APPLICATION – 429
APPEAL – 429

REASONS FOR DETERMINATION OF THE RACING PENALTIES APPEAL TRIBUNAL

APPLICANT:	**TONIA ROSE STAMPALIA**
APPLICATION NO:	**A30/08/429**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)**
DATE OF HEARING:	**27 AUGUST 1998**
DATE OF DETERMINATION:	**27 AUGUST 1998**

IN THE MATTERS OF an application for leave to appeal and an appeal by Ms T Stampalia against the determinations made by Western Australian Trotting Association Stewards on 11 and 17 August 1998 in not permitting the applicant legal representation at an inquiry into the analyst's finding in the blood sample taken from PRESLEY STRIKES on 16 February 1998.

Mr J Hammond, instructed by Hammond Worthington Prevost, represented the applicant.

Mr B Goetze, instructed by Minter Ellison, represented the Western Australian Trotting Association Stewards.

Preliminary

At the conclusion of the hearing, I granted the applicant leave to appeal and then allowed the appeal. In so doing I stated the following:

> *"This is an application for leave to appeal.*
>
> *The applicant is a licensed trainer. She is presently the subject of an inquiry being conducted by the Stewards of the Western Australian Trotting Association. The inquiry has been running said February 1998 and has been adjourned from time to time. It is due to recommence on Monday, 31 August 1998.*
>
> *At the resumption, it is envisaged at least that two expert witnesses will give evidence at the request of the Stewards. The applicant will seek to call two expert witnesses as well. Further, there may be application made by the applicant to recall and question two expert witnesses who have already given evidence.*
>
> *The applicant has sought of the Stewards their permission to be legally represented. She wishes to have counsel present to examine the witnesses who may be called. The Stewards have refused the applicant permission to be represented for that purpose. The applicant now applies for leave to appeal against that particular determination of the Stewards.*

The application for leave is made pursuant to s13(1)(d) of the Racing Penalties (Appeals) Act. By consent of the parties the matter has proceeded before me as both the application for leave to appeal and the appeal, should leave be granted.

I have listened carefully to the submissions by both counsel and I have considered the relevant law. In my view, the weight of authority applied to the facts of this particular case dictates that the application and the appeal be allowed, and I so order.

Specifically, the orders which I make are:

> *firstly, the application for leave be granted;*
>
> *secondly, the appeal be allowed; and*
>
> *thirdly; the appellant be permitted to be represented at the resumption of the adjourned inquiry and any further resumptions, specifically for the purposes of counsel being permitted to question any witnesses who may properly be categorised as expert witnesses.*

For the sake of clarity, I add that this order does not extend to permitting counsel to question any lay witnesses or to make oral submissions by way of a closing address. I will deliver detailed reasons for judgment ... "

REASONS FOR DECISION

Introduction

The appellant was the trainer and part owner of the horse PRESLEY STRIKES. That horse ran in the 1998 Classique Pearl – Qualifying Heat 2 at Gloucester Park on Monday, 16 February 1998. The horse finished second. A pre-race blood sample was taken. The analyst found a total carbon dioxide level of 36.5 millimoles per litre.

Rule 498 of the Rules of Trotting ("the rules") is in the following terms:

"Evidentiary Provisions

498. For the purposes of this part:

(a) ...

(b) where a sample from a horse is found to contain a substance described in this Rule in excess of maximum quantity or ratio appearing opposite the substance then the horse shall be deemed to have had administered to it a drug or drugs capable of producing that substance:

Substance	*Maximum Quantity or Ratio*
Carbon Dioxide	*35.0 millimoles of Total Carbon Dioxide per litre in plasma."*

Rule 497 is in the following terms:

"Drug Free Racing

497. (1) When any horse which has been presented to race is found to have had administered to it a drug:

(a) any person who administered the drug to the horse;
(b) the trainer; and
(c) any other person who was in charge of the horse at any relevant time;

is deemed to have committed an offence.

(2) It shall be a defence to a charge under sub-clause (1) for the trainer and any other person who was in charge of the horse at any relevant time to prove that he took reasonable and proper precautions to prevent the administration of the drug."

The Inquiry

Acting upon the analyst's findings, the Stewards opened an inquiry. The Stewards heard evidence on a number of different days, and the inquiry had been adjourned from time to time. At the time of lodging the application for leave to appeal and the appeal, the inquiry had been adjourned and was due to recommence on 31 August 1998. The Stewards had not formulated a charge against the appellant. It was open to the Stewards to formulate any one of 3 charges against the appellant, pursuant to Rule 497(1). One charge which could have been laid was pursuant to Rule 497(1)(a), which would require proof the appellant herself was the person who administered the drug.

The appellant duly attended each sitting of the inquiry. Evidence presented at each sitting was often of a highly technical nature. This arose partly because the appellant, through letters from her solicitors and questions from herself, raised issues concerning the accuracy of the testing procedure and the "validity" of the deeming provision set out in Rule 498. By way of example, the following questions were asked of the Stewards in a letter dated 10 March 1998:

"Could you please also advise us of the following as soon as soon as possible:

1. *the quantity of the sample which was taken from Presley Strikes on 16 February 1998;*

2. *the manner in which the sample has been stored including place of storage, the temperature at which the sample was stored and the material in which the sample was stored;*

3. *the number of samples and quantity of each sample that have been taken from the original sample;*

4. *the name of each laboratory in which samples have been tested or analysed;*

5. *the nature of the tests which were carried out in order to detect the level of carbon dioxide; and*

6. *the person or persons who specifically conducted the tests.*

Our client requests that she be given the opportunity to engage an independent expert to assess whether the sample from Presley Strikes on 16 February 1998 (sample No 6368) has retained its integrity and has not been disturbed in any way that could have effected the validity of the tests which have been conducted."

Similarly, the following questions were asked of the Stewards in a letter dated 30 April 1998:

" ... client will be calling two witnesses in addition to herself on 5 May 1998 and that the specialist equine research surgeon has requested that we obtain the following information from the Western Australian Trotting Association:

1. *The results of all TCO_2 tests undertaken on all samples on 16 February 1998 in sequential order as well as the exact time that each test was conducted.*

2. *The results of calibration tests conducted on the Beckman EL-ISE analyser on the day of the testing, including when the tests were conducted in relation to the results provided at 1 above.*

3. *The results of all TCO_2 taken on samples from Presley Strikes which were used to obtain readings of 36.3 and 36.5 mmol/L in the test and referee samples.*

4. *The date and time that the test samples were analysed.*

5. *Who witnessed the referee sample being analysed.*

6. *Results of all TCO_2 tests performed on standard breeds in the last twelve months.*

7. *Copies of any scientific data that was used to derive an upper TCO_2 level of 35 mmol/L.*

The Stewards' attitude towards an argument against the validity of the "threshold level" of 35.0 is illustrated by the following exchange between the Chairman and the appellant's solicitor (applying for leave to appear) at the inquiry on 11 August 1998. At T101 to 102:

"HAMMOND:	*There are some questions directed to the threshold of 35, yes, particularly the issue regarding what was said in Neil Brady which I think has already been referred to in this inquiry.*
CHAIRMAN:	*Given our advice of the 3rd and 5th of June that the threshold level of 35 was not an issue in this inquiry, at the last sitting opinion was given that the level was an arbitrary one without scientific validation and that's also alluded to in Dr Kannegieter's report that was forwarded yesterday, I'll point out to you that it's again – or it's still our opinion that such argument is irrelevant in terms of whether or not a breach of the rules of where a threshold level is specified may or may not have occurred.*
HAMMOND:	*Have we –*
CHAIRMAN:	*And the example I'll throw to you, if you were retained to defend a speeding charge, a Multanova speeding charge, do you adopt a shotgun defence? What I mean by that, with respect, do you firstly*

	attack the accuracy of the Multanova? Do you then question the qualifications of the operator? Do you then go on to perhaps the method of the film being developed, and finally when all else fails, do you say 60 kilometres an hour is not an – an appropriate speed for this stretch of road anyway, we believe it should be 70?
HAMMOND:	*Yes, some of those points would be attacked in a defence and indeed they have been done successfully in this State.* "

In my view, the technical evidence which was given during the inquiry was entirely relevant to the proceedings. The accuracy of the testing procedure is always open to challenge. The precise details of levels and times of testing may have become relevant if the Stewards chose to lay a charge under 497(1)(a). For example, the appellant would be entitled to know the time at which she was alleged to have committed such an offence. Technical evidence could be used to prove or disprove such a charge. The arbitrary level of 35.0 may not be open to challenge, but that is only one area which the appellant's solicitor was seeking to explore in questioning.

The Technical Evidence

There is no doubt that evidence of a highly technical nature was given, and was proposed to be given at the resumption of the inquiry on 31 August 1998. A brief summary of some of the witnesses, who were called or referred to, and their field of expertise is as follows:

Dr Jean Ralston	Principal Scientist, Racing Chemistry Laboratory
Dr C M Steel	Veterinarian, Murdoch University Veterinary Hospital
Harry Masters	Clinician, Murdoch University Veterinary Hospital
Dr J McDermott	Veterinarian
Dr P Casey	Veterinarian
Dr A McGregor	Veterinarian
Dr T A Rieusset	Veterinary Consultant
Mr C Russo	Senior Chemist and Research Officer, Racing Chemistry Laboratory
Mr G Buck	Principal Laboratory Technician, Racing Chemistry Laboratory
Dr S Beetson	Clinical Pathologist
Prof Reuben Rose	Professor of Veterinary Clinical Studies
Dr J H Vine	Laboratory Director, Racing Analytical Services Ltd

By way of illustration of the technical nature of the evidence, the text of a letter dated 8 June 1998 from Dr Steel of Murdoch University to the Stewards is as follows:

"The Head Steward
Western Australian Trotting Association

For venous blood gas analysis for "Presley Strikes", samples were collected from the jugular vein into Lithium heparin vacutainer tubes using the technique employed for pre-race blood testing. Samples were analysed within 20 minutes using an ABL 5 blood gas system (Radiometer, Copenhagen) which measures pH, pCO_2 and pO_2, and gives 8 derived parameters including TCO_2. Quality control is performed on control solutions and calibrations are performed automatically on 2 calibrating solutions and 2 premixed gases (see attached documents).

I have limited experience in monitoring venous blood gases (including TCO_2 levels) in horses as it is infrequently necessary in normal, non-anaesthetized horses, and as such I am unable to provide further comment in addition to what has been published on the significance of the racing TCO_2 levels in this horse compared to the normal Standardbred racehorse population.

Sincerely

Kate Steel "

The Requests For Representation

By letter dated 10 March 1998, the appellant's solicitor sought permission to represent her at the resumption of the adjourned inquiry. The Stewards replied by letter dated 13 March 1998, stating that "*... as you are aware Western Australian Trotting Association Stewards do not permit legal representation at their inquires*". Despite that blanket refusal, the Stewards had changed their attitude shortly afterwards. By letter dated 4 May 1998, they permitted the appellant's solicitor to appear at the resumed inquiry to make submissions as to the appellant's representation.

There is no doubt that the Stewards had power to hear such submissions and to allow representation at their discretion. Rule 38(b) is in the following terms:

" *Control of Inquiry*

(b) At any such inquiry or investigation by the Stewards (or by any other person or persons appointed as aforesaid) the Chairman of Stewards or the appointed nominee shall be in complete control of the inquiry."

Counsel did appear on 5 May 1998 and made submissions on the appellant's need to be represented. The Chairman declined the request for representation.

The inquiry was adjourned from 5 May 1998, to resume on 31 August 1998. On 31 August, the Stewards proposed to call Professor Reuben Rose. By letter dated 10 August 1998, the appellant's solicitor sought to address the Stewards on why the appellant should be represented during Professor Rose's evidence. The Stewards granted that request, and heard from the appellant's solicitor on 11 August 1998. The relevant submissions were as follows:

"*CHAIRMAN:* *And your letter states that: 'We are of the view that it would be unreasonable of the Stewards to expect Ms Stampalia to undertake the questioning of Professor Rose. Professor Rose will need to be questioned at length on a number of important and complex technical matters.' Firstly, we'll seek your guidance as to the nature of the important and complex technical matters that are to be discussed with Professor Rose.*

HAMMOND: *Well, we would be seeking to ask him questions regarding the Beckman Elise machine; the difference between that and the autogas machine. We would also be asking him a number of questions regarding what he said in Neil Brady against Harness Racing New Zealand and there would be certainly extensive questioning in relation to the statements he made in that case. We would also be questioning him as to a number of articles he has written in this area. We would*

be asking about testing he – that he undertook in New Zealand which he is now seeking to distinguish or disassociate himself from in the letter that he wrote to the Stewards. We would be asking about deviations that are permitted and what he thinks of the deviation in Western Australia. We'd be asking him about the variations – or what he considers to be normal resting TCO_2 levels in horses. We would be putting to him the Vetpath tests and asking him about the readings that were disclosed there. And we would also be putting to him some of the articles and the data that is contained in those articles that were presented to me – provided to me by the Stewards and we also now have to hand some other information which has been provided to us by Dr McGregor, some articles that he's provided in relation to the effect of a respiratory problem on TCO_2 levels.

The article – one of the articles which is in that folder I think that Ms Stamaplia handed you today by William E Jones, that's what I would consider very complex, not only for a layman but also for a solicitor to come to terms with. It was my preferred option in relation to that that Dr Casey be present because the way in which that is written and the technical nature of the article is very difficult to put.

They're just some of the things that we propose to ask Professor Rose. Following on from that, Mr Deputy Chairman, it's my view that when Ms Stampalia asks a question and this has become apparent from the transcript that she accepts the answer but then doesn't go on to narrow down that answer. For instance, if she asked the question of how slowly was someone going, the witness may say 'Well, fairly slowly.' I see it as my role to say, 'Well, what do you mean by fairly slowly? Is it 5 Ks an hour, 10 Ks or 15?' There are a number of questions as far as I'm concerned that just have never been answered properly and that needs to be addressed.

We've also got a list of questions for Dr Rieusset arising from the previous transcript which I also think as part of this submission I should be able to ask him rather than Ms Stampalia because they're quite technical as well. We imagine that that would take some one and a half to two hours to go through those questions as a lot of statements were made by him at the last hearing which were just either vague or left unfinished. I think they need to be pinned down."

The Stewards refused the request for representation, giving the following reasons:

"*CHAIRMAN:* *Ms Stampalia. Mr Hammond. Ms Stampalia has continued to demonstrate throughout this inquiry that she is quite capable of conducting herself competently in asking questions. It's been demonstrated throughout this inquiry that any shortcomings in the questioning can be corrected either by having short adjournments or further questioning emanating from the transcript when it is produced. We are mindful of the fact that this is not a court of law rather a domestic tribunal, and we do not consider it necessary or appropriate that expert witnesses be questioned by counsel. For that reason your application is denied Mr Hammond. I guess you'd like a short adjournment?*"

It is that determination of the Stewards which is the first subject of this application for leave to appeal and appeal.

The applicant's solicitor renewed the request for representation by letter dated 12 August 1998, saying:

> "*We again request that you permit our client's solicitor to question Professor Reuben Rose (and J Vine if he is called as a witness to the inquiry). Indeed it would be preferable in our view for our client's solicitor to question the remainder of the witnesses in light of the complex and technical material that will be the subject of the questioning.*"

The Stewards, in a letter dated 17 August 1998, again refused the request in the following terms:

> "*Your client's solicitor will not be permitted to question any of the remaining witnesses. The procedure that has been followed to this stage of the Inquiry, whereby your client asks a series of prepared questions then seeks short adjournments to clarify matters, will be continued. The opportunity to correct any oversights made by your client has so far been taken either by yourself by correspondence or by your client's questioning on resumption of the Inquiry.*"

That determination of 17 August 1998 is the second subject of the application for leave and the appeal.

The Law

An authoritative statement of the law is to be found in CAINS v JENKINS and OTHERS, (1979) 28 ALR 219. In that case, Sweeney and St John JJ said at page 230:

> "*On the authorities there is no absolute right to representation even where livelihood is at stake. But that is not to say that in all cases a tribunal can refuse it with impunity. The seriousness of the matter and the complexity of the issues, factual or legal, may be such that refusal would offend natural justice principles.*"

That approach was followed in X v MCDERMOTT (1994) 123 ALR 226. Sheppard J said at pp 237 – 238:

> "*It remains to mention one other matter which was the subject of some discussion during the argument. It was said that the investigating officer did not propose to allow the applicant to be represented by counsel at the hearing before him. That, of course, is entirely a matter for the investigating officer. But reflection on his part, and on the part of those responsible for his appointment, may suggest that it may be wise for the investigating officer to be assisted by a person who is legally qualified and to allow legal representation of the applicant by an appropriate legal practitioner so long as the assistance provided by the practitioner is given in a constructive way.*
>
> *The investigation will involve serious matters. Its outcome could have serious consequences, directly or indirectly, for the applicant and, possibly, for the complainants. There are many questions of difficulty that may arise.*"

The principles expressed in those cases are, I accept, correct statements of the law. It remains then to apply them to the facts of the present case.

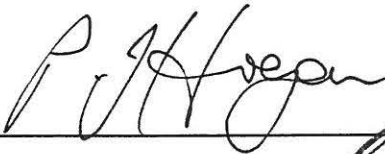
Conclusion

The matter under consideration before the Stewards was serious. A conviction for any offence against Rule 497 would render the applicant liable to a penalty of 12 months disqualification.

The issues of fact were of a very complex nature. Once it was accepted (as I do accept) that the technical evidence was relevant, there can be no argument that it was complex.
The question then remains whether the applicant was capable of representing herself. If not, then natural justice would require that she be permitted to have representation.

The Stewards decided in this case that the applicant was quite capable of conducting herself competently in asking questions. With respect to the Stewards opinion, I cannot see how that is so. She completed Year 10 at High School and has worked in the trotting industry since then. She is now 35 years of age. She has no other education. To expect her to properly cross-examine professional people including veterinary doctors and a professor is to expect the impossible. To the extent that the Stewards decided otherwise, their decision was incorrect. No reasonable Stewards could have come to that conclusion if they had taken all of this into account. In my view, what mislead the Stewards was their view, expressed at T101 – 102 of the transcript, to the effect that arguments directed towards attacking the technical evidence were irrelevant. Had they not taken that view, then it is likely that legal representation would have been allowed.

It is for these reasons that I allowed the application for leave to appeal and the appeal.



PATRICK HOGAN, PRESIDING MEMBER