

**RUNNING DOWN A DREAM: OSCAR PISTORIUS, PROSTHETIC
DEVICES, AND THE UNKNOWN FUTURE OF ATHLETES WITH
DISABILITIES IN THE OLYMPIC GAMES**

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Oscar Pistorius, a double-amputee sprinter set on competing in the Olympic Games, was banned from competition by the International Association of Athletics Federation (“IAAF”) after it found his prosthetic legs gave him an unfair advantage over other runners. On appeal, the Court of Arbitration for Sport held that Pistorius had no such advantage, but the court’s ruling was limited only to Pistorius and his specific prosthesis. This Recent Development describes how the court’s ruling imposes substantial burdens on both athletes with disabilities and the IAAF. This Recent Development also discusses why the IAAF is not in the best position to enforce the ruling, and it enumerates remedies the IAAF can implement to resolve eligibility questions when evaluating athletes with disabilities.

I. INTRODUCTION

On May 16, 2008, the Court of Arbitration for Sport (“CAS”)² ruled that Oscar Pistorius, a double-amputee sprinter, could compete for a place on the South African Olympic team for the 2008 Summer Olympic Games.³ The International Association of

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² Court of Arbitration for Sport/Tribunal Arbitral du Sport [hereinafter CAS-TAS], *Statutes of the Bodies Working for the Settlement of Sports-related Disputes*, A(S3), <http://www.tas-cas.org/d2wfiles/document/281/5048/0/3.1%20CodeEngnov2004.pdf> (last visited Sept. 18, 2008) (on file with the North Carolina Journal of Law & Technology) (“The CAS . . . procures the arbitral resolution of disputes arising within the field of sport through the intermediary of arbitration provided by Panels composed of one or three arbitrators.”).

³ *Pistorius v. International Association of Athletics Federation*, Court of Arbitration of Sport/Tribunal Arbitral du Sport, 2008/A/1480 *Pistorius v/IAAF*

Athletics Federations (“IAAF”)⁴ initially prevented Pistorius from competing because it determined his prosthetics gave him an unfair advantage.⁵ Extensive testing commissioned by Pistorius’s legal team revealed that Pistorius, who had already experienced tremendous success in the Paralympics,⁶ did not benefit from such an advantage, but the court limited its decision only to Pistorius and the specific model of prosthetic with which he wished to compete.⁷

This Recent Development argues that although the CAS ruled correctly in allowing Pistorius to compete, it imposed a substantial

(May 16, 2008) <http://www.tas-cas.org/d2wfiles/document/1085/5048/0/amended%20final%20award.pdf> (on file with the North Carolina Journal of Law & Technology).

⁴ The IAAF is the international governing body for the sport of athletics, which includes track events. International Association for Athletics Federations [IAAF], *Constitution of International Association for Athletics Federation*, Article 1(1), at 7 (2007), available at <http://www.iaaf.org/mm/Document/imported/9585.pdf> (last visited Sept. 18, 2008) (on file with the North Carolina Journal of Law & Technology).

⁵ “On 14 January 2008, the IAAF Council issued a Decision which included the following findings:

a. running with these prostheses requires a less-important vertical movement associated with a lesser mechanical effort to raise the body, and

b. the energy loss resulting from the use of these prostheses is significantly lower than that resulting from a human ankle joint at a maximal sprint speed.

Based on these findings the IAAF ruled that the *Cheetah*® *Flex-Foot* prosthetics used by Mr [sic] Pistorius were to be considered as a ... *technical device that incorporates springs, wheels or any other element that provides the user with an advantage over valid athletes, and therefore contravened Rule 144.2(e).*”

Pistorius para. 51, at 9.

⁶ *Pistorius* para. 33, at 6. Pistorius most recently continued his success at the Beijing Paralympics, where he won gold medals in the 100, 200, and 400 meter events. Associated Press, *Pistorius Wins Third Gold*, N.Y. TIMES, September 17, 2008, at D2, available at <http://www.nytimes.com/2008/09/17/sports/othersports/17paralympics.html?ref=todayspaper>.

⁷ CAS said its ruling was limited to Pistorius using this specific prosthesis in particular, and not to any other athlete using this prosthesis or Pistorius using any other prosthesis. *Pistorius* para. 103–04, at 16.

new burden on both disabled athletes and the IAAF. In Part I, this Recent Development describes how the IAAF prevented Pistorius from competing in track events after extensive testing of his prostheses. Part II explains how the CAS's verdict hurts athletes with disabilities and compels the IAAF to have more oversight than it is capable of having. Finally, Part III offers remedies for both athletes with disabilities and the IAAF.

II. THE PATH TO THE COURT

Oscar Pistorius was born without fibulae⁸ and has used prosthetics to walk and run for most of his life.⁹ He has been racing competitively for four years,¹⁰ has earned four gold medals in the Paralympic Games,¹¹ and recently achieved victories against non-disabled sprinters in South African competitions overseen by the IAAF.¹² Pistorius competed in these events without objection from the IAAF,¹³ but the organization changed its position when it revised its rules of competition in March 2007.¹⁴ The altered rules prohibit the “use of any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device.”¹⁵ The IAAF subsequently withdrew Pistorius's invitation to a future race

⁸ The fibula bone is “the lateral and smaller of the two bones of the leg, between the knee and the ankle.” ATTORNEY'S ILLUSTRATED MEDICAL DICTIONARY, F15 (1997).

⁹ *Pistorius* para. 29, at 6.

¹⁰ Steve Goldberg, *Pistorius's Star Continues to Rise at Paralympics*, N.Y. TIMES, September 12, 2008, at D6, available at http://www.nytimes.com/2008/09/12/sports/othersports/12pistorius.html?_r=1&scp=1&sq=pistorius%20star%20continues%20to%20rise&st=cse&oref=slogin.

¹¹ Pistorius earned a gold medal in the 200 meter event in the Athens Paralympics, and he earned gold medals in the 100, 200, and 400 meter events in the Beijing Paralympics. Associated Press, *Pistorius Wins Third Gold*, N.Y. TIMES, Sept. 17, 2008, at D4.

¹² *Pistorius* para. 34, at 7.

¹³ *Id.* para. 34–35, at 7.

¹⁴ *Id.* para. 37, at 7.

¹⁵ IAAF, *Competition Rules 2008*, Rule 144, at 99–100, available at <http://www.iaaf.org/mm/Document/imported/42192.pdf> (last visited Sept. 18, 2008) (on file with the North Carolina Journal of Law & Technology).

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and, in November 2007, requested that he submit his prosthetics for testing in Cologne, Germany, to determine whether such an advantage existed.¹⁶ Pistorius filed an appeal with the CAS in January 2008¹⁷ and convened, in February 2008, his own group of experts to test his prosthetics in Houston, Texas.¹⁸

The conclusions of the two tests were dramatically different. The IAAF asked the Cologne experts to determine if Pistorius had an advantage,¹⁹ whereas the CAS later found the correct determination should have been if Pistorius had a *net* advantage.²⁰ The court determined the device would be eligible under the net advantage qualification “[i]f the use of the device provides more disadvantages than advantages.”²¹ The Cologne experts found Pistorius to have an advantage, but the Houston experts found no net advantage.²² The conflicting results were also the unfortunate

¹⁶ *Pistorius* para. 38, 47, at 7–8.

¹⁷The CAS is charged with resolving “through the appeals arbitration procedure disputes concerning the decisions of federations, associations or other sports-related bodies[.]” Court of Arbitration for Sport/Tribunal Arbitral du Sport [CAS-TAS], *Statutes of the Bodies Working for the Settlement of Sports-related Disputes*, C(S12)(b), <http://www.tas-cas.org/d2wfiles/document/281/5048/0/3.1%20CodeEngnov2004.pdf> (last visited Sept. 18, 2008) (on file with the North Carolina Journal of Law & Technology). The arbitration panel that hears each case has “full power to review the facts and the law.” CAS-TAS, *Procedural Rules*, R57, <http://www.tas-cas.org/d2wfiles/document/281/5048/0/3.1%20CodeEngnov2004.pdf> (last visited Sept. 18, 2008) (on file with the North Carolina Journal of Law & Technology). The CAS determined that the burden of proof in this case was the “balance of probability.” *Pistorius* para. 87, at 14.

¹⁸ *Pistorius* para. 91, at 15.

¹⁹ *Id.*

²⁰ *Id.* para. 92, at 15. (“First, as noted above, a violation would only occur if the user of the prosthesis gained an *overall net advantage* over other runners . . .”).

²¹ *Id.* para. 83, at 13.

²²*Id.* para. 92, at 15 (specifically noting that the Houston testing found that Pistorius does not have “an *overall net advantage* over other runners”). The Cologne team found that Pistorius “does not have as much vertical force with each step,” nor does he use as much metabolic energy while running as compared to able-bodied runners. *Id.* para. 90, at 14.

consequence of each team testing different variables.²³ The CAS ruled that the IAAF failed to prove that Pistorius had a net advantage over able-bodied runners, so it declared him eligible to compete in IAAF-sanctioned events, including the time trials for the 2008 Summer Olympic Games.²⁴

III. ANALYSIS: THE CAS VERDICT BURDENS ALL INVOLVED

Although the verdict of the CAS is correct in light of the evidence specific to Pistorius, the narrow holding presents numerous hurdles for other disabled athletes seeking to compete in the Olympics. The CAS ruled that its decision was limited only to Pistorius and his use of the Cheetah® Flex-Foot prosthesis and held that the ruling “ha[d] absolutely no application to any other athlete, or other type of prosthetic limb.”²⁵ Contrary to the court’s intent,²⁶ this decision likely imposes an encumbrance not only on the IAAF, but also on athletes with disabilities.

A. *The CAS Ruling Imposes a Substantial Financial Burden on Athletes with Disabilities*

The CAS ruling imposes substantial new burdens on athletes with disabilities who wish to compete in able-bodied events. Given the advances in assistive technology, there will most likely be an increase in the number of people who use prosthetic devices

²³ In determining that Pistorius had an advantage, the IAAF-commissioned Cologne team tested the amount of vertical force he used while sprinting, in addition to metabolic energy expended. *Id.* para. 90, at 14. The Houston team tested: (1) the amount of oxygen Pistorius used as compared to able-bodied runners; (2) his rate of fatigue; and (3) “the amount of energy loss from the Cheetah[®] Flex-Foot prosthesis against the intact human leg, which includes tendons and other elements that generate positive energy[.]” *Id.* para. 91, at 15. In examining the factors tested by the Houston team, the CAS concluded that the Cologne team “did not measure any of these elements.” *Id.*

²⁴ *Id.* para. 98, at 16. Unfortunately, Pistorius failed to advance past the time trials to qualify for a spot on the South African Olympic team. Joshua Robinson, *Pistorius Left Off South African Olympic Team*, N.Y. TIMES, July 19, 2008, at D1.

²⁵ *Pistorius* para. 104, at 16.

²⁶ *Id.*

in athletics, perhaps eventually leading to an increase in elite athletes with prosthetics who wish to compete in the Olympic Games.²⁷ This CAS ruling provides little guidance, as even athletes who use the same model of Cheetah® Flex-Foot as Pistorius must receive IAAF's approval prior to competing in IAAF-sanctioned events.²⁸ If Pistorius decides to change his prosthetics, he again must prove that the new prosthetics do not give him a net advantage over other athletes.²⁹

The process of proving eligibility is a costly one, in terms of both financial costs and athletic setbacks.³⁰ A large international law firm³¹ represented Pistorius on a pro bono basis,³² but other athletes may not be able to attract such representation without incurring excessive legal fees. In addition to the legal fees incurred, athletes may also be responsible for funding the necessary testing because the CAS failed to designate who should bear the financial burden of testing the prosthesis to determine

²⁷ See Peter Charlish & Stephen Riley, *Should Oscar Run?*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929, 939 (2008) (“With more and more soldiers returning from Afghanistan and Iraq with disabling injuries and high-tech fixes, the population of disabled American athletes is growing at a faster rate than anytime since the Vietnam war.” (citing Steve Goldberg, *Do Disabled Athletes Have an Edge?*, TIME, June 8, 2007, available at <http://www.time.com/time/world/article/0,8599,1631050,00.htm>)).

²⁸ *Pistorius* para. 104, at 16 (“The ruling does not grant a blanket license to other single or double amputees to compete in IAAF-sanctioned events using Cheetah [®] Flex-Foot prosthetics, or indeed any other type of prosthesis.”). The process for receiving IAAF approval of a prosthetic is unclear at this point, given the newness of Rule 144(2), so it is not unreasonable to conclude that further litigation might be necessary.

²⁹ *Id.* (“[T]he Panel’s decision in this appeal has absolutely no application to any other athlete, or other type of prosthetic limb. Each case must be considered by the IAAF on its own merits.”).

³⁰ See *infra* notes 31–39 and accompanying text.

³¹ Dewey & LeBoeuf LLP, Firm Overview, <http://www.deweyleboeuf.com/firm/> (last visited Sept. 29, 2008) (on file with the North Carolina Journal of Law & Technology).

³² Press release, Dewey & LeBoeuf LLP, Oscar Pistorius Receives His Day in Court (Apr. 1, 2008), <http://www.deweyleboeuf.com/News/detail.aspx?news=6584> (on file with the North Carolina Journal of Law & Technology).

eligibility. The IAAF incurred costs of approximately 30,000 Euros for the tests conducted in Cologne;³³ the cost of Pistorius' Houston testing was likely of similar magnitude. Given the lack of direction from the CAS, athletes with disabilities may have to bear similar costs in future challenges.

Even after testing has been conducted, the path to the CAS is expensive. It costs 500 Swiss francs³⁴ to file an appeal with the CAS,³⁵ and when the case is heard, each side must pay in advance for "its own witnesses, experts and interpreters."³⁶ When the court issues its ruling, it can require one or both of the parties to pay for the arbitration costs, an amount that could be large, if not exorbitant.³⁷ Furthermore, since the CAS sits in Lausanne, Switzerland,³⁸ athletes and their trainers could incur substantial costs in traveling to the court as well as for their lodging and living expenses for the duration of the proceeding.

If the need for legal representation and the costs of testing and appearing before the CAS do not deter athletes with disabilities from seeking approval to compete in IAAF-sanctioned events, the missed opportunities while seeking approval may prove to be the tipping point. Pistorius lost precious training time waiting in legal limbo by the time the CAS issued its ruling, which might have contributed to his failure to qualify for the South African Olympic team.³⁹ If the CAS truly wants to ensure that qualified athletes

³³ Charlish & Riley, *supra* note 27, at 946.

³⁴ 500 Swiss francs is equal to roughly \$436.34 (converted on Oct. 7, 2008) <http://money.cnn.com/data/currencies/converter/index.html>.

³⁵ CAS-TAS, *Procedural Rules*, at F.

³⁶ *Id.*

³⁷ *Id.*

³⁸ CAS-TAS, *Statutes of the Bodies Working for the Settlement of Sports-related Disputes*, at A(S1).

³⁹ See Joshua Robinson, *Pistorius Left Off South African Olympic Team*, N.Y. TIMES, July 19, 2008, at D1 ("A year of distractions off the track might have taken a toll. 'We had to be in court; we had to fly to Europe for tests; we had to fly to Germany for tests,' Van Zyl [Pistorius's agent] said. 'You can't train all the time and see your coach all the time, so of course it had a negative effect.'"). See also Iñigo Mujika & Sabino Padilla, *Detraining: Loss of Training-Induced Physiological and Performance Adaptations*, SPORTS

with disabilities are eligible to compete in IAAF-sanctioned events, then the process of qualifying for competition must be streamlined to eliminate these substantial costs and delays.

B. The CAS Ruling Imposes a Substantial Burden on the IAAF

In addition to the substantial burden the court's ruling places on athletes with disabilities, the mandate that the IAAF resolve such issues in the future also imposes a substantial burden on the Association. The CAS provided the IAAF little guidance regarding procedures to follow when athletes with disabilities seek to compete in IAAF-sanctioned events.⁴⁰ In addition, the IAAF may not have the resources, efficiency, or neutrality required to judge disabled athletes' eligibility.⁴¹

1. The IAAF Does Not Have the Resources or Efficiency to Make Eligibility Decisions

As stated above,⁴² the cost of testing athletes' prosthetic devices would be high should the IAAF have to bear this expense every time an athlete with a prosthetic device wished to compete in an IAAF-sanctioned event.⁴³ The structure of the IAAF Council, which amended the Rules of Competition to create new rules about prosthetic devices, does not enable the efficient determination of eligibility. The IAAF Council, made up of twenty-seven members and the General Secretary of the IAAF, are authorized to, among

MEDICINE, Vol. 30 (3), 145, 151 (2000) ("When physical training is markedly reduced or stopped for a period longer than 4 weeks, the VO₂max of highly trained athletes declines by 6 to 20% In addition, long term inactivity may promote a decline in cardiac dimensions and ventilator efficiency"). VO₂max is the "maximal oxygen intake." *Id.* at 145.

⁴⁰ See *Pistorius* para. 104, at 16 ("Each amputee athlete must collaborate with the IAAF to have his or her eligibility under Rule 144.2(e), as interpreted by this Panel, established on an individual basis.").

⁴¹ See discussion *supra* Parts B.i-ii.

⁴² See *supra* Part II.A.i.

⁴³ See *supra* note 28 and accompanying text.

other things, make “urgent decisions” regarding eligibility.⁴⁴ Although it is commendable that the members hail from all over the world,⁴⁵ the hasty vote by mail that declared Pistorius ineligible to compete illustrates how this geographic diversity presents problems when urgent decisions are necessary.⁴⁶

Upon receipt of the Cologne test results, the IAAF sent the results to the IAAF Council for a vote on Pistorius’s eligibility and instructed that votes be returned to the association three days later.⁴⁷ With such short notice, only thirteen of the twenty-seven members returned their votes on time, and the deadline had to be extended.⁴⁸ If the issue had truly been urgent, the Council would not have had the required majority to make a decision.⁴⁹

Additionally, the miscommunication surrounding the factors to be tested in the IAAF-commissioned Cologne tests also signals the Council’s inefficiency.⁵⁰ The court found that the IAAF Council should have asked the experts who conducted the Cologne testing to determine whether Pistorius had an overall net advantage; since it did not include “net” in its communication to Cologne, the

⁴⁴IAAF Council, <http://www.iaaf.org/aboutiaaf/structure/council/orgCode=197356/index.html> (last visited Sept. 18, 2008) (on file with the North Carolina Journal of Law & Technology).

⁴⁵ *Id.*

⁴⁶ *See supra* note 39.

⁴⁷ *Pistorius* para. 66, at 11 (“The document sent to Council members over the IAAF President’s signature was despatched [sic] on a Friday (11 January 2008) with a request that the votes should be returned by the following Monday morning (14 January 2008).”).

⁴⁸ *Id.*

⁴⁹ International Association for Athletics Federations [IAAF], *Constitution of International Association for Athletics Federation*, Article 6.10 at 24 (2007) available at <http://www.iaaf.org/mm/Document/imported/9585.pdf> (last visited September 18, 2008) (“The President and each Council Member shall have a vote on all decisions to be taken and all decisions of the Council shall be by a Simple Majority.”) (on file with the North Carolina Journal of Law & Technology).

⁵⁰*See infra* note 51 and accompanying text.

expensive testing did not sufficiently address the question of eligibility, which the panel had to decide.⁵¹

2. *The IAAF Does Not Treat Disabled Athletes Impartially*

The IAAF's behavior during the Pistorius proceedings indicates it might act with prejudice towards athletes with disabilities in the future.⁵² When the IAAF Council received the results from the Cologne testing with the request for a vote on Pistorius's eligibility, the document "stated that abstentions would be counted as positive votes to declare Mr [sic] Pistorius ineligible."⁵³ Also, "*before the vote was taken* [as to whether] Mr [sic] Pistorius would be banned from IAAF-sanctioned events,"⁵⁴ IAAF officials told members of the press that the IAAF Council had voted Pistorius ineligible to compete. The most critical evidence of the IAAF's lack of impartiality towards athletes with disabilities is that the CAS found that when the IAAF Council amended its rules of competition to include the rule regarding prosthetics, it was "likely that the new Rule was introduced with Mr [sic] Pistorius in mind."⁵⁵ In sum, the IAAF's resources, structure, and past behavior have shed serious doubt on its ability to make fair and thorough decisions about the eligibility of disabled athletes.

⁵¹*Pistorius* para. 85, at 14 ("Unfortunately, as Prof. Brüggemann [the expert who led the Cologne testing] made clear during the hearing, the IAAF did not ask him to determine whether or not Mr [sic] Pistorius' use of the Cheetah[®] Flex-Foot prosthesis provided him with an overall net advantage or disadvantage. The Cologne Report therefore does not address the central question that the Panel is required to answer in this appeal.").

⁵² See *infra* notes 53–55 and accompanying text.

⁵³ *Pistorius* para. 67, at 11 ("The Panel also considers the technique specified by the IAAF in the voting papers, which stated that abstentions would be counted as positive votes to declare Mr [sic] Pistorius ineligible, was not a satisfactory method of justifying the FIAA's press statement to the effect that the decision was made by the Council *unanimously*.").

⁵⁴ *Id.* para. 68, at 12.

⁵⁵ *Id.* para. 56, 57, at 10.

IV. GETTING BACK ON TRACK: SUGGESTED REMEDIES FOR THE IAAF

The court missed an opportunity to enumerate the factors the IAAF should consider when evaluating prosthetics for eligibility under its amended rules of competition. In evaluating the two sets of results, the CAS did not pass judgment on whether the variables tested were adequate to measure any net advantage but simply compared them to each other.⁵⁶ If the variables used in the Cologne and Houston tests are combined, the variables to be tested would include: vertical force, metabolic energy expended, the amount of oxygen used, the rate of fatigue, and energy loss while using the prosthetic as measured against energy loss of an intact leg.⁵⁷ Even if these variables change as research expands our knowledge of prosthetic technology, providing a baseline of benchmarks would give athletes and the IAAF necessary guidance for future determinations of eligibility. Additionally, the court should have required the IAAF to submit the required evaluation process that an athlete's prosthetic device must pass in order to compete in IAAF-sanctioned events. Relevant factors should include: acceptable institutions to evaluate devices, a list of testable factors, and the process available for appeals. The manufacturers of these prosthetics should also be included in the conversation about prosthetic evaluation, as these technology companies have played a valuable role in other disputes involving the use of technology in elite sports and may be able to give valuable insight into the capabilities of their products.⁵⁸

⁵⁶ See generally *Pistorius*.

⁵⁷ *Id.* para. 90–91, at 14–15.

⁵⁸ The recent controversy surrounding the use of Speedo® Fastskin® LZR Racer® suits at the Olympic Games highlights the helpful role that manufacturers can play when eligibility disputes arise. The International Swimming Federation, swimming's international governing body, resolved the issue after meeting with swimsuit manufacturers. *Record-breaking Speedo[®] swimsuit passes test at FINA meeting*, ESPN.COM, Apr. 12, 2008, <http://sports.espn.go.com/espn/wire?section=swimming&id=3343364> (“After meeting with the manufacturers, FINA said it had ‘confirmed that all the swimsuits approved so far are complying with the specifications.’”) (last visited Oct. 8, 2008) (on file with the North Carolina Journal of Law & Technology).

A tenet of the Olympic Games is to enable all eligible athletes to compete, regardless of their individual finances.⁵⁹ The IAAF is the logical financier of testing because, as author of the amended rule, it is in the best position to judge compliance. If the IAAF thought amending its rules of competition to define devices was important, it should also bear the costs of fulfilling its duty to ensure that all competitors play by the rules.

VII. CONCLUSION

Oscar Pistorius's fight to compete in the Olympic Games has shed light on the future of elite athletes who use prosthetic devices. Although the CAS correctly ruled that Pistorius could compete, the court's ruling imposes substantial burdens on both individual athletes with disabilities and the IAAF. Thankfully, there are steps the IAAF can take to clarify its rules and support athletes who wish to participate in IAAF-sanctioned events. As prosthetic technology advances and more athletes with disabilities reach an elite level of competition, athletic governing bodies should take steps to create rules that include qualified athletes without compromising fair competition.

⁵⁹ International Olympic Committee [IOC], *Olympic Charter*, Rule 41, Bye-Law 4, at 81 (2007) ("The entry or participation of a competitor in the Olympic Games shall not be conditional on any financial consideration.").