RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF
MR D. MOSSENSON (CHAIRMAN)

APPELLANT	:	**GEORGE LIONEL WAY JNR.**
RESPONDENT	:	**THE STEWARDS OF THE WESTERN AUSTRALIAN TURF CLUB**
DATE OF HEARING	:	**16 & 17 December 1991**

Mr T.F. Percy on instructions from Mr T.J. Kavenagh appeared for Mr Way.

Mr R.J. Davies Q.C. appeared for the respondent.

1. BACKGROUND

On 17 October 1991, following preliminary argument on the 27 September 1991, the Tribunal granted leave to Mr G.L. Way Jnr. to appeal against the four convictions which had been imposed upon him by the Stewards of The Western Australian Turf Club ("The W.A.T.C.") early in 1987. In ruling that time be enlarged to enable Mr Way's appeal to proceed the Tribunal ordered that fresh evidence may be received at the appeal hearing.

On 17 February 1987 the Stewards of The W.A.T.C. conducted an inquiry in relation to the finding of an electrical apparatus on premises of Mr Way who was then the holder

of a trainer's licence with The W.A.T.C. ("the Battery Inquiry"). The evidence which was presented at the Battery Inquiry revealed that on 12 February 1987 a search at the home and stable of Mr Way, made pursuant to a search warrant, resulted in the discovery of an electrical device which was capable of delivering electric shocks which could affect the performance of a horse in a race or trial.

Following the Battery Inquiry Mr Way was charged with breaching the Rules of Racing A.R.175(a) which states:

> "The Committee of any Club or the Stewards may punish any person, who, in their opinion, has been guilty of any dishonest, corrupt, fraudulent or improper practice or any dishonourable action in connection with racing."

The particulars of the charge were:

> "... that you a licensed trainer with The W.A.T.C. committed an improper practice by having on your premises an electric apparatus capable of affecting the performance of a horse in a race or training gallop."

Mr Way pleaded not guilty to the charge but was convicted and was disqualified for a period of five years.

On 17 February 1987 the Stewards also conducted an inquiry into the Government Chemical Analyst's report on the urine specimens taken from Hollydoll Girl after it had won the Swan Premium Airship Handicap, run at Ascot on 26 January 1987, and the Retravision Country Dealers' Handicap, run at Ascot on 31 January 1987 ("the Hollydoll Girl Inquiry"). Swabs taken from Hollydoll Girl, revealed the presence of the substance

etorphine, a potent narcotic and analgesic, which was classified as a "drug" for the purposes of the Australian Rules of Racing as they then existed.

Despite the fact that Mr Way protested his innocence at the Hollydoll Girl Inquiry he was charged with breaching Rule A.R.178, which at the time read:

> "When any horse which has been brought to a racecourse for the purpose of engaging in a race is found by the Committee of the Club or the Stewards to have had administered to it any drug as defined in A.R.1, the trainer and any other person who was in charge of such horse at any relevant time, may be punished, unless he satisfies the Committee of the Club or the Stewards that he had taken all proper precautions to prevent the administration of the drug."

The particulars of the charge were as follows:

> "... that you being the trainer of Hollydoll Girl failed to take all proper precautions to prevent the administration of the drug Etorphine to that filly prior to her running in her race at Ascot Racecourse on January 26th and January 31st 1987".

Again, Mr Way pleaded not guilty but he was convicted and disqualified for a period of ten years to be served cumulatively with the other disqualification.

Hollydoll Girl was part owned by the then Chairman of The W.A.T.C., Mr J. C. Roberts, who was found to have had no knowledge of the matter at all. No action was taken against Mr Roberts personally although his horse was disqualified from both races.

Mr Way initially appealed to the Committee of the W.A.T.C. against his disqualifications but subsequently decided to abide by the decisions and withdrew the appeal.

On 20, 26 and 27 February 1987 the Stewards conducted an inquiry into the Government Chemical Analyst's report on the urine specimens taken from Brash Son after it had won the Advance-Australia Day Stakes, run at Ascot on 24 January 1987 and the Mount Barker Hotel - Mount Barker Cup, run at Mount Barker on 7 February 1987 ("the Brash Son Inquiry").

At the conclusion of the Brash Son Inquiry the Stewards charged Mr Way with breaching Rule A.R.178. The Stewards provided the following particulars:

> "... that you being the trainer of Brash Son failed to take all proper precautions to prevent the administration of the drug Etorphine to that horse prior to Brash Son running in the Advance - Australia Day Stakes at Ascot on 24th January '87 and again to Brash Son prior to it running in the Mt Barker Cup at Mt Barker on 7th February '87."

In relation to the Brash Son charge Mr Way pleaded guilty and was disqualified for a period of five years which was ordered to be in addition to the previous disqualifications.

No charges were laid against the owner of the horse Mr L.R. Connell. Brash Son was disqualified from both races.

2. THE BATTERY CHARGE

At the commencement of the hearing of the appeal before the Tribunal the first eight pages of the transcript of the Steward's inquiry of 17 February 1987 which related to The Battery Inquiry were made available by the respondent to Mr Way's Counsel and to the Tribunal. This transcript had not previously been supplied to Mr Way and was not

produced in relation to the October Tribunal hearing when Mr Way sought leave to appeal. Apparently Mr Way had not endeared himself to the Stewards in relation to the transcript of the Hollydoll Girl Inquiry as, to quote the words of Counsel for the respondent, "Long before an appeal was lodged in this matter, the Stewards were in the course of showing pages 9 onwards of the transcript to Mr Way when he got up and shot through with it".

The new Battery Inquiry Transcript made clear for the first time the precise background to the A.R.175 conviction and put beyond doubt that the offence in question had nothing to do with drugs. Despite that fact, because of the special circumstances of this case, including the fact that the transcript had not previously been produced at the Tribunal's preliminary hearing in relation to these matters at which the Stewards did not oppose the application for leave to appeal, Mr Way was allowed to proceed with his appeal in relation to the battery matter as well as the two drug related convictions.

The amended notice of appeal contains the following grounds of appeal:

"1. Fresh evidence has recently come to the Appellant's attention which could establish that Mr Way did take all proper precautions to prevent the administration of the drug.

2. The Appellant appeals against the conviction and penalty imposed under Rule A.R.175(a) on the following grounds:

A. The Stewards failed to accord the Appellant procedural fairness by:

(a) NOTICE: failing to give any or any adequate notice to the Appellant that a hearing was to be held in relation to the finding of an electrical apparatus;

(b) ADJOURNMENT: by failing to allow the Appellant an adjournment of the proceedings following indication that he was not prepared to proceed with the inquiry immediately;

(c) PARTICULARS: in failing to provide the Appellant with a transcript of the proceedings or to adjourn the proceedings to facilitate the provision of such transcript;

(d) UNDERSTANDING: by proceeding with the hearing notwithstanding the Appellant having indicated that he did not understand the charge;

(e) REASONABLE OPPORTUNITY TO ANSWER THE CHARGE: by failing to advise the Appellant of his right to have the proceedings adjourned so that he had a reasonable opportunity to prepare his case once he was charged,

and that accordingly the conviction recorded and penalty imposed on the said charge was void and a nullity.

B. The Stewards erred in finding as a question of fact that:

(a) the electrical apparatus was found on the premises of the Appellant there being no evidence that the apparatus was ever on his premises;

(b) that the premises in question belonged to the Appellant.

C. The Stewards erred in law:

(a) in failing to consider whether mere possession of an electrical apparatus amounted to an improper practice;

(b) by proceeding on the incorrect assumption that mere possession of an electrical apparatus necessarily amounted to an improper practice;

(c) in failing to recognise the difference between an offence under Rules A.R.175(a) and A.R.175(hh); the former requiring an element of active or repetitive use the later requiring only simple possession;

(d) in construing Rule A.R.175(a) as though the conduct referred to is to be treated separately whereas on a proper construction the words "improper practice" should be read *ejusdem generis* to the words "dishonest corrupt or fraudulent" and requires an element of fraudulent conduct.

3. The penalties imposed by the stewards should be varied in the light of the fresh evidence referred to in paragraph 1 above."

As it transpired, no fresh evidence was presented in relation to the battery charge and Mr Way simply mounted an argument based upon submissions relating to the alleged procedural unfairness and breach of natural justice as reflected in the new transcript of the Battery Inquiry. Upon close scrutiny of that transcript it is apparent that Mr Way adopted an attitude of being obstructive or deliberately obtuse in his answers to the questions which were put to him by the Chairman of Stewards and in his behaviour generally. The manner in which Mr Way handled himself in the witness box before this Tribunal reflects that he is anything but unintelligent. This approach by Mr Way before the stewards no doubt made the orderly conduct of the Battery Inquiry all the more difficult.

The chief race-course investigator for The W.A.T.C., Mr Goddard, was accompanied by four police detectives when the battery device was located on the person of Mrs Way at the Way property situate at 30 Mathieson Road, Belmont. Mr Way was present at the time of the discovery; indeed Mr Way was instrumental in having the device extracted from Mrs Way's jeans pocket. It is also worth noting in this context that at Mr Way's

Caversham stables he stated to some employees "Val got caught with my jack trying to help me". Mr Way clearly would have known that the respondent would inquire into this serious matter. Although Mr Way claims he was not given any or any adequate notice that a hearing was to be held in relation to the electrical apparatus, in the circumstances it is not considered that this constituted a serious breach of procedural fairness even although on the facts before me it appears that the adequacy of the notice may well have been less than satisfactory in other circumstances.

Had Mr Way been half co-operative at the Battery Inquiry the matters complained of in the amended grounds of appeal 2A(b) to (e) inclusive may well not have arisen. Mr Way was present when the stewards heard the relevant witnesses. The detailed statement of Mr Goddard, who was present when the battery was discovered, was read out. Although Mr Way was given the opportunity to question the adverse witnesses and an opportunity to be heard the transcript reveals that his own attitude did him some disservice in the proceedings.

Even although it was demonstrated that Mr Way does have an arguable case I am not persuaded that any alleged procedural unfairness, particularised in 2A of the appeal notice, and any of the alleged errors or findings, particularised in 2B and 2C, have been made out by Mr Way. In coming to that conclusion I am greatly assisted by the unreported decision of Pidgeon J. in the Supreme Court of Western Australia No 2299 of 1987 in the case of Bruce Alan Morris v Neville James Way which was heard 18 - 20 January 1988 and delivered on 9 February 1988. In that case Mr Morris sought a declaration that the disqualification imposed by the stewards was ultra vires, void and of no effect.

Mr Morris was charged under the same rule as Mr Way and the particulars of the charge were virtually identical. Whilst there is a remarkable similarity between the facts of the Morris appeal and the current appeal the cases can, however, be distinguished in that Mr Morris instituted the Supreme Court proceedings seeking a declaration that the disqualification was ultra vires and of no effect. Interestingly, Mr Morris was also disqualified for a period of five years. The inquiries were commenced as a result of a battery device having being located on land on which Mr Morris trained race horses. By dint of shear coincidence the CIB stumbled onto the battery at Mr Morris' property when in fact they were searching for something else, which is precisely what occurred in the present case.

The nature of the inquiry before stewards is identified and analysed in the Morris decision and in the authorities referred to therein. In particular, the remarks of Lord Wilberforce in Calvin v Carr [1979] 1 NSWLR 1 at pages 14 to 15 are helpful:

> "In addition to these formal requirements, a reviewing Court must take account of the reality behind them. Races are run at short intervals; bets must be disposed of according to the result. Stewards are there in order to take rapid decisions as to such matters as the running of horses, being entitled to use the evidence of their eyes and their experience. As well as acting inquisitorially at the stage of deciding the result of a race, they may have to consider disciplinary action: at this point rules of natural justice become relevant. These require, at the least, that persons should be formally charged, heard in their own defence, and know the evidence against them. These essentials must always be observed but it is inevitable, and must be taken to be accepted, that there may not be time for procedural refinements. It is in order to enable decisions reached in this way to be reviewed at leisure that the appeal procedure exists. Those concerned know that they are entitled to a full hearing with opportunities to bring evidence and have it heard. But they know also that this appeal hearing is governed by the Rules of Racing, and that it remains an essentially domestic proceeding, in which experience and opinions as to what is in the interest of racing as a whole play a large part, and in which the standards are those which

> have come to be accepted over the history of this sporting activity. All those who partake in it have accepted the Rules of Racing, and the standards which lie behind them: they must also have accepted to be bound by the decisions of the bodies set up under those rules so long as when the process of reaching these decisions has been terminated, they can be said, by an objective observer, to have had fair treatment and consideration of their case on its merits."

Mr Way's Counsel argued that there was no pressure as this case had taken some days to get to an inquiry and that it could be dealt with in the fullness of time giving Mr Way every opportunity to proceed how he wanted and to be heard at length if necessary. Counsel for the respondent pressed upon the Tribunal that the holder of a trainer's licence accepts the obligations that go with it and the summary proceedings associated with it, that improper devices directed in making animals go quicker in an unfair way is something which is fundamentally abhorrent to the racing industry, and that when someone is found in possession of such a thing then the consequences are dire. I accept these latter propositions to be entirely appropriate.

3. THE BATTERY FINDING

Bearing in mind that this appeal is argued some five years after the event in circumstances where Mr Way chose not to pursue his original appeal rights, that no fresh evidence was produced before the Tribunal as well as the other factors referred to, I find that the argument raised in relation to the conviction under Rule A.R.175(a) fails. I am satisfied that in the circumstances Mr Way was properly convicted of an improper practice in connection with racing following the Battery Inquiry.

4. THE DRUG CHARGES - INTRODUCTION

For Mr Way three witnesses were called in relation to the drug aspects of the appeal. A considerable body of new evidence was produced by Mr Way himself in addition to his two witnesses Mr Adrian Bernard Williams and Ms Paula Wagg.

The latter's evidence can be dealt with in passing. Ms Wagg, who is a horse trainer licensed with The W.A.T.C. and formerly a professional jockey, had resided at 28 Mathieson Road for two years. Ms Wagg gave evidence regarding security at the premises and supervision of horses. She knew that horses had to be supervised by someone all the time on race days and that when a horse is swabbed after winning one has to sign a document stating the horse has been under supervision from a particular time.

The only evidence called for The W.A.T.C. Stewards was the production by Peter Jones Chadwick, a cadet steward, of a number of records relating to the swabbing and performances of various horses which Mr Williams had claimed to have doped.

5. MR WAY'S EVIDENCE

I am satisfied that the following relevant facts have been established by the evidence which was presented to the Tribunal by Mr Way:

5.1 Mr Way was an experienced and large scale trainer, having been involved in the racing industry for some 30 years prior to the Inquiries with approximately 100 horses in work.

5.2 The horses which Mr Way trained were located at least at three of his four properties. One such property was his farm property which was located in Caversham and two others were the adjoining properties in Mathieson Road, Belmont which were used for pre-race activities. Mr Way lived on one of these latter properties, namely, 30 Mathieson Road.

5.3 Mr Way's various stables were inspected every year by the Stewards or representatives of The W.A.T.C. and Mr Way had never been queried regarding the standard of the security at his properties. The security at the 28 Mathieson Road Belmont property was described as comprising fences, lock up gates, dogs and flood lighting which, at the relevant time, were probably equal to the physical level of security of stables of other trainers in the area. Mr Way's leading role in the television feature film which was shown to the Tribunal demonstrated how relatively easy it was for a trespasser to penetrate the physical security of a stable of the standard of Mr Way's properties.

5.4 Mr Way had a floating staff of about 20 to 25 persons. Staff availability around the beginning of 1987 was described as "pretty tough" with "an enormous turnaround". When new staff were engaged it was normally on a trial basis and without any prior enquiries being made. This method of employment was the same adopted by other trainers as in those days there was no form of accreditation or registration of stable employees in this State, unlike some of the other States.

5.5 Mr Way had met Mr Williams many years before in Sydney and then met him again in Perth in January 1987 when Mr Williams sought some part time employment. Mr Williams was employed to:

> "Just to pick up the droppings in the yard throw an odd water in, do a bit of sweeping up, just general duties that most of the other stable hands do not like doing ..." (page 25 of the transcript).

Mr Williams had no particular responsibilities in relation to Hollydoll Girl or Brash Son even at the times that they were brought down to the Mathieson Road property prior to being taken to the race track nearby on the days they were racing. On the occasion that Brash Son went to race at Mt Barker the horse was stabled at the late Gerry Van Eyke's stable in Albany. It was not part of Mr Williams' duties to go down with Brash Son on that trip, although he did in fact go to Mt Barker in order to attend the race meeting.

In return for his part time employment Mr Williams received his board and keep at Mr Way's 28 Mathieson Road property and some financial help from time to time. Mr Way made no inquiry to satisfy himself as to Mr Williams' suitability for this menial role.

5.6 On each occasion prior to the three Belmont races in question the horses were brought down from the Caversham property to the property where Mr Williams was resident either early on the day of the race or a couple of days prior to the race.

5.7 Mr Way personally played no role in supervising the pre-racing activities of his horses. He described his own role in this regard as follows:

> "Well Saturday's I completely distance myself from everything. Saturday's starts off in the morning of ringing up the owners and telling them what I think their horse will do and I leave everything to the staff." (page 29 of the transcript).

5.8 Although there was another person, William Duffy, at the property who helped out in the mornings and was doing a bit of odd work, there were no full time employees living at 28 Mathieson Road and no instructions had been given regarding keeping an eye on the horses on race days to those two employees. The person responsible for looking after the horses prior to the races was the strapper who often would leave the horses unattended and go off to the races as long as there was someone in the house. Mr Way indicated that on race days one of the boys would come down from the farm and might have a rest or sleep for a couple of hours. Having "a rest until he went to the races ... would be quite acceptable by me" (page 59 of the transcript).

5.9 In relation to the assertion from Counsel for the respondent that Mr Way had never instructed that at the critical time just before the horses were taken over to the racecourse to race that they be kept under supervision or observation Mr Way answered "... there always had to be someone on the property. Whether he was asleep I don't, I can't verify..." (page 71 of the transcript).

5.10 Mr Peter Finger was the foreman whose duty on race days was to arrange for Mr Way's horses to reach the track and to organise the staff for the particular meeting.

5.11 There was no evidence from Mr Way of having instructed Mr Finger regarding supervision of the animals prior to the races. There also was no evidence to establish that Mr Finger did organise and require the horses to be in any way monitored before they raced.

5.12 Mr Way completely denied all knowledge of the drug etorphine having been administered to the horses. His support of them when they won whilst affected by the drug was nil or at best limited and certainly was not by his standards unusual.

6. MR WILLIAMS' EVIDENCE

Mr Williams gave detailed evidence in the course of the proceedings and was subjected to rigorous cross-examination. Mr Williams claimed he was only answerable to George Way and he confirmed he had no role in relation to taking the horses to the races as essentially his job simply was to clean up at the stables.

Mr Williams admitted injecting Hollydoll Girl and Brash Son with the drug etorphine, also known as elephant juice, prior to them running in the relevant races. He alleged that he had acquired the drug some time before in Sydney. When Mr Williams moved to Western Australia he brought the drug with him. He lived at a number of different addresses and

usually stored it in the ground in a wet tea towel. The drug, which was in liquid form, was kept in a doctor's rubber stoppered jar into which one could insert a needle.

On the day Mr Williams first "needled" Hollydoll Girl he went over to the racetrack at around 9.00 am and bet on the Eastern States races prior to returning at around 10.30am. Mr Williams had on the previous night extracted the drug into a syringe and he then went into the yard. He put a halter on the horse and inserted just one drop off the end of the needle mixed with distilled water at around 11.00am. Mr Williams' admissions as to the administration of etorphine on the next two occasions followed a similar pattern, whereas on the occasion Brash Son ran in the Mt Barker Cup Mr Williams admitted that he gave the horse the same drug but that he did so at the races. "There was a strapper looking after him, this was about, I'd say about one o'clock, half past twelve, one o'clock, might be a bit earlier. The horse was at the races earlier but the strapper was there, I just sent the strapper away "do you want to have a break, go to the toilet, or go have something to eat, get something to eat" and I done it then." (page 92 of the transcript).

On each occasion Mr Williams asserted no one else was a party to the action and no one else knew about him having injected the horses. He carried out his evil task "To make it do its best in the race ... Make it win, make it try harder." (page 83 of the transcript).

Mr Williams also admitted injecting the drug into a number of other horses including Privy Miss, Swift Arrow, Rockin Rhythm, Matobi and Prince. Some of these other horses were also trained by Mr Way. Mr Williams also said that in 1989 he had "inserted a go slow" to the horse Amyquil as result of which he was subsequently convicted and received a nine month jail sentence. Mr Williams had organised and supplied the drug. After Mr

Williams handed himself in to the police around March or April 1990 he was charged and convicted of having an illegal drug etorphine and was sentenced to two months jail.

One could be excused for concluding that Mr Williams' story lacked some precision and that in the telling of it there were some fanciful elements and some contradictory detail, particularly in relation to the Mt Barker drugging. It was established in cross-examination that Mr Williams was a person with a criminal record. His insincerity and evasive answers left doubts regarding his honesty. He admitted he did not care what he had told the Stewards when he appeared before them at an inquiry regarding the drugging. I agree with Mr Way's Counsel's description that Mr Williams was "an extremely small time amateurish operator" with there being no evidence of any substantial betting moves for either of the horses.

Despite these misgivings regarding Mr Williams there is no good reason why the fundamental elements of his story should not be believed. Certainly no other explanation or even a hint of an explanation was forthcoming as to how or why Mr Way's horses were injected with the illegal substance. I can only conclude on this evidence, when considered in conjunction with Mr Way's, that Mr Williams did inject the illegal substance to both horses on both occasions, that he did so of his own initiative and completely unknown to Mr Way. The motive simply was to make some money by backing the horses in the races.

I am satisfied that Mr Williams was the type of person who was capable of having administered the drug to the horses in question and that in all likelihood he did blight Mr Way's racing stable early in 1987 in the manner in which he described to the Tribunal.

7. THE APPELLANT'S SUBMISSIONS

Mr Percy submitted that the evidence of Mr Williams does shed a different light on whether or not Mr Way can be said to have discharged the reverse onus which is placed on Mr Way under Rule 178 namely that "... he had taken all proper precautions to prevent the administration of the drug". I agree with Mr Percy's contention that the matters that were determined at the Stewards' Inquiries essentially took a different course because the involvement of Mr Williams was not known and very little actually came to be described as regards the questions of stable security and the engagement of employees. The Inquiries mainly concerned whether or not there was such a drug as etorphine, whether or not it had been detected as well as the reliability of those tests.

The considerations before the Tribunal are completely different in view of the fresh evidence and what must now be addressed is whether or not in all of the circumstances there were proper precautions both in terms of stable security and in relation to supervision.

I accept the argument that at the time it was virtually unknown to inquire into a person's previous criminal record, that any checks made by a prospective employer were at best perfunctory and in terms of the then Rules there was nothing to suggest to Mr Way that Mr Williams at the time that he was engaged was other than an appropriate candidate for his particular employment. It was further argued that the duties of any resident stable hand by their very nature, will provide virtually unlimited access to a trainer's horses. It was submitted that no trainer could ever invoke such a standard of security so as to prevent the malpractice of a dishonest employee and that a stable hand was in a position of trust with unlimited access around the clock and that nothing short of continuous

personal observation of every stable hand would prevent the activities and malpractice of a dishonest employee. Whilst these assertions may be true in general the evidence establishes a slightly different picture in this case for the simple reason that Mr Williams was not responsible to supervise. It would be a different matter if Mr Williams had, in breach of his obligations and duties, failed to observe the necessary standards of performance imposed upon him by Mr Way in attending to the horses prior to racing.

Counsel for Mr Way submitted that the test in this case is whether or not Mr Way could satisfy the Tribunal on balance that he in all the circumstances took such precautions as were standard within the industry at the time. Counsel argued that, based on the evidence of Ms Wagg, it was impracticable with a large team of horses to have them totally supervised even on race days. "Indeed, in a utopian world, on race days all horses would be permanently supervised and not left out of the all seeing eye of the trainer or responsible stable hand for one second, but unfortunately we do not live in such a utopian world and there will obviously be opportunities and occasions when horses are left unattended during the course of the day, especially or even on race days" (page 233 of the transcript).

Despite Counsel's eloquence, the facts established in this appeal do reveal that there was scant concern or regard for the supervision of the horses at the Mathieson Road property on race days prior to those horses proceeding to the race track and further that this inadequate supervision continued or was maintained for prolonged periods of time. The evidence as to what supervision actually took place at Mt Barker is at best vague. No evidence was given as to who the person was who supervised Brash Son before Mr Williams relieved that person of his duties, what instructions if any were given regarding

the level of supervision by that person and whether that person knew Mr Williams had any relationship to the horse or to Mr Way.

Whilst I agree with the general description of Mr Williams, which is contained in the following passage, being a statement by Counsel for Mr Way:

> "The real question the Tribunal needs to establish is whether on balance it is satisfied that he was the proponent behind the doping of "Hollydoll Girl" and "Brash Son". Whether it is more likely or not that he was. And just on that question, it really would be would it not an inordinate coincidence that of all the persons in Western Australia who may well have been responsible for that particular incident, we have a person who not only had the opportunity to do it, there is no question that he had opportunity to do all four of those positive swabs. He is a person with the inclination. We saw that yesterday when he gave his evidence. Really a person who is oblivious to the fact that he has a serious criminal record, of his requirement to give frank evidence to a Stewards or a police inquiry. But a person who would have no trepidation at all of injecting a valuable racehorse with scant regard to the consequences to the owners, trainers or whoever. Until such time as all the chips are down and he decides to clean the slate." (page 241 of the transcript)

I do not agree that this amounts to the "real question". As I see it the issue simply is whether Mr Way as the trainer of the horses in question did or did not take all proper precautions in the circumstances.

The words "all proper precautions" contained in rule 178 were carefully analysed by Counsel for Mr Way. It was argued that, bearing in mind that The W.A.T.C. itself set no parameters of security as to the nature or type of guarding of the horses or the physical characteristics of stables and as there was only an annual inspection by the Stewards then that which occurred was suitable or satisfactory in the circumstances. The answer to that is I believe that whilst the Belmont premises physically may have been suitable, the degree or extent of action taken to supervise what was occurring at those premises on race days

was not satisfactory. The physical condition of the premises did not fail Mr Way. Rather what let him down was a combination of his own conduct as the trainer, regarding his personal use of those premises prior to racing, plus the conduct of his staff, who should have been under his direction, to take "all proper precautions" at those premises.

A number of cases were examined which dealt with the equivalent terminology to the key phrase "all proper precautions" contained within legislation regarding testators' family maintenance and insurance matters (Bosch v Perpetual Trustee Co [1938] AC 463, In re Richardson (deceased) [1920] SAR 24, Francis v Francis [1955] 3 All ER 837, Fraser v B N Furman (Prodns) Ltd (1967) 1 WLR 898, Woolfall and Rimmer Ltd v Moyle [1942] 1 KB 66, Norwich Union Insurance Co Ltd v R & W Products (1969) 90 WN (NSW) 554, Mason v Century Insurance Co Ltd [1973] 2 NZLR 216, W & J Lane v Spratt [1970] 2 QB 480, Albion Insurance Co Ltd v Body Corporate Strata Plan No 4303 [1983] 2 VR 339, R v Thames Magistrates' Court; Ex parte Polemis [1974] 1 WLR 1371, Board of Education v Rice [1911] AC 179, R v Brewer; Ex parte Renzella [1973] VR 375).

Counsel submitted on the basis of these authorities that if Mr Way can establish both a lack of recklessness and a lack of a knowledge of a danger coupled with the fact that he subsequently did nothing which was unreasonable in all the circumstances as accepted by the industry, then he must have established on balance that, in the circumstances, he took all proper precautions.

8. THE RESPONDENT'S SUBMISSIONS

Mr Davies Q.C. for the respondent submitted that A.R.178 was not a rule of negligence but rather a rule of absolute offence, but for the proviso contained within it. In order to make out the offence one has only to establish that a horse was brought to the course and raced, and secondly, that it was found to have a drug in it. For the purposes of a conviction one would not need anything else. Unless the trainer can satisfy the Stewards that he has taken all proper precautions to prevent the administration of the prohibited substance then the offence has been committed. The key words are "satisfy the Stewards". It is the opinion of the Stewards as to what would amount to all proper precautions. It is the consequences not the conduct that determines the seriousness.

Persons who take out a licence agree to be subject to the rules of racing according to Counsel. "These rules set down an absolute offence that says if one of your horses races and it returns a positive swab for drugs, you're gone, and that has to be, you can't have it any other way ... You simply cannot have a racing industry if you have it any other way. With the one out which you may satisfy the Stewards, not the Tribunal, not the appellate Tribunal, the Stewards, that you took all proper precautions to prevent the administration of the prohibited substance." (page 276 of the transcript).

The conclusion pressed upon us by the respondents' Counsel was that "The short answer in this case is nobody was delegated to watch it and Mr Way didn't particularly care whether they were or not." (page 284 of the transcript).

Reliance was placed on the fact that the industry requires a person whose horse wins and a swab is taken, to sign saying the horse has been under constant supervision, in order

to support the contention that there are certain periods in relation to presenting a horse to race to avoid outside interference. The most critical times are race days, or to use Counsel's words "You might as well put a sign around their necks saying "Racing today", might as well as put a big neon sign up with an arrow saying "This guy is racing today ..." Because that's the critical time ..." (page 279 of the transcript).

It was asserted that this rule is fundamental to racing and that it is irrelevant that many trainers may have been jolly lucky over recent years in circumstances where they may not have taken all reasonable and proper precautions, particularly at critical times.

The duty of an appellate Court was referred to in a number of authorities (Craig v The Queen (1933) 49 CLR 429; Craig v. The King (1983) 49 CLR 429; Green v. the King (1936) 61 CLR 167; Ratten v. The Queen (1974) 131 CLR 510 and Lawless v. The Queen (1979) 142 CLR 659). Whilst it is up to the appellate Tribunal to take on the onerous task of assessing the evidence carefully for itself as to cogency and to see whether it could have the effect of removing the certainty of guilt, it is different in this case where the onus is in the reverse.

9. THE DRUG FINDINGS

I agree with all of the submissions of Counsel for the respondent which are identified above. I am satisfied that the practical application of Rule A.R.178 is that there must be someone responsible with authority properly supervising the horses which are due to race. The fact that many trainers who have failed to impose this level of vigilance may have done so without calamity cannot afford Mr Way any assistance in relation to the problems which beset his stable.

I have already mentioned that the evidence establishes that there was nothing unsatisfactory in regard to Mr Way's premises. However it is also established on the evidence that no one was delegated to watch Mr Way's horses prior to them racing and Mr Way did not particularly care as to what may have been happening to them at that critical time. The likelihood of the presence of an attendant of some sort who had no direct or explicit instructions and who more than likely was esconsed in the house asleep at the critical time cannot be said to amount to the level or standard of care required by the Rules.

I accept the submission of Counsel for the respondent that on race days horses should be supervised more closely than on days when they are not racing. In the circumstances that prevailed at 28 Mathieson Road at the time the existence of fences, lock up gates and a dog on the property on their own are clearly insufficient in my opinion.

On balance I am not satisfied that Mr Way had taken "all proper precautions to prevent the administration of the drug" on the four relevant race days in that the evidence establishes that he was careless or indifferent in relation to the two horses in question.

Whilst I am of the view on the evidence that the circumstances surrounding the Mt Barker "needling" were less severe from Mr Way's viewpoint, as the drug was administered at the race course, Mr Way did after all plead guilty to this offence and no evidence was produced to explain precisely what were the "proper precautions" taken to prevent the incident occurring.

10. CONCLUSION

For these reasons I am not satisfied that Mr Way has discharged his onus in relation to any of the matters appealed against.

Accordingly I would dismiss the appeal.

As the question of the penalty, which is expressly raised in ground of appeal 3, has not been fully argued before the Tribunal I would be prepared to grant liberty to Mr Way to make submissions regarding this aspect.

Dan Mossenson

DAN MOSSENSON, CHAIRMAN
13TH March 1992