

WADA REPORT ON ATP POSITIVE DRUG TESTS

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On Friday, July 17, 2004 at 1 pm British Summer Time the World Anti Doping Agency, (WADA), released its report into the occurrence of seven positive urine samples of 19-norandrosterone² administered by the Association of Tennis Professionals (ATP)³ amongst its members between August 2002 and May 2003. In addition to these positive results there were also a further 36 samples that had what were described as *elevated* levels of nandrolone or its derivatives. These elevated levels are not enough for a player to be banned from competition, but they are nevertheless sufficiently high to be of concern to the administrators of the sport, and due to their elevated nature cannot be classified as negative. WADA, at the request of the ATP produced their report which related:

“On 8 August 2003 ATP formally requested that WADA perform an oversight review of ATP’s *‘investigation and administration relating to the seven player samples collected between August 2002 and May 2003 which were reported as analytically positive for 19-norandrosterone’*. . . . WADA undertook to respect the confidentiality of the players involved. No names or other identifying information were provided to WADA when conducting this review.”⁴

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2. A derivative of nandrolone, which is an anabolic steroid, only available generally on prescription and administered via injection. 19-norandrostendione and 19-norandrostenediol on the other hand are steroid precursors which may be purchased for oral use without prescription as nutritional supplements in health food stores and over the internet in many countries (Young, p.2).

3. The governing body of men’s tennis and the administrators of all men’s professional tournaments outside of the “Grand Slam” events of the Australian Open, the French Open, Wimbledon and the US Open.

4. WADA, “WADA report on ATP cases”, July 2004, at p.2.

The initiation of this report was prompted by the inconsistencies surrounding these failed and elevated tests. An earlier report into the failed tests had previously been commissioned by the ATP,⁵ which stated:

“These test results were extraordinary in three respects. First, this large number of positive and elevated tests in a short period is very unusual, particularly for tennis, which has never before had a pattern of tests involving nandrolone or its related substances. Second, all of the tests involved low levels of the metabolite, suggesting the source may have been a contaminated supplement. Third, and of particular importance, most of the samples had a common analytical fingerprint indicating that the same product had caused the positive and elevated tests.”⁶

Concern was expressed amongst the tennis community that there existed the possibility that these samples had suffered some form of contamination. Young explained:

“A study commissioned by the IOC and conducted at the Cologne laboratory concluded that supposedly clean supplements sold by companies that also sell steroid precursors are more likely to be contaminated than supplements from companies that do not sell steroid precursors. . . . Studies by the IOC Laboratories in Cologne and at UCLA have demonstrated that even the most miniscule amounts of contamination (several billionths of a gram in a tablet) can cause a positive test. Even product testing to the US pharmaceutical standard of 99.9% purity provides no protection since contamination as low as 0.004% can cause a positive test.”⁷

These particular factors are obviously a major concern, and any erosion whatsoever of the principle of strict liability, (as was subsequently witnessed in these cases), would lead inevitably to the widespread use of a defence based on these factors.

In the most prominent of the seven failed cases, Bohdan Ulihrach was sanctioned with a two-year suspension by a disciplinary panel. However, in one of the other six cases, WADA reported that one

5. The report author was Richard Young, attorney at law and a partner in the firm of Holme Roberts and Owen LLP, specialising in anti-doping issues in sport. He is an experienced arbitrator for the Court of Arbitration for Sport.

6. R. Young, *Investigation report regarding the detection of 19-Norandrosterone in the urine of numerous ATP players between August 2002 and May 2003* at p.1.

7. *ibid.*, p.3.

of the players in his defence⁸: “included an allegation that the ATP had supplied the player, through one of its trainers, with a supplement, namely electrolyte tablets”.

This allegation was sufficient to prompt the ATP to withdraw the electrolytes, under the suspicion that they may be a possible source of such contamination. The compelling similarities in the test results produced by these and other players was a factor that would cause real problems for the ATP. The report continues:

“The ATP learned early in the Inquiry, from Dr. Ayotte⁹ at the Montreal laboratory, that not only were there seven positive cases, but another 36 analyses which indicated elevated levels of 19-Norandrosterone. Dr Ayotte had undertaken research into all of the 43 cases and reached a conclusion *that all must have been ‘caused by the same source’ because the analyses revealed a common analytical fingerprint in all samples.*”¹⁰ (Emphasis added)

From 1992–2002, the ATP had only one positive test for the substances in question, and yet in an eight-month period from August 2002 through to May 2003, 43 such tests were identified as being either positive or elevated for those products. The Young report in attempting to reconcile these issues reported:

“Changes in the number and distribution of ATP tests were carefully considered. Although the ATP did more tests at more tournaments than in prior years, and more out of competition tests, these changes do not explain the dramatic difference in test results. Indeed, only one of the 43 positive or elevated samples came from an out of competition test. . . . The demographics of the players producing the 43 positive or elevated samples were studied samples with particular care to look for any apparent pattern. No pattern emerged. Rather, these 43 samples were produced by a remarkably diverse group of players at 17 tournaments taking place at different times in different parts of the world. Specifically, the players whose samples produced these results came from more than a dozen different countries on several continents, with many different native languages, and different coaches and personal trainers.”¹¹

The conclusion reached by Dr. Ayotte, and reported by Young was that:

8. WADA, above, n.3 at p.7, para.6
9. Dr Christiane Ayotte, Director of the IOC’s laboratory.
10. WADA, above, n.3 at p.8, para.8.
11. Young, above, n.5 at p.4.

“The unique analytical pattern of these ATP cases indicates that the players’ positive and elevated levels of 19-norandrosterone could have been caused by a common source. The low levels of 19-norandrosterone detected are consistent with the oral administration of contaminated nutritional supplements.”¹²

Bohdan Ulirach’s original case, under authority of the Tennis Anti-Doping Program adjudication process was presented to a tribunal of independent arbitrators. Following a finding that Ulirach had committed a doping offence, the aforementioned sentence was imposed (*i.e.* a two-year suspension): Ulirach appealed to the Court of Arbitration for Sport. However, following the submission of the details of the anomalies contained in these tests to the representatives of the players concerned, the proceedings were re-opened by the Tribunal Chair. The result of this re-examination of the issues presented were to have the effect of driving a coach and horses through the principle of strict liability and formed the basis of the argument which Greg Rusedski used to escape sanction for his failed test later in the year.¹³ Young stated:

“After considering this new evidence, the independent Tribunal in the Ulirach case reversed its previous finding of a doping offense. Ulirach’s eligibility and ATP ranking points were reinstated. The Ulirach Tribunal’s analysis of the strict liability provision under ATP rules is particularly important. The Tennis rule, like the IOC rule, provides that athletes are absolutely responsible for the presence of any prohibited substance in their urine. This is certainly fair in the case of contaminated supplements because any player who chooses to continue taking supplements is, assuming a known risk of a positive test. The Ulirach Tribunal found, in the unique circumstances of that case, that the strict liability rule was trumped by the general doctrine of equitable estoppel. The Tribunal found that because the ATP trainers had violated the ATP’s own warnings and had given players supplements, the burden shifted to the ATP to establish that the supplement distributed by its trainers were not contaminated with 19-norsteroids. The ATP could not meet this burden and as a result the Tribunal dismissed the case.”¹⁴

The CAS appeal was therefore withdrawn. The Ulirach Tribunal were mindful of the perception

12. Dr C. Ayotte, cited by Young, *ibid.*

13. The Greg Rusedski case formed no part of this WADA review and is detailed at greater length in “Tennis—When Strict Liability is not So Strict” [2004] I.S.L.R. 65.

14. Young, above, n.5 at p.8.

that their decision would impact severely on the sacrosanct principle of strict liability and in attempting to pacify these fears concluded:

“This Tribunal decision should not be read as a qualification of the concept of strict liability as that notion has become understood under the *CAS lex sportif*. This situation is, in the experience of this Tribunal, and we suspect in the experience of the world of sport, a unique set of circumstances. These reasons should not be read as placing any sort of qualification on the strict liability principle because of an assertion by an athlete that the analytical results being challenged may have arisen because of a supplement made available to the athlete by competition sponsors or its sports federation. There has been extensive investigation by the ATP in this matter for which it should be commended for the integrity with which it conducted itself. To the ATP’s credit and with considerable courage it voluntarily undertook in the face of a very perplexing set of facts to investigate and ultimately implicate itself in the problem in which they and the players found themselves. The principles applied in this case are not to be read as a qualification or refinement of the principles of strict liability.”¹⁵

The importance of the principle of strict liability is illustrated by former Olympic champion and current chair of London’s bid for the 2012 Olympics, Lord Coe, who in the wake of the Dwain Chambers decision,¹⁶ opined:

“While the rule of strict liability—under which athletes have to be solely and legally responsible for what they consume—must remain supreme, one cannot help but feel queasy that, as he starts his two-year ban, Chambers was caught in the crossfire of a war that was obviously a skirmish between the sport’s authorities and a dubious laboratory. *However, we cannot, without binding reason and cause, move one millimetre from strict liability—if we do, the battle to save sport is lost.*”¹⁷ (Emphasis added)

Furthermore, commenting on this case and in particular on the sidelining of strict liability, Dr Ayotte explained in a letter to Richard Young:

15. Ulirach Tribunal report, cited in Young, above, n.5 at p.10.

16. Chambers was found guilty of taking an illegal steroid and banned from athletics for a period of two years, despite his argument that it was unknown to him how the banned drug, (THG), had got into his system.

17. S. Coe, “We cannot move from strict liability rule”, *Daily Telegraph*, February 25, 2004.

“I have come to accept my work in this field because I am entirely and morally satisfied with its outcome, globally and in each individual positive case. I feel differently here. This is a very unique situation. For the first time in my career I doubt that it is fair to apply the strict liability rule in these cases.”¹⁸

It is clear that it required very special circumstances to persuade the appropriate authorities to depart from this principle. However, this was the path that the ATP chose to take, opening themselves up to abuse of this humane concession in future cases. It must be questioned whether this was a wise path, particularly when it is remembered that the ATP, although being the governing body of the men’s tour is in effect also the union of the players, and therefore it may be argued that they have a conflict of interest in protecting the careers of any player found guilty of a doping offence.

Following the exoneration of the players involved, further analysis determined that the electrolytes handed out by the ATP trainers could not be responsible for the positive and elevated test results. The WADA report states:

“Further information that has been made available to WADA during the carrying out of this inquiry reveals that there continue to be near-positive results with the same fingerprint. *This only accentuates the fact that it could not have been the electrolyte supplied by the ATP players during the period August 2002-May 2003 that led to the positive analytical results.* If that is the case, and there seems to be no evidence to the contrary now, then the exonerations were clearly based on an incorrect factual finding. The facts as now known could not have supported the shifting of the onus of proof to the ATP nor could they support the application of the principle of estoppel. It is regrettable that the true picture and the full evidence were not available at the first hearings where the decisions were made.”¹⁹ (Emphasis added)

With this in mind, the decision to exonerate the players appears to be dangerously flawed. The justification for the decisions to ignore the principle of strict liability was that the ATP could have themselves, through their trainers have caused these test results. With this theory in tatters, and yet the ATP unwilling or unable to revisit the decisions, the authority and reputation of the governing body of men’s professional tennis has suffered a severe blow. WADA continue:

18. Dr C. Ayotte in Young, above, n.5, Annex 4.

19. WADA, above, n.3 at p.13, para.19.

“Under the strict liability principle which is, and must be, the bedrock of any anti-doping program, it is not ATP’s responsibility to track the source of any elevated or positive result. It is for the player to prove how the substance gets into his/her body.

Again, ATP, being a player association, understandably wants to assist its members in detecting such source. It is clear that now that the estoppel theory is no longer sustainable the ATP should be in a position to prosecute any positive case even if it has not been able to identify the source of contamination, if indeed there is a single source.”²⁰

Where this saga leaves the principle of strict liability in general and more specifically doping control in tennis in general is open to question. The authority of the ATP, despite their protestations has been severely damaged, and their departure from strict liability is a course of action that they appeared to be too willing to undertake. Whilst the WADA report may have criticised some of the dealings and reasoning of the ATP in their investigation of these cases,²¹ it did thankfully in no way cast doubt upon the integrity of the ATP. They did nevertheless heavily criticise the willingness of the organisation to readily accept the defence put forward by the players and the procedures under which the ATP pursued their enquiries:

“Principles of law must be based on facts. When the facts are incorrect, then the principles can be incorrectly applied. It is WADA’s considered view that this is one of those situations.

There is no issue of lack of integrity in the ATP investigation, nor any question of bona fides in the way it was conducted, nor in the conclusions of the investigation. The ATP took considerable steps and incurred considerable expense to try to establish the source of the positive analytical results. The result, however, is that because the matters were dealt with so quickly, there was not one of the cases which went through a normal arbitration process, there was not one player whose evidence was heard on oath or tested upon cross-examination before a Tribunal, nor were any of the experts so heard. Under the circumstances, and in hindsight, that is regrettable.”²²

Whilst the reasons for the apparently common test results remain a mystery, an adherence to the principle of strict liability must be maintained. The position we have at present is that any player who is

found to have a test result of the manner of these 43 tennis professionals merely has to align his case with those and he will ultimately be exonerated, as was seen with Greg Rusedski. As was pointed out in the WADA report, only one player originally raised the possibility of the electrolytes administered by the ATP trainers as having actually caused their failed drugs test, and only once it had proved successful did other players then embrace the defence.

Clearly something inexplicable has happened in relation to drug testing in the world of men’s professional tennis and the ATP, to their credit, are pursuing an answer, seemingly at great expense.²³ However, as pointed out by WADA, this pursuit is probably not the most productive use of time or resources:

“The ATP has informed WADA that this fingerprint continues to be found in samples from male tennis players. It is WADA’s view and recommendation that the topic be the subject of immediate research, and WADA suggests that collected and retained samples be used as part of such research.

The continuation by ATP through another Commission to hunt for a source might be endless, and may not be the wisest use of funds. The ATP might be wise to allow research of a scientific kind to occur, and to persuade its players to consent and co-operate to such a project so that independent researchers might carry it out as soon as possible.

WADA carefully considered the possibility of recommending participation in any further inquiry commission. In these circumstances, it is WADA’s view that such a commission, while well-meaning, will not have the power or jurisdiction to obtain evidence sufficient to locate the cause or causes. The expense and resource required for it would be better applied to research.”²⁴

Until the source of these common test results is uncovered, it is essential for the integrity of anti-doping control in sport that the ATP reaffirm their commitment to the principle of strict liability. If they fail to do this, then the men’s professional tennis tour risks being thrown into complete disrepute. The only realistic and enforceable alternative to strict liability would be to declare an amnesty on all drug abuse in sport, and therefore to legalise all performance enhancing substances. This is a route that the sporting world and indeed society at large is at present unwilling to countenance and therefore is an argument to be pursued at a later date.

20. *ibid.*, at p.19, para.3(b).

21. *ibid.*, at pp.10–12.

22. *ibid.*, at p.14, paras 23–24.

23. Through investigation via a further commission.

24. WADA, above, n.3 at p.20, para.6.