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**DOPING in the UK:  
ALAIN AND DWAIN, RIO AND GREG - NOT GUILTY?**

in *Sport in Society*, 9

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Athletes are not quite like ordinary citizens. ‘Ordinary’ laws and moral principles apply to athletes as much (or as little) as anyone else – but athletes are subject to another set of considerations *just because* they seek to enter the co-operative enterprise of competing with and against others in sporting contests. As ‘contractors to contest’, they must accept certain constraints in order to count as acceptable opponents.

One such putative constraint is that against doping in sport. Much has been written on the theory, facts and morality of doping, and on the justification for banning it. In Britain, the chief sources of study and comment seem to have been Grayson 1999, Waddington 2000, Houlihan 2002, and articles from the *Journal of Philosophy of Sport*, including those collected in Morgan & Meier 1988, and from collections edited by Tamburrini & Tännsjö, 2000 and 2005.

This essay is an attempt to explore the issue of doping in sport via applied ethics, showing how complicated and messy individual cases can be, and how our judgements about them are coloured by a range of moral possibilities and intersecting contextual features. Sometimes the sheer weight of competing considerations, together with the uncertainty of empirical determinations, overwhelms our ability to arrive at conclusions acceptable even to ourselves – sometimes there just aren’t any clear-cut answers.

The paper, then, will address issues of the relation between theory, empirical evidence, background scientific assumptions, the ethics of sports and sports rules, and the context-dependence of our judgements. It will do so via an examination of four recent cases involving British athletes, Alain Baxter (skiing), Dwain Chambers (athletics), Rio Ferdinand (football) and Greg Rusedski (tennis). These cases present us with very different though overlapping features, which open up a wide range of issues for consideration. It will explore the adequacy and morality of the actions of the athletes and their support teams, and of certain rules, procedures, decisions, and judgements surrounding these cases. The outcome will be assessments of the relative innocence and guilt of each athlete in respect of a variety of factors.

In order to set the scene for our four cases, let me very briefly address some of the central questions.

***Why do athletes take drugs?***

There are many reasons given for taking drugs, which refer to the supposed benefits of doping:

- Enhanced performance (direct and indirect)
- Decreased recovery period, allowing more intensive training
- Masking the presence of other drugs
- Making the weight
- Staying the course (simple endurance - e.g. long-distance cycling)
- Psychological edge (promoting the athlete's confidence)
- Keeping up with the competition (coercion - pressure to follow suit)

### ***Why do we think it is wrong to take drugs?***

#### *1. Pre-competition agreements*

The primary wrong lies in simple rule-breaking. The rules function as a kind of pre-competition agreement which specifies an athlete's eligibility to compete and his rights, duties and responsibilities under the agreed rules. What's wrong with doping is the secretive attempt to evade or subvert such a 'contract to contest', an explicit example of which is the Olympic Oath, by which athletes swear that they have prepared themselves ethically, and will keep to the rules. To subvert the contract to contest threatens the moral basis of sport, jeopardises the integrity of the sporting community and erodes public support and trust.

However, the rules themselves require a basis of justification, since the anti-doping rules must appeal to some issue of principle in addition to rule adherence. Considerations advanced include the following:

#### *2. Unfair Advantage*

Arguments against performance enhancement through doping are not simply arguments against performance enhancement, since that is what athletes constantly seek to achieve by training, coaching, nutrition, the application of sports science, etc. Neither is the argument simply against performance enhancement by means which confer an unfair advantage, since many legal means are beyond the resources of most countries. Rather, the argument is specifically against unfair advantage conferred by illegal means.

#### *3. Harm*

Many argue that doping may be harmful, because the substances are inherently harmful, or because they have been administered without medical supervision, or because they have been inadequately tested. Further, it is argued that harm to other athletes is caused by the coercion they feel to follow suit in order to maintain competitiveness.

#### *4. Social Harm*

With the huge expansion in the market for drugs in gyms and fitness clubs, there is now an emerging claim for a further wrong: that, by modelling dope as a lifestyle, athletes contribute to the social problem of thousands of sport, fitness and bodybuilding fans consuming substances

whose long-term effects are unknown. Athletes, it is said, should be more aware of their social responsibility.

### ***Why do we ban doping?***

It is one thing to say that doping is wrong, and quite another to ban it, which requires the apparatus of testing, judicial procedure and enforcement. So alongside such principles we see various rationales for testing and enforcement, including:

- Fairness Preservation (against unfair advantage)
- Athlete Protection (against harm to health and reputation)
- Retribution and punishment.
- Deterrence via detection.
- Lifestyle prescription
- The 'role model' requirement

But there are also two kinds of arguments against a ban. The first is 'empirical', suggesting that we cannot test effectively and fairly, because:

- there is inadequate coverage (not enough resources for testing and testers, or not enough support from civil authorities)
- the tests not good enough (one test for EPO had only 92% accuracy, and the cycling federations were afraid to have their decisions tested in court, since they could have been ruined by one court action)
- athletes with the best knowledge and resources know how to avoid detection, which is why the testing procedures catch so few (there is a suspicion that, out of the relatively few cases of detection, there is a relatively large proportion of cases where the athlete was convicted of some very minor infraction, or on a technicality, or for a non-performance enhancing substance, or where there is a reasonable doubt that the athlete did anything wrong at all)
- there are many cases which seem to be simple mistakes

The second kind of argument is 'moral', suggesting that we should not ban on grounds of infringement of liberty and should not test on grounds of invasion of privacy. This kind of argument would also point to the many cases of injustice in the history of testing and enforcement, and to the tyranny of value and lifestyle prescription.

### ***Why isn't it just down to individual choice?***

Some argue that a ban is simply parentalism - that we cannot justify interference in the individual athlete's decision-making processes. Tamburrini, for example, says:

*... the ban on performance-enhancing methods constrains the professional activities of athletes, and ... the reasons often advanced to support that constraint do not stand criticism* (Tamburrini, 2000, p. 215)

However, Schneider (2005, pp. 88-89 in draft) argues that the 'individualistic' view fails to give adequate recognition to the private/public distinction. It seems to suppose that any individual's 'private' views and decisions (such as to engage in doping, or to seek performance-enhancing

genetic technology) are privileged, and should be taken into account by any existing institutions (such as sports practices). Schneider objects that such private views should not be allowed to 'trump' the values expressed in and through the practice - that there is a 'public' view here that should take precedence.

In this she is surely right - there has to be, as a minimum, a debate between the representatives of the practice and intending reformers. Individual reformers cannot simply expect that those who defend the cherished values of an established practice will (or should have to) accede to individuals' private views as to what will benefit the practice. Why should people who want 'clean' sport have to accept dopers?

The history of sports development is littered with examples of reformers, dissenters and break-away factions who founded new versions of a sport, or even new sports, which seems to suggest that some established practices were successful in 'defending' themselves against incursion. Some have suggested that this is the way forward for dopers: they should announce themselves as dopers, and set up their own versions of various sports. But this won't solve our problem, because there is no guarantee that some dopers won't refuse to identify themselves as such, since they presently only succeed in their plans if they're secretive. Just as at present, there is no guarantee that any individual would deny himself the advantage of pretending to be clean whilst secretly doping. If he doesn't respect the anti-doping rules now, why should he respect the clean/doped distinction later?

So I accept, with Schneider, that sports practices are not 'private', and need not be constrained to take account of everyone's private preferences. They are communal practices, and encapsulate certain shared views, adherence to which is a prerequisite of entry and participation. Of course, rules change - sometimes as a result of pressure from within the practice, and sometimes from without - but only (in some sense) *with the consent of the practice*.

However, to call them 'public' practices overstates the case, since it suggests that the sports practices themselves are (or should be) sovereign, against private interests. This ignores the fact that they exist within and cannot (or on occasion should not be allowed to) remain isolated from wider society, which may legitimately take a view on the desirability of allowing a certain sports practice, or a certain activity within a sports practice. For example, in the UK, duelling and bare-knuckle boxing are illegal; and within rugby certain bodily assaults have become actionable.

So, instead of simply the public and the private realms, we must draw a distinction between the private realm, the practice realm and the public realm, which permits us to recognise that there may be issues which highlight the relationship between the practice realm and the public realm. There may need to be a conversation between views arising within and representing the sports practice, and views reflecting changing and developing attitudes in wider society - for example on such matters as the use of drugs and body technologies. Public attitudes have changed dramatically in recent years, and this can be expected to have some impact on sports practices.

### ***The Ethical Basis of the Idea of Sport***

Let me comment upon a positive feature of the debate about performance-enhancing drugs. The drugs debate has forced everyone to think in ethical terms, and to appeal to ethical principles.

But if we take these appeals seriously, and follow them through, there are some interesting consequences. Assume that drug-taking in sport is wrong, and ask the question: 'why is it wrong?' The answers we have given above were all stated in terms of some ethical principle that is claimed to be central to our idea of sport, which drug-taking allegedly violates. Let us revisit two of those arguments and see where the underlying principles lead us:

1. *Unfair Advantage or Inequality of Opportunity*

Some say that what is wrong with drug-taking is that it confers an unfair advantage. Notice that no-one can (sincerely) make this objection to drug-taking unless he is sincere in his commitment to sport as embodying fairness, and as disallowing unfair advantages as being against the idea of sport.

However, many of those who hold this objection against drug-taking seem perfectly prepared to allow various kinds of very obviously unfair advantages. For example, only certain countries are able to generate and enjoy the fruits of developments in sports science; and only certain countries are able to take advantage of the knowledge and technology required for the production of specialised technical equipment. Is this fair? The company that produced the so-called 'moon-bikes' for the US cycling team in the 1984 Olympic Games later shamelessly marketed them under the slogan: '*The Unfair Advantage*'.

Let's widen the issue: it seems to me a fact that international competition is grossly unfair, because some countries have the resources to enhance the performance of their athletes, and some don't. Those nurtured within advanced systems might take time to consider the extent to which their performances are a function not just of their abilities as individual sportspeople but also of the social context within which they have been nurtured. Have not their performances been enhanced? Are not their advantages unfair?

Consistency requires that we revisit the whole idea of disadvantage, and also inequality. For example, why not include more 'ethnic' sports in the Olympic programme, rather than continuing the present Western hegemonic domination? Kabbadi, a sport popular on the Indian sub-continent, is a sport based on the game form of 'tag', which is known in most societies in the world. It requires minimal facilities and no equipment. Why should we westerners not have to learn such sports and compete on those terms, rather than collude in the disappearance of indigenous sport forms in favour of our own curriculum?

Anyone who relies on 'unfair advantage' arguments in the case of doping must also revisit and reconsider such arguments in other contexts.

2. *Rule-Breaking, or Cheating*

Others say that drug-taking is wrong simply because it is against the rules of competition. But pace-making is against the rules of the IAAF, although it is allowed so as to facilitate record-breaking attempts in the commercial promotion of media spectacle, and no-one is disqualified. In fact, runners can earn large fees for performing this 'service'. If officials so readily flout their own rules, they are poorly placed when athletes do the same, or when critics demand better justification for the rules that presently exist.

In a world where the values of sport are sometimes forgotten under the pressures of medal-winning and the marketplace, it ill behoves those responsible to turn a moralistic eye on athletes. Why should athletes take any notice of the moral exhortation of those who have profited from the commercialisation of sport, when they see the true values lived and expressed by those around them?

The drugs debate has made everyone stand on ethical principle. But think how sport might develop (what it might become) if those principles were not merely used opportunistically over the drugs issue, but rather were acted upon consistently in the interests of truly fair competition and equality of opportunity. I think that there is an opportunity here to open up debate again about the ethical basis of sport, so that our sports practice (and the sports science and training theory that support it) becomes rooted in firm principles that encapsulate what we think sport *should be*.

### *A Thought Experiment*

#### 1. *The Harmless Enhancer*

Imagine that, along with my colleague Leo Hsu, I have succeeded in producing a pill whose entirely natural ingredients are derived from herbs to be found only in a remote part of Taiwan, and so far unknown to Western medical science. The ingredients have been used in traditional medicine for 3000 years without harmful effects, but our new (and secret) applications have revealed hitherto unsuspected (and remarkable) performance-enhancing effects. Are there any reasons why we should not use it?

This imaginary scenario ‘takes out’ a certain kind of medical critic, whose complaints are mainly related to harms - actual or supposed, demonstrable or alleged. This scenario *ex hypothesi* requires us to imagine a substance which is (a) proven to have no harmful effects and which is (b) a proven performance-enhancer: and it asks us to consider the question “What, if anything, could be wrong with taking a harmless enhancer?”

#### 2. *The Undetectable Enhancer*

Imagine further that such a pill is completely undetectable in use. This imaginary scenario ‘takes out’ the intrusive and (let’s not forget it) enriched pharmacologists - for their role has been both to develop performance-enhancing drugs and also to develop ways of detecting them! This scenario *ex hypothesi* requires us to imagine a substance which is (a) in principle undetectable in use and which is (b) a proven performance-enhancer: and it asks us to consider the question “What, if anything, could be wrong with taking an undetectable enhancer?”

### *Responses*

My main answer is that, despite the fact that they were harmless and undetectable, it would be wrong to take these enhancers if they were banned, because it is simple rule-breaking. If anyone seeks to evade any rule for advantage, especially when they do it knowingly and secretly, then that is the clearest possible case of cheating. True, there may well be arguments outstanding regarding the justice, relevance or importance of the rule itself; but so long as the rule is the rule

we ought all to obey it, on pain of sanction. To get into the Ritz, men must wear ties. Whether or not this is a stupid or trivial requirement is irrelevant to whether I get into the Ritz. There are plenty of places to eat, but if I want to eat at the Ritz, I had better wear a tie.

Sports competitors prepare and compete on certain more or less precise understandings described by the rules. Any attempt to evade these rules for advantage is cheating. It is an attempt to subvert the very basis upon which alone the activity is possible; it is to pervert the logical and moral basis of the whole social practice of sport. *This* is the greatest harm perpetrated by doping cheats: not the alleged medical harm to self or the coercion of others, but the harm to self and others caused by behaviour which threatens the social practice of sport itself.

Now we must turn to a detailed consideration of our cases, where we shall see some of these features, reasons, principles and arguments in application. We shall also be able to assess each case against the notion of secretive evasion of rules for advantage, and to ask whether the behaviour exhibited threatened the social practice of sport.

## **ALAIN BAXTER**

### **The Case**

Before his slalom competition on the last day of the Winter Olympic Games in Salt Lake City, the Scottish skier Alain Baxter took the American version of a Vicks nasal spray decongestant which, unlike the British version, contained lev-methamphetamine. As a result of his positive test he was denied the only skiing medal ever won by a Briton in the history of the Olympic Games. He appealed to the International Olympic Committee's (IOC) Court of Arbitration for Sport (CAS), which heard the case at the Winter Olympic Games in Salt Lake City in October 2002 and which cleared him of intending to cheat. However, his result was not reinstated, nor his bronze medal.

### **Principles**

#### ***1. Strict liability***

Strict liability is the legal principle that identifies fault and assigns liability regardless of circumstances. A landlord must not allow his premises to be used for drug trafficking. If his tenants traffick, he is liable, regardless of whether he colluded in it or profited by it, or whether he was even aware of it. Claiming ignorance or stupidity is no excuse.

Another example from sport is that of Romanian gymnast Andrea Raducan, who had a gold medal withheld at the Sydney 2000 Olympics after testing positive for pseudo-ephedrine, having taken two Neurofen tablets for a headache under the supervision of team doctor Oana Ioachim, and having entered this on the requisite declaration form.

We can see why we need such a principle as strict liability. It denies an excuse to those who should have taken more of an interest, or who should have taken more care. Its justification must be that, without it, many guilty defendants would escape serious charges, e.g. of corporate



negligence or drug smuggling. Without it, almost anyone could offer an excuse – to allow people to claim lack of intent, ignorance or stupidity would open the floodgates.

In sport, the argument is that even if an athlete unknowingly took a doping substance, or took it without any intent to gain an advantage, other athletes should still be protected from any advantage he might have gained (see the comments of Flint et al, 2003, on the CAS adjudication).

But strict liability can sometimes produce what seem to be very harsh and unjust outcomes for some individuals in particular cases. Many unwitting drug mules languish in jails as a result of having drugs planted on them by people they thought were friends - because ignorance or lack of intent are no excuse.

The same applies to Baxter. The facts are not altogether clear, but some versions say that he failed to take medical advice, presumably because he was confident of the contents of the spray, the British version of which he used frequently without concern. He said that he had been bought an inhaler that was not his usual brand by his brother, which he did declare to doctors. But then,

*“I saw the inhaler I wanted to buy in the first place because I have been using it since I was a kid. At the time it never crossed my mind it was different to the British one. In my mind I had no reason to get it checked.”* (Davies, 2002b)

However, it seems that the American version of the Vicks spray is “clearly marked on the American anti-doping website’s list as one to avoid” (Davies 2002a), so that if Baxter had thought to check, the information was available. Thus it could be said that Baxter’s fault (if any) lay in his failure to take steps that were open to him in order to protect himself, such as submitting all of his medications to medical authority, and double-checking substances for himself - but this in itself shows the lengths to which athletes must now go to avoid prosecution.

Craig Reddie, British Olympic Association chairman and IOC member, commented:

*“The BOA is very disappointed with the decision reached by the IOC. We take the view that Alain has suffered a dreadful penalty.  
“No way can Alain be described as a ‘drugs cheat’.”* (Davies, 2002b)

The main rationale for testing is commonly supposed to be fairness preservation (against unfair advantage). However, Baxter and Raducan are both considered to have gained no advantage at all, and yet they have been punished by the denial of their just reward. How can this be justified? Only if we assert the primacy and overwhelming importance of the principle of strict liability in fairness preservation, and the instrumental use of these athletes in the service of deterrence.

## **2. Restorative Medication**

This raises the issue of whether (and, if so, when and how) we can distinguish the performance-enhancing and the ‘restorative’ (or ‘compensatory’) usage of drugs - the issue of dope *versus* medication.

In one sense, all restorative/compensatory usage is also performance-enhancing. It enables me to perform to the best of my ability on the day, despite the fact that I have, say, a headache or a cold. But let us distinguish this sense (as ‘restoring’ my performance to its optimal) from that of an ‘additional’ enhancement.

The problem is that it is difficult to determine the threshold according to which am I restored, and above which my restoration in fact tipples over into a possible additional advantage. If a decongestant ‘opens my pipes’ when I have a congesting cold, won’t it also open them a little more than usual when I’m perfectly healthy, thus conferring an advantage?

One example of the effect of this difficulty is that of Rex Williams, then President of the World Snooker and Billiards Association, who was banned in 1977 for using beta-blockers, which he was using on medical prescription for a heart condition. That is to say, he needed the beta-blockers in order to be ‘normal’. In effect, the, the doping regulations made it impossible for him to compete on equal terms with others, presumably because an additional benefit could not be ruled out.

Such cases have led to the development by WADA of an International Standard for Therapeutic Use Exemptions (TUE), which sets out the criteria for the granting of a TUE, which must be applied for no less than 21 days in advance of an event, and must involve no additional enhancement of performance, the absence of a reasonable therapeutic alternative and evidence of significant need. (See WADA website).

### ***3. The science of the substances***

Often, the science of the particular substances involved goes unchallenged or unexplored, when the whole case rests upon dubious science. In Baxter’s case, for example, we should note that there are two varieties of methamphetamine. The ‘lev-methamphetamine’ variety found in Baxter’s sample (and used in some nasal decongestants) is commonly thought to have no performance-enhancing properties, and the manufacturer, Proctor and Gamble, sent a statement to this effect to the CAS. However, the International Olympic Committee (IOC) does not distinguish that from the ‘dextro-methamphetamine’ variety, a stimulant known also as ‘speed’, which may enhance performance by improving reaction times. The IOC bans both, and Baxter’s test would not have distinguished between them (see Cairns, 2002, pp. 121-2).

In the case of Raducan, IOC President Jacques Rogge publicly conceded that her use of the drug was not performance enhancing, but nevertheless supported the punishment, saying “the rules are the rules.” And it is clear that the IOC does not have to prove the performance-enhancing qualities of a particular drug in a particular case (see Flint et al, 2003, p. 955). All that the CAS has to do is to apply the IOC rules that ban certain substances.

But the cases of Baxter and Raducan make it clear that there is a huge responsibility on the shoulders of those who compile the list of banned substances, for there is a massive gap between the propositions:

- substance X has performance-enhancing qualities
- substance X was found in Y’s body
- Y’s performance was enhanced

#### ***4. The science of minute quantities***

Many athletes have been detected with the tiniest quantities of banned substances, where the tiniest quantities are enough to convict. Is this fair? One view says that testers can't know that tiny traces come from tiny doses - for they might be tiny traces of larger doses taken much earlier. Since there is no way of estimating the size of dose from the size of trace, unless there is supplementary information available, the strict liability approach is the only way to catch offenders.

A similar problem arises in the case of comparisons of minute quantities with similarly minute quantities that are within the range of the naturally occurring. A study at Aberdeen University suggested that a combination of food supplements and strenuous exercise could produce levels of nandrolone above the acceptable, even up to 20 nanograms-per-millilitre, whilst 5 nanograms-per-millilitre would indicate a positive test.

When margins are so small, and the consequences of a positive test so significant, we ought to be *very* careful before announcing guilt. Remember, we are relying absolutely on the accuracy and reliability of the testers, the tests themselves and of the procedures used.

#### ***5. The substance in the event - blanket testing***

In addition to the science of the substances in general, we might also investigate the actual performance-enhancing capacity of a particular drug in a particular event. Graham Bell, the performance director for British skiing said,

*“A drug like methamphetamine would not help an alpine skier. At the end of the day it's about skill and staying on your feet, and there's not a pill that's been invented that could make you ski better.”* (Bell, 2004)

Now, Bell might be right or wrong about this - but it does raise the question of 'blanket testing' (testing everyone for everything). If a substance is considered not to be performance-enhancing in a particular event, to insist on tests and sanctions in that event suggests that another rationale for testing is in fact operative, and not the principle of fairness preservation. I can think of three possibilities:

- (i) that the testing procedures are such as they are in order to fit the convenience of the testers (it's presumably easier for them to apply one set of rules for everyone)
- (ii) that such a practice is considered in some sense fair to all athletes
- (iii) that there is some moral rationale operating, in addition to fairness preservation - for example the assertion of the social responsibility of the athlete as role model.

But these are never the overt rationale used by testing authorities, who rely for their legitimacy on anti-performance enhancement, based on the fairness preservation rationale.

#### **Outcome**

No-one thinks that Alain Baxter tried to cheat, nor that he knowingly took a banned substance, nor that he gained any advantage on the day (apart from the restorative benefit of the medicine).

Although he was not guilty of those things he still lost his bronze medal, but he was banned from competition for only 3 months by the skiing federation (the FIS), presumably in view of the many mitigating factors in the case (Cairns, 2002, p. 122). The psychological effect of the accusations and procedures on the athlete, however, is impossible to calculate (see Hart 2004).

## **DWAIN CHAMBERS**

### **The Case**

Dwain Chambers, a British track athlete and European 100 metres champion, tested positive for Tetrahydrogestrinone (THG), a form of anabolic steroid banned under the IAAF doping regulations, during an out-of-competition test at his German training base on 1<sup>st</sup> August 2003. Chambers did not deny that the drug was present in his urine sample, but denied knowingly taking a banned substance. Instead, he blamed his Georgian coach Remi Korchemny and his nutritionist Victor Conte of Balco Laboratories, Los Angeles, who he says were responsible for his nutritional and supplemental regimes (see Hart, 2003).

### **Principles**

#### ***1. Strict liability again.***

Chambers protests his innocence - but then he would do so whether innocent or guilty, for he has his family, his friends and the outside world to face. However, protestations of innocence are useless against the strict liability provision. Sebastian Coe (2003) writes:

*Chambers' mitigating plea is likely to be one of ignorance. It will not cut much ice. The genesis of his difficulties may well lie in the hands of a Georgian emigre, now a resident of the United States, but the responsibility for what he has consumed, even unwittingly, I am afraid, lies fairly and squarely with the sprinter.*

*For the International Association of Athletics Federations or UK Athletics to depart one millimetre from the legal concept of strict liability is to drive a coach and horses through the last few years of hard pounding in the war against drugs.*

#### ***2. Secrecy and Intent***

Don Catlin, a molecular pharmacologist and director of the Olympic Analytical Laboratory at the University of California at Los Angeles, who led the effort to isolate and analyze THG, says that scientists familiar with androgenic steroids and their illicit use in athletics were not at all surprised by the discovery of THG. He says,

*We've known about designer steroids for many years, but up to now we've never been able to prove that someone is actually making them ...*

*The fact that we finally characterized one is certainly no reason to celebrate. I'm much more worried about the next THG out there that we haven't found yet. (Ashley, 2004 - and for a detailed account of the process, see Longman and Drape, 2003)*

The idea of the ‘designer steroid’ clearly indicates that there do exist people at a high level in the supply chain whose whole intent is to provide substances for performance-enhancement which will evade the current regulations or the means of enforcing them. Such secretive evasion of a rule may be thought to compound an offence, for it indicates a level of forethought and planning. If the athlete fully understands that he is consuming such a substance, then he shares fully in the intent to deceive which forms the basis of his cheating.

Richard Pound, President of the World Anti-Doping Agency (WADA), speaking after the announcement by UK Athletics of Chambers’ punishment, said:

*We are pleased that the process has produced this result of a two-year ban, which is in compliance with the World Anti-Doping Code for a first offense for the use of steroids. This is a particularly important decision because a disciplinary committee has now confirmed that THG is, in fact, a banned substance related to a steroid named on the Prohibited List. THG is a steroid created specifically to enhance sports performance and allow competitors to cheat. A two-year sanction for its use is completely appropriate.*  
(<http://www.wada-ama.org/en/t1.asp?p=41275&x=1&a=89361>)

### **3. The Role of the Coach (and other support staff)**

David Moorcroft (in Knight, 2003a) said that UK Athletics had included £300,000 in its annual budget since 1999 to fight doping cases, and he wanted to see the fight against drugs to be taken beyond the athlete. He said,

*The rule of strict liability means the athlete is responsible for what is in their body but I would like to work with the IAAF and the World Anti-Doping Agency to try and unravel why these things happen.*

*I’ve felt for a long time that behind every positive case are people around the athlete. The sport needs to figure a way that we could either investigate the coaches and agents or make strict liability apply to the support team around an athlete.*

This raises questions of responsibility in two senses. Firstly, if coaches, doctors or managers are actually responsible for suggesting, supplying or prescribing dope or supplements to their athletes, then surely they, too, should be held responsible for any offences against the rules of the sport. Secondly, if they are to be seen in a supervisory or management relation with their athletes, then they should take some responsibility for advising and protecting the athlete.

Chambers was managed by John Regis, the former European 200m champion, who heads the athletics division of the Stellar Agency. Regis admitted (in Knight, 2003a) that, despite his role in looking after Chambers’ career, the athlete had been “largely unprotected”. However, there are small signs of change. Istvan Gyulai, the IAAF general secretary said:

*“There is a clear intention within the IAAF to look behind the scenes and there is a growing conviction that it is not just the athlete who carries the blame. We already have a rule which empowers the ruling council to take action against any person - a coach, agent, doctor or manager - who helps with doping. It’s never happened before but it can*

*be at the discretion of the council and involve a ban for a year, two years or for life.” (in Knight, 2003c)*

#### **4. Safety**

Some substances have been developed so rapidly and recently that there cannot have been time for the usual trials conducted on substances intended for use on humans.

Dr Olivier Rabin, the science director of the World Anti-Doping Agency, is reported as warning that Chambers could suffer effects beyond the two-year ban imposed, since taking THG has possibly put his long-term health at risk.

*A new drug can cause toxic damage to the liver, kidneys, brain and blood. That’s why drugs go through extensive tests and have to be approved by an ethical committee. (Knight, 2004)*

*To me it’s insane. This went from the test tube to the athlete. There is a huge risk. Who knows what will happen in the future? It is extremely scary that this substance never had any testing on animals before being given to elite athletes, who have in effect acted as guinea pigs. (Mackay, 2004b)*

#### **5. Retrospective testing**

With the invention of a new test for THG, some authorities have been keen to re-test athletes whose collected test samples have been retained by the testing authority. For example, in the United States re-tested samples from the national athletics championships in June 2003 revealed four THG ‘positives’.

It has been suggested that this is unfair, on three grounds: firstly, simply that it is retrospective, secondly that it puts the athlete in ‘double jeopardy’, and thirdly that there is no precedent.

(i) The first argument goes as follows: retrospective legislation is widely regarded as unsatisfactory, since citizens cannot be expected to act in accordance with law that has yet to be written. We act on the law as it is, and we should be judged accordingly. Applying new law retrospectively is unfair. So, similarly, it is unfair to re-test retrospectively, hunting for new substances only recently discovered.

This argument does not hold even in the case of legislation in general. Murder is against the law, now and in the past. The invention of DNA profiling permits us to identify past murderers with new methods, and there is no unfairness in that. Similarly, steroid doping is against the rules, now and in the past. The invention of testing for the steroid THG permits us to identify past dopers with new methods, and there is no unfairness in that. Retrospective testing is not retrospective legislation.

(ii) The second argument notes that the principle of double jeopardy states that a person cannot be tried twice for the same offence, nor be convicted of different crimes arising from the same

conduct. Because of this, some have seen re-testing as problematic, since it puts the athlete twice in jeopardy:

*At the heart of the legal debate is whether samples that have been previously given the all-clear can then be subjected to a second analysis, a process that would go against the principle of 'double jeopardy' that is enshrined in British law.*

*"The issue with retrospective testing is whether we have got the right to test a negative sample a second time," said a UK Sport spokesman. (Knight, 2003c)*

However re-testing is not re-trying. Re-testing is about detection, so as to bring someone to 'trial' for the first time. Double testing is not double jeopardy.

An important side-issue to note here is that one of the chief exceptions to the principle of double jeopardy is in respect of the professions. If a member of a profession (such as athletics) commits a crime and in so doing also infringes the disciplinary code of his profession, he may be liable to be dealt with under that code as well as by the law. So an athlete considering using a Class A drug does indeed face double trouble.

(iii) The third argument notes the lack of precedent, and lack of an agreed policy across sports and across countries. Knight (2003c) says:

*The legal debate is further complicated by the fact that UK Sport carry out drug tests across 41 sports, each of which has its own set of rules. They are consulting with administrators from all the affected sports to establish a common policy, though the fact that there is currently no provision for re-testing samples in any of the sports' regulations has only added to the headache.*

In addition, there is confusion at the international level. Some governing bodies have ordered the immediate re-testing of stored urine samples (for example in athletics and swimming, where samples collected at the sports' respective world championships in Paris and Barcelona were sent for a second analysis). However, FIFA, the world governing body of football, decided not to re-test samples on legal advice. So it does seem as though we stand in need of adequate codification of the rules, and their consistent application.

## **6. Individual and team guilt**

It is one thing to face the consequence of one's own folly or misfortune, and quite another to visit it upon others. Where a guilty individual takes part in a team sport, the effect on other competitors has to be considered.

*A ban for Chambers will mean he and his team-mates, Darren Campbell, Marlon Devonish and Christian Malcolm, being stripped of their silver medal from the World Championships 4 x 100m. Knight (2003c)*

This was indeed the outcome, but our immediate response is to ask why they should suffer, too, when they are guilty of nothing, not even of knowledge of Chambers' doping. Presumably one argument is that, even though they were innocent, they cannot be allowed to benefit from his cheating.

Some people think that this principle extends from 1 in 4 to 1 in 11. When Rio Ferdinand was still playing for Manchester United, whilst waiting for the hearing of his case regarding his missed dope test, Sepp Blatter (President of FIFA, the world federation of football) suggested that Ferdinand should not be playing club football. He said: "I thought he was suspended. You would have to nullify all the matches he has played." (Davies C, 2003)

On precisely this point, however, UEFA (the European governing body) did not act. Recently, Wales lost to Russia in a two-leg play-off for a place in the Euro 2004 finals in Portugal, but the Russian Yegor Titov failed a drug test after the first leg in Moscow, and the Welsh FA submitted a written complaint to UEFA, asking for the result to be overturned so that Wales could take Russia's place at the finals. UEFA declined to nullify the result, and Russia went to Portugal, minus Titov.

So we seem to be left with no clear directive here, although I will return to this theme in the next section. Meanwhile, let us conclude by noting that at least one member of the Welsh team, Robbie Savage, thought that UEFA's decision was fair enough. He said:

*"Over the two legs they beat us fair and square and they deserved to go through to the finals ... it's the biggest disappointment I have ever had in my career."*  
(Hytner, 2004)

## **Outcome**

Chambers received a two-year ban, and it is doubtful whether he will return to athletics. His case, however, raises issues that sports authorities have not yet been able to resolve satisfactorily.

## **RIO FERDINAND**

### **The Case**

Rio Ferdinand was found guilty by a Football Association tribunal of failing or refusing to provide a sample for UK Sport anti-doping officials on 29 September 2003 at Manchester United FC's Carrington training ground. After being informed that he was to be tested, he says that he forgot, left the ground and went shopping. The testing period was two hours, according to the officials, and Ferdinand rang after an hour and a half to say that he had forgotten about the test, but was now available. The testers decided that there was insufficient time for him to attend, and he was deemed to have missed the test.

On 19 December he was banned for 8 months from all competitions, including England's Euro 2004 campaign, and fined £50,000 (see Kelso, 2003).

### **Principles**

#### ***1. Failure to attend***



As with breathalyser or blood testing for alcohol in the motoring context, a dope test refusal in sport carries a presumption of guilt. In addition, a failure to attend or to make oneself available for testing is often counted as a refusal.

In principle, it might seem harsh to punish Ferdinand when no doping offence has been proven, and when there is good reason to suppose either that he committed no offence or that his offence did not confer a performance advantage (and I shall discuss both possibilities in due course). However, we can see the reason why a refusal should be treated so seriously, for it denies the authorities a legitimate opportunity to secure evidence of the offence. Similarly, we can see the reason why test evasion should be treated as seriously as refusal, especially when conditions of testing are laid out in advance, and why a failure to attend should be treated as an evasion unless exceptional and attested reasons are provided.

In Rio's case there seem to be a number of possibilities:

*(i) He forgot. It just slipped his mind.*

This was Rio's defence, but it simply beggars belief. If true, it would have been an astounding lapse in player responsibility. How could a senior professional footballer have failed to notice the importance and seriousness of the occasion, to the extent of leaving the ground with his driver, and going shopping?

In any case, it is surely an astounding lapse in supervision of the player. Presumably, this is the responsibility of UK Sport's anti-doping officials (although there is an issue here of whether or not Manchester United's own officials permitted the UK Sport people adequate access to the ground and to players). But Manchester United's officials were also responsible for an astounding lapse in protection of their player, of their investment of £30 million in Rio, and of their club's season, which nose-dived when Rio was suspended.

If *(i)*, then both he and the club deserve his fate, for their incompetence and unprofessionalism in not realizing the seriousness of the situation, the requirements upon them to act, and the probable outcome of non-compliance.

*(ii) He deliberately avoided the test because he did not appreciate the importance of the requirement to be tested*

It is the responsibility of Football Association, the Professional Footballers' Association (which is the players' trade union), UK Sport and MUFC both to educate players as to the requirements and the likely punishments, and to conduct the testing in an idiot-proof fashion. It seems that they all failed in some respect.

Professional players also need to adopt professional attitudes, though. There is a possibility here that a high-ranking player behaved in a casual or even arrogant manner, believing either that he was so important as to be above the law, or that the punishments were unlikely to be severe.

In mitigation, however, there was no consistent FA policy to rely on (see examples later), there was evidence of leniency in prior cases, and apparently no player support facility available anywhere - at the FA, the PFA or MUFC.

*(iii) He deliberately avoided the test because he believed that the test would reveal something in his system that he wanted to conceal*

To test this suggestion, we must consider the nature of the hypothetical ‘something’ ...

*(a) a banned substance?* Here we are reliant on the science of the situation. Rio apparently tried to be tested that day, but the testers had left, so he was tested two days later, when he tested negative. Is there a substance such that a 48 hour delay would make a difference in detection? If not, it looks as though Rio was innocent of taking a performance-enhancing substance. However, not all banned substances are performance-enhancing.

*(b) a recreational drug?* Again: is there a substance such that 48 hours would make a difference? If so, a suspicion might arise that the reason for test avoidance could have been to conceal use of a recreational drug. Now we have to raise the question: what should drug tests test for? Of course, UK Sport will test for everything on the banned list, but this undermines the primary rationale that testing is for fairness preservation, and the denial of unfair advantage.

On this occasion, we had a ‘blanket’ test, and MUFC seem to have had the right to see the results, which immediately introduces other rationales, such as the social responsibility (‘role model’) rationale and the ‘lifestyle’ rationale.

If a recreational drug were involved, and the player sought to avoid detection by postponing the test until 48 hours later, this seems a small enough offence. If it had been possible to see this as simply an internal disciplinary matter, it could have been settled between player and club. As it is, a lack of clarity, combined with the intrusiveness of anti-doping rules, might have been factors in the more serious procedural offence having been committed (failure to take the test).

*(c) the presence of a medical condition or a prescribed medicine?* Medical matters immediately raise issues of privacy, and Rio reportedly rang his medical centre from his mobile phone before going shopping. There might have been many reasons for this, but one possibility, presumably, is for medical advice on what might be revealed by the test. After having been reassured, it would then be possible for him to offer to take the test after all.

Alternatively, it would have been useful if he could have negotiated, on a basis similar to medical confidentiality, that any non-relevant substance should not be revealed to MUFC or anyone else. But it is very unclear how a player might go about such a negotiation, and it is not clear that anyone advises or reassures players on matters such as these. We might ask whether there is a code of practice, a hotline, or a support service available for players, or someone to turn to.

If Rio was seeking to preserve privacy on a medical matter, I think most people would feel sympathy on at least privacy grounds. It is unfortunate that there was no clear and agreed prior procedure for dealing with such issues, which had been adequately communicated to players.

## ***2. Performance-enhancing and ‘Recreational’ Drugs***

Discussion of drugs in sport takes place in a context of social concern regarding the use of 'recreational drugs' in the general population, but the source of concern is different in each case. We must distinguish the fairness preservation rationale against drugs in sport from the various rationales put forward against recreational drugs, and we must not confuse performance-enhancement and recreational uses of drugs by sportspeople.

But this is just what UK Sport did, in testing for all substances. It is almost as if they were acting as agent for the club management's overseeing of the player's lifestyle. This seems to me to over-aggrandise the anti-doping agency's role and remit. It certainly extends it well beyond the performance-enhancement rationale that gives it unquestioned authority and such wide-ranging powers. Such unwarranted intrusion into players' private lives prejudices its fragile legitimacy, which is based on an acceptance of its independent pursuit of fairness preservation.

This point was not widely recognized in the discussion until the Mutu case. Adrian Mutu, the Romanian striker playing for Chelsea, tested positive for cocaine in October 2004 and was sacked by his club. Although there seems to be some unfairness here, since drug testing in the workplace is generally seen as contrary to human rights provisions unless health and safety is an issue, the sports doping regulations permit little opportunity for sports employers to make the distinction between performance-enhancing and recreational drugs, since both are on the banned list (see Kelso, 2004).

Thompson (1982, p. 315) says: "We would not tolerate urinalysis ... as a condition of employment in a bank or a factory." So why do we tolerate it in sport? It must be justified in sport only because of the contract to contest - the pre-contest agreement between athletes to compete without performance-enhancement by drugs.

However, there is a different rationale under which highly paid professional athletes might reasonably consent to operate. Although such close attention by employers to one's private life would not be tolerated in most spheres of life, there is something different about a very highly rewarded public figure who has signed a particular form of contract. Some contracts even include prescriptions against alcohol and late nights, and most players believe that the reward is worth the discipline.

Finally, there is the 'role model' argument - that players should set a good example, and the 'practice preservation' argument - that players should not bring the game into disrepute. However, both of these would be more persuasive

*... if clubs and regulators took a similarly firm stance over the regular abuse of alcohol, on-field aggression, open disrespect for authority, and allegations of sexual aggression, that have become a feature of the game. (Kelso, 2004)*

### ***3. Suspension Pending Enquiry or Appeal***

After his failure to attend for testing, Rio continued to play for his team. However, in other professions, the accused is not allowed to continue activity whilst under enquiry relating to conduct, or appeal. There are two competing principles at work here: one says that the individual is innocent until proven guilty; the other says that he should be suspended pending the outcome.

The first protects the rights of the individual, whilst the second protects the integrity of the practice, in this case, football. We should ask what happens if Rio is guilty, and Manchester United have won games with him playing? It seems excessive to render all the results null and void - but it seems weak to allow them all to stand.

One suggestion is that we should assess the extent to which the player contributed to the result. He might be thought to have been just one of eleven, playing the kind of role in the victory that one of the substitutes might well have done - in which case there does not seem to be much of a case for overturning the result. On the other hand, if the player had scored the winning goal, or had scored three, he might be thought to have been the deciding factor. (The discussion of individual and team guilt in the Dwain Chambers case refers here.) In Rio's case, he seems to have been an important factor in his team's defensive performance, and so we must ask what has been his likely effect on the teams he played against whilst under enquiry and appeal. What if, for example, he contributed significantly to the defeat of a team that was subsequently relegated, or knocked out of a competition?

It is difficult to see how we can deal with such matters on a case-by-case basis, because such a procedure presents enormous difficulties of calculation and comparison and raises the spectre of injustice across cases. A clearer resolution, and one that respects football, would be to insist upon suspension after a failed or missed drugs test, followed if necessary by a swift enquiry or appeal.

That is to say, Rio should not have been playing in those games at all.

#### ***4. Clarity and Consistency of Testing Procedures, Protocols and Penalties***

The Football Association admitted that they had been caught out by Rio Ferdinand's drugs case. David Davies, the FA's executive director, said of their testing procedure: "It is apparent to some of us it was not introduced with people who wouldn't turn up in mind. We didn't envisage someone failing to take a test" (Davies C, 2003). Neither had the FA paid sufficient attention to the timescale and efficiency of their procedures (for one thing, the appeal procedure was long and cumbersome), to rule clarity, transparency of process, and awareness of their rules, protocols and penalties.

We can ask questions, too, about the management of the actual testing event itself. Ferdinand was deemed to have missed the test, even though he called the testers within 90 minutes of his appointed time. Who was it who decided that two hours was the limit, that 30 minutes was insufficient time for Rio to attend, and that there was to be no discretion on the matter? Doubtless they are very busy people, but why could the testers not have waited a few more minutes for Rio to arrive, given the gravity of a failure to attend? FA General Secretary Graham Kelly reports that the FA only later drew up 'revised procedures to include this two-hour stipulation'.

Next, we can point to many inconsistencies in treatment of individuals. In 2002 FIFA allowed the FA let off Billy Turley, who had tested positive for nandrolone. Edgar Davids and Jaap Stam were both banned by UEFA for 5 months for testing positive for nandrolone, whilst Rio got 8 months for a failure/refusal followed shortly by a negative test.

The harsher treatment of Rio may be related to the aim of making an example of a high-profile player – of setting the standard for future cases. Two members of the three-man tribunal which convicted Ferdinand sat in a case involving the little-known Manchester City player Christian Ngouai, who committed the same offence earlier in the year, and who received only a £2,000 fine. Ngouai, also, was allowed an hour's grace to complete the test.

Even the UEFA guidelines currently suggested a minimum six month ban for a first offence, but at the time FIFA was in discussions with WADA. So the harsher treatment may also be related to the national and international politics of football. The FA had recently appointed a new chief executive who, it could be argued, used the high profile of Ferdinand to set an example for a firmer stance on disciplinary issues (McCarra, 2003). At the same time, the IOC and WADA were struggling to persuade governments to contribute their share to the funding of WADA, and to persuade some of the more influential and powerful international sports federations to agree to the WADA code, so as fully to internationalise its provisions and to render clear its guidelines and coherent its punishments. FIFA president Sepp Blatter's calls for a greater punishment for Rio attest to the growing rapprochement of FIFA with WADA, since FIFA was a notable non-signatory to the WADA code. Blatter was working with Dick Pound, chair of WADA, towards an agreement whose importance to them both can be assessed by the fact that it was announced at a special ceremony at the FIFA Centennial Congress in Paris in May 2004. At that time, IOC president Jacques Rogge praised Blatter for FIFA's compliance. He said: "The agreement with WADA sends a strong signal to other international sports organisations and national governments."

Finally, we should record the many inconsistencies in rules and their application across sports. The IAAF controls athletics, and issues a two-year ban for a first drugs offence, and a life ban for a second. All of the footballers discussed would have been banned for two years if they had been athletes. It could be said that such inconsistencies are a direct result of the powerful professional federations of football, tennis and cycling protecting their valuable assets, their professional athletes, and calculating their financial losses over an extended ban. In addition, their athletes are willing and able to defend themselves in the courts, so the federations fear bankruptcy if successfully sued by their own athletes.

The athletes have a right to know what to expect from the disciplinary process (see Hansen, 2003). On the evidence of prior cases, Rio had every right to conclude that any punishment would be nugatory. If he (or anyone advising him) had reason to believe that an 8-month ban was even a remote possibility, the whole event might have been differently managed.

##### ***5. Player Protection - The Role and Responsibilities of the Club and Others***

Rio Ferdinand should have been better advised and protected by those around him. Sebastian Coe said:

*But how could a club with their wealth and resources allow this situation to develop? Once the truth emerged, they were outraged that they couldn't shut up shop. But this was not just an impertinent question from a journalist that could be slapped away. Beyond missing his test, I don't necessarily think Rio was guilty of anything more than being involved with a club who could not see the importance of this issue. Manchester United*

*... implied that random testing is some sort of personal intrusion. They're living in la-la land. (McRae, 2004)*

WADA was set up in 1999 to develop international co-operation in the fight against doping. It is now backed not only by the IOC, but also by more than 70 governments, and most of the International Sports Federations. It wants a two-year ban for a first drugs offence, and a life ban for a second, as in athletics, and a strict liability policy. Why did those in charge of football in England, and those whose well-paid responsibility it was to protect the player and the club's asset, not see this coming?

## **Outcome**

Since Rio is palpably innocent of taking any performance-enhancing substance, and the temporary amnesia argument is unconvincing, a not unreasonable supposition is that he deliberately evaded the test because he wished to avoid detection of some non-performance-enhancing substance in his system. The irony is that it is not clear why such a substance should be any of the business of UK Sport, the FA, or his club.

He has been punished because failure to attend = test refusal = presumption of guilt of using a performance-enhancing drug. Although we can be pretty sure that he was innocent of that, because of the subsequent negative test, nevertheless the UK Sport anti-doping system ground out its result. If he was merely seeking to avoid the club's disciplinary procedures for the use of a social drug, or to preserve his privacy over a medical matter, he nevertheless ran foul of the performance-enhancing drug detection machinery.

As it is, the consequences were very serious indeed. Not only did a player in his prime - some think the best defender at the 2002 World Cup - spend many months in enforced idleness, but also his club suffered badly. A few weeks after his ban, Manchester United had the worst defensive record in the Premier League, dropped 12 points behind the leaders, and eventually lost their champions title. And although his country put up a fair performance at the Euro 2004 championship we can't really estimate the consequences of his absence.

Rio is now back playing for club and country, the FA has improved its procedures, and FIFA has signed up to WADA. But it is hard to believe see how the FA, the PFA, MUFC and Rio's agent and advisers come out of this with any credit at all.

## **GREG RUSEDKI**

### **The Case**

In 2002, the Czech tennis player Bohdan Ulihrach was found to have taken the steroid nandrolone and was banned for two years by the Association of Tennis Professionals (ATP). However, other players who gave samples at around the same time also showed elevated nandrolone levels and an enquiry by an IOC-accredited laboratory in Montreal revealed that all these cases had a 'common analytical fingerprint' – i.e. were likely to have come from the same ingredients. These ingredients were mineral supplements and electrolytes that had been provided

by the ATP trainers to players on the ATP tour. Ulihrach's sentence was quashed, and charges were dropped against six other unnamed players.

On July 23<sup>rd</sup> the British tennis number two, Greg Rusedski, tested positive for the steroid nandrolone on the ATP tour in Indianapolis. His was one of 47 positive samples from the top 120 players, all of which demonstrated the 'common analytical fingerprint', such as was unknown in any other sport, thus indicating a single source from within tennis. 43 cases were not investigated further. However, Rusedski's sample was one of four taken two months after the trainers had been instructed to desist, and so the ATP moved to prosecution. Rusedski announced his involvement publicly, denied any wrong-doing and declared his intention to defend himself.

### ***1. Strict liability***

If the principle of strict liability were to hold, the question arises as to why the ATP saw fit to quash Ulihrach's sentence and to drop charges against others. Many athletes, including Alain Baxter, as we have seen, have been able to tell a story which might have provided a good excuse for the existence of banned substances in their bodies - and yet they have still received punishments, presumably on the ground that any relaxation of the principle would open the flood-gates to imaginative athletes and clever lawyers.

The first point to notice, then, is that in the case of Ulihrach and others the ATP breached the principle of strict liability.

### ***2. Acknowledgement of a wider authority***

The ATP would not have been able to do this if it had been willing to acknowledge a wider authority in doping matters. Here it is useful to ask what reason there is for more than one governing body in world tennis, over and above the obvious economic reasons. For the origins of this scandal lie not only in the incompetence of the ATP, but also in an arrogant isolationism, which presumably preserves its power over the game. The ATP were all at once: provider of the banned substance, provider of the agents who supplied the substance to the athletes, employer of the athletes, policeman, judge and jury.

Without outside checks or referral to any authority other than itself there is a rich context here for confusion and injustice. Some of this could surely have been avoided if there were a unified world administration for tennis, and if tennis had signed up to the provisions of WADA. The ATP could even have taken the issue to the Court of Arbitration for Sport in Lausanne in 2002, instead of trying to deal with it 'in-house'. It didn't do so, and thus the Rusedski case was an accident waiting to happen. This raises serious questions about the governance of tennis at the highest level.

Parsons (2003) reports that the International Tennis Federation, who deal with offences involving Grand Slam tournaments and Davis Cup matches, were furious at the ATP because their high-handed approach was bound to suggest that tennis does not take drug-testing as seriously as other sporting bodies, whereas top professionals (e.g. Agassi, in Parsons 2004 and Shine 2004) argue that tennis is among the best-policed sports.

### ***3. Equitable estoppel***

The ATP presumably realised that it had placed itself in an impossible position, having accepted that it had provided the contaminated supplements in the first place, and that at least the majority of its athletes who tested positive were not guilty of any intentional wrong-doing. Of course, this alone would not have been a defence against the strict liability rule, but Ulihrach's ban was overturned in July 2003 on the grounds of 'equitable estoppel', the legal principle that says that a person cannot be prosecuted for an offence that is shown to be the fault of the prosecuting authority (see Hart 2004). Now we can see the importance of reference to authorities other than oneself, for the defence of equitable estoppel was available to the player only because the ATP was both an agent in the offence and the prosecutor. This is a direct result of tennis not signing up to WADA, and being policed by itself. Rusedski, too, relied upon this defence.

#### ***4. Reliance on science (of nandrolone in the body, and of quantities)***

It is difficult to see how we can have good law if it is based on flawed or inadequate science. And, of course, less than reliable science also brings dope testing, and sport itself, into disrepute.

Dr Wheeler, from St Thomas' Hospital, London, is quoted as saying that there is evidence that after a competitive event or hard training, nandrolone levels go up above the limit. Nandrolone can also easily enter the body through contaminated hydrating substances or through contaminated meat; and legal dietary supplements are broken down by the body to produce the same substances created when nandrolone is broken down in the body. Also, nandrolone traces can persist within the body for up to 12 months. Finally, Wheeler states that 'the nandrolone research that was carried out was on a few individuals who were not athletes.' (1999)

One ruling in 1999 of the Court of Arbitration for Sport in Lausanne supports these misgivings and said that, despite the WADA ruling that 4 nanograms of nandrolone per millilitre of urine, 2 to 5 nanograms was a 'grey area', and that such a level 'could be the result of endogenous production of the human body.' (see Goodbody 2004, p. 42). Such findings suggest that too strict an application of the rules might well result in injustice, and to avoid it we need to be as sure as we can be that we can rely on the science behind the rules.

#### ***5. Supplements***

Since Rusedski's case rests on allegations of contaminated supplements, it raises the general issue of supplements. Richard Quick, a swimming coach who thinks of himself as someone "on the cutting edge of what can be done nutritionally and with supplements" is quoted as claiming that his athletes can do "steroid-like performances", trying to "keep up with the people who are cheating without cheating". (Sokolove, 2004, p. 53)

And there are other 'artificial' means of enhancing performance, such as the altitude chamber which, whilst not illegal, severely test our intuitions as to what should be permissible.

*A whole team of long-distance runners sponsored by Nike lives in a much more elaborate simulated high-altitude dwelling in Portland, Oregon. (Sokolove, 2004, p. 53)*

So comprehensive and elaborate are the plans for nutrition, supplementation, enhancement and doping that, from the point of view of the athlete, it can be difficult to see where one begins and



the other ends. There has also been some official confusion over the relative seriousness of a particular drug, for example in cases involving modafinil. When Kelli White, who was a training partner of Dwain Chambers, tested positive at the World Championships, the International Association of Athletics Federations (IAAF) classified modafinil as a mild stimulant.

*The classification meant White faced disqualification and losing her 100 and 200m gold medals - but no ban. The new WADA list of prohibited substances, published on Jan 1, however, includes modafinil as a major stimulant. (Knight, 2004)*

So was she taking a mild or a major stimulant? Did she take it or was she given it to take? Did she really appreciate what she was doing and what the consequences might be?

*Kelli White ... lost her medals and prize money after a drug test showed that she had taken the stimulant modafinil. "After a competition", she said, "it's hard to remember everything that you take during the day." (Sokolove, 2004, p. 52)*

How revealing – this suggests a regime designed by a team of support staff, to which the athlete submits. Even ‘clean’ athletes take a cocktail of pills that they hope will compensate for the supposed advantages of the banned substances taken by the cheats who risk detection. Greg Rusedski took such a cocktail every day, with a detailed and systematic diary – and we should assume that this is the rule rather than the exception amongst elite athletes, many of whom tread a fine line between the legal and the illegal.

## **6. The Effect on the Logic of a Competition**

As with Rio, Greg Rusedski was free to continue playing competitive tennis until his tribunal, held eight months after his positive test. We have contradictory intuitions and traditions operating here. On the one hand, he’s ‘innocent until found guilty’, and should not be penalized in advance of the tribunal. On the other hand, a serious charge often brings an immediate suspension from duty pending investigations. For, if guilty, he would have been allowed to play as a cheat.

In the Baxter case, his Olympic bronze medal had to be returned, and the next best competitor was elevated - but what can the organizers of a tennis tournament do if a cheat wins a tournament? In like fashion, the cheat’s result could be expunged, and other players advanced in the rankings. But, in this case, not only would he have won the contest; but also he would have beaten players in earlier rounds who were then knocked out, so that they could not make their mark in further rounds. Someone might reasonably claim, as the England football team regularly does in the World Cup after meeting Brazil, “If he hadn’t beaten me in an earlier round, I might well have gone on to win.” To expunge not only his tournament win, but all of his results, would make a nonsense of the whole tournament.

### **Outcome**

Rusedski was found not guilty at tribunal, and left without a stain on his character. Doubtless he will continue to keep a check on the supplements he takes, and will get them regularly tested for himself.

## CONCLUSION

Sometimes, we want the law to be clear-cut and evenly applied, but what we have seen through a consideration of these cases is that there is often genuine complexity and difficulty in the context and in the detail of the particular case. Outcomes are often determined not just by the rule, but also in the interpretation and application of the rule, which requires reference to background moral principles. In turn, those principles can only themselves be applied with reference to empirical features of the case, and also to facts of the matter. Mitigation, too, is almost wholly determined by context and by the features of the particular case.

What we learn from this is that justice does not run on rails. There is no simple reading-off of the correct disposal of the case from the rules governing it. Rather, it is a matter of thoughtful judgement, the weighing of all the elements present, and the bringing to bear of wider moral principles. We also learn that, if we carefully consider a range of cases, we can test both them and ourselves for consistency of approach and consistency in application of principle, and thereby extend our capacity for thinking through cases and arriving at just disposals.

We need to be constantly vigilant that consistency across cases is preserved. In order to achieve this, we should be on the lookout for any more general outcomes that might be applied across cases, and asking whether any more systematic view is achievable.

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