest is in their athlete. The recognition of their position as

54. *Condon v Basi* [1985] 1 W.L.R. 866; *Caldwell v Maguire and Fitzgerald* [2001] EWCA Civ 1054; [2002] P.I.Q.R. 6.

55. For discussion of the various advantages and disadvantages of implementing a standard of reckless disregard for negligently inflicted sporting injuries see P. Charlish, "A Reckless Approach to Negligence" (2004) 4 J.P.I.L. 291; D. McArdle, "The Enduring Legacy of Reckless Disregard" (2005) 34 C.L.W.R. 316.

56. A reference to a suggestion from Hamm that he would return the gold medal if requested to by the FIG.

57. B. Grandi, FIG president and IOC member, August 26, 2004, at www.fig-gymnastics.com.

58. USOC Official communiqué, August 27, 2004, at www.usa-gymnasticsolympics.com.

59. *ibid.*

stewards of the movement is particularly stark—this being the case, their loyalty should be placed with the movement itself rather than with the individual athletes and central to the well-being of the Olympic movement is the principle of fairness to all. This principle was so readily identified by Irina Karavaeva but not apparently by Hamm nor the USOC.

The stance taken by the Americans meant that Young's only chance of gaining his rightful reward was by appealing to the CAS. This appeal was duly heard on September 27, 2004. Unfortunately the CAS ruled against Young, suggesting that his appeal to the FIG had not been lodged in time. They stated:

"We consider that this sufficiently identifies that any appeal must be dealt with during, not after a competition. After a competition, the person/body is effectively *functus officio*. This interpretation conforms with the natural expectation of both participants, spectators and the public at large that at the close of a competition in any sport, gymnastics included, the identity of the winner should be known, and not subject to alteration thereafter save where exceptionally, for example, the purported winner is proved to have failed a drug test and so been disqualified."⁶⁰

Furthermore, the error was explained as an error of interpretation concerning the technical regulation on the part of the judge,⁶¹ and as such any sanction would be applied against the judge rather than a reversal of the still clearly erroneous result. With respect this appears to be an unjust and inequitable perspective. Essentially there is an acknowledged error which has produced an erroneous result and yet technicalities are being allowed to stand in the way of equity. The CAS suggests that allowing the erroneous result to stand would serve to solidify the authority of referees and umpires. They continued:

"It⁶² would contribute to finality. It would uphold, critically, the authority of the umpire, judge or referee, whose power to control competition, already eroded by the growing use of technology such as video replays, would be fatally undermined if every decision taken could be judicially reviewed. And, to the extent that the matter is capable of analysis in conventional legal terms, it could rest on the premise that any contract that the player has made in entering into a competition is that he

or she should have the benefit of honest 'field of play' decisions, not necessarily correct ones."⁶³

The CAS in this instance has allowed an unjust result to stand. They have thrown equity and fairness out of the window. This was not a matter of judgment or opinion; it was a very clear and definite error. It is not a decision which might have opened the floodgates, neither is it a decision which would have adversely affected the authority of referees and umpires on the field of play. This merely compromises the integrity and good name of the appropriate governing body and the CAS itself.

The CAS, in a final abdication of fair play and justice, commented:

"While in this instance we are being asked, not to second guess an official but rather to consider the consequences of an admitted error by an official so that the 'field of play' jurisprudence is not directly engaged, we consider that we should nonetheless abstain from correcting the results by reliance of an admitted error. An error identified with the benefit of hindsight, whether admitted or not, cannot be a ground for reversing a result of a competition . . . So it needs to be clearly stated that while the error may have cost Yang a gold medal, it did not necessarily do so."⁶⁴

The final justification for refusing remedy is presented as the uncertainty engendered by the erroneous scoring. The incident occurred with one rotation still to come and of course if the Korean gymnast had been granted the correct score then this might have impacted on the performance of the athletes in the final rotation.⁶⁵ This argument of course is particularly strong when considering the case of Vanderlei de Lima, and was so graphically illustrated as suggested earlier in the 1954 Commonwealth Games marathon when Jim Peters collapsed. It is a strong reason for upholding field of play decisions, but it should not necessarily override moral concerns of fairness and equity. It is submitted that, in this situation, the award of a second gold medal would refrain from penalising the entirely blameless first-place finisher but would provide an equitable remedy for the unfortunate victim of erroneous judging.

The *Segura* criteria currently provide severe restrictions for any competitor hoping to review a decision taken on the field of play. What is apparent is that the application of the appropriate rules appears to be afflicted by varying inconsistencies.

60. CAS 2004/A/704 *Yang Tae Young v FIG* at [3.7]

61. *ibid.*, at [3.8].

62. Reaching decision by agreement rather than through legal means.

63. *fn.63* above, at [3.13].

64. *ibid.*, at [4.7]–[4.8].

65. *ibid.*, at [4.7].

Furthermore, the end product of these inconsistencies appears at times to result in equity and justice, as seen, for instance, in the case of the Canadian and Russian ice-skaters, but at other times produces palpably unfair results as seen in the case of Yang Tae Young. Part of the problem of course lies in the fact that most examples are not so black and white. The reality in de Lima's case for instance is that there were simply too many variables to be certain that he would have retained his lead over Baldini and any decision must be based on equity and fairness and certainly not based solely on whether we feel sympathy for the unfortunate athlete or not. It is submitted, however, that a less severe approach might at times be appropriate, in that where there is an error in law (not an error of opinion or judgment), or a misapplication of the rules, then where this has very clearly affected the result of the competition, the adjudicating body or more exceptionally the CAS may at their discretion and on a case-by-case basis, seek a remedy based on fairness and equity.

Ultimately of course, de Lima's appeal failed. Although being full of sympathy for the Brazilian, the CAS Panel refused to find remedy for him. In conclusion, they stated⁶⁶:

"The circumstances surrounding this event are extremely unfortunate. In hindsight, one can only regret that stricter security measures were not taken to avoid the mishap which befell him. The Appellant must however draw solace from the fact that he was not only awarded one

of the highest distinction possible within the Olympic movement, the Pierre de Coubertin medal, but the sportsmanship and dignity with which he faced these unfortunate events will be remembered in Olympic lore as one of the true demonstrations of what the Olympic spirit is ultimately all about. History will have a brighter and more appreciative memory of such athletic feats and moral character over that of the result of the particular race."

The comforting words of the panel at the conclusion of their decision, with respect provide scant consolation to de Lima. Owing to the inability of the CAS to look beyond *Segura*, an opportunity has been missed to reclaim some of the morality for track and field that has been lost in the wake of the damage that recent scandals such as Balco have done to the public image of the sport. It was a chance to take a moral lead and seek the compassionate remedy rather than the strictly legalistic one. Rather than awarding the almost meaningless Baron Pierre de Coubertin award for fair play, the IOC might instead have shown compassion and considered authorising the award of a second gold medal to de Lima. This would not have resulted in a reckless expansion of the *Segura* criteria nor, it is submitted, would it have caused the floodgates to open. Rather it would have edged the sporting world, if only for a few moments, back to the lost Corinthian values of yesteryear.

66. fn.1 above, at [33].