

TENNIS—WHEN STRICT LIABILITY IS NOT SO STRICT

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Greg Rusedski, the British No.2 tennis player learned yesterday,² that he would not be facing a two-year ban for testing positive for the banned steroid nandrolone. Rusedski tested positive in July 2003 with a reading of 5 nanograms per millilitre of urine, (the threshold level is two nanograms per millilitre and to give some comparison, Linford Christie had a level of 200 nanograms, C.J. Hunter the American shot putter 2000 nanograms and Peter Korda, the tennis player 40 nanograms,³ when they were all banned from their respective sports). Rusedski argued that the source of his elevated nandrolone levels were salt tablets actually distributed by the Association of Tennis Professionals (ATP) the governing body of men's tennis. His defence rested on the fact that seven other samples from players, collected by the ATP had had positive readings and a further 36 had what were deemed to be elevated, but not positive levels (in other words, sufficiently high enough to cast doubt, but not enough to convict). However, these samples were collected between August 2002 and May 2003, after which time, the tablets were withdrawn by the ATP. Rusedski, as already stated tested positive in July, his argument being that the ATP had not informed the players personally that the tablets had been withdrawn and that therefore he continued to take them, and hence he was it seemed an innocent victim of this failure of communication. The verdict, reported in *The Times*,⁴ stated:

“He (Rusedski) argued that it was unfair that the ATP should seek to prosecute him for substances which they themselves have given to him, which in all probability caused him to test positive . . . they (ATP), could have and should have taken steps to notify its players in a

‘meaningful’ and ‘direct’ way of its decision to cease distributing the electrolyte tablets that it had previously handed out so freely.”

There are several areas of concern about this particular passage. *The Times* continued⁵:

“The tribunal, selected by the ATP, rounded on the governing body for not having talked to Rusedski about its decision to withdraw the salt tablets from distribution in May 2003—although messages were posted on locker room walls and printed in the player's weekly newsletter for three months.”

It is difficult to see what else the ATP could have done other than communicating individually with all its members, (they have over 1,400 members). It could certainly be argued that they had done all that could reasonably be asked of them and that where there is a change in policy all that is required is reasonable consultation or reasonable notice, and that the measures taken by the ATP were, or at least should have been, sufficient to fulfil their obligations towards their members.

The second significant strand of Rusedski's defence lay in the analytical make up of his test result. As the *Independent* newspaper reported, before the hearing⁶:

“As the issue drags on, so the other competitors on the ATP Tour wonder where the situation will lead—particularly six of the players who were let off even though *Rusedski's sample and theirs demonstrated a common analytical fingerprint.*” (Emphasis added).

This factor seems to suggest either that the samples came from the same source, or that they were all contaminated in the same way.

In his defence, Rusedski relied on the fact that the players with whom his sample apparently shared the same analytical makeup had not been banned from the sport and that therefore he too should be cleared, as there must be doubt about the integrity of either the testing procedure or of the tablets themselves. Further investigations have uncovered no tablet contamination and therefore the suspicion must be that it is the testing process that has allowed this contamination. Rusedski's defence was bolstered by the admittance of the ATP that in the case of at least one of the player's with whom Rusedski's sample shared common characteristics, (Bohdan Ulihrach), it was likely that his positive test was caused by substances given to him by the ATP, therefore by associating himself with Ulihrach

1. Lecturer in law at Sheffield Hallam University.
2. March 11, 2004.
3. www.theglobeandmail.com
4. www.timesonline.co.uk March 11, 2004.

5. www.timesonline.co.uk March 11, 2004.
6. *The Independent*, March 1, 2004, p.48 John Roberts.

in the manner described, the British tennis star was able to cast sufficient doubt upon the integrity of his own test result.

This is undoubtedly a huge issue not just for tennis, but for the worldwide battle against doping in sport. In the time between Rusedski's public unmasking and his acquittal, 16 more tennis players have been found to have elevated levels of nandrolone in their urine.⁷

There has been much concern about the implications for sport of the Rusedski decision. The World Anti-Doping Agency, (WADA), issued a statement in the wake of the decision. It stated⁸:

"The decision only exacerbates the Wada's concerns regarding the initial decision taken by the tribunals in the seven previous cases. *As we have stated in the past, the decision to exonerate was based on a scientific theory regarding the electrolytes and is not conclusive.* The fact that another case has now been adjudicated based on the same premise is greatly disturbing, particularly if it is proved to be incorrect." (Emphasis added).

The ATP has, as is common with nearly all other sports, its own anti-doping programme. The stated purpose of this programme is⁹:

"The purpose of this Tennis Anti-Doping Programme (the '*Programme*') is to maintain the integrity of tennis and to protect the health and rights of all tennis players.

The regulations are quite specific on the issue of prohibited substances being found within the body of any participant. Article C(1)(a) states¹⁰:

"It is each player's duty to ensure that no *prohibited substance* enters his body. A player is responsible for any *prohibited substance* or its *metabolites* or *markers* found to be present in his specimen. Accordingly, it is not necessary that intent, fault, negligence or knowing *use* on the player's part be demonstrated in order to establish a doping offence under Art.C(1); nor is the *player's* lack of intent, fault, negligence or knowledge a defence to a charge that a doping offence has been committed under Art.C(1)."¹¹

7. *www.timesonline.co.uk*, March 11, 2004, Neil Harmon, tennis correspondent.

8. *www.timesonline.co.uk* March 11, 2004, John Goodbody.

9. ATP Tennis Anti-Doping Programme 2004, Art.A (1).

10. ATP Tennis Anti-Doping Programme 2004, Art.C(1)(a).

11. This is taken directly from the World Anti-Doping Association Code 2003, Art.2(1)(1)

An exception to the severity of this rule is if the prohibited substance can be produced internally, by the body.¹² There is a possible defence if the substance in question is for therapeutic use. However, in order to qualify for this exemption, the player in question must have obtained a "therapeutic use exemption", before ingesting the substance.¹³ Quite clearly, this does not apply to Rusedski, although it is reasonable to assume that he would try and link the fact that the tablets were provided by the ATP themselves, as sufficient to at least suppose that this may be classified as therapeutic use.

It falls to the ATP to establish that a doping Offence has taken place, and that further more¹⁴:

"The standard of proof shall be whether the ATP has established the commission of the alleged doping offence to the comfortable satisfaction of the *Anti-Doping Tribunal*, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond reasonable doubt."

This is an offence of strict liability, with narrow stated exceptions, the very presence of the banned substance sufficient without more of being in violation of the anti-doping regulations promulgated by the ATP. Article 3(1) states¹⁵:

"The presence of a prohibited substance or its metabolites or markers in a player's specimen, unless the player establishes the presence is pursuant to a therapeutic use exemption granted in accordance with Article E."

Under these stated regulations, Rusedski was fortunate indeed to be completely exonerated. There is no allowance made for how the substance entered the body. If it is there, and no exception applies, then the player is guilty. This is the essence of strict liability.

The sanctions for a positive test result are quite clear, first offence being a two-year ban and any subsequent offence carrying a lifetime ban. There is no apparent moderation of this sanction unless a player can establish that the substance was a "specified substance", as defined under Art.M(3), which states¹⁶:

"The *prohibited list* may identify specified substances that are particularly susceptible to unintentional anti-doping rules violations

12. Art.C(1)(c).

13. ATP Tennis Anti-Doping Programme 2004, Art.E(1).

14. ATP Tennis Anti-Doping Programme 2004, Art.K(3).

15. ATP Tennis Anti-Doping Programme 2004, Art.C(1).

16. ATP Tennis Anti-Doping Programme 2004, Art.M(3).

because of their general availability in medicinal products or that are less likely to be successfully abused as doping agents. . . . Where a player can establish that the *use* of such a specified substance was not intended to enhance sport performance, the period of *ineligibility* found in Art.M.2 shall be replaced.”

Rusedski’s situation clearly does not fall into this particular exception, as a finite list of these “specified substances” is found in App.3.¹⁷

Therefore what needs to be asked is what the justification was for sidelining the principle of strict liability, in favour of what would appear to be a humanitarian, forgiving and arguably a moral decision. As already stated, it was accepted that there was the possibility that Bohdan Ulihrach’s positive test was caused by his use of salt tablets supplied by the ATP, and the fact that Rusedski’s sample had the same analytical fingerprint as Ulihrach’s suggested two possible explanations: either that they ingested the same apparently contaminated ATP supplied tablets, or there was contamination of their samples emanating from the testing procedure. The fact that in this year alone a further 16 players have tested positive for the same banned drug seems to suggest that something is fundamentally wrong with the testing procedures of the ATP, or that systematic drug abuse is rife in men’s tennis. It is interesting to note that this profusion of positive test results have not occurred at the Grand Slam events,¹⁸ which are administered by a separate organisation,¹⁹ but only at events administered by the ATP.

There is of course a further possible explanation that clearly was not accepted by the panel; that both players were guilty of ingesting the same banned substance, obtained from another source. As reported in the *Guardian* newspaper²⁰:

“Yesterday’s developments indicate that the pills are either still in circulation or that they were never the source. Last night the ATP admitted that it was no closer to a definitive answer.”

Whatever the explanation, the stated regulations of the ATP are that the player, if found with a banned substance in their body, should face an automatic ban. So why were these rules not followed?

The stated reasons are that the ATP failed to adequately warn their players of the possibility of the supplied tablets being contaminated and that once

this was discovered and they were withdrawn, then the ATP had a responsibility to take all possible means to inform and educate their members as to this risk. The tribunal actually stated²¹:

“The ATP could have—and should have—taken steps to notify its players in a ‘meaningful’ and ‘direct’ way of the reasons for its decision to cease distributing the electrolyte tablets that it had previously handed out so freely.”

As already stated, it is difficult to see what else the ATP could have done, other than directly contacting each and every one of the members of the ATP. It is suggested that their action in withdrawing the tablets, putting notices up in the player locker rooms and posting messages in the weekly player newsletter, was reasonable in the circumstances.

The possible source of Mr Ulihrach’s positive test, which was accepted by the ATP, was the possibly contaminated salt tablets. The implication, due to circumstances was that therefore Rusedski’s sample could have been contaminated in the same fashion. However, concerning these tablets, *The Times* reports²²:

“The ATP was able to identify only one jar which appeared to have been used at a tournament where positive or elevated tests occurred. All of the approximately 500 tablets in the remaining half of the jar were analysed at an IOC²³ laboratory in Cologne. *No contamination was found.*” (Emphasis added).

It is unfortunate that no contaminated tablets have been found, however, the question of the existence or otherwise of these contaminated tablets should not have ever arisen. Based on the applicable principle of strict liability, once illegal substances have been found in a urine sample, then the individual should be found guilty, however the illegal substances got into the person’s body in the first place.

The World Anti-Doping Agency, (“WADA”), in the wake of the Rusedski decision expressed its concern. David Howman, WADA Director-General, stated²⁴:

“We have been concerned about all of these nandrolone cases in tennis in two aspects; one because there is the erosion of strict liability (the regulation by which competitors are

17. ATP Tennis Anti-Doping Programme 2004, App.3.

18. The Australian Open, The French Open, Wimbledon and the US Open.

19. International Tennis Federation.

20. Stephen Bierley & Paul Kelso, the *Guardian*, March 11, 2004, p.1.

21. *www.timesonline.co.uk*, March 11, 2004.

22. *www.timesonline.co.uk*, March 11, 2004, Neil Harman, Tennis Correspondent.

23. International Olympic Committee.

24. David Howman, cited in *www.timesonline.co.uk*, March 11, 2004, John Goodbody.

always responsible for what they consume) and also because of the large number of nandrolone findings in tennis.”

There can be no justification for this erosion of the principle of strict liability. It is pointless having such a standard available if at the first sight of an unjust outcome, the principle is disregarded.

The rationale for a policy of strict liability is a laudable attempt to level the playing field in competitive sports, and it is certain that at times, unjust results will occur. However, what is without doubt is that the policy was implemented for very specific reasons, aptly summed up in the decision from the Court of Arbitration for Sport in *Quigley v UIT*²⁵:

“It is true that a strict liability test is likely in some sense to be unfair in an individual case . . . where the athlete may have taken medication as the result of mislabelling or faulty advice for which he or she is not responsible. . . . But it is also in some sense ‘unfair’ for an athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. Just as the competition will not be postponed to await the athlete’s recovery, so the prohibited banned substance will not be lifted in recognition of its accidental absorption. 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. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations.”

The decision to completely exonerate Greg Rusedski is without doubt a humane decision, which will be welcomed by his legion of fans. It seemed to be based on the principle that it would have been unfair of the ATP to ban Rusedski for taking, in good faith, substances provided by the ATP. In more legal terms, the stated reason was based on the principle of estoppel, which²⁶:

“prevents a person from adopting a position inconsistent with an earlier position if it results in injury to someone else.”

However, what this decision has done is add an unnecessary layer of uncertainty to an already difficult area. There must be clarity when dealing with this issue, and the principle of strict liability brought such clarity. The decision of the tribunal, in disregarding the principle of strict liability, and erring on the side of morality and justice rather than clarity and certainty may well have been a satisfactory result for Greg Rusedski, but it is one which individuals such as Dwain Chambers²⁷ will look upon with a certain amount of anger. Tennis has, by this verdict, left itself open to charges of incompetence at best or cover-up and corruption at worst. It is a course of action that they may come to regret.

26. Paul Kelso, the *Guardian*, March 11, 2004, p.29.

27. The British athlete recently banned for testing positive for the steroid THG, despite his defence that he ingested the product unintentionally.

25. World Anti-Doping Association Code 2003, Art.2(1)(1) Comment, p.9.