

**RACING APPEALS TRIBUNAL
QUEENSLAND**

NOTICE OF DECISION

APPEAL NO: RT012-07

DATE: 23 May 2007

APPELLANT: John Wallace

RESPONDENT: Queensland Racing

APPEARANCES: Mr GW Diehm of counsel instructed by Butler
McDermott Lawyers for the Appellant, and
Mr JE Murdoch SC on behalf of Queensland Racing.

REASONS FOR JUDGMENT

Mr Brockwell Miller - Deputy Chairman

Mr Dennis Standfield – Member

The Appellant was the trainer of “Boffa” when that horse competed in Race 8 at the Gold Coast Turf Club meeting on Saturday, 31 March 2007. A blood sample taken from “Boffa” was analysed and found to have an elevated Total Plasma Carbon Dioxide level when such analysis was performed at the Racing Science Centre in Queensland. The Certificate of Analysis from that Centre (Exhibit 8) identified the concentration as 37.4mmol/L. The uncertainty of measurement noted in that Certificate was not greater than 1.2mmol/L at the threshold level which was 36mmol/L. As is the usual practice when a laboratory confirms what can be noted as a positive finding, a further independent confirmatory analysis is conducted by

another NATA accredited laboratory. This further confirmation analysis was conducted by the Australian Racing Forensic Laboratory in New South Wales and the Confirmation Test Report (Exhibit 17) identified that the result reflected a reading of 37.5mmol/L with a measurement of uncertainty again of 1.2mmol/L at the threshold concentration of 36.0mmol/L in plasma.

As a result of those Certificates being returned to the Stewards of Queensland Racing, an inquiry was convened during the course of which Mr Wallace was charged under AR 178 which reads:-

When any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be punished.

The particulars of the charge noted by the Stewards at page 92 of the transcript identify that:-

As the registered trainer, Mr Wallace, of Boffa, you presented that gelding to race at the Gold Coast Turf Club on Saturday, 31 March 2007 when a blood sample taken from that horse prior to competing in Race 8, the Class 2 Handicap of 1800 metres, which upon analysis by 2 independent NATA

accredited laboratories reported a total plasma carbon dioxide level in excess of the 36 millimole threshold as prescribed by the Australian Rule of Racing, namely 37.4, as reported by the Queensland Government Racing Science Centre and 37.5, as reported by the Australian Racing Forensic Laboratory.

Mr Wallace was subsequently found guilty of the charge and a penalty of six months disqualification of his trainer's licence was imposed. It is as a result of that penalty and finding of guilt that the appeal to this Tribunal was lodged. The Grounds of Appeal were appended to the Notice of Appeal and identified as:-

- (a) that the Stewards' panel failed to take into consideration the expert evidence of Dr Brown in that they accepted the readings from the "Beckman Elise" machine as being accurate in determining the levels of carbon dioxide in the tested samples from the race horse "Boffa".
When in fact the machine tested bicarbonate only;*

- (b) the Stewards' panel failed to take into consideration the expert evidence of Dr Brown in raising the reasonable hypothesis that the Beckman Elise machine could not have been properly calibrated for both the Brisbane and Sydney measurements;*

- (c) *the Stewards' panel failed to take into account the variation in readings taken at the extreme end of the curve of readings referred to in the Brisbane analysis bearing in mind the evidence of Dr Brown;*
- (d) *the Stewards' panel failed to consider that the raw data from the Sydney analysis differed from the Brisbane analysis despite the fact that it was contended by the Stewards that the same Beckman instrument was used in both analyses;*
- (e) *the uncertainty of measurement relied upon by both the Sydney and Brisbane laboratories was unreliable;*
- (f) *The Chairperson of the Stewards' panel presiding at the Gold Coast and throughout the inquiry should have disqualified himself (sic).*

Further Grounds of Appeal were noted in the letter from Butler McDermott dated 17 May 2007 directed to the Racing Appeals Tribunal which effectively contended that:-

1. *On the evidence before the Stewards the Appellant was not "a trainer in charge of such horse at any relevant time within the meaning of AR 178"; and*

2. *Alternatively on the evidence –*

- (a) *it had not been proved that the Appellant was not under an honest and reasonable but mistaken belief in the existence of a “lawful” level of total carbon dioxide in the horse’s blood at any material time (within the meaning of section 24 of the Criminal Code);*

- (b) *the Appellant had not breached R.178 because the event, being the level of total carbon dioxide above the prescribed limit in the horse’s blood stream at the time the horse was “brought to the racecourse”, was an event which occurred by accident within the meaning of section 23 of the Criminal Code.*

Those further Grounds of Appeal were the subject of an Application for Leave to Amend which was granted by the Tribunal at the commencement of the hearing and so far as the two further grounds referring to the sections of the Criminal Code were concerned, sought to raise as a defence the exculpatory elements of that Code where mistake and accident were evident.

The Tribunal was fortunate in that Counsel for both parties provided succinct Outlines of Submissions in support of their client’s arguments. Without the benefit of those submissions and the erudite argument of those Counsel, this Appeal would have

certainly taken considerably more time than it did in the end result and we are thankful to them for their assistance in that respect.

It behoves this Tribunal to address each of the grounds of appeal. However, before so doing, it is appropriate that it be acknowledged here that, at the outset, the Appellant abandoned the ground of appeal stipulated in subparagraph (f) of the Annexure "A", such grounds relating to the issue of bias of the Chairperson of the Stewards.

The first Ground of Appeal raised at the hearing centred upon the proper construction to be given to AR.178. It was submitted that a trainer who was not present at any time when the horse was *brought* to the racecourse for the purpose of engaging in a race could not be found guilty if that horse is subsequently returned with a finding of a level of TC02 above the prescribed limit. The basis suggested was that the words *the trainer* where they appear in that rule are qualified by the phrase *in charge of such horse at any relevant time* and as Mr Diehm confirmed, that practicality (where a trainer is absent from the racecourse at the relevant time) must be a situation that arises from time to time. Most assuredly that issue does arise and it is not for this Tribunal to embark upon a discussion of the events that might become apparent where a trainer is not, at the relevant time, with the horse at a race meeting. Suffice to say that the trainer is registered in respect to that horse and is responsible for that horse at all times. The relevant rule has been, in our opinion, properly phrased to visit upon a trainer a liability in respect to the horse at all times but it is qualified by

the use of the words *other person*. In our opinion, other people may have control of a horse from time to time throughout the day or even during a period of holidays.

Licensed stable hands, foremen and even, on some extraordinary occasions, other licensed trainers will be in charge of horses not ordinarily in their care. The rule has been framed, as Mr Murdoch suggests, to broaden the net to bring to account any additional persons who may be in charge of a horse on behalf of the trainer but that does not, of itself, exonerate a trainer from the principal responsibility and it is not necessary to prove that the trainer was in charge of a horse at a relevant time.

We do not consider that this Ground of Appeal has any merit whatever.

The second Ground of Appeal argued before us centred upon the *exculpatory provisions* of the Criminal Code of Queensland. Section 36 of the *Criminal Code Act 1899* provides:-

Application of Rules

- (1) *The provisions of this chapter apply to all persons charged with any criminal offence against the Statute Law of Queensland.*

Statute Law of Queensland is not defined but a decision of the Full Court of Western Australia in *Harper v The Racing Penalties Appeal Tribunal of WA* has held that *statute law* in the relevant Western Australian Criminal Code would include by-laws made or amended by a Principal Club pursuant to a statutory authority. The

Appellant argues that as the *Racing Act of Queensland* was a statutory enactment of 2002, it therefore satisfies the requirement *the Statute Law of Queensland* as noted in section 36 of the Criminal Code and as such it brings into account the right to give consideration, during the course of Racing Inquiries, to the benefits of the exculpatory provisions of sections 23 and 24 of the Criminal Code. What, however, concerns us is that section 36 stipulates that the relevant provisions of the Code will apply to all persons charged with any *criminal offence* against the Statute Law of Queensland. If this charge could be classified properly as being a *criminal offence*, then the submission in question may well have merit. What is, however, apparent is that any conviction of a registered person under the relevant Rules of Racing cannot, by itself, be identified as a criminal conviction. There are no doubt circumstances that may arise where criminal convictions can be brought against an individual as a result of something that does occur within the confines of the Racing Industry but a conviction under the racing regime can never be said to have a criminal connotation. For that reason we do not accept that the exculpatory provisions of the Criminal Code can apply in circumstances such as those with which we are now visited.

It is perhaps appropriate to identify the issues of those exculpatory provisions. The Appellant contends that he was under a mistaken belief as to the existence of a lawful level of total carbon dioxide in the horse's blood at the relevant time. We cannot here identify that there was any mistake or even mistaken belief as no evidence was ever submitted as to how the level in the horse's system rose above

the prescribed threshold. It would appear therefore that the Appellant could never have had any belief whatever that was mistaken.

Again, recourse to section 23 of the Criminal Code by the Appellant relates to an event which occurred by accident. The event, it is suggested, was the level of total carbon dioxide being above the limit in the horse's bloodstream at the time that the horse was brought to the racecourse. The evidence simply is that there cannot be an accident as to how that level achieved that reading. The horse in question had to ingest a substance which would, in all of the circumstances, have raised the level above the 36.0mmol/L prescribed limit. There was no accident therefore in the level being raised above the threshold. The argument as to sections 23 and 24 of the Criminal Code must therefore fail.

It should be borne in mind that Mr Wallace has been charged under the *presentation* Rule of Racing. In other words, he suffers the consequences if a horse, of which he is in charge, is presented to a racecourse for the purposes of racing while, in its system, it has a prohibited substance. This in effect does magnify the consequences of what can simply be described as a strict liability situation. If evidence had been available to substantiate a charge that he, as the trainer or an other person in charge of the horse, had specifically administered the substance, then the presentation rule would not have been the subject of the charge but he would have been promptly charged with the administration of a substance which, of course, bears a much higher penalty. It is, in our opinion, a possible defence to the administration charge

that the person who administered the substance was under a mistaken belief as to the substance which may have been administered to the horse. That *mistaken belief* forms the crux of one of the exculpatory provisions of the Criminal Code and a defence thereunder may well have been available. Whether or not there was any *accident* that could have been considered as relevant to the administration is, however, something else altogether which must be taken into account dependent on all the circumstances.

The third Ground of Appeal relates to the evidence of Dr Brown regarding the blood test results falling within a range of possible outcomes. In that respect Dr Brown submitted into evidence Exhibits 49 and 50 which are graphs which he suggests opened the prospect that the range of tolerance (the measure of uncertainty of 1.2mmol/L) might be greater than that allowed for in the testing laboratories. This of course is an issue that relates to the accuracy of measurements and the methods that are adopted by the various laboratories in undertaking the testing and analysis of the various samples. It is suggested that before testing can be undertaken, the relevant machines must be properly calibrated and Exhibit 50 is suggested by Dr Brown as identifying areas of *Unknown Value* at the extremes of the scale. He has suggested that the measure of uncertainty would, at the relevant time and at the relevant threshold, be uncertain and therefore could perhaps be higher than allowed for by the relevant laboratories.

Each of the laboratories that undertook the testing of the samples used are accredited with NATA. As such, by virtue of its accreditation, each laboratory is deemed to have properly identified and calibrated its machines and evaluated the samples appropriately. It is not appropriate, in our opinion, for a person, qualified or not, to simply opine that there may be a difference in the measurement of uncertainty at differing levels along the scale. Unless evidence was available to suggest that one or both of the machines was defective or inoperable, then mere conjecture cannot be enough. Certificates were issued that stipulated the level of the substance in the horse's blood stream. An allowance factor (the measurement of uncertainty) was utilised to provide any possible benefit to the Appellant. Notwithstanding that benefit, the level of the sample still exceeded the threshold. Certificates were provided to the Stewards and the Rules of Racing entitled the Stewards to rely upon them. In doing so they came to the conclusion that the level had been exceeded and that a charge should therefore be laid. If there had been any proper explanation available to explain why the level was exceeded, then evidence should have been presented to support same. No such evidence, in that regard, was forthcoming and in the circumstances this Tribunal cannot have any reliance upon the evidence of Dr Brown to support the Appellant's contention. This Ground of Appeal must also fail.

The fourth and last Ground of Appeal argued before this Tribunal centred upon the issue of severity of penalty. The Stewards, during the course of their deliberations, identified that Mr Wallace had various previous convictions which would ordinarily have precluded his being granted any dispensation from what they consider to be the

benchmark of nine months disqualification. They did, however, take into account his personal situation and his longevity as a horse trainer. During the course of their deliberations they opined that it would be appropriate and proper for a penalty of six months disqualification of his trainer's licence to be imposed. In matters that have been brought before this Tribunal where similar charges have been levelled, it has been regularly stated that a disqualification is an appropriate deterrent to the members of the Racing Industry and that it would not, in these circumstances, be appropriate for a suspension to be levelled. Having said that, the Stewards have on a number of occasions sought to increase the length of the penalty imposed. This Tribunal has, to this point in time, steadfastly rejected such a proposition unless of course it could be shown that there was some form of repeat offending being undertaken. It is true that Mr Wallace has had some other offences but frankly they are not, in our opinion, such as to warrant the imposition of any loading upon a six months disqualification. We believe that the Stewards acted properly in identifying that six months was an appropriate penalty and we do not consider that it was manifestly excessive in all of the circumstances. In the circumstances we dismiss the appeal as to penalty and as to guilt and we order that the deposit be forfeit.

Mr Brockwell Miller
Deputy Chairman

Mr Dennis Standfield
Member
