APPEAL – 735

THE RACING PENALTIES APPEAL TRIBUNAL

DETERMINATION AND REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**DAVID POWRIE**
APPLICATION NO:	**A 30/08/735**
DATES OF HEARING:	**30 SEPTEMBER AND 6 OCTOBER 2011**
DATES OF DETERMINATION:	**6 OCTOBER and 16 DECEMBER 2011**

IN THE MATTER OF an appeal by DAVID POWRIE against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 9 September 2011 imposing a three month disqualification for breach of Rule 175 (q) of Australian Rules of Racing.

Mr F J Powrie appeared for Mr D Powrie.

Mr H Taylor appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

BACKGROUND

This matter started as an appeal against the severity of a three month disqualification penalty imposed by the Racing and Wagering Western Australia ('RWWA') Stewards of Thoroughbred Racing. The appellant, David Powrie, is a 20 year old licensed track rider who had pleaded guilty to the charge laid against him by the Stewards of having breached Rule 175 (q) of the Australian Rules of Racing for physical misconduct at the back track adjacent to Ascot Race Course on 27 August 2011.

The following exchange (taken from the bottom of page 8 and top of page 9 of the Stewards' transcript of evidence) reveals the circumstances of the offence which lead to the Stewards' decision to lay the charge:

'Chairman: *..., well can you explain to us why you felt the need to head butt Mr Miller?*

Powrie: *Well the reason that I said that it wasn't his saddle, the one I was riding in on the day wasn't his saddle and I said that as a joke. Obviously it wound Mr Miller up, ...*

Chairman: *Sorry, what was the joke?*

Powrie: *That I sold it.*

Chairman: *Alright.*

Powrie: *His saddle that I sold it, I was playing with a joke and it arced him up and we got, were, close while we were verbally talking and yeh I got, I think I gave him a head butt.*

Chairman: *Alright, so at the time, were you riding a horse?*

Powrie: *I was.*

Chairman: *Okay. So what, you got off the horse?*

Powrie: *Yeh.*

Chairman: *And what, did you bring the horse with you or did you....*

Powrie: *I had it in my hand, yeh.*

Chairman: *Right, Well why did you take that action? Why did you take that path of action to head butt? I mean Mr Miller's, he's, you'd be in your 60s Mr Miller would you?*

Miller: *60, yeh....4*

Chairman: *Yes, 60 and how old are you?*

Powrie: *20.*

Chairman: *Alright and you're a lot taller than Mr Miller?*

Powrie: *I realise that.*

Chairman: *Well why would you being doing this?*

Powrie: *I'm not sure, it was a last second thing.*

Chairman: *Right.*

Powrie: *When I was verbally close to arguing yeh and I'm sorry. I apologised to Mr Miller and feel very bad for what I did.*

Chairman: *Right.*

Powrie: *And I shouldn't have, because we were mates, are mates, and I don't know and I felt very bad and sickened after I realised what I did.*

Chairman: *Right.*

Powrie: *And I still feel pretty upset about it and it was the wrong thing for me to do.'*

When asked by the Chairman of the inquiry to explain the '*...split second decision*' the appellant simply responded '*yeh, just came over me like cause I got worked up and that was it, yeh*' (page 10).

David Powrie had been living at Mr Joe Miller's premises for a period of time prior to the incident. Mr Miller is a licensed trainer who had employed the appellant to break horses and do some track work. The appellant had borrowed one of Mr Miller's saddles for track work.

The charge which was laid against the appellant was expressed in the following terms:

'...Rule 175(q) and that rule reads: The Committee of any Club or the Stewards may penalise any person who in their opinion is guilty of any misconduct, improper conduct or unseemly behaviour and we specify improper conduct and in our opinion the improper conduct is that within the confines of the Ascot Racecourse on the morning of the 27th August, you did during a verbal altercation with Trainer Mr Joe Miller deliberately head butt him, causing him facial injuries'. (pages 15 & 16 of the Stewards' inquiry transcript).

As the appellant pleaded guilty to the charge there was no need for the Stewards to state any reasons for convicting. The Stewards' reasons in respect of the penalty were as follows:

'... we do view it as a very serious matter, which we had said from the onset. You're a healthy 20 year old man and you've head butted a 64 year old man, much smaller than you and at the time he was holding a horse. Your conduct cannot be justified under any circumstances. We believe the incident on the evidence presented was in the view of other persons attending at the track and Mr Miller did suffer facial injuries as a result of your assault on him and did require first aid. You have shown genuine remorse at today's hearing and we acknowledge that you did initiate a phone call following the assault to apologise for your actions. You have pleaded guilty here today and you've been forthright with your evidence. You have not appeared before the Stewards before on any other matters. In regards to penalty, any penalty that the Stewards decide on must serve as a general and specific deterrent and in the circumstances we do not believe that a suspension or fine is warranted. In our opinion a disqualification is appropriate and that's for a period of 3 months. The disqualification is within the range of penalties for a breach of this rule. We did consider a longer term of disqualification, but we see you as a young man who is obviously looking to make a career in the industry and after hearing you today we think your future application for a breakers license which is obviously what you want to get involved in, would be looked at more favourably if you were prepared to consider seeking some professional help for your anger issues. In that regard we can offer confidential assistance through Mr O'Reilly if you're prepared to take that opportunity. Because we feel that, that would be in your best interests so that you wouldn't be in a position like this again.' (pages 21 and 22).

THE APPEAL

At the time when the appeal notice against the penalty was lodged a suspension of operation of the penalty was also sought. After receiving written submissions from both sides I refused to grant the stay application.

At the outset of the appeal hearing Mr F J Powrie, a former Chief Steward of the Western Australian Turf Club, was given leave to represent his son the appellant. Mr Powrie applied to

substitute new grounds of appeal. The proposed new grounds not only addressed the penalty but also the conviction. Appealing a conviction, despite a plea of guilty before the Stewards, is somewhat unusual but not unique. The Stewards did not oppose the application to substitute. Consequently I granted leave and the matter proceeded on the basis of the following much more complicated replacement grounds:

'Appeal against the conviction and penalty of 3 months disqualification imposed on David Powrie by the RWWA Stewards, under ARR 175 (q) for misconduct on 9th September 2011.'

A. Conviction

The RWWA Stewards erred in convicting the appellant in that they failed to fulfil their obligation to afford natural justice by:-

a) *failing to advise formally of the inquiry,*

b) *accepting the investigation and 'report' (Exhibit A) – as relied upon by the them*[sic], *which was not supported by evidence nor was it comprehensive or thorough,*

c) *allowing an observer to give evidence,*

d) *failing to afford the appellant an opportunity to call witnesses,*

e) *relying on facts not contained in evidence,*

f) *relying on medical evidence and treatment not supported in any way,*

g) *incorrectly framed the charge related to the actual locality of the incident,*

h) *demonstrated bias throughout the inquiry.*

The appellant's 'guilty plea' arose through:

a) *his desire to bring the matter to finality quickly,*

b) *the fact that he had been assured that he would not lose his license (sic),*

c) *being intimidated by the presence of the 'observer' who had verbally threatened and intimidated him immediately prior to entering the inquiry.*

By reason of the foregoing errors it is submitted that the conviction be quashed.

B. Penalty

The Stewards erred in their consideration of an appropriate penalty in that they:-

a) *failed to take into consideration that J Miller instigated the incident and provoked the appellant,*

b) *took into account, as an aggravating feature, the created evidentiary fact that the incident took place in view of other persons attending the track,*

c) *wrongly arrived at a level of 'injuries' – not supported by any evidence, as an aggravating circumstance,*

d) *failed to articulate what they considered to be a starting point for the offence absent of any of the mitigating circumstances,*

e) *failed to explain and give reasons why a fine or suspension was not warranted,*

f) *failed to specify what discount was appropriate, individually or in totality, with respect to the mitigating circumstances, namely:*

i. *the genuine remorse shown,*
ii. *initiation of an apology by 'phone,*
iii *'plea' of guilty,*
iv. *forthright nature of evidence,*
v. *that the appellant had never appeared before any Steward or Judicial Authority on any matter.*

g) *failed to take into consideration the appellant's youth, inexperience and immaturity,*

h) *failed to adequately consider the appellant's unblemished record,*

i) *failed to fully weight the level of genuine remorse,*

j) *failed to consider that the appellant's responsive reaction lacked any degree of premeditation, was completely spontaneous and was out of character,*

By reason of the foregoing errors and even after any unmentioned discount was allowed, the Stewards have erred in imposed [sic] *a penalty which was still at the upper level of penalties commonly imposed under this Rule'.*

APPELLANT'S APPROACH AT THE APPEAL

During the course of his submissions Mr Powrie endeavoured to present some fresh factual material from the bar table on a range of issues. Much of this information related to the appellant's motives and reasons why he conducted himself as he did at the Stewards' inquiry. Although this material was not objected to I felt obliged on a number of occasions to inform Mr Powrie that I could not allow him to present what amounted to fresh evidence on the appellant's behalf as none of the facts being addressed had been raised at the Stewards' inquiry. I informed Mr Powrie that he must confine himself to dealing with the contents of the transcript of the proceedings before the Stewards. In addition I made it clear that any such information he had already volunteered would not be taken into account. As the appellant was present at the appeal hearing, it would have been a simple matter for Mr Powrie to have sought leave to call the appellant to give this evidence himself. Section 17(6)(b) of the *Racing Penalties (Appeals) Act* 1990 specifically provides for the receipt and admission of evidence. But Mr Powrie did not seek to call the appellant.

Mr Powrie did however seek leave to call Ms Laura Woolford. Ms Woolford had not given evidence before the Stewards at their inquiry. Nor was she present. I was told Ms Woolford had witnessed the whole incident. Despite opposition from the Stewards, I granted leave to call this person. On the other hand I disallowed Mr Powrie's further request to call another person

whom Mr Powrie explained was to give evidence of the incident, but whom I was informed did not in fact witness the altercation.

MS WOOLFORD'S EVIDENCE

Laura Woolford is a young lady around the same age as the appellant. At the time of the incident Ms Woolford was socially friendly with the appellant and working as a stable hand for Mr Joe Miller. I was satisfied Ms Woolford was a totally dispassionate witness who gave a very clear account of the unfortunate affair. Ms Woolford was the only one to observe the incident between the two men. She did so at very close range as at the time it took place she was assisting Joe Miller with some horses at the back track adjacent to Ascot Racecourse. Her unchallenged evidence of the fight which erupted was as follows:

'Ms Woolford: And while me and Dave were talking, Joey came – was cantering up towards us. He then asked Dave – then he said to Dave, "Give me my saddle back." Dave answered and said it's not his saddle. Joey then asked, "Where is my saddle?" and Dave replied, "I sold it." Then Joey got, I guess, angry and rode towards Dave. Then they started to argue. The horses started to freak out. Then Joey approached Dave on his horse and pulled Dave off his horse. Once that happened, both the horses were shying and pretty much all over the shop. I walked towards the baby and Dave ….

Mr Powrie: Sorry, you walked towards the baby ---? --- Yes.

--- which is ---? --- Only because of my knowledge ---

--- the appellant's horse? --- of the horse that Joey was riding. He was a very dangerous animal. I knew it would kick the other horse. I then – Joey then got off his horse. At the same time Dave passed me the young horse and I grabbed the young horse off him.

Powrie: Can I just stop you there for one second. You said that Mr Miller pulled him off the horse? --- Grabbed him by the scruff of his neck and pulled him off the horse.

Woolford: Grabbed him by the scruff of his neck? --- Like, his shirt.

Powrie: His shirt? ---

Woolford: And pulled him off the horse.

Powrie: You're talking about the appellant? He grabbed him? ---

Woolford: Yes, and pulled him off.

Powrie: Yes. What type of saddle was Mr Miller in? ---

Woolford: A stock saddle.

Powrie: A stock saddle?

Powrie: Yes. Just on that – I know the answer to this, but was it dangerous? ---

Woolford: Yes.

Powrie: *Right. Sorry, I interrupted you because you – now David Powrie is on the ground and Mr Miller is still on the horse ---?*

Woolford: *--- No. As I took Dave's horse ---*

Powrie: *You grabbed the baby, yes? ---*

Woolford: *Yes – Joey was dismounting his horse, but he held onto his horse. He had his horse the whole time. They then started to argue. They pretty much were then, I don't know, that far apart, the whole time arguing, walking around, swearing ---*

Powrie: *As bad as each other? ---*

Woolford: *Yes.*

Powrie: *That's swearing and verbally ---?*

Woolford: *--- Yes. Screaming, yes.*

Powrie: *Yes? --- And then ---*

Powrie: *Sorry, just on that, the argument – was it to do with the saddle ---?*

Woolford: *--- Yes.*

Powrie: *--- or was it to do with being pulled off?*

Woolford: *--- It was – started about the saddle and then Joey obviously ---*

Powrie: *No, when they were this far apart you said?*

Woolford: *--- I'm not sure exactly. It was just a lot of hatred words being thrown at one another. I'm not sure if either of them really had any point. They were just arguing, just fighting. And then – so it went back and forth for a while. Joey walked towards Dave with his horse. Dave didn't want to do anything. He had his hands like this. Joey kept walking towards him. Then – it went on for a while and then Dave took his helmet off and stepped towards Joey and hit his head onto Joey's helmet. Then after that Joey was quite stunned and his nose – and he realised that his nose was bleeding on the bridge of his nose here. He then walked towards Dave, who was walking away from him, and kicked Dave in the leg. And by that time the other witness had started walking – there was other people coming, and they continued to argue but ---*

Powrie: *Right? --- Someone else walking towards – from down by the river.*

Powrie: *Right? ---*

Woolford: *They continued to argue, and I just stayed holding onto the horse, because there was nothing really else I could do. And then Mr Coulty came and asked what was going on. He just said, nothing, they were just having a blue, and Dave grabbed his horse and walked off. After that, Joey put the horse he'd jumped off and was holding onto into the round yard, got onto the horse that I brought down and trotted off down the back track as Dave – who was on the other side of the fence, walking away from the incident – and continued to yell at Dave, and then they ---*

Powrie: *Right. And he walked down on the outside of the back track and Joey got on the other horse and trotted after him and started arguing, and they continued to argue. After that, Joey just continued to ride around on the horse until the work was done and we ---*

But you said he – are you saying he – they were taunting each other to hit each other?

Woolford: *---They were both as bad as each other, yes.'*

COMMENTS ON THE NEW EVIDENCE

Ms Woolford gave her evidence on oath. It was delivered clearly with confidence, conviction and objectivity. No cross-examination followed in relation to any of the passage quoted above. The brief questioning of Ms Woolford from the Stewards was virtually limited to the strength of the head butt and its consequences. As the evidence quoted above was unambiguous and in no way challenged there was no reason for me but to accept it entirely. This fresh evidence clarified the rather cryptic responses which the appellant had given to the Chairman of the inquiry when the appellant merely acknowledged that he '*...got off the horse*', stated he was not sure why he so acted, said '*...it was a last second thing*' and that he '*...got worked up and that was it...*'. Ms Woolford's version on the other hand painted a full and completely different picture. As is clear from her quoted evidence, I was supplied ample details of the actual circumstances which lead to the head butt. The appellant was in fact pulled off his horse by the scruff of his neck by Mr Miller. Further, I was given details of the fight which took place between the appellant and Mr Miller after the forced dismount whilst the horses were in an agitated state and immediately prior to the head butt being delivered. This evidence presented a completely different scenario to that which the Stewards had to deal with. On the evidence before the inquiry the appellant's actions were clearly capable of being categorised as totally irresponsible, unprovoked and completely inexplicable. By contrast, I was required to adjudicate on a quite different factual situation. Ms Woolford's evidence proved crucial to my decision which was in part to uphold the appeal.

CONVICTION - NATURAL JUSTICE

The appeal against conviction is based on the allegation of failure to afford natural justice. Natural justice is a well known and relatively straight forward concept. It is a term used to describe the requirements of fair play in adjudicating a party's rights or obligations in the course of proceedings. For a person appearing before Stewards to be given a fair hearing, as with most other types of proceedings where these principles apply, there must initially be adequate notice given of the hearing and sufficient information provided to the party affected of the subject matter of the process. Should the proceedings progress to a charge being laid for an offence against the Rules the requirement for natural justice dictates that the accused must be

provided with details of the nature of any accusation being made. This requirement involves being supplied adequate notice of the alleged misconduct. An accused must then be given the opportunity to state a case in defence and be dealt with by adjudicators who act in good faith. In other words, persons appearing before Stewards who initially are only suspects but then are subsequently charged are entitled to the right to be heard by unbiased adjudicators. I was satisfied each of these requirements or characteristics of natural justice were in fact present or afforded to the appellant. In the notice given of the charge the Stewards clearly stated the accusation being made. The Stewards quite properly provided the appellant with the specifics of the charge accompanied by adequate detail of the circumstances so that he could know precisely what was being alleged and what he was required to respond to.

The Rule in question potentially contains three different offences namely, misconduct, improper conduct and unseemly behaviour. Only the relevant offence was specified, namely improper conduct. The charge was formulated with adequate precision. It is relevant to note the appellant did acknowledge to the Stewards he understood the charge (page 16).

PARTICULARS OF ALLEGED NATURAL JUSTICE BREACH

The natural justice case presented for the appellant was a fairly lengthy and wide-ranging affair. The particulars in the appeal notice coupled with the submissions and allegations made by Mr Powrie collectively amounted to a strong criticism of the way in which both the investigation and Stewards' inquiry were conducted. It was claimed that the appellant had no opportunity '*to call witnesses or say anything at all*' or test the evidence. In levelling these criticisms Mr Powrie argued that the Stewards failed to adopt the appropriate procedures which were incumbent on them as a '*judicial body*'. Some of the propositions which were advanced, whilst they arguably in part may have been technically correct to a degree, were of such a minor or peripheral nature as to lack any material impact. I quickly reached the conclusion that, overall, there simply was no basis for any of the harsh criticism which was being made as to how the matter had been handled. Equally, there was no merit in the assertion that the same high standard of adjudication required of a '*judicial body*' could properly be said to apply to a Stewards' inquiry.

As quoted above the appellant's appeal grounds rely on a range of particulars to support the breach of natural justice proposition. As to the first, I was satisfied there was no merit in the argument put to me that the appellant was *not advised formally of the inquiry* (Conviction sub-ground a)). At the outset the Steward chairing the inquiry explained to both of the parties who were called to the inquiry the purpose of the exercise, which was to inquire into a report received from Mr P O'Reilly. They both were clearly told a charge may be laid from evidence flowing from the inquiry (page 2). Both stated they understood that position.

I also rejected the allegation that the Stewards erred in *accepting the investigation and report* which was Exhibit A in the proceedings below (Conviction sub-ground b)). I was not persuaded there was anything unsatisfactory with the way in which the report was prepared and presented to the Stewards or with the fact the Stewards relied on the report. Indeed, after the report was read and exhibited the appellant was asked '*...is that basically what occurred?*', to which he answered '*yep*'.

As to Conviction sub-ground c) regarding *the observer giving* evidence, the son of the person who was injured in the fight, Mr P Miller, was not only in attendance at the Stewards' inquiry, but importantly, he did speak out on a number of occasions during it. Everything Mr P Miller was allowed to contribute was more than questionable in terms of its probative value as he neither saw the actual incident itself nor sighted his father's injuries following the altercation. Yet he purported to comment on both aspects. His role should have been confined merely to that of an 'observer of proceedings'. But after having been allowed to give evidence in those circumstances, what he contributed should have been completely ignored. Despite the blemish of not silencing Mr P Miller, it appeared in all likelihood in fact that his comments were ignored. I was satisfied that the inquiry was not compromised by the comments. No breach of natural justice had occurred. Mr P Miller's presence and evidence did not taint the hearing.

The assertion that the appellant was *not afforded the opportunity to call witnesses* (Conviction sub-ground d)) due to the alleged failing on the Stewards' behalf was also unsupportable. The passages in the transcript from pages 16 to 21 reflect the fact that the appellant was asked if there was anything he wished to put before the Stewards. This was followed by a series of

questions from the Stewards to elicit relevant information. At the end of the process the appellant was then asked if he had 'Anything further?' to which he replied he did not.

I saw no merit in the arguments that the Stewards *relied on facts that were not contained in the evidence* (Conviction sub-ground e)), and that they relied on *medical evidence and treatment which was in no way supported* (Conviction sub-ground f)). Mr Powrie had argued the description of the injuries suffered by the trainer were somewhat overstated. Even if that were the case, which I concluded it was not, the extent of the injury in itself did not help support an appeal against conviction. The conclusions which the Stewards reached on the scant and questionable evidence were appropriate. The appellant failed to offer any meaningful explanation or excuse for his actions. He had simply pleaded guilty and did not dispute the relevant factual matters which the Stewards were therefore entitled to rely on.

The allegation raised regarding the *incorrect description of the locality* of the incident in the context of the way the charge was framed (Conviction sub-ground g)) was of no consequence. There can be no doubt that the appellant knew precisely where the event took place and which incident was being reviewed by the Stewards. Indeed, immediately after the charge was laid the Chairman of the Stewards' inquiry asked whether the appellant understood the charge. The appellant replied '*yes sir*' (page 16).

This then only leaves the last and serious allegation of *demonstrated bias throughout the inquiry* (Conviction sub-ground h). From the information which was before me on this aspect, namely the transcript and the oral submissions presented at the appeal, I was fully satisfied that the bias proposition completely lacked substance.

Bias is a very serious allegation. Clearly the onus is squarely on the person who alleges bias to prove it. I was satisfied from studying the transcript and the lack of merit in the argument which was advanced to support this proposition there simply was nothing which suggested the Stewards were in any way biased. All of the key elements to the hearing were fair. There was no reasonable basis for suggesting the Stewards had been unable to consider the case with anything but open minds. Rather, it was apparent from the transcript, the Stewards were open to persuasion and had dealt with the appellant's testimony appropriately. The Stewards obviously cannot be criticised for the fact the appellant was not forthcoming. A logical

consequence flowed from the lack of any explanation of the circumstances surrounding the incident. Obviously no adjudicator can be held accountable for what a person appearing before them has failed to divulge in circumstances where a reasonable opportunity to present a case has been afforded. As it transpired, I too was not informed by the appellant, despite the opportunity for supplementary evidence to be given during the appeal hearing, why the appellant had kept the factual circumstances surrounding the incident and the provocation for his actions to himself.

As to the balance of the matters pleaded in the conviction ground, three reasons for the appellant's guilty plea are advanced, namely the factors a) to c) stated at the end of ground A Conviction. None of the three reasons could possibly be substantiated from the material before me. Had the appellant seriously intended to have me take into account the three factors, it was necessary for the appellant to give evidence to lay a foundation to support these propositions. No such evidence was forthcoming. Nothing else substantiated any of the propositions. Accordingly, I concluded those factors could have no influence on the outcome of the appeal.

As I was satisfied that the Stewards correctly decided that the appellant's behaviour did amount to a breach of Rule 175(q), I dismissed the appeal as to the conviction on 6 October 2011.

PENALTY

At the same time as I handed down my decision on the conviction ground I informed the parties I was satisfied that the penalty of disqualification was too severe in this unusual case. I reached this conclusion despite the fact the Stewards were entitled to and had quite correctly treated the matter as serious on the evidence before them. Relevant to this is the fact the Stewards' inquiry transcript reveals the appellant agreed to anger management assistance on the assumption it would help him obtain a Breakers' Licence. The Chairman of the inquiry went on to acknowledge the fact that the appellant had said the behaviour was out of character '*...but something obviously triggers behaviour like that*'. (page 28). The Stewards were only made aware of one aspect of the circumstances leading to the belligerency, namely the so called 'joke' regarding the saddle sale. Unknown to the Stewards, but revealed by Ms Woolford at the appeal, the so called triggers thereafter were, in essence, the aggressive actions of

Mr Miller in pulling the appellant off his mount initially, Mr Miller's subsequent threatening conduct and the unseemly fight which followed. Had the Stewards been aware of this evidence I would be surprised if they would have considered anger management to be appropriate. But having said that I do acknowledge the appellant was far from entirely innocent at the very beginning in terms of setting things up for the eruption which followed. The appellant could be said to have started a chain reaction with his misplaced attempt at humour. This primed the matters which led to the incident in respect to which punishment was imposed. It was the appellant's misguided *'joke'* at the outset which had aroused Mr Miller. Once Mr Miller took the action which he did that in turn lead quickly to both men behaving disgracefully and Mr Miller eventually receiving the facial injury inflicted by the appellant.

The penalty ground B raises the range of issues quoted in full earlier. I now summarise them with the following headings and deal with each sequentially.

a) J Miller Instigated and Provoked Matters

As I have already made more than clear already, the initial step which ignited the flare up between the two antagonists was the appellant's inappropriate response to Mr Miller's question. Whilst the intention in so answering may only have been innocent, albeit mischievous, it quickly lead to serious consequences, which, no doubt with the benefit of hindsight, were clearly unintended. The appellant's response to the query as to the saddle was inappropriate. Unsurprisingly it upset Mr Miller. Ms Woolford's evidence somewhat vividly explained what transpired thereafter. Mr Miller's conduct in physically removing the appellant from his horse was both potentially dangerous and an over-reaction from the much more experienced man. Once the appellant was on the ground both men then proceeded to engage in strenuous verbal and physical conduct directed against each other. In this respect again, Mr Miller, a licensed person who owed some responsibility to his employee, should have behaved much more sensibly. This aggression in turn led to the appellant inflicting the injury. The Stewards knew nothing of these happenings. Mr Miller, the much more senior man, had held a position of authority over the youthful appellant. The conduct of both men, not just the youthful appellant, cannot be tolerated in the industry. Had the Stewards been informed of the

circumstances, one could reasonably have expected their decision in relation to the appellant and their attitude as to Mr Miller's role in the affair to have been quite different. Inexplicably, the appellant failed to reveal any of the detail to the Stewards. Rather, for whatever reason, the appellant in fact positively mislead the Stewards to his own detriment. His only explanation for head butting, as quoted previously, was '*I'm not sure, it was a last second thing*'.

b) In Public View of Others Attending the Track

Ms Woolford witnessed the whole incident. Another person came on the scene, but only after the physical clash was completely over or at best during its dying moments. It is relevant in assessing the seriousness of the misconduct and the consequent penalty to be imposed, to acknowledge the fact that the incident was out in the open rather than behind closed doors. But it is a relative factor, as the circumstances in this case were not as bad as those associated with some other convictions which have related to fighting at the actual racecourse itself and in front of public attending a race meeting.

c) The Level of the Injuries

The Stewards stated in their findings the injuries were '*facial*' and they did '*require first aid*'. As I understand the evidence put to the Stewards, that aid was rendered domestically at home. Although the injury did not require hospitalisation or professional medical treatment, there was nothing either inappropriate or of any consequence with respect to these descriptions given by the Stewards.

d) Failed to Articulate a Starting Point

It is true the Stewards in their reasons did not identify the range of penalties or tariff for such an offence. They simply stated the three month disqualification was within the range.

e) Fine or Suspension

I do not regard the failure to explain and give reasons why a lesser penalty was not warranted as a serious omission in light of the scant facts before the Stewards. The

appellant's failure to explain or in any way justify his actions left the Stewards with little alternative but to treat the matter with the severity which they did.

f) Mitigating Circumstances

This ground appropriately identifies some five valid mitigatory factors. In their reasons the Stewards made some reference to mitigating elements. I was persuaded by Mr Powrie's argument on this aspect. In light of the Woolford evidence I concluded that collectively, the factors of mitigation should weigh heavily in the appellant's favour and do justify a significant reduction in the penalty to be imposed.

g) Youth, Inexperience and Immaturity

The Stewards in their reasons did take into account the appellant's youth. I was satisfied in the light of the extra facts which were revealed at the appeal the appellant's age and associated factors of inexperience and immaturity largely explain this misdemeanour from his perspective. The appellant's adrenalin rush was no doubt a contributing factor, triggered by having initially been pulled off his horse followed by the aggressive physical and verbal argument at close quarters with the much older man.

The appellant had only been licensed as a track rider for two years. It is worth restating, he is a young man with limited experience. He had never offended previously. Those facts would suggest that he may have never have appeared before a panel of Stewards at an inquiry before. Despite the appellant's youth and inexperience, at the completion of the appeal hearing I continued to remain puzzled why the appellant had failed to advance his own cause and provide any explanation or excuse for his actions when he came before the Stewards. That puzzlement was heightened by the fact that the appellant was represented by his experienced father, a former Chief Steward.

h) Appellant's Record

This aspect too is deserving of some weight. There was no evidence of any previous misconduct or aggression. There was nothing to suggest on the evidence this episode was anything but out of character and, hopefully, unlikely to be repeated.

i) Remorse

The Stewards quite appropriately acknowledged in their reasons the appellant's genuine remorse. This fact was clearly evident to them from the report of Mr O'Reilly and from what they learned at the inquiry.

j) Appellant's Spontaneous Responsive Reaction without Premeditation

Ms Woolford's evidence did prove the appellant's behaviour met the description contained in this sub-ground of appeal. The appellant clearly behaved reactively on the spur of the moment. The Stewards however were not in a position to know how or why the appellant had so responded as he failed to explain matters to them.

Whilst the imposition of the heavy burden of a three month disqualification may have been justified on the evidence below, it was not appropriate for me to endorse that penalty. I was satisfied that the appellant's behaviour in the light of the Woolford evidence did not justify either a disqualification or a suspension. But the appellant did need to be punished for his role in this unsatisfactory affair. Further, an appropriate message to industry participants needed to be conveyed, making it clear to all that such conduct is intolerable.

PENALTIES IMPOSED IN OTHER CASES

Some very useful material was handed up to me at the appeal hearing which addressed the issue of penalty. It comprised a W.A.T.C. Racing Information System (Print Penalties by Rule Number) (exhibit 1), a Table of Particulars for Offences under AR 175(q) (exhibit 2), the RWWA Record of Convictions for B P Newnham (exhibit 3) and two Thoroughbred Media Releases (exhibits 4 and 5).

Exhibit 1 lists offenders and penalties imposed under the Rule 175(q) since December 2002. The list reveals breaches of this rule have occurred reasonably frequently, with some 83 entries. The range of penalties imposed has varied enormously. Eight cases resulted in disqualifications, two being for six months and six for three months. Of the seven suspensions, one was for five months and four days, three for three months and the others ranged down to one month. Of the fines two were for the maximum of $2,000. One was $1,500. Ten were $1,000. Four were $750. Eleven were $500. Two were $400. Six were $250. Sixteen were $200. Seven were $100 and one was $50. Exhibit 2 contains a list with more details of 24 of the offences listed in exhibit 1. In the light of this information it is clear that the penalty imposed on the appellant, as the penalty appeal ground correctly alleges, was in fact at the upper level of those imposed under this Rule over the last nine years.

OCTOBER DETERMINATION

As already mentioned, at the same time as I handed down the 6 October 2011 determination on conviction, I also announced I was satisfied the Stewards fell into error in imposing a three month disqualification on this young first offender. In view of the evidence which was presented before me I advised the parties in my opinion a disqualification was inappropriate. Disqualification is a fitting punishment for the upper level of serious offences. The effect of a disqualification is to take from the offender the ability or opportunity to participate directly or indirectly in any aspect of the sport of racing. It banishes the offender from licensed premises and excludes employment in any aspect of the industry (Australian Rule 182). Consequently, a disqualification removes a person's right to earn a living or to continue to enjoy any aspect of the sport. A disqualification is like a warning off which has been imposed for a specific period. For a 20 year old on the threshold of a career in the industry it is a severe penalty indeed. Its impact is felt not simply during its currency but remains as a pronounced stain on one's record forever. Whilst not as harsh, a suspension is a temporary withdrawal in whole or in part of a licence or privilege under the Rules, which could have the effect of denying someone like the appellant, the ability to ride during its currency or work in any stable. When one considers Mr Miller's role in the affair, as already amply explained, coupled with the appellant's mitigating factors, it would not be appropriate to ostracise the appellant from the industry with a

suspension. Having reached that conclusion it remained open under the Rules to impose a fine or simply to reprimand. I quickly dismissed the notion of the latter as I considered the misconduct involved to be far too serious for a mere reprimand.

As I had not received enough information to set the fine based on exhibits 1-5, I sought additional particulars in relation to the cases where fines had been identified as the penalty in exhibit 1 but where no details were included in the material before me. Consequently, I adjourned the matter in October to enable the Stewards to supply such extra information as they could. I gave Mr Powrie leave to comment in writing on any response I received from the Stewards.

At the conclusion of the October hearing Mr Powrie told me the affect of the appellant being out of work due to his suspension was worth something in the order of $6,500. As a consequence of the plea for leniency I was also asked to order a partial refund of the lodgement fee.

It has not been the practice for the Tribunal to order refunds even in the case of a completely successful outcome unless special circumstances exist. This was not such a case. The appellant's conduct in the melee coupled with his lack of forthrightness before the Stewards (apart from his ready plea of guilty), did not warrant deviating from the practice. The appellant's failure to explain matters to the Stewards was compounded by his having mislead them with the answers I identified earlier. This offender must be punished for the injury he inflicted. Despite my having quashed the disqualification, this is not a case where a person's privileges have been inappropriately taken away as a consequence of the Stewards having miscarried in their handling of the matter. Minus the Woolford evidence I would also have concluded this was a serious matter which deserved disqualification consequences such as those imposed. There was no breach of natural justice involved. The Stewards were not shown to be in error in their treatment of the matter in the light of the material before them. Despite those considerations, my decision to quash the disqualification meant that the appellant had in fact been excluded from earning a livelihood from 9 September 2011 on 6 October 2011. The appellant had in fact suffered from the disqualification even though his record would not reflect that penalty.

THE SUPPLEMENTARY MATERIAL

As usual the Stewards quickly and fulsomely responded to my request for more information by helpfully supplying the details of many cases of fines. Their response was accompanied by an explanatory letter. I agree with many of the observations contained in the letter. As the letter so neatly describes important aspects of this matter, it is worth quoting from it in large measure as follows:

It is self evident from the list provided that a vast array of factual matrixes potentially fall within the ambit of AR175(q) given the broad construction of the rule. The personal circumstances of the individuals involved is also highly varied, with the circumstances of each offence in relation to matters such as levels of mitigation, provocation and degree of force all varying significantly depending on each individual case. When compared to the earlier list which became Exhibit 1 at the Appeal proceedings, it is clear that matters which may similarly be described as 'altercations', physical or verbal, have attracted penalties of both fine and disqualification. This illustrates the strong dependency on the variables of each matter, making it difficult to compare one offence of AR175(q) with another as each will ultimately turn on its own circumstances and the personal antecedents of those involved.

Clearly as the Tribunal must now exercise the penalty discretion, a penalty needs to be affixed for the offence in all of these circumstances as it cannot be left unresolved. It is understood that disqualification, suspension or reprimand have been already determined to be inappropriate, thus leaving a fine as the remaining mode of penalty.

Whilst the matter was found in all the circumstances not to warrant disqualification, the outcome of this matter will establish a precedent unless otherwise recorded in the determination and to that extent the Stewards submit remains a serious matter. With respect, the matter should in the first instance, be determined in isolation of the unique circumstances now faced as a result of the portion of penalty served, in order to record an appropriate penalty for the offence simpliciter in all of the circumstances. The determination of a fine would then be fully reflective of the disapprobation for the conduct of one licensed person assaulting another by way of a head butt, of itself potentially a criminal assault, which is known to have the potential to cause serious injury. This would ensure the appropriate message was sent both specifically and generally. Consequently the Stewards respectfully submit it would be inappropriate to affix a nominal or salutary fine due to time already served but rather any penalty should be condign with the offence itself.

In response to the appellant's submission on the question of applying the penalty arrived at, the Stewards respectfully direct the Chairman to AR196(4) which states:

> *AR196(4). Any person or body authorised by the Rules to penalise any person may in respect of any penalty in relation to the conduct of a person, other than a period of disqualification or a warning off, suspend the operation of that penalty either wholly or in part for a period not exceeding 12 months upon such terms and conditions as they see fit.*

In light of the fact that the appellant has served a portion of the disqualification penalty now found to be inappropriate, the Stewards respectfully submit that it is appropriate for any fine ultimately determined at the discretion of the Chairman to be appropriate for the offence, to be suspended in accordance with AR196(4) on the condition that the appellant does not offend under this or any similar rule in relation to conduct for a period of 12-months or such other similar condition or length of time held to be suitable by the Chairman.

Mr Powrie availed himself of the opportunity to respond to these propositions. Included in his response he submitted:

- It would be spurious to decide the matter in isolation having served approximately one third of the disqualification.

- The Stewards overplayed the seriousness of the head butt by ignoring the fact the appellant was dragged off his horse.

- This case, like some others in the past, involved a person in a position of responsibility who conducted himself improperly towards an apprentice under his control.

- The précis of the additional case information supplied by the Stewards failed to contain the records of the people fined.

I have taken note of these and the other propositions made by the parties in reaching my ultimate conclusion of the matter.

THE FINE

I now sum up some of my previous remarks with the following propositions:

1 A wide range of conduct has been punished over the years for breaches of the relevant Rule.

2 The surrounding facts and circumstances of each offence must impact significantly on the consequent punishment.

3 The personal circumstances of each individual concerned needs to be carefully evaluated.

4 The penalties in each case also depend on the factors of mitigation.

5 Because of these variables comparing one offence with another is difficult.

6 The penalty determination for the appellant's offence initially needs to be evaluated devoid of the impact of the term of disqualification he has actually served and this will

help ensure an appropriate message is conveyed both to the individual and the industry.

7 The fine in this case should be condign with the offence and all relevant circumstances.

8 The impact of the disqualification already served should be accommodated with a suspension of the operation of the ultimate penalty imposed.

The general descriptions contained in the material before me of so many of the offences such as 'physical assault' and 'physical altercation by fighting' is only the first step in trying to evaluate one case versus another as a step in the process of arriving at an appropriate penalty.

The Steward's letter refers to establishing a precedent in isolation of the unique circumstances. The following factors which combine to make this case a somewhat unique case cannot be ignored:

1 The age difference between the combatants;

2 The disparity of their respective roles and positions with the younger man having lived at the much older man's premises and worked for him;

3 The fact the younger man had failed to return a saddle and added to the aggravation which this caused in treating the matter as a joke;

4 The reaction from the appellant which resulted from initially having been pulled from his horse followed by the volatile behaviour thereafter;

5 The injury inflicted by the resultant head butt;

6 The ample remorse;

7 The failure to disclose the surrounding facts and circumstances; and

8 The ready admission of guilt to the Stewards which was not accompanied by an appropriate explanation.

But for Mr Miller's contribution to the battle which led to the injury which was inflicted, combined with the other mitigatory factors which have previously been identified, a fine at or near the top end of the range would have been appropriate. Having weighed all these factors I am satisfied a fine of $1,000 is appropriate.

I have adopted the proposition of Mr Borovica quoted in his letter. In view of the disqualification already served the $1,000 fine should be suspended on condition the appellant does not offend under Rule 175(q) or any similar rule in relation to conduct for the period expiring 31 August 2012.

ORDERS

I conclude this matter by ordering that:

1 The appeal against conviction is dismissed. The conviction is confirmed.

2 The penalty of three months disqualification imposed by the Stewards is quashed.

3 The appellant shall be liable to a fine of $1,000.

4 Payment of the fine shall be suspended until 31 August 2012 provided the appellant does not offend under Rule 175(q) or any similar rule in relation to conduct.

DAN MOSSENSON, CHAIRPERSON