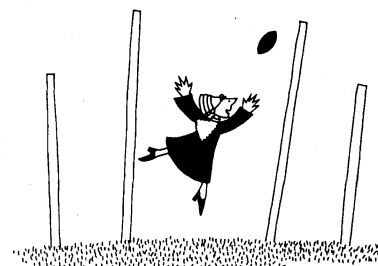


SPORT AND THE LAW

Pistorius: reaching his capabilities

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REFERENCES

1. It has been argued that the IAAF devised the rule to prevent Pistorius competing in the Olympics, although the IAAF denies this. CL Cole, 'Oscar Pistorius's Aftermath' (2009) 33 *Journal of Sport and Social Issues* 3, 3.

2. Refer to report of Professor Peter Brugemann, Director of the Institute of Biomechanics and Orthopaedic at the German Sport University in Cologne, in Carwyn Jones and Cassie Wilson, 'Defining Advantage and Athletic Performance: The Case of Oscar Pistorius' (2009) 9 *European Journal of Sports Science* 125, 125–6.

3. CAS 2008/A/1480 Pistorius v/IAAF para 93.

4. Silvia Camporesi, 'Oscar Pistorius, Enhancement and Post-Humans' (2008) 34 *Journal of Medical Ethics* 639, 639.

5. Ibid.

6. Gregor Wolbring, 'Oscar Pistorius and the Future Nature of Olympic, Paralympic and Other Sports' (2008) 5 *Script-ed* 140, 151–2.

7. Ibid 152.

8. Alexis Chappel, 'Running Down a Dream: Oscar Pistorius, Prosthetic Devices, and the Unknown Future of Athletes with Disabilities in the Olympic Games' (2008) 10 *North Carolina Journal of Law and Technology* 16.

9. As noted by George Vecsey, 'A Ruling on the Side of Opportunity', *The New York Times* (New York), 20 May 2008.

South African sprinter Oscar Pistorius was born without fibulas (bones in the lower legs). He had both legs amputated below the knee when he was 11 months old, a necessary requirement in order for him to use prosthetic limbs. Using his prosthetic limbs drew Pistorius into controversy leading up to the 2008 Beijing Olympics.

Pistorius is a talented athlete, a paralympian who at the 2006 Paralympic Athletics World Championship and the 2008 Beijing Paralympics won gold in the 100, 200, and 400 metre events. His times were fast enough to suggest that he could compete in the 2008 'able-bodied' Olympics. But his quest to compete against able-bodied athletes has caused controversy. It had been argued that his prosthetic limbs — Ossur Flex-Foot Cheetah, which are J-shaped carbon fibre prosthetic limbs — give him an unfair advantage over those without them.

On 14 January 2008, the International Amateur Athletics Federation (IAAF) decided that the use of the prosthetic limbs (the Cheetahs) contravened their Rule 144.2 which prohibits 'the use of any technical device incorporating springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device'.¹ This is the 'techno doping prohibition'. According to an IAAF commissioned report, the Cheetahs provided certain performance advantages in relation to energy efficiency over able-bodied athletes.² Although it should be noted, there are certain disadvantages, such as at the start and initial acceleration phases of the race.

On 26 May 2008, the Court of Arbitration for Sport (CAS) reversed the IAAF decision, holding that the IAAF did not prove beyond reasonable doubt that Pistorius's prosthetic limbs 'provided him with an overall net advantage over athletes not using such devices'.³ Although the IAAF accepted the CAS decision, one of its officials (Elio Locatelli, Director of Development) remarked that the 'purity' of sport is damaged by someone running at the Olympics with blades.⁴ Is Locatelli implying that athletes with disabilities are impure?⁵

The CAS panel made it clear that their decision was limited only to the use of the specific Cheetahs in question. It did not deal with ethical and philosophical issues that Locatelli's objection possibly raised.

One of the more common objections to Pistorius competing in the Olympics is that he would have an unfair advantage over able-bodied athletes. Even though CAS rejected this objection, it does raise the

issue of sports ethics. The traditional view is that the Olympic Games are contests in which athletes compete on their natural abilities. This tradition was well and truly established in the 15th Olympic Games in 720 BC when Orsippus accidentally dropped, or intentionally threw aside, his loincloth and went on to win the first two races. All other athletes quickly followed suit, and it was a long time before Greek athletes again girded their loins for battle. A very level and highly visible playing field. In this tradition of pure sporting ethics, there is no place for pharmacological agents or technological devices. However, in the modern Olympics, a 'sports' ethics' view of a 'level playing field' does not necessarily hold up to close scrutiny.

There is no doubt that athletes from developed nations, with their Ministries of Sport and substantial public funding for sport, have a significant competitive edge. The medal tallies from any Olympic Games reveal the definite correlation between national wealth and Olympic success. Resources permit many nations to offer their athletes the finest facilities and coaches, and subsidies enable the athletes to dedicate themselves to the task of athletic success on a more or less full time basis. What chance do athletes without these benefits have of competing on an equal basis?

Shoes form an essential part of an athlete's tools.

Athletes seek out the shoes that will give them the best performance enhancement. But, not everyone has access to the same quality or performance enhancing shoes.

There are other inconsistencies in how the IAAF applies technical aid prohibitions. As noted by Gregor Wolbring: 'For example, it [IAAF] permits athletes to sleep in tent-like devices designed to simulate high altitude and increase oxygen-carrying capacity and is actively opposed to their prohibitions'.⁶ Wolbring adds that if 'techno doping prohibition' is about the 'pure' abilities of the athlete, then 'every "technical aid" from shoes to bobsleigh and other aids used to perform' will need to be standardised and 'every athlete who fulfils certain criteria' will need to have 'access to them in competition and in training'.⁷ The recent controversy about swimsuit design illustrates the point. Perhaps, all swimmers will soon be required to wear Tony Abbott-style speedos (aka budgie smugglers). Well, all male swimmers.

The CAS decision is narrow and case specific and, though favourable to Pistorius, it is not a victory for disability rights.⁸ In fact, advocates of disability rights have reason to be concerned that Pistorius had to resort to the CAS and to face negative reactions to the decision from some quarters.⁹ National



and international sporting federations and national governments could stand up for disability rights if they embraced article 30.5 of the United Nations *Convention on the Rights of Persons with Disabilities*,¹⁰ which addresses the rights of people with disabilities in sport, recreational play, and leisure.

We should be championing the talents of Pistorius and not engaging in technical and 'sports ethics' arguments to ban him. These arguments do not necessarily measure up well to close scrutiny and the spirit of *Convention on the Rights of Person with Disabilities*. Also they do not comply with Pistorius's fundamental right to a life of dignity and the opportunity to reach his capabilities.¹¹

As we contemplate the Pistorius case, the issue of fairness, equality, dignity and disability rights, the words of Jones and Wilson ring ever so true:

He [Pistorius] did not come up trumps in the natural lottery in relation to athletic hardware. He was born with a congenital absence of the fibula in both legs. Oscar Pistorius's endeavours are testament to dedication, courage, hard work, and perseverance, initially to overcome his disability and then to pursue an athletic career. Such qualities ... ought to be rewarded ahead of natural endowments.¹²

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10. Adopted by the UN General Assembly on the 13 December 2006.

11. Pistorius failed to qualify for the South African Track and Field team for the 2008 Beijing Olympics. He did compete in the 2008 Paralympics winning gold in the 100m, 200 m and 400 m events. He now has his sights set on qualifying for the 2012 Olympics.

12. Jones and Wilson, above n 2, 128.

Vale Francis Regan

Professor Francis Regan from Flinders University, Adelaide, died on 8 January after a short and very untimely illness.

Francis was for many years a committee member of the *Alternative Law Journal* and our book review editor. He was a founding member of the International Legal Aid Group and an authority on legal aid and access to justice. He was well-known for his commitment to achieving social justice through law, and will be greatly missed.