APPEAL - 613

DETERMINATION AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**STEPHEN JOHN WOLFE**
APPLICATION NO:	**A30/08/613**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR S L PYNT (MEMBER)**
DATE OF HEARING:	**26 JULY 2004**
DATE OF DETERMINATION:	**5 OCTOBER 2004**

IN THE MATTER OF an appeal by Mr S J Wolfe against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 19 April 2004 imposing a 12 month disqualification for breach of Rule 177A of the Australian Rules of Racing.

Mr T F Percy QC with Ms A Blackburn, instructed by Dwyer Durack, appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

Background

Mr Stephen John Wolfe was the trainer of the unraced two year old SAVAGE CABBAGE which ran in an Official Barrier Trial over 400 metres at Belmont Park on 28 October 2002. Nearing the winning post SAVAGE CABBAGE fell. Its jockey Jason Oliver sustained fatal injuries from the fall. SAVAGE CABBAGE broke its off foreleg and was euthanased. A

post trial urine sample taken from the euthanased horse disclosed the presence of the prohibited substances phenylbutazone and oxyphenbutazone.

On 5 December 2002, following a Stewards' inquiry, Mr Wolfe was disqualified for two years for a breach of Australian Rule of Racing (AR) 177A. That Rule states:

> *'When a horse is brought to a racecourse or recognised training track to engage in a trial or test for the purpose of obtaining a permit to start in a race whether after suspension or otherwise and a prohibited substance is detected in any sample taken from it prior to or following the trial or test, the trainer and any other person who was in charge of the horse at any relevant time may be punished.'*

AR 1 includes the following definition of punishment:

> *'"Punishment" includes the suspension of any licence, disqualification and the imposition of a fine and "punish" has a corresponding meaning.'*

AR 196(1) is in the following terms:

> *'(1) Any person or body authorised by the Rules to punish any person may, unless the contrary is provided, do so by disqualification, or suspension and may in addition impose a fine not exceeding $75,000, or may impose only a fine not exceeding $75,000.'*

Mr Wolfe appealed to this Tribunal (Appeal 585). The appeal was against both the conviction and the penalty of disqualification for two years. On 1 December 2003 the Tribunal:

(i) by a unanimous decision dismissed the appeal against conviction; and

(ii) by a majority decision quashed the penalty of two years disqualification and referred the matter back to the Stewards to redetermine the appropriate penalty to be imposed after taking into account the reasons of the majority and such further relevant evidence, if any, as the Stewards thought fit.

The Stewards commenced to rehear the matter on 13 February 2004. Further sittings were held on 19 March and 19 April 2004. At the final sitting the Stewards announced that the appropriate penalty was a disqualification for 12 months. The reasons stated by the Chairman of Stewards were as follows:

> *'The need for redetermination was largely based upon the discreet and isolated point relating to a question of causal link between the presence of the phenylbutisone (sic) in SAVAGE CABBAGE and the catastrophic fracture the horse sustained during the running of the trial. A careful examination of the Tribunal's findings revealed that whilst the reasons for returning the matter to the Stewards revolve around an issue of causal link, it remains for the Stewards to determine an appropriate penalty in all the circumstances of the case.*
>
> *To this end, it is worthy of noting, that in determining the question of penalty, the relationship if there is to be one between the presence of phenylbutisone (sic) and the catastrophic fracture is but one of the many points of significance in assessing*

the question of penalty. Many of these were addressed in detail in the original Stewards' determination and were subject to various grounds of appeal. Whilst it is unnecessary in light of these circumstances to restate the lines of reasoning in respect to these other matters, it is worthy to reiterate the significant findings made by the Stewards in the first instance as they are critical an any assessment of penalty in this case.

In re-considering penalty, the Stewards have taken in account all the evidence and submissions initially placed before them in previous hearings and all evidence and submissions in this rehearing. The reasons for determination of the Racing Penalty Appeals Tribunal has been a guiding factor with the Stewards with the redetermination of penalty. Mr Wolfe and his Counsel have been given the opportunity to address the Stewards, call further witnesses and place any further evidence before the Stewards.

PENALTY FINDING

BRIGINSHAW STANDARD

For clarification purposes, the Stewards sought legal advice on the Briginshaw standard. After considering that advice the Stewards interpretation of the Briginshaw Standard is as follows.

Although the standard of proof always remains as proof on the balance of probabilities, when important matters of serious consequence to a person fall to be determined, a greater degree of clarity of evidence and satisfaction with that evidence, is required before serious findings are to be made.

The Chief Justice of the High Court, Sir John Latham, in the Briginshaw case, having stated that the standard of proof to be applied is proof on the balance of probabilities, expressed the higher care to be taken in this way:

"... subject only to the rule of prudence, that any Tribunal should act with care and caution before finding that a serious allegation such as that as adultery is established."

Consequently the Stewards, in considering serious findings, should act with care and caution and should consider whether it is prudent to make such a finding. I believe the Stewards have applied that standard to this matter.

DORSAL METACARPAL DISEASE

In the Stewards opinion, Savage Cabbage was suffering from dorsal metacarpal disease or shin soreness prior to and during the trial on 28 October 2002. Whilst this was found by the Stewards and accepted by the Tribunal, under these circumstances, it is appropriate to refer to the following evidence.

Dr. Judith Medd, WATC Veterinarian

In her statement Exhibit E under post mortem examination Dr. Medd states:

"Directly below the carpus on the left fore dorso-proximal cannon area a moderate bony prominence a "splint" or "buck" was visible and palpable. Another bony prominence was visible and palpable lower down the cannon bone on the dorso-medial aspect nearer to the fetlock joint."

At page 21 of the Stewards transcript, Dr. Medd states:

"But of the left fore limb when I looked at that, I did observe two separate of these bony lumps which I concluded at the time were most likely evidence of this condition known as dorso metacarpal disease ..."

Dr. A. O'Hara, Veterinary Pathologist, Murdoch University

Dr. O'Hara, a senior lecturer in Pathology at Murdoch University conducted a detailed examination of the forelimbs of Savage Cabbage. In her comprehensive report Exhibit V, Dr. O'Hara states

"that both forelegs were found to have moderate, multi-focal nodular osteopath: presumptive chronic periosteal reaction."

Dr O'Hara's histological report states:

"The fore limbs were found to have moderate multi-focal chronic polyphasic periosteal new bone formation in cortical bone modelling and remodelling."

"So the final diagnosis for the right forelimb and third metacarpal bone: a severe, acute, transcortical comminuted, compound fracture: probable catastrophic stress fracture. And moderate to marked, multifocal, chronic, polyphasic periosteal new bone formation and cortical bone modelling and remodelling"

The radiographic reports state in part:

"The soft tissue swelling and periosteal new bone formation in the dorsal cortex of the left third metacarpal (bucked or sore shins) although this distribution is unusual (more commonly over the mid-diaphysial region)."

And further:

"The presence (sic) [of] radiographically visible periosteal new bone formation indicates that the reaction has been present for at least twelve to fourteen days."

On the 29 November 2002 at the initial Stewards inquiry, Dr. O'Hara was questioned regarding the shin soreness of Savage Cabbage (page 153 Stewards).

Percy: As a result of your investigations, you discovered nothing that would indicate that the horse would necessarily have been displaying any outward or discernible signs of soreness prior to its death?

O'Hara: No, that's no (sic) correct because there was a periosteal bone reaction, most horses would be, one or two out of four were lame according to, you know, references that were cited. So he probably should have been lame.

Jockey Paul King

Jockey Paul King rode the horse GEEPEE for Mr. Wolfe in an earlier trial on the 28th October 2002. In Mr. King's opinion GEEPEE was shin sore and consequently did not push the horse out. The Racecourse Investigator, Mr P. O'Reilly, interviewed Jockey King and his statement Exhibit L the following exchange took place (page 55 pt7 – Stewards' transcript)

He said: Then come the trial on the Monday, rode my horse around the gates, had no, no problem at all with horse's action leading to barriers. Jumped out, went probably, sort of, probably 100 metres and then commenced to grab and sat on my horse til the end of the trial. In my opinion, the horse was shin sore. I don't know any vet call after the trial as to whether it came back a positive shin soreness or anything else, but I did tell Mr Wolfe I thought the horse was shin sore after dismounting.
I said: Alright, now, okay, now you didn't, you didn't ride that out? I'll just stop. (Phone rang). Alright now you didn't, you didn't ride that horse out because you felt it was shin sore?
He said: No, I don't ride horses, I don't ride 2 year olds out if they're shin sore. I just, once I feel they're action short in stride I sit up on them. I don't, in my opinion, I think 2 year olds don't need to be pushed out if they're shinny.
I said: Alright, now when you got back to the stalls Mr Wolfe made comment of your ride?
He said: I just said to Mr Wolfe that I thought the horse was shin sore. Mr Wolfe said it's not that shin sore and obviously I don't think he was overly happy that I hadn't pushed, overly happy that I…
I said: That's one each (phone rang.)
He said: Overly happy that I hadn't pushed the horse out in the trial. You know, obviously owners were there and wanted to see the horse sort of do its best, but like I've said, I don't push 2 year olds that if I feel they're shin sore.
I said: Alright, now, you were with Jason and you both rode horses for Mr Wolfe in the second trial?
He said: No, I rode one of Stan Bates in the second, Mr Wolfe had one in the second which was SAVAGE CABBAGE.
I said: Alright.
He said: As I was about to mount my horse, Jason was about to mount Mr Wolfe's horse which was directly next to me.
I said: Alright, and did you hear the instructions from Mr Wolfe to Jason, telling how…?
He said: The instructions were, yeah, the instructions for Jason were to make sure he pushed the horse right out.
I said: Right.
He said: He's words were "make sure you push this horse right out Jason."
I said: Right.
He said: And that's all, all he said to Jason, and then we commenced to sort of walk down towards the mounting enclosure paddock together and that's when I said, I didn't push the last one out because I thought it was shinny and Jason came back with "I reckon this is shin sore too." And that's all he said.
I said: Right.

All the afore mentioned evidence relating to dorsal metacarpal disease was stated in the original inquiry and formed the basis of the stewards conclusion was shinsore which was confirmed by the Tribunal's determination. It is important to make the distinction that this conclusion was not based upon expert scientific evidence alone but rather was made after considering all the evidence presented relevant to this point.

ANALYTICAL EVIDENCE - MR. A. STENHOUSE/DR. J. VINE

The evidence of eminent racing analysts, Allan Stenhouse and Dr. John Vine was highly significant and compelling in support of the Stewards contention that SAVAGE CABBAGE received a closer administration of phenylbutisone (sic) before trialling.

I refer to the following evidence:

Dr Stenhouse at page 118 of the Stewards' transcript states: ... by comparison with the response we got from this sample to the response we get, we got in the sample sent from the WATC, we could estimate that there was about 12 micrograms per mille of urine of phenylbutisone (sic).

Chairman: Can you put that 12 micrograms, what does that mean? Can you put that, is that a high amount, medium or low?

Stenhouse: That's a fairly significant amount, a high amount.

On page 120 of the Stewards' transcript: at point 6 Mr Stenhouse states:

Well I think, in essence, I've really given an opinion already. In that I am quite certain that we can't detect phenylbutisone (sic) out past two days, so the fact that we have found it quite easily would say, would to me mean, that this sample was taken within two days of, or sometime, you know, within two days, so it could even be earlier than two days of the administration.

Dr Vine on page 168 of the Stewards' transcript at point 2 states: ... in this particular case we did analyse a standard which contained 10 micro which was equivalent to 10 micrograms of phenylbutisone (sic) and on the basis of that we would say that this sample contains something in excess of 10 micrograms per mille of phenylbutisone (sic).

Chairman: Right, and in your experience, is that a high level?

Vine: It is a relatively high level, yes. It's difficult to be, again to be quantitative and to be precise about these things, but perhaps the best way I can put this into context, is to say that during the analysis of the sample, we found it was necessary to dilute the sample by 10 in order to obtain data that wasn't distorted by our analytical method.

Page 171 point 7 Vine: Yes, after a single dose of phenylbutisone (sic) you wouldn't normally expect to find phenylbutisone (sic) at four and a half days, not, over the test too, the methodology we employ.

Page 171 (sic) [172] Point 6 Dr Vine states: Well I don't, I hesitate to say that anything is impossible but you have to remember in this particular instance, we're not talking about just barely detecting this drug, we're talking about the finding of this drug in such a concentration that we had to actually dilute the sample for our instruments to give us proper readings. So, the sample was overloading the instruments.

As previously stated, the Stewards maintain, on the evidence before them, that SAVAGE CABBAGE had another administration of phenylbutasone (sic) closer to the trial date, a fact not seriously disputed by Counsel for Mr. Wolfe. At pages 73 point 2, Stewards inquiry:

Percy: Perhaps I could just say something here, Mr. Chairman, that the Racing Tribunal has found that it was quite open to this Tribunal to find that there was a much later administration, and we wear that.

After considering all this evidence, the Stewards believe that SAVAGE CABBAGE was shin sore leading up to and during the trial. Subsequently, it becomes apparent to the Stewards that reasons, not admitted by the Trainer, existed for the horse to be treated with phenylbutazone. Notably the trainers initial evidence in regard to the question of administration rested solely upon an administration made some 5 days prior to the trial in question for a rear leg injury. It was evidence that was steadfastly maintained by the trainer. Yet the expert evidence revealed that this admitted time of administration was not the administration which lead to the detection and that a significantly closer administration of the prohibited substance had occurred. In the absence of the expert evidence, clearly the trainer's evidence was potentially misleading in determining the reasons for the prohibited substances presence. The trainer's explanation for the prohibited substances presence has been proven to be incorrect for whilst he may well have treated the horse in the manner suggested by him, this is clearly not the reason why this horse returned the result that it did. There has been no evidence presented which explains how this second administration came to be made. Clearly it had nothing to do with the rear leg, as the trainer had not given any evidence relating to additional treatments being made for this reason. Yet the drug in question namely phenylbutazone, is a non-steroidal anti-inflammatory that is used in the treatment of shin soreness. So whilst the trainer readily acknowledged using phenylbutazone in the treatment of what was said to be a rear leg injury, he is unable to offer any explanation why this same drug was later again administered to the horse significantly closer to the trial. It is significant in this case as evidence existed, even prior to the trial, that this horse was exhibiting some signs of shin soreness. Virtually all that has followed since by way of autopsy and expert evidence has served to confirm the comments made by Jockey King and the proposition that this horse was shin sore, a position which was reached by the Stewards in the first hearing and accepted by the Tribunal. The absence of evidence relating to this second administration, which we now know must have occurred, is therefore of significance in the overall determination of this case.

CAUSAL LINK

The "causal link" question is the most complicated aspect of this case. Extensive evidence throughout this inquiry has been heard in relation to this specific issue.

The Stewards find that Savage Cabbage was suffering from dorsal metacarpal disease at the time of trialling. A post euthanasia urine sample taken from Savage Cabbage has revealed a high level of phenylbutazone and oxyphenbutazone. Phenylbutazone is a common drug used in the treatment of shin soreness. Savage Cabbage suffered a catastrophic fracture to the off fore cannon bone. The question that has to be answered is – are these facts connected and do they in a clear and cogent manner satisfy the Briginshaw principle to the higher standard?

There has been a great volume of evidence (Dr. Medd, Dr. Hilbert, Dr. Riggs, Professor Hutchins and Dr. Tobin) called before the Stewards examining all aspects of any possible links between various elements of this case such as, stress fractures, catastrophic fractures as a result of stress fractures, the significance or otherwise of phenylbutazone in these circumstances and scientific evidence relating to the examination of this horse's forelimbs. The compelling evidence that has evolved is that whilst this condition (shin soreness) was present at the time of trialling it cannot be said that shin soreness on its own has caused the catastrophic fracture to Savage Cabbage.

According to Dr. Riggs the catastrophic fracture was most likely the result of a stress (fatigue) fracture. Dr. Riggs stated at page 11 of the rehearing:

"I would assume that this represents a form of stress fracture, a catastrophic extension of a stress fracture."

Dr. Riggs believes that the location and geometry of the fracture makes him believe that this was a stress fracture gone catastrophic. At page 17 Dr. Riggs states:

"My belief that it's a stress fracture is based really on, as I've, I'll reiterate, that it's a, it is a spontaneous fracture and this would be a very difficult location to break simply by bending the bone, in other words, by a person applying a simple large force to the bone, it would be difficult to get the leverage to actually break it at that location. Of course, though, it is at a location where stress fractures are known to occur and it has consistent, morphological characteristics with other fractures I've seen at post mortem at this location and then as I said, there's the evidence of the periosteal reaction."

So whilst Savage Cabbage was shin sore and most probably suffering a stress fracture they were clinically unrelated events, that is, one condition did not necessarily cause the other. Drawing from that, and considering the evidence, it is not possible for the Stewards to say that a causal link has been established to the requisite standard between the shin soreness, the presence of phenylbutazone and the catastrophic fracture.

Much has been made of this question of "causal link" to the extent where it is perceived as being the overriding concern on the question of penalty. The Stewards acknowledge that the "causal link" had it been made, is a significant

aspect of the penalty. However, even in the absence of finding a "causal link" in the whole of the circumstances of this matter gives rise to a serious penalty.

Welfare of the Horse

Whilst much has been made of other factors applicable in the determination of penalty, it must be said that the Stewards place no lesser importance on the issue of the welfare of the horse.

In Western Australia, it has been policy and practice for a considerable number of years that all 2-year-old horses are examined and shins palpated prior to a race. Depending on the Official Veterinarian's report, such horses exhibiting signs of shin soreness are withdrawn from their respective races. These signs consist of bucked shins, soreness, pain and heat. There have been five withdrawals in the last 3 years. The Stewards introduced this policy, in conjunction and with the cooperation of the Trainers association to protect the welfare of the horse and rider and to protect the interests of the punter. Trainers are well aware of this policy.

Rules

Prior to July 2003, there was a local rule of racing that prevented a two-year-old horse if found to be shin sore from racing. Similarly, a two-year-old horse, which raced and was found to be shin sore was automatically barred from racing for 6 weeks. In a rule rewrite both rules were basically combined to read:

Local Rule of Racing 30A (c):

A two years old found to be shin sore will not be permitted, without the permission of the Stewards, to start in a race or a trial.

The thrust of the point that the Stewards wish to make is that trainers have clear responsibilities in relation to shin sore horses. Shin soreness is a constant, niggling problem for a trainer, interrupting a horse's racing programme, delaying it's ability to qualify to race and adding to the cost of training which is eventually is an added burden to the owner. However, these considerations can in no way vindicate a trainer from taking risks with unsound horses.

Savage Cabbage was shin sore at the time of trialling on 28 October 2002. The colt was presented to trial with a prohibited substance in its system. Mr. Wolfe openly acknowledges that he was aware it was against the Rules of Racing to present a horse with a prohibited substance in its system yet he presented Savage Cabbage to trial. A closer administration of phenylbutazone took place and did and potentially did have a masking effect on the shin soreness. This closer administration has impinged on the Official Veterinarian's ability to assess unhindered the condition of Savage Cabbage at trial time. Simply put, Savage Cabbage should not have been subject to the trial. No professional advice was sought. As this case so tragically illustrates, there is a very real need to err on the side of caution and that if a horse is showing signs of shin soreness or is shin sore that it should be properly evaluated by a professional and that horse is not exposed to further strain in the meantime, an approach advocated by Dr. Riggs. In this case there was no proper evaluation but instead a situation where in the final analysis

following a spontaneous catastrophic fracture it is revealed that the horse had in its system an exceptionally high level of phenylbutazone. The determination of this case is not an exercise of producing a scientific thesis concerning issues of shin soreness and catastrophic fracture, but to consider all relevant evidence.

In the Stewards opinion, a clear and serious message must be sent to the industry that despite the pressure that participants face from vested interests, the welfare of the animal must always remain a priority and even minimal risk is totally unacceptable.

SUMMARY

Mitigating Factors

The Stewards again identify the mitigating factors in this matter, those being:

1. *Mr Wolfe's guilty plea.*

2. *Mr Wolfe's unblemished record in relation to breaches of the prohibited substances rules in a career spanning some eighteen years as a trainer.*

3. *The remorsefulness shown by Mr Wolfe.*

4. *The commitment of Mr Wolfe to the industry and his personal circumstances.*

In arriving at a penalty in this matter, the Stewards find that:

1. *Savage Cabbage was shin sore when presented to trial on the 28 October 2002.*

2. *Savage Cabbage had an administration of phenylbutazone closer to the trial than stated by Mr. Wolfe.*

3. *Mr. Wolfe was fully conscious that it was contrary to the Rules of Racing to present a horse to trial with a prohibited substance in its system. Had Mr. Wolfe adhered to the rules, Savage Cabbage should not have been presented to trial and consequently the tragic events would not have unfolded. Whilst acknowledging, as previously enunciated the "causal link" consideration, Mr. Wolfe's actions have had serious consequences. In the Stewards opinion this aspect cannot be overlooked.*

4. *The Stewards believe that a clear and serious message must be sent to the racing industry. The Stewards, through their intimate knowledge of the industry, are aware that shin soreness in young horses is the bane of trainers and owners. Whilst common in occurrence, it is a condition that requires astute and professional advice and treatment. To preserver (sic) with the training of these young horses and subject them to a competitive trial, when shin sore is totally inappropriate. As in this case, it appears that there was an underlying stress fracture. The correct course of action was to have the horse fully examined by*

professional persons and a course of action defined. It is totally inappropriate to administer an anti inflammatory drug to the horse and trial it. This penalty must encompass a deterrent component, as all steps must be taken to prevent a repeat of these tragic events.

5. *The Stewards hold that Mr. Wolfe was negligent in trialling a horse which was shin sore and which had an administration of phenylbutazone close to the trial.*

6. *The Stewards maintain this is a serious breach of the rules.*

7. *The provisions of ARR 196 have been considered. The Stewards are conscious of the "Strempel" and "Mooney" cases, but as the Tribunal has expressed, under the circumstances, they are of little value in relation to this case.*

It is the decision of the Stewards to disqualify Mr. Wolfe for a period of 12 months.'

Mr Wolfe lodged Notice of Appeal on 20 April 2004 and sought a stay of proceedings. The Chairperson granted Mr Wolfe an interim stay pending a formal hearing where both parties were represented by senior counsel. On 23 April 2004 the Chairperson extended Mr Wolfe's stay of proceedings until midnight on 26 July 2004, the date of the appeal hearing, or as otherwise ordered.

The Appeal

The grounds of appeal are:

1. The Stewards erred in failing to confine their decision on the question of penalty to the issues upon which the matter had been referred back to them by a decision of the Racing Penalties Appeal Tribunal.

Particulars

(a) The issues upon which the matter was remitted to the Stewards were:

(i) the question of the causal link between the horse fracturing its leg and the presence of the prohibited substance ("the causal link"); and

(ii) the onus of proof.

(b) The rehearing was conducted entirely on these bases.

(c) No further evidence or submissions on other issues were presented or invited.

(d) In departing from the issues referred back to the Stewards, the Appellant was denied procedural fairness in the conduct of the hearing.

(e) It was not open to the Stewards to redetermine penalty on the basis of a fresh approach involving new factors which had not been part of their original findings or reasons.

(f) In particular, the factors considered by the Stewards under the headings of "Welfare of the Horse" and "Rules", were not appropriate considerations on a rehearing, not having been part of the original case and not being the subject of any new evidence.

2. The Stewards having failed to find any causal link between the presence of the prohibited substance in the horse and the injury to the horse erred in imposing a penalty of disqualification.

Particulars

(a) The appropriate penalty in the absence of a causal connection to the consequences of the accident was a significant factor which may have warranted disqualification: Reasons of the Racing Penalties Appeal Tribunal ("Reasons of the RPAT") Chairman at p 24 and Member Nash at p 5.

(b) A lesser penalty of suspension, rather than a fine, was probably not appropriate (Reasons of the RPAT per Member Nash at p 5).

(c) Other similar cases had been dealt with by way of a fine and there was no other relevant feature of the case that required a disqualification.

(d) The imposition of a fine is to be regarded as a very serious penalty in itself: Reasons of the RPAT per The Chairman at p 25, citing *Strempel.*

(e) In holding that a "serious" penalty was required (p 7), the Stewards failed to consider that a fine and the attendant odium of a conviction could also be a serious penalty: *Strempel.*

3. The Stewards gave no reasons for not imposing a fine.

4. The Stewards erred in taking into account irrelevant and factually incorrect considerations in their consideration of the question of penalty.

Particulars

(a) The finding of negligence by the Stewards could not be sustained in the absence of a causal link (Reasons of the RPAT per Member Nash at p 4) and was irrelevant.

(b) The finding that there was a "potential ... masking effect" of pain: Reasons of the Stewards of 19 April 2004 ("Reasons of the Stewards") at p 8 was:

(i) contrary to the evidence; and

(ii) contrary to the judgment of the Tribunal (Reasons of the RPAT at p 19) and was an irrelevant consideration in determining penalty.

(c) Any "potential" effect of the prohibited substance was speculative, unproven and was not appropriate to be taken into account for the purposes of assessing penalty.

(d) The Stewards finding that the horse had an "exceptionally high" level of the prohibited substance was incorrect as a matter of evidence (Reasons of the Stewards at p 8). The quantification of the level in urine was "difficult" and at worst it could be said that the level was "relatively high": Evidence of Vine at p 168, referred to in p 5 of the Reasons of the Stewards.

(e) The Stewards erred in taking into account the effect and import of a new rule (ARR 30A(c)) which was not in force at the time of the offence in question.

(f) The Stewards erred in finding that "even minimal risk is unacceptable" as there is always some risk in racing any horse, and particularly young horses, or horses that have previously broken down: *Strempel*, (supra).

5. The Stewards adopted an incorrect standard of proof.

Particulars

(a) The Stewards saw the potential masking effect of the substance as an aggravating factor.

(b) The finding was contrary to the evidence.

(c) By embracing a fact which was only a potentiality on the evidence and using it as an aggravating factor the Stewards adopted a lower standard of proof than was required.

6. Despite finding the absence of a causal link, the Stewards erred in imposing a penalty which was based on an implied acceptance by the Stewards that there was a causal link.

Particulars

(a) The Stewards held that there was a need to express general deterrence for the "tragic event": (Reasons of the Stewards p 9).

(b) The Stewards referred to the "serious consequences" of the Appellant's conduct (Reasons of the Stewards p 7) which was an inappropriate and impermissible factor in the determination of penalty.

7. The Stewards erred in finding that the previously decided cases of *Strempel* and *Mooney* were of no relevance to the question of penalty.

(a) The case of *Strempel* was wrongly seen as being inappropriate where causation was proved: Chairman at p 26.

(b) Having rejected any causal link, the Stewards were obliged to consider the penalties imposed in highly similar cases.

(c) The case of *Strempel* was virtually indistinguishable on its facts other than that it concerned the administration of two prohibited substances and a plea of not guilty and was arguably more serious than the present case.

8. The Tribunal should deal with the question of penalty for the purposes of this Appeal by considering fresh evidence that has only come to light since the Stewards' rehearing.

Particulars

(1) Following the Stewards handing down of their decision on the 19 April 2004 the Appellant was given a copy of a comprehensive report into the death of Jason Oliver by *Worksafe Western Australia* dated 9 January 2003 ("the Report"). The Report was conducted under the provisions of the *Occupational Health and Safety Act (WA) 1984*.

(2) The Report had been requested by the Appellant previously, but was only made available following repeated requests, and was not released to the Appellant prior to the Stewards' decision being handed down.

(3) It is not known whether the Stewards had access to the Report prior to making their determination on penalty, but the Report indicates that the WATC had cooperated with the Authority in the preparation of the Report and the author of the Report had access to the transcript of the original Stewards' Inquiry.

(4) The Report includes significant expert findings and recommendations which mitigate the circumstances of the offence as found by the Stewards; including:

(i) The safety helmet worn by the deceased, whilst meeting prevailing industry standards, was seen by Worksafe as not being strong enough for the purpose of riding in races.

(ii) The inner track at Belmont was considered unsafe for trials of young horses and its use for this purpose should be discontinued.

(5) The tightness of the track had always been seen by the Appellant as a mitigating factor and evidence was called to this effect at the original hearing (p 238). The Tribunal Chairman's observation that the condition (Reasons of the RPAT p 25) of the track was not an issue was not strictly correct.

(6) The Stewards in their original determination discounted the tightness of the track as a relevant factor (Reasons of the RPAT p 4) whereas it would now appear that there is significant independent evidence that it may have been a relevant factor and the Stewards' finding in this regard is almost certainly incorrect.

(7) To the extent that any of the surrounding circumstances were relevant as tending to aggravate the offence, the Tribunal should use the evidence of the contents of the Report in coming to its assessment of penalty.

Ground 8 was not part of the grounds originally filed. At a directions hearing on 19 July 2004, the Chairperson gave leave for it to be included. When the appeal came on for hearing, the Chairperson exercised his discretion to not receive the fresh evidence referred to. Consequently, the factual basis for ground 8 fell away and it was not pursued. It does not need to be considered here.

The Nature of This Appeal

The Appellant's contention is that the penalty is too severe because of its type, rather than its length. The Appellant submits that there should have been a fine rather than a period of disqualification.

Appeal Principles

This Tribunal, like any appellate body, should not interfere with a penalty merely because it is of the view that the penalty might be excessive. It interferes only if it can be demonstrated that the Stewards acted on a wrong principle or misunderstood or wrongly assessed some part of the evidence bearing on the question of penalty. The error may appear in what the Stewards said or did in the proceedings, or the penalty itself may be so excessive as to demonstrate that there has been an error.

For a penalty to be described as so excessive as to demonstrate error, often an appellate body will look to see if it is so far outside the range of penalties commonly imposed for offences of its type as to amount to a "manifestation" of error. There are no decisions made by this Tribunal on penalties for offences against this rule. As far as we are aware, there have been no decisions made by any racing tribunal in Australia. Consequently, there is nothing by way of a range of penalties available for scrutiny. However, there are two cases in which the Stewards in this State have imposed penalties at first instance. They will be referred to later.

Ground 1

It is true that the Stewards were required by the Tribunal's earlier determination to give reasons should they maintain that there was a causal link, and to demonstrate that they had considered the matter to the required standard. However, they were also required to take into account any further evidence they thought fit. The Tribunal's earlier determination gave the Stewards a very wide discretion, not limiting them to the two central points on which the appeal was allowed. In our opinion, it cannot be demonstrated that the Stewards went outside the bounds of that direction from the earlier Tribunal decision.

The Stewards called Dr Riggs, Head of Veterinary Clinical Services at the Hong Kong Jockey Club. Dr Riggs' expertise is in equine orthopaedics. The Appellant called Professor Hutchins, a specialist in equine medicine and surgery. Both of these witnesses in fact aided the Appellant's cause on the issue of causation, leading to the Stewards' ultimate conclusion that there was no causal link proved between the shin soreness, the presence of phenylbutazone and the catastrophic fracture.

Particulars 1(c), (d) and (e) amount only to an introduction to what is complained of in 1(f). That latter particular complains that the factors considered under "Welfare of the Horse" and "Rules" were not part of the original case and were not the subject of any new evidence. In our opinion, it is incorrect to assert that the matters referred to by the Stewards under those headings were not part of the original case.

The prevention of injury and the welfare of horses are so well accepted in the industry as to require no specific mention. For example, Professor Hutchins in his evidence at the second inquiry (TT 55 and TT62) referred to the study and paper by Nunamaker in the US. In the introduction to that paper, it is said:

> *'The purpose of these studies was to better understand the condition of bucked shins so that a treatment or preventative strategy could be developed/implemented to improve the health and safety of horses ...'*

It was the Appellant in fact who called Professor Hutchins as a witness at the second inquiry, so it can hardly be complained here on appeal that the factors under that heading should not have been considered.

In any event, the welfare of the horse was indeed the subject of evidence at the first Stewards' inquiry. Dr Medd, at the original inquiry (T14 – T16), gave evidence of her duties as course veterinarian on the day. She identifies horses needing a closer inspection, observes them at trotting gait for signs of lameness, watches the field in running for signs of injury, observes the runners after the trial and inspects horses afterwards at the direction of the Stewards. Should any horse show signs of lameness prior to a trial, it would be withdrawn. On the day of the trial, she withdrew two other horses for lameness.

The matters referred to under the heading of "Rules" were also part of the original case. It is true that the rules changed between the time of the trial and the delivery of the Stewards' reasons, but the effect and import of the rules did not change. This is elaborated on later in our consideration of ground 4 at particular (e).

In our opinion, ground one is not made out. The factors referred to by the Stewards were relevant, and they were not new. They were part of the original case. It cannot be said that the Stewards took into account irrelevant considerations.

Ground 2

This ground puts the matter too highly. It asserts that there could not be a penalty of disqualification for this offence unless a causal link was found. It challenges the Stewards' approach to fixing the penalty, explained by them as follows:

'To this end, it is worthy of noting, that in determining the question of penalty, the relationship if there is to be one between the presence of phenylbutisone (sic) and the catastrophic fracture is but one of the many points of significance in assessing the question of penalty.'

We agree with the Stewards' approach. Nothing in the particulars of ground 2 causes us to find that they were in error.

Particular 2(a) does not appear to make grammatical sense. We take it to mean that if a causal connection was found to exist, then that would be a factor in the exercise of imposing a penalty. If so, then we would agree with that proposition, and that is exactly what the Stewards said. The particular adds nothing to the ground itself. As to 2(b), we would not accept that the reasons of Mr Nash in the previous Tribunal decision should be taken into account in determining this ground of appeal. The matter has been redetermined, with new evidence and new reasons. All parties are entitled to a decision based on that process.

Particulars 2(c), (d) and (e) are essentially repeated in ground 7. Leaving these particulars aside for the moment, we would dismiss ground 2.

Ground 3

Decision makers are bound to give reasons. If reasons are not given, an appellate body cannot discern whether there has been an error. An appeal then must be allowed, and the sentencing exercise carried out again. However, no error has been made here. As the matter was argued before the Stewards, there were only two options open. The Appellant submitted for a fine, as opposed to disqualification. The Stewards decided on disqualification. In giving lengthy reasons for the penalty of disqualification, the Stewards were giving reasons why they did not impose a fine. Ground 3 is not made out.

Grounds 4, 5 and 6 - Introduction

These grounds have a common theme. They complain about the Stewards' fact finding and their reasoning process in reaching the penalty. They argue that the Stewards should not have found that there were any actions on the part of the Appellant, and even if there were any actions on his part, there were no intermediate steps between those actions and the catastrophic fracture. The Stewards' findings attribute the catastrophic fracture to the Appellant's actions. The two extremes are able to be discerned.

At the one end, the Appellant's position, and his evidence, is that he did nothing. There were no actions on his part. His evidence was that there was an administration $4^1/_2$ days prior to the trial, a time which would have allowed for the effect of the drug to be gone. He instructed Jason Oliver to make sure the horse finished the trial off, an instruction he described as being *"nothing untoward"* (T234). At the other extreme, the Stewards' finding was in two parts. Firstly, that the Appellant presented the horse for trial with a prohibited drug in its system, and he caused or allowed it to be trialled when he knew it was shin sore. The second part of the Stewards' finding was that the Appellant's actions caused the catastrophic fracture.

Even without the causal link between the shin soreness, the presence of phenylbutazone and the catastrophic fracture, the Stewards still attributed the catastrophic fracture to the

actions of the Appellant. At point 3 of their summary of reasons, the Stewards referred to the "tragic events". Further, they went on to say:

> *'Whilst acknowledging, as previously enunciated the "causal link" consideration, Mr. Wolfe's actions have had serious consequences.'*

The reasoning process was explained by the Stewards, and elaborated on by their counsel at the hearing of the appeal. We understand it to be as follows:

1. The horse was shin sore. The evidence on this came from a number of sources. Dr O'Hara gave evidence that the horse was shin sore. Jockey King heard Jason Oliver say: *'I reckon this is shin sore too.'*

2. The Appellant knew that the horse was shin sore. The evidence came from the fact that there had been an administration. One of the purposes of phenylbutazone is to treat shin soreness. The evidence of Dr Riggs at TT15 of the second inquiry is to that effect. The Appellant's evidence at the original inquiry that there had been an administration $4^1/_2$ days prior was demonstrably incorrect. This factor adds to the evidence that the Appellant knew that the horse was shin sore. The Appellant gave evidence that was "potentially misleading", and the Stewards used that against him.

3. The horse most probably had a stress fracture. The evidence on that came from Dr Riggs at TT11.

4 One of the effects of phenylbutazone is to mask the possible pain caused by bone pain. A stress fracture causes pain. The evidence on that came from Dr Riggs at TT14 and TT27. At TT27, Dr Riggs said:

> *'But if this was a stress fracture in this location, then on the basis of past experience and the literature, these fractures often cause variable lameness ...'*

There was also evidence from Professor Hutchins at TT61:

> *'MEDD* *So horses with, with the stress fracture as we've discussed, do you think most of them would be lame?*
>
> *HUTCHINS* *I would expect most of them to be lame, particularly after work and twenty four hours...'*

5. Had there not been an administration, Dr Medd may have observed something which would have led her to withdraw the horse from the trial.

6. Had the horse not run, the catastrophic fracture would not have occurred.

We turn now to consider the individual grounds.

Ground 4

Particular (a) focuses on the Stewards' description that the Appellant had been negligent. The Stewards said:

'The compelling evidence that has evolved is that whilst this condition (shin soreness) was present at the time of trialling it cannot be said that shin soreness on its own has caused the catastrophic fracture to Savage Cabbage.'

And later:

'The Stewards hold that Mr. Wolfe was negligent in trialling a horse which was shin sore and which had an administration of phenylbutazone close to the trial.'

This particular is presented on the basis that there was no causal link between the shin soreness, the presence of phenylbutazone and the catastrophic fracture. It is said that because there was no causal link, there should not be a finding of negligence. It is now common ground that there was no causal link between those three things. However, this does not lend any support to the Appellant's contention.

The Stewards' finding was in two parts. One part was the finding that the administration was close to the trial. The other, the fact that the Appellant trialled the horse when it was shin sore. The use of the descriptive word "negligent" does not add to or take away from those findings of fact, both of which were open on the evidence. Both of the findings did not depend on there being the causal link referred to. They depended on all of the evidence, both scientific and otherwise.

It is incorrect to describe the description of the Appellant being negligent as a fact, in the sense that it is said to be a factually incorrect consideration in the process of fixing a penalty. Even less was the description of the Appellant being negligent the ultimate determination of the case, in the sense that a finding of negligence is most often understood in civil law. It is not even properly described as a finding, or something to be "held" as the Stewards put it. It must be remembered that the Stewards are not lawyers, they are lay persons with expertise in the racing industry. They used the word "negligent" in a descriptive sense only. This is well illustrated by the Chairperson's summary of the Stewards' position at the original inquiry, referred to in the original appeal decision. The Chairperson said at page 25 of his reasons:

'According to Mr Davies QC the finding of gross negligence only means that it was a serious risk to send out a horse which was suffering from 'bad' legs with the treatment in its system.'

The real findings of fact were the two referred to above, and because they were open on the evidence we do not find particular (a) to be made out.

Particular (d) should be considered before particulars (b) and (c). Particular (d) refers to the evidence on the level of the drug found in the urine. The level is one of the factors which allowed the experts to provide opinion evidence on whether the drug was having an effect, which is the subject of particulars (b) and (c).

The importance of the level of the drug in the sample was two fold. Firstly, it could provide evidence of whether the drug was within time so as to be having an effect. Secondly, it could provide evidence of when the administration took place. The testing process was qualitative, not quantitative. Despite that, Dr Stenhouse at T168 gave an estimation of "in excess of 10 micrograms per mille of phenylbutazone". He referred to this as a relatively high level. This particular complains that the Stewards used the phrase "exceptionally

high" instead of "relatively high". We do not find the point taken by the Appellant to be of any significance. It ignores the other evidence given by Dr Stenhouse. Dr Stenhouse went on to say at T171 what he meant by his evidence that it was a "relatively high level". He said:

> *'... you have to remember in this particular instance, we're not talking about just barely detecting this drug, we're talking about the finding of this drug in such a concentration that we had to actually dilute the sample for our instruments to give us proper readings. So, the sample was overloading the instruments.'*

In our opinion, the Stewards were correct in their assessment of Dr Stenhouse's evidence. Taking into account all that he said, the level could indeed be described by the Stewards as "exceptionally high". They are entitled to come to their own conclusions based on all the evidence. Clearly, they did not mistake the evidence. We do not find any merit in particular (d).

Particular (b) is in two parts. Part (ii) says that the finding of the Stewards was contrary to the judgement of the Tribunal at first instance. Having looked again at the reasons of the Chairperson at pages 18 to 19, we think that the Appellant reads too much into those reasons to try to support this particular. They do not preclude this finding.

The first part of particular (b) is important. It is a step in the reasoning process which led to the finding of responsibility for the catastrophic fracture. It is said that the finding was contrary to the evidence. We do not agree. Dr Riggs said that there was a possibility that pain from the underlying stress fracture was disguised (TT14 and TT27). Professor Hutchins went further than that in his evidence. He explained that phenylbutazone will have a pain relieving effect for a defined period of time (TT68). Professor Hutchins was doing no more than stating the obvious. The crucial issue was whether this administration in this case potentially had a masking effect. Clearly, that depends on the time of administration. In this case, the Stewards had the evidence of Dr Vine and Dr Stenhouse, both of whom gave evidence of the relatively high level in the urine. They also had the "potentially misleading" evidence of the Appellant, that the administration was $4^1/_2$ days before the trial. That fact was able to be used against the Appellant. Putting all that together, there was evidence of an administration within time for the drug to be having the potential effect of masking the pain caused by the underlying stress fracture. The finding was not contrary to the evidence.

We find that particulars (b) and (c) are not made out. The findings were not contrary to the evidence. The question of whether there was pain will always be speculative in the absence of a veterinary examination. The evidence of Dr Riggs was that there was most likely a stress fracture (TT11). Dr Riggs later said that there was no scientific evidence of a predisposing stress fracture (TT31), but this did not detract from the opinion he earlier gave at T11. The evidence of Professor Hutchins was that the horse would be expected to be lame (TT61). Following on from that, the pharmacological evidence was not speculative. It was as precise as could possibly be. The evidence that phenylbutazone masks possible bone pain came from Dr Riggs at TT14 and TT27, and from Professor Hutchins at TT61 and TT67.

It is true that Dr Hilbert, at the original inquiry, gave evidence that phenylbutazone is *"... not an analgesic ..."* However, the Stewards were entitled to prefer the evidence of Dr Riggs

and Professor Hutchins to the effect that there was a potential masking of pain. Dr Hilbert's evidence was quoted in the Chairperson's reasons for decision at page 19, but that in no way elevates his evidence into a finding of the Tribunal. The Tribunal does not make findings of fact.

The finding that the phenylbutazone potentially had a masking effect was factually correct and a relevant consideration. It was not speculative and unproven.

Particular (e) complains that the Stewards should not have taken into account the effect and import of Local Rule 30A(c), because it was not in force at the time of the offence. This particular makes the same complaint as in particular (f) in ground 1. The rule is in the following terms:

> *'A two years old found to be shin sore will not be permitted, without the permission of the Stewards, to start in a race or a trial.'*

It can be seen that this rule does not create an offence. It is an enabling provision, allowing the Stewards to properly carry out their powers and responsibilities.

This rule was introduced on 1 July 2003. In their introduction to this part of their reasons, the Stewards referred to the two rules which preceded it. The rules referred to were not in fact rules, but regulations contained in the "Regulations Applicable to all Racecourses and Training Grounds in Western Australia". They were:

> *'**33**. The Stewards may prevent from starting in a race or trial any horse which in their opinion is lame or shows any defect calculated to cause injury or which may be suffering from any infectious skin disease.'*
>
> *'**81**. Owners and trainers are hereby notified that after shin soreness a two-years-old will not be permitted to start in any race for six weeks.'*

The Stewards said that these two "rules" were "basically combined" into LR 30A(c). Leaving aside the fact that they were regulations and not rules, the Stewards were entirely correct in what they said. The effect of the Appellant's actions, as the Stewards saw it, was to prevent Dr Medd from ascertaining whether the horse was lame, so as to consider withdrawing it from the trial. This has the same effect as Rule 30A(c). In any event, the rule and its predecessor regulations do not create offences. They are empowering provisions. They do no more than serve to illustrate the point that the Stewards in fact made, that trainers have clear responsibilities in relation to shin sore horses, namely to not do things which have the effect of preventing the Stewards from carrying out their role. The Stewards were correct to take into account Local Rule 30A (c).

For these reasons, we do not find any substance in particular (f) of ground 1 or in particular (e) of ground 4.

Particular (f) complains that the Stewards should not have found that "even minimal risk is unacceptable". The complaint is based on the assertion that there is always a risk in racing young horses anyway. That may be so, but in using the phrase complained of, the Stewards were doing no more than expressing their finding that the Appellant's actions had the effect of creating the risk of the injury to SAVAGE CABBAGE. We do not think that the Stewards' expression should be elevated into a finding of fact. The findings of fact are

challenged elsewhere in these appeal grounds. We do not find any merit in particular (f) of ground 4.

Ground 5

This ground depends on it being determined that the finding that there was a potential masking effect of the substance was contrary to the evidence. For the reasons we have expressed under particulars (b) and (c) of ground 4, we would dismiss this ground. The finding of there being a potential masking effect was not contrary to the evidence.

Ground 6

There is no doubt that the Stewards found that the Appellant's actions caused the catastrophic fracture. They said:

> *'This penalty must encompass a deterrent component, as all steps must be taken to prevent a repeat of these tragic events.'*

That expression "tragic events" is not only a reference to the catastrophic fracture. By linking that phrase back to the penalty to be imposed on the Appellant, the Stewards placed the responsibility for the consequences on him.

The Stewards also said:

> *'Mr. Wolfe's actions have had serious consequences. In the Stewards opinion this aspect cannot be overlooked.'*

It is clear that the Stewards placed the responsibility for the consequences on the Appellant.

Ground 6 complains that these findings should not have been made once it was determined that there was no causal link. The obvious question to be answered then is what is the "causal link" referred to in the Stewards' reasons and in the ground of appeal. This is explained by the Stewards in their reasons as follows:

> *'So whilst Savage Cabbage was shin sore and most probably suffering a stress fracture they were clinically unrelated events, that is, one condition did not necessarily cause the other. Drawing from that, and considering the evidence, it is not possible for the Stewards to say that a causal link has been established to the requisite standard between the shin soreness, the presence of phenylbutazone and the catastrophic fracture.'*

Despite the finding of no causal link, the Stewards made the findings of responsibility referred to above. They placed responsibility on the Appellant. The responsibility was placed on the Appellant not because of the particular causal link referred to. Responsibility was placed on the Appellant for the reason that had the horse not been presented for the trial in contravention of the rules, there would have been no consequences. The Stewards said:

> *'Had Mr. Wolfe adhered to the rules, Savage Cabbage should not have been presented to trial and consequently the tragic events would not have unfolded.'*

Responsibility was attributed to the Appellant because his actions contributed to the consequences. On reviewing the evidence, we are satisfied that in all of the circumstances, the Stewards were entitled to find that the Appellant did things which led to the consequences.

The breach of the rules was that the Appellant presented SAVAGE CABBAGE to trial with the prohibited substance in its system. As in any case, there can be more serious and less serious types of offences. The features of the offence in this case included the following two factors, both of which were open to the Stewards to find on the evidence:

1. The horse was shin sore. This was the first point made by the Stewards in their summary. As we have noted above, there was evidence on this point from Dr O'Hara. As well, Jockey King heard Jason Oliver say: *'I reckon this is shin sore too.'* In the Tribunal's previous decision, the Stewards' finding that the horse was shin sore was accepted.

2. The Appellant knew that the horse was shin sore. This is implicit in the Stewards' finding at point 4 of their summary, where they said:

   'To preserver (sic) with the training of these young horses and subject them to a competitive trial, when shin sore is totally inappropriate.'

The Appellant's knowledge that the horse was shin sore was also one of the Stewards' findings at point 5 of their summary. There was evidence to support this finding. The evidence was that the Appellant admitted using phenylbutazone, and phenylbutazone is often used to treat shin soreness.

The Stewards characterised the particular offence committed by the Appellant as being "negligent". That was a description that was open to them on the evidence. But the seriousness of the offence was not only to be determined by the Appellant's actions. It was also to be determined by the consequences, if any, of those actions. The Stewards found that the Appellant's actions prevented the Veterinary Steward, Dr Medd, from properly assessing the horse. Had there not been an administration, Dr Medd may have observed something which would have led her to withdraw the horse from the trial. Dr Medd gave evidence at the original inquiry that she observes the horses for signs of lameness. As she said at T19:

> '... I withdraw lame horses ...'

The Stewards said in their reasons that:

> *'This closer administration has impinged on the Official Veterinarian's ability to assess unhindered the condition of Savage Cabbage at trial time. Simply put, Savage Cabbage should not have been subject to the trial.'*

In our view, it was open on the evidence for the Stewards to go past the point of simply the commission of the offence and to attribute responsibility to the Appellant for the consequences. In particular, it was open on the evidence for the Stewards to attribute the catastrophic fracture and its consequences to the Appellant. However, the question then arises whether that conclusion is reconcilable with the finding that:

> *'... it is not possible ... to say that a causal link has been established to the requisite standard between the shin soreness, the presence of phenylbutazone and the catastrophic fracture.'*

In our view it is possible to reconcile the two. The Stewards found that there was probably an underlying stress fracture. That is not the same thing as shin soreness. The closer administration had the potential to mask pain caused by the shin soreness and the probable stress fracture. Shin soreness is a condition, not the pain resulting from a condition. Shin soreness is otherwise known as dorsal metacarpal disease, something quite different than an underlying stress fracture. As the Stewards said at TT88:

> *'In the Stewards opinion, Savage Cabbage was suffering from dorsal metacarpal disease or shin soreness prior to and during the trial on 28 October 2002 ...'*

We find that ground 6 has not been made out. The Stewards were not in error in attributing responsibility to the Appellant for the consequences of his actions. There was no "causal link" of the type referred to in the Stewards' reasons, but there was a link of a different type, namely that the potential masking of pain prevented Dr Medd from properly assessing the horse prior to the trial. Had Dr Medd been able to do so, the horse may not have run and the catastrophic fracture may not have occurred. That chain of reasoning permitted responsibility to be attributed to the Appellant.

Ground 7

This ground can now be dealt with in the light of our finding in respect of ground 6. It is also dealt with together with particulars (c), (d) and (e) of ground 2.

The ground calls in aid the principle that a penalty should be within the range of penalties commonly imposed for offences of its type. As we have noted above, there is little by way of a range of penalties available for scrutiny. There are two cases at first instance before the Stewards. The Stewards referred to those cases, *Strempel (Appeal 549)* and *Mooney*. Those cases require some explanation.

In *Strempel*, the trainer was found to have committed two offences against AR 177A. She had presented a horse for a trial, and it was found to have two prohibited substances present. They were methylprednisolone and ketoprofen, both non steroidal anti-inflammatories. The substances were detected post euthanasia, as the horse had broken both its forelegs during the trial and had to be euthanased. The Stewards imposed penalties of $1,000 and $2,500 for each offence respectively. That case was also characterised by the fact that the horse in question had a known history of leg problems. The case came before this Tribunal on appeal against conviction, and the conviction was set aside. Penalty did not have to be considered. In *Mooney*, the trainer was found to have committed an offence against this same rule. Again, the horse in that case broke a leg and had to be euthanased. The drug in question was dexamethasone, a non-steroidal anti-inflammatory. Mrs Mooney had a previous conviction for presenting a horse with a prohibited substance in its system. The Stewards imposed a fine of $3,500. The case did not come on appeal to this Tribunal.

In this case, the Stewards found, as they were entitled to, that SAVAGE CABBAGE was, as the Appellant was aware, shin sore at the time of the trial, and that the potential

masking of pain arising from the administration of the prohibited substance prevented Dr Medd from properly assessing the horse prior to trial. Accordingly, responsibility for the consequences could be attributed to the actions of the Appellant. In our view the Stewards having made such a serious finding against the Appellant and after taking into account the appropriate mitigating factors, were entitled to impose a disqualification rather than a fine. While it may not be possible to distinguish some of the circumstances in this case from those in the *Strempel* and *Mooney* cases, that does not in our opinion prevent the Stewards from imposing a penalty of disqualification. In our opinion, the two decisions on AR 177A can hardly be considered as binding on the Stewards as to the appropriate range of penalties that can be imposed. Further, the Tribunal has not had the opportunity to consider penalties for breach of this rule before, because in the *Strempel* case the Tribunal set aside the conviction, and there was no appeal from the Stewards' decision in the *Mooney* case.

The initial disqualification imposed by the Stewards following the first hearing was two years. That followed the determination of a causal link between the prohibited substance in the horse and the injury sustained. Having found on the second hearing that this causal link could not be established, the disqualification imposed was 12 months. In our opinion, while the Stewards still found the Appellant to be responsible for the consequences, the seriousness of the breach of AR 177A was substantially reduced from the first finding to the second finding. This required the Stewards to impose the lesser period of disqualification. As a matter of law, it is not for an appellate body to substitute its own opinion for that of the sentencing authority, in circumstances where no error has been demonstrated.

Racing is an important industry in which many people participate at various levels. Some participants are full time professionals whose livelihoods and careers are built around the sport. Others are only involved part time, casually or on a hobby basis. There are some people who invest heavily by owning racehorses, racing establishments or by betting at the races. To the extent that racing is a source of government revenue, the community has at least some indirect interest in the health and success of the industry. Without strict regulation and control there would be no racing industry as we know it. The responsible body for racing in this state is Racing and Wagering Western Australian (RWWA). RWWA oversees the sport pursuant to rules, namely the Australian Rules of Racing and the Local Rules of Racing.

To be able to train racehorses approval and registration as a trainer pursuant to the rules is essential. RWWA is empowered by the rules to licence trainers. To be eligible to train it is necessary to agree to be bound by the Rules (AR 2). RWWA is also empowered to refer any matter relating to racing to Stewards (AR 7). In order for the Stewards to perform their vital role in assisting to control racing, they are given wide powers (AR 8). In the exercise of those powers the Stewards conducted the inquiries which led to the conviction and the imposition of the penalties on Mr Wolfe. No horse may run in any organised trial unless trained by a licensed trainer and stabled in accordance with the conditions of the licence (AR 56A). Under the rules there are restrictions on the eligibility of horses to participate in trials (for example AR 64A, C, E and G).

The control regime created by the rules is designed to ensure racing is conducted drug free. AR 177A contemplates punishing a trainer for having brought a horse to a recognised training track to engage in a trial or test which has a prohibited substance in its

system. As discussed earlier one form of punishment for offending against this rule is disqualification. Disqualification is a very serious penalty. A disqualified person shall not enter any racecourse or training track owned, operated or controlled by a Club. Nor may such a person enter any training complex or training establishment of any Club or any licensed person, be engaged in any capacity in any racing stable, ride any racehorse, enter or nominate any horse, race or train any horse, share in any winnings or participate in any way in the training of any racehorse (AR 182). This means that such a trainer can no longer carry out any professional duties relating to racing.

The care and training of racehorses are pivotal and highly responsible roles in the industry. Owners of racehorses entrust their valuable animals to trainers for care, maintenance, preparation and presentation to race. The manner in which the preparation and presentation takes place influences the way jockeys can ride their mounts. What transpires during riding in races and at trials can impact on other riders and their mounts. Clearly it also can affect the outcomes of races. This situation in turn has the potential to affect the betting public and the confidence in the integrity of the sport.

Any breach of the rules involving prohibited substances, whether in the course of racing or trialling, is a very serious matter. There is the need to impose an appropriate punishment on the offender. As part of the overall control of the industry, Stewards when sentencing must also be mindful of the message being conveyed to the other professional participants in the industry as well as the punter. As part of enforcing the rules and applying racing's drug free policy the Stewards would be derelict in their duty if in the sentencing process and in arriving at penalty they failed to draw attention to the potential adverse consequences and risks associated with the introduction of prohibited substances into horses under the care of trainers.

Over the years the Tribunal has on many occasions determined that it is appropriate for Stewards to impose periods of disqualification on trainers who have presented horses to race with prohibited substances in them. Despite that, there have been some cases when a penalty less severe than a disqualification has been appropriate. Equally, depending on the particular circumstances, some offences have justified more lengthy periods of disqualification than otherwise. The same general philosophical approach to penalty should apply in the case of presenting for trials as it does for actual racing, with such variations or modifications as are appropriate after taking account all other relevant surrounding circumstances. Merely because a horse has participated in a trial rather than having engaged in a race should not automatically mean that a fine is to be regarded as the only appropriate penalty in the circumstances of a case such as the present.

As we have found no error on the part of the Stewards in relation to the penalty, we would dismiss ground 7.

Conclusion

For all of the above reasons, we would dismiss the appeal. The suspension of operation of the penalty automatically ceases.

DAN MOSSENSON, CHAIRPERSON

PATRICK HOGAN, MEMBER

STEVEN PYNT, MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA