APPEAL NO. 479

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR R NASH (MEMBER)

| | |
|---|---|
| APPELLANT: | GREGORY DONALD HARPER |
| APPLICATION NO: | A30/8/479 |
| DATES OF HEARING: | 25 AND 26 NOVEMBER 1999 |
| DATE OF DETERMINATION: | 4 APRIL 2000 |

---

IN THE MATTER of an appeal by G D Harper against the determination by the Western Australian Turf Club on 15 November 1999 imposing a disqualification of 12 months for breach of Rule 178 of the Australian Rules of Racing.

---

S Owen-Conway QC and A Kurtz instructed by Hammond Worthington appeared for the Appellant.

R J Davies QC and A Carr, instructed by Freehill Hollingdale & Page, appeared for the Western Australian Turf Club Stewards.

---

**Background**

The Western Australian Turf Club Stewards received a report from the Australian Racing Forensic Laboratory in Sydney ("ARFL") that a blood sample taken from the horse CORNER BLEAK prior to racing in Race 3, the Western Warriors Handicap, at Belmont Park on Wednesday, 21 July 1999, had recorded an elevated level of $TCO_2$ (total carbon dioxide).

The Appellant was at all material times the trainer of CORNER BLEAK. He was registered as a trainer with the Western Australian Turf Club ("the Turf Club").

The Turf Club received from the ARFL on 22 July 1999 a Notification of Irregulatory in respect of the blood sample taken from CORNER BLEAK. The Notification of Irregulatory indicated that an elevated plasma $TCO_2$ level had been detected during screening of the blood sample. As a result the reserve blood sample was dispatched to another official racing laboratory, the Racing Analytical Services Limited in Flemington, Victoria ("RASL"), for confirmatory analysis.

By a letter dated 26 July 1999 Dr Alan Duffield, Official Analyst at ARFL wrote to the Turf Club advising that a preliminary screening of the blood sample by ARFL gave a plasma $TCO_2$ reading of 38.3mmol/L + or - 1.2mmol/L. The letter also enclosed a letter and report from RASL dated 22 July 1999. David Batty, Deputy Laboratory Director of RASL in the letter of 22 July 1999 attached a report on the $TCO_2$ concentrations showing that the reserve sample had a $TCO_2$ level of 36.9mmol/L + or - 1.2mmol/L.

Following the receipt of the report by RASL the Stewards wrote to Dr Vine, the Laboratory Director, requesting information about the origin of the uncertainty measurement of + or - 1.2mmol/L and asking if they could certify the level of uncertainty of measurement for the analysis of the blood sample taken from the horse CORNER BLEAK on 21 July 1999.

By letter dated 26 July 1999 (Exhibit 7), Dr Vine responded to the Turf Club. In that letter he stated that over the last few years the standard deviation for measurements of $TCO_2$ had been shown to be consistently less than 0.7mmol/L. Using 0.7 mmol/L as the standard deviation the maximum uncertainty for measurements was calculated at 1.2 mmol/L. Dr Vine went on to say that by agreement the three Australian racing laboratories (with the exception of the Racing Chemistry Laboratory in WA) have standardised on an uncertainty level of 1.2 mmol/L. According to Dr Vine that is the level of uncertainty specified on positive reports or

certificates issued by these laboratories. However, Dr Vine went on to say that the actual uncertainty of measurement at any given time from the three participating laboratories did not necessarily equate to 1.2 mmol/L. Dr Vine stated that the adoption of an uncertainty level of 1.2 mmol/L overstated the actual uncertainty and stated that at the time the relevant sample was analysed, the actual uncertainty at the 99.9% confidence level determined by Racing Analytical Services Limited for $TCO_2$ measurements was 0.8mmol/L. He attributed this to improvements in analytical methodology.

The letter from Dr Vine did not, however, purport or represent itself to be a certification that the blood level analysed from CORNER BLEAK was 36.9mmol/L + or - 0.8mmol/L.

On 3 August 1999 Mr Harper was called to the offices of the Turf Club by the Stewards to attend an inquiry into the report from the ARFL that there was a level in excess of 36mmol/L of $TCO_2$ detected in the blood sample taken from CORNER BLEAK before it ran in Race 3 at Belmont Park on 21 July 1999.

Australian Racing Rule 178 ("AR178"), which is incorporated into the Western Australian Turf Club Rules of Racing, provides:-

> "When any horse which has been brought to a race-course 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 prohibited substance as defined in A.R.1, the trainer and any other person who is in charge of such horse at any relevant time, may be punished, unless he satisfy the Committee of the Club or the Stewards that he had taken all proper precautions to prevent the administration of the prohibited substance."

AR178B(3) provides that a substance falling within the category of "alkalinising agents" is a prohibited substance. Rule 178B is subject to Rule 178C. Rule 178C provides that where certain prohibited substances are present at or below levels set out therein, they are excepted for the provisions of Rule 178B. One of the exceptions set out in paragraph (a) is that total carbon dioxide ($TCO_2$) found at a concentration of 36.0mmol/L in plasma or less is excepted for the provisions of AR178B.

At the outset of the inquiry on 3 August 1999 Mr Harper requested legal representation but, for reasons which will be analysed later since they form part of the ground of appeal, that request was denied by the Stewards.

The Inquiry thereafter ran over 5 sitting days, 23 August 1999, 13 September 1999, 1 October 1999, 22 October 1999 and 3 November 1999.

At the end of the hearing on 3 November 1999, Mr Zucal, the Deputy Chairman of Stewards, who was chairing the Inquiry, stated:-

> "Mr Harper at this stage of the Inquiry and after considering the evidence thus far, Stewards believe that you should be charged under Australia Rule of Racing 178...
>
> Now particulars of the charge Mr Harper are that you brought CORNER BLEAK to Belmont Park Racecourse on Wednesday 21 July, 1999 for the purpose of engaging in Race 3 the Western Warriors Handicap 2200m with the pre-race blood sample taken from CORNER BLEAK having detected in it a level in excess of 36mmol/litre."

Mr Harper pleaded not guilty and was given an adjournment to make more submissions.

The matter was adjourned to 15 November 1999. On that day further evidence was adduced by and on behalf of Mr Harper. Submissions were then made by both Mr Harper and also a Dr Snow, who was to some extent acting as a defacto counsel for Mr Harper in respect of the technical aspects of the evidence.

In concluding the hearing of the charge, Mr Zucal announced the Stewards' determination in the following terms:-

> "Mr. Harper on the 3rd of November, 1999 you were charged under ARR.178, the particulars being that you brought CORNER BLEAK to Belmont Park Racecourse on Wednesday the 21st July, 1999 for the purpose of engaging in Race 3 the Western Warriors Handicap 2200m and the pre-race blood sample taken from CORNER BLEAK having detected in it, a level in excess of 36 mmol/litre. Today that charge was clarified and you understood that in excess of 36 mmol litre referred to TCO2. The Stewards have considered ARR.178 and the charge and all the evidence placed before them throughout this Inquiry. In saying that, this has been a lengthy Inquiry commencing on August 3, and has run for seven hearings. Considerable evidence has been taken from yourself and expert witnesses namely, Dr. Duffield, Dr. Vine, Dr. Casey, Dr. Snow, Dr. Stewart and Dr. Symonds. Dr. Kannegieter supplied a written submission. There has been 56 Exhibits entered into evidence. Stewards have considered the evidence in relation to the analytical findings of the Australian Racing Forensic Laboratory and the Racing Analytical Services Limited. In relation to this evidence we say this. ARFL reported a level of TCO2 at 38.3 mmol litre and RASL a level of 36.9 mmol/litre. Throughout this Inquiry RASL's findings have come under intense scrutiny. Dr. John Vine is the

Laboratory Director of RASL, has been for 10 years. Dr. Vine has co-operated fully with this Inquiry, making available the extensive data, documentation and information for you and your equine experts. Further, he was been questioned and cross-examined at five hearings. Both the Australian Racing Forensic Laboratory and Racing Analytical Services Limited are NATA accredited and Official Racing Laboratories. We accept the evidence and analytical findings of both the ARFL and RASL.

In relation to the question of uncertainty of measurement or machine variation, the Stewards after considering the evidence, are of the following opinion:- The threshold for TCO2 under the Australian Rules of Racing is 36 mmol/litre. Any level in excess of 36 is evidence of an administration of a prohibited substance. ARFL reported 38.3 and RASL 36.9, these values are subject to an uncertainty of measurement. Historically, three Australian Laboratories namely the ARFL, RASL and the Queensland Racing Science Centre report an uncertainty of +/- 1.2 mmol/litre. This is an agreement between the three Laboratories and it is their policy. There is no reference to the level of uncertainty in the Rules of Racing. In this matter, it has become crystal clear that at least two of those Laboratories, namely ARFL and RASL have been able through the use of ASE Standards, to reduce the uncertainty of measurement to 0.8 mmol/litre. Most importantly, the Stewards believe that the sensitivity in relation to the detection of elevated levels of TCO2 has not changed. The accuracy of the machine has been improve (sic), but the method for the detection of elevated levels of TCO2 has not changed. We are of the opinion that the level of uncertainty for the analysis of both sample B01017 was

+/- 0.8 mmol/litre. Further, the Stewards are of the opinion that the levels reported 38.3 and 36.9 are true levels of TCO2 detected. In any event, the Stewards believe that they are entitled to proceed on the basis of the ARFL report. ARFL reported a level of 38.3 mmol/litre. Throughout the evidence, three expert witnesses had this to say in reference to the 38.3 level. Dr. Symons page 22 point seven of the Transcript said, "Elevated levels of TCO2 greater than 36 mmol/litre are evidence that excessive amounts of alkalinising agents have been administered." Dr. Vine page 60 point one said, "I really see no other explanation for those values other than the administration of alkalinising agent. I think any other possibility is extremely unlikely." And Dr. Duffield page 69 point four, "Let me go to the impoundment results first of 31.5, 31.5, 31.5 and 30.0 that reflects a normal resting horse whereas the result of 38.3 is not a normal horse. A horse in my view, which has been administered alkalinising agent" On that we believe that there is proof that an administration of an alkalinising agent took place. Evidence was led in relation to possible reasons why TCO2 could be raised. We've considered all the evidence in relation to this and the impoundment results and believe that CORNER BLEAK, did not have a naturally occurring high level of TCO2. Mr. Harper the onus lies with you to present your horses free of prohibited substances. In our opinion, we believe that you presented CORNER BLEAK to race with a prohibited substance in its system and you were in charge of that horse as (sic)that time. Accordingly, we find you guilty as charged. Mr. Harper, it's left with the Stewards to consider a penalty. Do you care to address us on penalty?'

The Stewards subsequently concluded on penalty in these terms:

> Mr. Harper is assessing a penalty, the Stewards have consider (sic) all that you've placed before us and all that has been discussed on penalty. Further, we believe the following to be pertinent to penalty:- 1. A breach of the drug rules, discredits racing and tarnishes it's (sic) image. It undermines the integrity of the Industry. We have taken into account the nature of the prohibited substance and we believe it to be a performance enhancing substance. 3. Your record, in 1993 you (sic) previously convicted under ARR.178 and ARR.175(h)(ii) for the same substance and disqualified for six months on each account. These penalties were served concurrently. 4. We have considered your personal circumstances. They include your training establishment set-up, your financial status, your staff commitments and your number of horses. After having considered all that has been placed before us in regards to penalty, we believe that you would be disqualified for a period of 12 months. You have the right of Appeal against this decision if you so desire Mr Harper."

**The Appeal**

Mr Harper appealed against the decision. In their final form the grounds of appeal state:

> **"Ground 1: Error of Law**
>
> The Respondents erred in law in finding that the Appellant was guilty of the offence charged under Rule 178 of the Rules of Racing of the Western Australian Turf Club, which finding:

(i) was based on a wrong construction of Rule 178;

(ii) was erroneous and not open to the Respondents on the evidence;

(iii) took into account irrelevant material;

(iv) failed to take into account relevant material; and

(v) was unreasonable in the sense advanced in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 233.

**Ground 2: Denial of Natural Justice - Departure from Established Practice and Procedure Without Notice**

There has been a denial of natural justice by reason of the Respondents and the West Australian Turf Club.

(i) departing from their long-standing practice whereby the Respondents allow for an uncertainty of measurement of plus or minus 1.2 millimoles in relation to total carbon dioxide readings in blood samples, and give full credit for this level of uncertainty ('Practice'). The Respondents departed from this Practice without notice to the Appellant and the racing fraternity of Western Australia;

(ii) instigating an inquiry in circumstances in which they failed to comply with the procedures prescribed by AR178D in that the confirmatory analysis was below 36.0 millimoles;

(iii) departing from the findings of Racing Analytical Services Limited dated 22 July 1999 and the Australian Racing Forensic Laboratory dated 26 July 1999 which both allowed for a level of uncertainty of plus or minus 1.2 millimoles;

(iv) depriving the Appellant of his legitimate expectation that the Practice would be adhered to in the circumstances of this case; and

(v) depriving the Appellant of his legitimate expectation that the Respondents would act only in accordance with the procedure prescribed by AR178D.

**Ground 3: Denial of Natural Justice - Refusal to Permit Legal Representation at Inquiry**

The Respondents erred in their decision to deny the Appellant legal representation at the Inquiry on the grounds that such denial:

(i) constituted a denial of natural justice in the circumstances having regard to the following matters:

a) the consequences are of a serious nature involving loss of livelihood, professional licence and reputation;
b) charges were involved;
c) the penalty is significant;
d) the facts involved important matters of credibility;
e) the Appellant was unable to adequately represent himself; and

f) the issues (both factual and legal) were complex.

(ii) relied upon Australian Rule of Racing 199B and Local Rule 9A when such rules are ultra vires in that:

a) the rules are contrary to the general law;
b) the rules are in excess of the enabling statute, the Western Australian Turf Club Act 1892, and the By-laws of the Western Australian Turf Club enacted pursuant to the said Act; and
c) in any event the rules constitute a denial of natural justice.

**Ground 4: Failure to Accord Procedural Fairness**

(i) the Respondents erred in law in failing to give the Appellant a reasonable opportunity of properly considering, understanding and responding to the expert evidence relied upon by the Respondents against him;

(ii) the Respondents failed, until giving their reasons on 15 November 1999, to clarify the charge against the Appellant so as to make clear that they were relying upon an uncertainty measurement of 0.8 millimoles per litre and not 1.2 millimoles per litre, notwithstanding specific requests from the Appellant for such clarification during the course of the Inquiry;

(iii) the Respondents failed to allow the Appellant's expert witness, Dr Casey, to hear Dr Vine's evidence in relation to a letter from Dr Casey which related to the

formula for the uncertainty of measurement and the means of calculation thereof;

(iv) Dr Vine ignored the Appellant's repeated requests to supply his complete set of mathematical workings to Dr Casey so as to enable Dr Casey to check Dr Vine's methodology and results for validity and accuracy;

(v) The Appellant repeats Grounds 2 and 3 above;

(vi) in failing to accept as complete and correct the certificated findings of the official racing laboratories, and in seeking to unilaterally reduce the value customarily credited for uncertainty of measurement, the Respondents put the Appellant at an acute evidentiary disadvantage relative to the Respondents who had ready access to the official racing laboratory data and expertise. The Respondents' expert refused to provide crucial information, that could only be supplied by him, namely his mathematical workings by which he arrived at the 'experimental' measure of uncertainty;

(vii) the Chairman put leading questions to the Respondents' expert witnesses in an apparent attempt to elicit evidence favourable to the Respondents' case against the Appellant;

(viii) the Appellant repeats Ground 5 below;

(ix) the Respondents ignored Mr Harper's request to have an independent laboratory test sample B01017 in its entirety notwithstanding that the ARFL is the

nominated laboratory of the WATC, and RASL is the nominated laboratory of ARFL such that it might reasonably be inferred that both laboratories have a pecuniary interest in the continuing good relationship with the WATC; and

(x) in calling two expert witnesses, both of whom led complex and controversial scientific evidence, the Respondents put Mr Harper in the exceedingly difficult position of having to refute or otherwise discredit that evidence.

**Ground 5: Reasonable Apprehension of Bias**

(i) There was a reasonable apprehension of bias on the part of the Respondents by reason that the same stewards who decided to charge the Applicant (sic) with an offence on 3 November 1999 continued to sit and to hear the charge against him and ultimately to decide he had committed an offence; and

(ii) The Respondents, and in particular the Chairman of the Inquiry had made up his mind that the Appellant was guilty of the charge before the evidence was concluded.

**Ground 6: Penalty**

In imposing a period of disqualification of 12 months, the Respondents failed to have any regard or any proper regard to the following considerations:

(i) the Appellant took all reasonable and proper precautions to prevent the administration of a

prohibited substance; and

(ii) no evidence was adduced, nor was there any suggestion that the Appellant did in fact administer orally or intravenously a narcotic poison or performance enhancing drug to CORNER BLEAK. The evidence of what the horse was fed disclosed that only potassium citrate had any potential alkalinising effect, but that since only 1 teaspoon was fed to CORNER BLEAK, it could not have raised his plasma total carbon dioxide levels above the threshold level of 36.0 millimoles per litre."

**Preliminary Matters**

Dr Vine was called to give evidence before the Stewards' Inquiry and gave his evidence by telephone on 3 August 1999. In the course of giving his evidence Dr Vine stated that his laboratory standard deviation over the 12 months prior was around 0.36mmol/L. As a consequence of that, the maximum level of uncertainty was 0.77mmol/L or rounded off to 0.8mmol/L. It is noticeable that the difference in the $TCO_2$ measurements of ARFL and RASL was 1.4mmol/L.

The Stewards also called Dr Alan Duffield from ARFL. He said the 1.2mmol/L level of uncertainty was set by the manufacturers of the Beckman EL-ISE machine which was used to measure plasma total carbon dioxide. Dr Duffield went on to say that his laboratory, however, had been able to calculate its own experimental uncertainty from using the Beckman EL-ISE instrument and that the experimental measurement of uncertainty according to them was + or - 0.8mmol/L.

When recalled to give evidence before the Stewards Inquiry on 23 August 1999, Dr Vine (T56) stated:

> "...1.2[mmol/L] was a value which was applied to certificates of analysis, and, by agreement with the other laboratories, but the actual uncertainty of measurement as determined from the calculation that was used to arrive at the 1.2 many years ago would indicate the true uncertainty of measurement was somewhat lower than that".

At T57 Dr Vine stated that the laboratories continued to use the 1.2mmol/L uncertainty measurement to avoid confusion. He stated that the issue of whether that accurately reflected the uncertainty is something that had been discussed at laboratory meetings and the feeling of the meetings was that it would "send out a clearer message to the industry if we keep that value as it is".

Dr Peter Symons, Veterinary Steward working with the Turf Club, gave evidence that he had attended Mr Coulson's property where the horse "CORNER BLEAK" was identified and a blood sample was taken for $TCO_2$ analysis. The horse was then taken to an impoundment complex and kept under security at all times. The horse was fed with a food regime similar to that advised by Mr Harper, when questioned by Dr Symons on 27 July 1999 about the feed types used to feed CORNER BLEAK. During the impoundment period $TCO_2$ blood samples were taken at the same time of day as the blood sample was taken on the race day. The $TCO_2$ levels measured during the impoundment period were as follows:

| | | |
|---|---|---|
| 27 July 99 (a.m.) | - | 31.5 |
| 27 July 99 (p.m.) | - | 31.5 |
| 28 July 99 (p.m.) | - | 31.5 |
| 29 July 99 (p.m.) | - | 30.0 |

All of those measurements were made by ARFL. In respect of each measurement, a formal plasma $TCO_2$ result report was provided.

On 23 August, Mr Harper was told that Dr Duffield and Dr Vine had travelled from the Eastern States to be in attendance and would be available for cross examination. Mr Harper was asked if he would be in a position to question them. He declined on the basis that he said he was unable to do so. Mr Harper read some submissions prepared by his lawyer, Mr Hammond, which set out the reasons for requesting legal representation. Mr Harper argued that he was being denied natural justice and sought legal representation again. He submitted to the inquiry that it should cease on the basis that there was no prima facie evidence to support a finding that a prohibited substance had been administered. Mr Hammond, Mr Harper's lawyer, then gave evidence explaining why legal representation was necessary. The Stewards then ruled on and disallowed the applications for legal representation. However, Mr Hammond was allowed to sit at the back of the room as an observer and thereafter Mr Harper had a legal representative in the inquiry room as an observer.

Dr Vine gave evidence (T60) that there was no other explanation for the two recorded values analysed from the samples taken on race day, other than an administration of an alkalinising agent. He stated that any other possibility was extremely unlikely. Dr Vine (at T61) did, however, state that the 1.2 measure of uncertainty continued to be used by his laboratory despite the fact that their experimental precision had improved.

Dr Vine was asked about the variance in the measured levels of $TCO_2$ in the two different laboratory tests. He put forward a number of explanations for this, which included experimental variation by each of the laboratories, variation in the tubes themselves in that one sample of blood might have slightly more $TCO_2$ in it than another sample of blood in another tube, and also the possibility that the sample analysed by Dr Vine's laboratory may have lost a little bit of $CO_2$ in transit. He stated that he could not quantify the likely level of contribution of those factors, but that they were all possibilities. Dr Vine did, however, say it was not

possible to establish why there was such a variation. He confirmed that RASL also used the Beckman EL-ISE machine.

When Dr Duffield was recalled to give evidence on 23 August 1999 he was asked why the laboratories hadn't altered the uncertainty level to + or - 0.8mmol/L. At T68 he stated that he suspected there was a little inertia on the part of the laboratories and that it had never been formally addressed.

Mr Harper was questioned on 13 September 1999 about the feeding regime of CORNER BLEAK. He stated at T96 that he did not feed the horse sodium bicarbonate or any alkalinising agent. At T99 Mr Harper stated his horse, a week or so prior to the race, had a respiratory problem but by the time of racing that had gone. Mr Harper (T100) stated he believed he'd transported CORNER BLEAK to the racecourse. Mr Harper claimed (T100) that the horse was sweating profusely when it arrived at the racetrack but went on to say he wasn't asserting that had anything to do with the $TCO_2$ level. Dr Symons, however, gave evidence that CORNER BLEAK was in the quietest 30% of horses he had seen on that race day. He said that he had not observed the horse to have been sweating.

Mr Harper described (T103) the security of his stables to be excellent and that he had not noticed anything untoward on the evening of 20 July, the day before the race.

On 13 September 1999, the inquiry was adjourned to 1 October 1999. On 1 October Dr Vine again gave evidence. He said the probability of the actual $TCO_2$ being within plus or minus 0.08mmol/L of the measured valued was in fact 99.7% not 99.9% (T117). He went on to say that the probability of the $TCO_2$ content of the sample being <u>greater</u> than the bottom end of the measurement range of error (ie 36.1mmol/L) was 99.9% (to one decimal place) because there was only half the probability of the $TCO_2$ measurement error falling on the lower half of the deviation range

(T121). To put it another way, Dr Vine said there was 1.35 chances in 1000 that the true $TCO_2$ value was lower than the measured value minus 0.08mmol/L (T124).

Dr Vine acknowledged (T125) that the formal level of uncertainty that his laboratory reported had not changed from 1.2mmol/L.

Dr Casey, who was then a director of the Equine Testing Programme and Andrology Services at the University of Auckland and also a director of North Western Veterinary Limited, a veterinary company in New Zealand, gave evidence for the Appellant. He also questioned Dr Vine at length. Dr Casey said (T140) that the levels of 38.3 and 36.9 "have an unacceptably large amount of variability". Dr Snow, a veterinary surgeon and equine exercise physiologist, from New South Wales, who gave evidence on 22 October 1999, expressed a similar sentiment (T173, 174 and 176).

At T179, the Chairman of Stewards, Mr Zucal, was asked by Dr Snow whether or not it was correct that it was usual for the decision of the Stewards to be made on the confirmatory analysis (ie, in this case the RASL result). The Chairman responded that that was right but then said: "It's a matter of rules and for the panel to decide".

At T190 Dr Vine agreed that the certification of the result included the level of uncertainty of plus or minus 1.2mmol/L. Dr Vine agreed that the difference between the result of 36.9 from RASL and 38.3 from ARFL was greater than you would normally expect to see (T199). He also agreed that both tubes tested by his laboratory showed a substantially lower result than that of the initial sample measurement from ARFL. He did, however, maintain the view that the most plausible explanation for this difference was tube leakage which always lead to a reduction in the $TCO_2$ level measurements.

Dr Duffield who also gave further evidence on 22 October 1999 said (T216) that the makers of the Beckman EL-ISE rated "their instrument as having no greater variation than 3% of 40mmol/L. 3% of 40mmol/L = 1.2mmol. Dr Duffield said (T228-229) the variation in the readings between the two different lab results could also be due to how full the tube was initially. The less fluid in the tube, the lower the $TCO_2$ level will be generally.

Dr Duffield also indicated that part of the difference between the measurements of both samples could in part be explained by the levels of experimental uncertainty.

Dr Snow (T255) expressed the opinion that it was not fair to compare a horse's resting $TCO_2$ with pre-race levels which can be higher due to the excitement a horse may experience in the period leading up to a race.

The issue of high $TCO_2$ levels occurring naturally was one of the main issues before the Tribunal in the matter of *Stampalia*, Appeal No 435, delivered on 8 April 1999. Interestingly Mr Hammond, who was the solicitor acting for the Appellant in this case had also been the solicitor acting for the Appellant before the Stewards during the *Stampalia Inquiry*.

The Stewards referred to research undertaken by a Professor Rose, a veterinarian who has a long history of research in the area of horse exercise physiology and the influence of alkalinising agents on the performance of horses. A letter dated 16 April 1996 from Professor Rose to the Chairman of Stewards of the Western Australian Trotting Association which was provided in the course of an inquiry undertaken by the WATA Stewards in relation to elevated $TCO_2$ levels in horses, was tendered as Exhibit 31 in the Inquiry now under review. Professor Rose indicated that temperature variations in horses, even in hot conditions do not effect the $TCO_2$ level. He stated that substantial sweat loss can result in small increases in $TCO_2$. He went on to say that in respect of endurance horses even in the cases of very extensive sweat loss $TCO_2$ values are not

increased to more than 35mmol/L. He also noted that stress did not appear to have any effect, few diseases increase $TCO_2$ levels and excitement had no effect on $TCO_2$ levels. He went on to say that $TCO_2$ values in individual horses can vary considerably during the course of the day. However he had not ever seen a value approach 37mmol/L in normal horses. He stated at page 2 of his letter:-

> "If one accepts that the mean plus or minus 3 standard deviations represents the normal population, then our data and that of Auer et al (1992) would indicate that values of 35mmol/L were abnormal. To allow for errors in measurement and an adequate safety margin, we suggest that measured values greater than 37mmol/L could be considered to be evidence of administration of sodium bicarbonate or some other alkalinising agent."

A paper entitled *"Detection of bicarbonate administration (milkshake) in Standard bred horses"* undertaken by DE Auer, KB Skelton, S Tay (all from the Racing Science Centre in Albion Queensland) and FC Baldock (from the Department of Primary Industries, Animal Research Institute in Queensland) was tendered into evidence as an attachment to a submission of Mr Harper (Exhibit 44). The paper summarises their researches in relation to $TCO_2$ concentrations measured in standardbred horses as follows:-

> "Total plasma carbon dioxide ($TCO_2$) concentrations were measured in Standard bred horses to determine criteria to discriminate between normal horses and horses with excessive $TCO_2$ concentrations on raceday. $TCO_2$ concentrations from stabled horses were distributed normally with a mean of 30.2mmol/L and a standard deviation of 1.2 (n=192) while pre-race $TCO_2$ concentrations were not normally distributed. The results indicate that

> about 50 horses per million are likely to have $TCO_2$ concentrations greater than or equal to 35mmol/L and that it is extremely unlikely that a normal horse would have a resting $TCO_2$ concentration above 36mmol/L."

At page 340 of that Journal the authors of the article state:-

> "The decision to nominate a threshold $TCO_2$ concentration to discriminate between horses administered a 'milkshake' and normal horses is based on the balance of importance placed upon the concurrent needs to detect bicarbonate administrations and yet ensure no false positives are declared. For example, based upon the results of this study, selection of pre-race plasma $TCO_2$ concentration of 37mmol/L as the threshold would lead to detection of 50% of horses administered 'milkshakes', and for a pre-race concentration of 35mmol/L, 67% of the horses administered a milkshake would be detected. A misdiagnosis of a normal animal as 'positive' would be extremely unlikely."

Dr Stewart, a veterinary surgeon, was called to give evidence before the Stewards by Mr Harper on 15 November 1999, after Mr Harper had been charged. Dr Stewart was an equine veterinary surgeon. He gave evidence in relation to the uncertainty measurement and expressed the view that it was probably even greater than 1.2mmol/L. He referred to the fact that the WA laboratory's uncertainty level was 1.4mmol/L. He also criticised the Auer et al study which he considered was based on small numbers of horses and said 36mmol/L was too low as a threshold for deeming an administration (T422).

The Stewards also had before them a number of other scientific papers concerned with $TCO_2$ levels found in horse blood plasma. A letter from Dr

Kannegieter, Specialist Equine Surgeon, was also tendered into evidence (Exhibit 52). He, inter alia, expressed the view that until the 0.8mmol/L uncertainty level was published and made open to scientific scrutiny there should not be a departure from the uncertainty levels of +/- 1.2mmol/L.

There was a substantial volume of expert evidence before the Stewards. They were required to weigh up the competing contentions of the experts and make a judgment. In the end they chose to prefer the evidence of Drs Duffield and Vine and accepted 0.8mmol/L was the true level of experimental uncertainty for the ARFL and RASL laboratories.

On 3 November 1999 when Mr Harper was charged with having a "pre-race blood sample with excess of 36mmol/L" that was clearly referable to the horse's $TCO_2$ level. In my view this was implicit and I note that there has been no appeal on that point.

**AR178D and the Stewards' Finding of an Administration**

AR178 requires the Stewards to find that the horse had been administered with a prohibited substance. $CO_2$ is not, as noted above, a prohibited substance unless it is in excess of 36.0mmol/L. In my view it was open to the Stewards to find on balance that CORNER BLEAK did have in excess of 36.0mmol/L of $TCO_2$ in the horse's blood plasma. The question then is whether it was open to the Stewards to find that there had been an administration.

AR178D(2) provides:-

> "Upon the detection by an official racing laboratory of a prohibited substance in a sample taken from a horse such laboratory shall:-
>
> (a) notify its finding to the Stewards, who shall thereupon notify the trainer of the horse of such finding; and

(b) nominate another official racing laboratory and refer to it the reserve portion of the same sample and, except in the case of a blood sample, the control of the sample, together with advice as to the nature of the prohibited substance detected."

AR178D(3) provides:-

> "In the event of the other official racing laboratory detecting the same prohibited substance, ..... in the referred reserve portion of the sample and not in the referred portion of the control, the certified findings of both official racing laboratories shall be prima facie evidence upon which the Stewards may find that a prohibited substance had been administered to the horse from which the sample was taken."

The report of RASL was 36.9 plus or minus 1.2mmol/L. That cannot constitute a certification that the sample was over 36 mmol/L, in my opinion, since the reported level could be as low as 35.7mmol/L. Therefore, the criteria of Rule 178D for the deeming of prima facie evidence of an administration, were not satisfied.

The Stewards in their findings (T452) accepted the evidence of the two racing laboratories in relation to the readings of 38.3mmol/L and 36.9mmol/L. However the Stewards wrongly went on to say:-

> "Any level in excess of 36 is evidence of an administration of a prohibited substance."

That was to wrongly interpret Rule 178D which requires certification of both laboratories.

However, the Stewards independently of Rule 178D went on (T453) to find that the evidence of Dr Symons, Dr Vine and Dr Duffield supported the proposition that it was extremely unlikely that a level in excess of 36mmol/L could have been reached unless there had been an administration. They also took into account the horses impoundment test results for $TCO_2$ level.

In addition to the above the Stewards also had, to support their conclusion, the evidence of Professor Rose's article and also Dr Auer et al.

Interestingly, Mr Harper agreed that he had fed one teaspoon of a mix which included potassium citrate which was found to have an alkalinising value. Mr Harper gave evidence that he did put potassium citrate into some horses' feed if they are having urinating problems (T97). He also stated that although he fed his horses in separate feed bins, when they finished their feed it was possible that they may go to another horse's feed bin (T96-97).

**Ground 1: Error of Law**

This ground alleges that the Respondents made an error of law in finding the Appellant guilty of the offence charged under AR178 of the Turf Club Rules for a number of reasons set down in subparas (i) to (v).

The first sub-ground is that the finding was based on a wrong construction of AR178.

For the reasons stated above, I agree the Stewards could not rely on Rule 178D as a basis for finding there was prima facie evidence of a prohibited substance having been administered. That said, it does not necessarily follow that there was no evidentiary basis to support the Stewards' finding

that there had been administration of a prohibited substance. The Appellant submits at para 5.8 of the Appellant's written submissions:-

> "AR178D like the repealed AR117B is an evidentiary rule. However, 178D so precisely covers the circumstances upon which the stewards can make a finding of administration of an alkalinising substance that as a rule of construction, there is no room for such a finding to be made in contravention of the procedure laid down by AR178D."

In my view, the Stewards are entitled to consider and weigh up all the evidence before them. They are not, as suggested by the Appellant, confined to what has been certified by the official racing laboratories. There is nothing in this approach which is inconsistent, at least as I understand it, with what was said by the Full Court in *Danagher v Racing Penalties Appeal Tribunal & Ors* (1995) 13 WAR 531. In my opinion it was open to the Stewards to have regard to the evidence of Drs Duffield and Vine and to conclude that the actual level of experimental uncertainty in their respective laboratories for $TCO_2$ measurements in blood plasma was plus or minus 0.8mmol/L.

In my view it was reasonably open to the Stewards to find, based on the evidence given of uncertainty measurements and the evidence of the likelihood of an administration explaining such measurements of $TCO_2$, that there had been an administration of a prohibited substance.

Ground 1(ii) contends that the Stewards' finding of the offence under AR178 having been made out was erroneous and not open to them on the evidence.

In my opinion it was open to the Stewards to find the Appellant had breached AR178. The clear evidence was that both laboratories had, as a matter of scientific determination and experience, rather than convention,

an experimental uncertainty level of 0.8mmol/L when testing $TCO_2$ levels in blood samples. The evidence of Dr Vine was that there was a 99.7% probability of the actual $TCO_2$ level being plus or minus 0.8mmol/L of the measured level of 36.9mmol/L made by RASL. That was the confirmatory analysis. Therefore, even if one were to give the Appellant the benefit of the doubt by adopting the lower of the two laboratory measurements, there was still very strong evidence to support the finding made by the Stewards that there was an actual $TCO_2$ level of not less than 36.1mmol/L. As noted above, the evidence of Dr Vine was that it was 99.9% likely that the true $TCO_2$ level was greater than 36.1mmol/L.

The Stewards then relied on the evidence of Dr Symons, Dr Vine and Dr Duffield, all of whom expressed the opinion that it was extremely unlikely that the horse would have a $TCO_2$ level of in excess of 36 without there being an administration of an alkalinising agent which is a prohibited substance.

Dr Symons (T22) stated that elevated levels of $TCO_2$ greater than 36mmol/L was evidence that excessive amounts of alkalinising agents had been administered. Dr Vine at T60 said:-

> "I really see no other explanation for those values other than the administration of some alkalinising agent, I think any other possibility is extremely unlikely. The only other possibilities would be some extreme respiratory disease, which clearly wouldn't lie in the case of a fit racehorse."

In my view it was open to the Stewards to prefer and rely on the evidence of those witnesses.

Ground 1(iii) asserts that the Stewards took into account irrelevant material in reaching the conclusion that the Appellant was guilty of a charge under Rule 178. The irrelevant material was said to be the

expressions of opinion from Dr Vine and Dr Duffield about the true uncertainty measurement in respect of $TCO_2$ level measurements. In relation to this ground of appeal, I can only say that for the reasons I have expressed above I am of the opinion that that evidence was relevant, in fact it would seem to me to have been evidence of central relevance to the issues before the Stewards.

Ground 1(iv) asserts that the Stewards failed to take into account relevant material in finding the Appellant guilty under Rule 178. This ground was particularised by paragraphs 8.2 through to 8.19 of the Appellant's submissions. Those submissions stated as follows:-

> "8.2 That the 'experimental' range posited by the WATC's experts for UM has not been subjected to objective scientific scrutiny: see Exhibit 52 per Dr Kannegieter, p1, paragraph 4. Further, that the change from +/- 1.2 mmol/L to +/- 0.8 mmol/L had never been formally addressed: see tp 68 per Dr Duffield."

I do not accept the views expressed by Drs Vine and Duffield were not objective. Even if they had not been subjected to outside scientific scrutiny that does not mean the Stewards could not consider the views and form a view as to weight.

> "8.3 That the official racing laboratories, ARFL and RASL have not altered their certificates to reflect a change in the qualification in respect of uncertainty of measurement, and continue to publish their certificates with an allowance for inaccuracy of +/- 1.2 mmol/L: see Exhibits 11 and 12.

8.4 That the laboratory worksheet placed into evidence: see Exhibit 12, p2, discloses that RASL determined the adjusted value of its analysis to be 35.72 mmol/L. It is clearly evident on the face of the relevant laboratory worksheet that RASL, on 22 July 1999, deducted 1.2 mmol/L from its Raw value to determine its Adjusted Value notwithstanding the existence of any 'experimental' UM in the minds of RASL's Laboratory Director, Dr Vine.

8.5 That the Laboratory Directories (sic) of both ARFL and RASL attested their Raw values remain subject to +/- 1.2 mmol/L for uncertainty of measurement: see tp 61 and 125, per Dr Vine and tp 69 per Dr Duffield."

These were matters which occupied a substantial amount of the Inquiry hearing. They were well articulated before the Inquiry. I do not accept the contention they were not taken into account. In any case, in my view it didn't alter the fact it was open to accept the oral evidence of Drs Vine and Duffield.

"8.6 That there is a statistically significant difference of 1.4 mmol/L between the certified findings of ARFL and RASL which has not been adequately explained, and where the findings are purported to be from laboratories priding themselves on improved methodology and accuracy so that they can safely reduce their UM. Dr Vine explained the large variation in the assay results returned by ARFL and RASL at tp 63. He suggested that a combination of factors might produce a 'slight

> variation' between results, including normal experimental variation; the blood of the 4 tubes in the same sample can have different constitution even though it is extracted sequentially; the tubes may have 'leaked'; and loss of C02 in transit. Dr Vine admitted at tp 197 that 1.4 mmol/L was a greater difference that one would usually expect. There was a mere 4 hours transit time between dispatch from ARFL in Sydney and receipt by RASL in Melbourne: see 197 and Exhibit 5.
>
> Dr Symons at tp 175 suggested the large variation could have been attributed to improper collection technique (i.e. failure to properly fill the tubes) in addition to the matters considered by Dr Vine. Dr Symons said at tp 175-"The most important factors are, I think, samples from the same horse, but one stays in Sydney, the other one goes to a different lab and is worked on by a different city at a different time.. it's the same blood but its analysed under a lot different circumstances.. its (sic) not uncommon for us to have a drop between the first and second analysis at another lab."
>
> Dr Snow put to Dr Vine at tp 200, that it was not merely a loss of 1.4 mmol/L in one tube, but in both tubes since the laboratory worksheet at (sic) similarly lower results in both tube 3 and tube 4: see Exhibit 12, p 2."

It cannot be said, in my view, these matters were not taken into account. There were many pages of the Inquiry directed to the significance of

1.4mmol/L between the 2 measurements. I have dealt with this evidence above.

> 8.7 "That Mr Harper adduced evidence to show that in three recent instances, namely the WATA inquiries into True Romance, Michael Leslie and Presley Strikes the confirmatory finding was slightly *higher* than the preliminary finding. This countered the evidence led by Drs Vine and Symons that it was *usual* for the confirmatory sample to return lower values: see Exhibit 39."

I have difficulty understanding why it is said these matters were not taken into account by the Stewards. They were matters articulated before the Stewards.

> "8.8 That the large variation in the certificated findings between the two official racing laboratories cast doubt on the validity of the entire assay.
>
> 8.9 That the Victorian Racing Club when faced with a mere 1.0 mmol/L difference in the preliminary and confirmatory assay results aborted the Inquiry into possible elevated levels in Tricky Prince at tp 178 and 179: see also Exhibit 24."

These matters were the subject of considerable attention before the Stewards and cannot, in my opinion, be said they were not taken into account.

> "8.10 That the Laboratory Directors of ARFL and RASL gave divergent explanations of the origin of UM of 1.2 mmol/L. Dr Vine of RASL explained that UM of

> +/-1.2 mmol/L was derived through statistical analysis of experimental data, whereas Dr Duffield of ARFL explained that UM of +/- 1.2 mmol/L was based on the manufacturer's specifications for the Beckman Synchron EL-ISE instrument: compare tp 56 per Dr Vine and tp 68 per Dr Duffield. It is submitted that the manufacturer's specifications have pre-eminence over Dr Vine's or Dr Duffield's personal 'experimental' and unscrutinised UM."

Again, I don't know how it can be said this was not taken into account. In any case the fact that there were different opinions as to how the 1.2mmol/L variation was reached was not a matter of great significance. The central issue was what the true level of experimental uncertainty was at each of the two laboratories, which both laboratory directors said was 0.8mmol/L.

> "8.11 That the constitution of the Verichem control substance does not necessarily mimic equine blood plasma, so that although resort to the control might ensure precision in measurement, the measurement, may, nevertheless be inaccurate. This point is crucial because the 'experimental' UM of +/-.8 mmol/L is derived from statistical analysis of data in respect of the Verichem control. The Director of RASL explains that it is impossible to use an equine blood plasma control. It is submitted that this is a fatal flaw in the testing process and invalidates all $TCO_2$ assays: see tp 221-225."

This was a matter in respect of which Dr Snow asked Dr Duffield a number of questions. It was a matter articulated before the Stewards and, in my opinion, there is no basis to say it was not taken into account.

> "8.11(sic) That in accordance with the proper construction of AR178D and the mandatory procedure it prescribes, if the preliminary analysis on sample BO1017 performed by ARFL had returned an Adjusted value of 35.7 mmol/L, no confirmatory analysis would have been ordered: see tp 208-9.
>
> 8.12 That the Laboratory Director of ARFL attested that under those circumstances no confirmatory analysis would have been ordered:
>
> DR SNOW: "...if you had a plasma $TCO_2$ concentration of 36.4 would that be forwarded on for confirmatory analysis?"
>
> DR VINE: "No. Well our criteria say that for screening, say that it has to accede the threshold level by more than the uncertainty of measurement."
>
> 8.13 That it may have been pure chance that, out of the 4 vials of blood constituting sample B01017, the first 2 chosen showed a $TCO_2$ concentration of above the threshold, whereas the remaining 2 vials showed a mean $TCO_2$ concentration of only 35.7 mmol/L: tp 210."

The matters set out in 8.11 to 8.13 were, in my opinion, irrelevant. In any case, it cannot be said the Stewards did not take them into account.

8.14 "That RASL failed to comply with its standard operating procedures. The relevant analyst failed to date and initial the machine print-outs in circumstances where 2 crucial print-outs are both labeled 'tray 4, cup 1' such that there is no evidence to show each of the tubes were analysed rather than 1 of the vials analysed in duplicate: see Exhibit 40."

This matter was raised before the Stewards. Dr Vine gave evidence in relation to this at T307 to T308. He stated he believed the correct procedures were undertaken in the laboratory and said that it would be "blindingly obvious" to any analyst if one sample only were tested since there would be an unopened sample still in the rack. He did concede, that the analyst overlooked initialling the printout but did date, sign and initial the worksheet.

"8.15 That RASL's Laboratory Director's (sic) was not present at the time the analysis on sample B01017 was conducted. Because of his absence, any assurances given by Dr Vine as to the procedures actually undertaken, or the integrity of the sample are worthless."

This is a matter which was argued by the Appellant before the Stewards. It is a submission. There is no reason to believe the Stewards did not consider this submission.

"8.16 That points 8.14 and 8.15 above show that even thought (sic) ARFL and RASL are NATA accredited, people can, and often do, make mistakes and raises the question of what other mistakes might have

been made in this assay."

This is dealt with above.

"8.17 That the WATC operates under an obligation as a Principal Club to act in accordance with the policy of the Australian Conference of Principal Clubs [the 'Conference']. The Conference has publicly guaranteed that it will not alter assay sensitivity for therapeutic substances without notice to the racing industry as a whole: see Exhibit 41, p 4, and Dr Symons confirmation at tp 170-1. $TCO_2$ is considered a therapeutic substance since can (sic) neutralise the potentially harmful acidic diets fed to racehorses. The WATC has breached this obligation by attempting unilaterally, and without prior notice to the industry, to effect a negative adjustment in the sensitivity of assays in respect of $TCO_2$ from +/- 1.2 mmol/L to +/- 0.8 mmol/L. Dr Vine stated at tp 57 that the feeling of the meeting of the official racing laboratories was to maintain the UM off 1.2 mmol/L because it "sends out a clearer message to the industry."

This was a matter fully articulated before the Stewards. It cannot be said, in my opinion, these matters were not considered by the Stewards.

"8.18 The premise that normal horses having been prepared for racing, and suffering pre-race stress and anxiety can present with a $TCO_2$ concentration in excess of 36.0 mmol/L (see Dr Stewart at tp 428-431). Dr Stewart suggested that it is improper to explain the atypical with reference to the typical. In

particular he presented his hypothesis that 'anxiety' may serve to elevate $TCO_2$ in some normal horses. The Respondents acknowledged that Dr Stewart had done much work involving $TCO_2$, and Dr Symons congratulated him on his efforts: see tp 444.

Dr Snow presented evidence that one horse, 'Three Witches' was banned from racing because it was found to have abnormally high $TCO_2$ levels: see Exhibit 30 and p 261."

The fact that the Stewards preferred the evidence of other expert witnesses does not mean the evidence of Dr Stewart was not considered and taken into account by the Stewards.

"8.19 The Tribunal erred in law in failing to have regard to the evidence of Mr Harper which did establish that he had taken proper precautions to prevent the administration of a prohibited substance. In considering whether he had made out his defence the Respondents should have had regard to the evidence before them which was relevant to the of (sic) whether Mr Harper had taken reasonable and proper precautions to prevent the administration of a prohibited substance. There was uncontested evidence of Mr Harper to the effect that he had taken all reasonable precautions at all times to ensure the security of the horse prior to the race: see Exhibit 47. On this evidence the Respondents should have concluded that he had made out his defence. It is clear from the Respondents' reasons that they simply ignored this aspect of the case entirely."

Although the Stewards did not specifically refer to this in their reasons, it does not mean it was not taken into account. It was clearly a matter the Stewards themselves called evidence in relation to and considered during the course of the Inquiry.

In my view all of the matters referred by the Appellant in paragraphs 8.2 through to 8.19 were matters which were before the Stewards and there is no basis, in my view, to say that the Stewards ignored those matters when considering the evidence as a whole, and in coming to their decision.

Ground 1(v) contends that the finding was unreasonable in the sense advanced in *Associated Provincial Picture Houses Ltd v Wensbury Corporation* [1948] 1 KB 233. For the reasons already covered above, I would not uphold this contention. In my view, it could not be said that the reasoning of the Stewards was so unreasonable that no reasonable decision-maker could have reached it.

**Ground 2: Denial of Natural Justice - Departure from Established Practice and Procedure Without Notice**

This ground contends that the Appellant had a real and legitimate expectation that he would be dealt with by the Respondents on the basis of a long established practice/policy of allowing an uncertainty measurement of plus or minus 1.2mmol/L and subtracting 1.2 from the certified measurement. It was also argued that the Appellant had a legitimate expectation that the WATC would provide him with notice of any proposed change to the policy prior to entering the horse for a race. It is said that Mr Harper was deprived of a real and legitimate expectation that he could continue to prepare his horses for racing in the knowledge that the uncertainty of measurement would remain at plus or minus 1.2mmol/L.

If it is being suggested by this ground that Mr Harper had some form of legitimate expectation that he could ever present horses with a truly measured $TCO_2$ level exceeding 36.0mmol/L then it must surely be misconceived since the expectation is contrary to the tenor of the Rules themselves.

However, even if such a legitimate expectation did exist the question arises what procedural fairness requirements result as a consequence of such a legitimate expectation. In *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* [1994-95] 183 CLR 273, Mason CJ and Deane J at 291 stated:-

> "The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door. ....
>
> But, if a decision-maker proposes to make a decision inconsistent with the legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity for presenting a case against the taking of such a course. So, here, if the delegate proposed to give a decision which did not accord with the principle that the best interests of the children were to be a primary consideration, procedural fairness called for the delegate to take the steps just indicated."

In *Haoucher v The Minister of State for Immigration and Ethnic Affairs* [1989-90] 169 CLR 648, Deane J at 651-652 stated:-

> "The notion of a 'legitimate expectation' which gives rise to a prima facie entitlement to procedural fairness or natural justice in the exercise of statutory power or authority is well established in the law of this Country (see eg *FAI Insurances Ltd v Winneke*). The notion is not, however, without its difficulties. For one thing, the word 'legitimate' is prone to carry with it a suggestion of entitlement to the substance of the expectation whereas the true entitlement is to the observance of procedural fairness before the substance of the expectation is denied (see eg *Salemi v MacKellar (No 2), Kioa v West).* In that regard there is much to be said for preferring the phrase 'reasonable expectation' which has often been used in judgments in this Court."

In my view, if there did exist a legitimate expectation as asserted by the Appellant, then he was given every opportunity by the decision-makers, the Stewards, to present a case against the Stewards taking the course of accepting the evidence of Dr Vine and Dr Duffield that the true experimental uncertainty was +/- 0.8mmol/L. Accordingly, in my view this ground ought to fail.

**Ground 3: Denial of Natural Justice - Refusal to Permit Legal Representation at the Inquiry**

There is no unqualified right to legal representation before the Stewards. Rule 199B of the Rules provides:-

> "A person attending or required to attend an inquiry conducted by the Stewards or the Committee of a Club or Association shall not be entitled to be represented by any other person, whether a member of the legal profession or

> otherwise, provided that an apprentice jockey may be represented by his master or other trainer acting for his master."

Therefore there is no entitlement to legal representation. Mr Davies QC submitted the Rule should not be interpreted to mean that there can never be legal representation at an inquiry but rather states that there is no actual entitlement to such representation.

In *Stampalia v The Racing Penalties Appeals Tribunal of Western Australia & Ors* [2000] WASCA 24 Owen J, giving the judgment of the Full Court in that case, said at page 16:-

> "There is no unqualified right to legal representation before the [WATA] Stewards. However, there is absolutely no doubt that the Stewards are bound to afford procedural fairness to a person whose conduct they are investigating. It may well be that in a particular case a right to legal representation may be an essential ingredient of the right to procedural fairness because of the circumstances of the case, the nature of the inquiry into the subject matter being dealt with and so forth: *Cains v Jenkins* (1979) 28 ALR 219 at 229-230."

At page 19 Owen J stated:

> "Each case must depends on its own facts. What has been held here to be sufficient compliance with the obligation to afford procedural fairness might not be adequate in another case. A body such as the Stewards ought always be cognisant of the fact that the consequences of the decision they make are serious and can affect a person's livelihood.

> They ought not to assume that legal representation is a privilege to be afforded only in rare and exceptional cases."

In this case the Stewards gave consideration to Mr Harper's request for legal representation (T4). They considered it was inappropriate for Mr Harper to have legal representation but allowed Mr Harper to confer regularly throughout the hearing with his legal representatives, allowed Mr Harper to effectively be represented by equine experts, namely Drs Casey and Snow at various times throughout the inquiry, and also received written submissions and requests from Mr Harper's legal counsel.

I have read the transcript of the proceedings before the Stewards and have formed the view that the refusal to allow Mr Harper legal representation, in the sense of having legal counsel represent him in this inquiry, did not result in Mr Harper being denied natural justice especially when regard is had to the extent to which both Drs Casey and Snow effectively acted as advocates for Mr Harper during the course of the hearing and the extent to which they were able to cross examine Drs Duffield and Vine in relation to their $TCO_2$ test results and findings. In addition, Mr Harper, Drs Casey and Snow were allowed to adjourn the hearing to consult with Mr Harper's legal advisers who were present observing the Stewards' Inquiry.

In my view it could <u>not</u> be said in this case that Mr Harper:-

(a) was prevented from marshalling evidence to counter that led by the Respondents' experts;

(b) was unable to collate evidence in support of his own case;

(c) was left unable to appreciate the evidence in the context of the inquiry;

(d) was prevented from encouraging the inquiry to act fairly and properly and according to its legitimate authority; or

(e) was unable to monitor the inquiry's performance and its' duty to act fairly and properly and according to the legitimate authority.

I would add that Mr Harper was represented by Senior Counsel in the appeal before this Tribunal. There was no application made to adduce further expert or other evidence before this Tribunal which can occur, with the leave of the presiding member, under Section 11 of the Racing Penalties (Appeals) Act 1990.

Further, in relation to the Stewards' interpretation of Rule 199B, it was clear that they were prepared to allow a de facto representation of Mr Harper by both Drs Casey and Snow in relation to dealing with the more technical aspects of the evidence. This demonstrates that the Stewards did not regard Rule 199B as absolutely prohibiting in all circumstances representation of an appropriate kind.

**Ground 4: Failure to Accord Procedural Fairness**

Ground 4(i) asserts that the Respondent erred in law in failing to give the Appellant a reasonable opportunity of properly considering, understanding and responding to the expert evidence relied upon by the Respondent against him. In my view this ground is not made out when one reads the entirety of the transcript. Drs Vine and Duffield were both recalled to allow the Appellant's expert, Dr Snow, to question them at length.

Ground 4(ii) contends that the Respondents failed, until giving their reasons on 15 November 1999, to clarify the charge against the Appellant so as to make clear that they were relying upon an uncertainty measurement of 0.8mmol/L and not 1.2mmol/L, notwithstanding specific

requests from the Appellant for such clarification during the course of the inquiry. In my view this ground must also fail. It was made quite clear to the Appellant throughout the inquiry and after that the Appellant was charged, that the Stewards were considering the evidence of Drs Vine and Duffield to the effect that the true experimental uncertainty range was plus or minus 0.8mmol/L rather than 1.2mmol/L. The fact that the Stewards had not reached any concluded view of that matter until they came to deliver their reasons for decision was quite proper and did not constitute a denial of procedural fairness. It was a matter for the Stewards to weigh up and consider once they had heard all of the evidence and submissions from the parties.

Ground 4(iii) contends that the Respondents failed to allow the Appellant's expert witness, Dr Casey, to hear Dr Vine's evidence in relation to a letter from Dr Casey which related to the formula for the uncertainty of measurement and the means of calculation thereof. In my view the complaint made in this ground, in the context of the proceedings as a whole, does not lead to a result that there was a failure to afford the Appellant procedural fairness. Dr Vine's response to the matters raised in Dr Casey's letter were transcribed and provided to the Appellant's solicitors. The Appellant had ample opportunity to have that evidence reviewed prior to the resumption of the hearing on 15 November. In my view, in that context, it cannot be said that there was any denial of procedural fairness in the procedure adopted by the Stewards.

Ground 4(iv) contends that Dr Vine ignored the Appellant's repeated requests to supply his complete set of mathematical workings to Dr Casey so as to enable Dr Casey to check Dr Vine's methodology and results for validity and accuracy. The last request from Dr Casey was by letter dated 3 November 1999 (Exhibit 44). That was read on to the transcript by the Chairman of the Inquiry at T318-319.

Dr Vine was faxed the request and commencing at T333 he provides his response to the concerns, queries and criticisms made by Dr Casey. He explains the manner in which the variables were ascertained or computed for the purposes of the calculation of the margin of experimental uncertainty. Following the evidence given by Dr Vine, Mr Harper was charged under Rule 178. He pleaded "Not Guilty" and the matter was adjourned to 15 November 1999 being two weeks later as requested by Mr Harper. No evidence was called from Dr Casey to criticise or contradict Dr Vine's explanation. In my view, there was consequently no procedural unfairness resulting.

Ground 4(v) purports to merely repeat grounds 2 and 3 and contends that as a result what is alleged in those two grounds there was a failure to accord procedural fairness. For the reasons already expressed, in my opinion, these grounds are not made out.

Ground 4(vi) contends that the Stewards in failing to accept as complete and correct the certificated findings of the official racing laboratories and in seeking to unilaterally reduce the value credited for uncertainty of measurement, put the Appellant at an acute evidentiary disadvantage relative to the Respondents who had ready access to the official racing laboratory data and expertise. It goes on to assert that the Respondents' expert, presumably Dr Vine, refused to provide crucial information, that could only be supplied by him, namely his mathematical workings by which he arrived at the experimental measure of uncertainty.

In my view this ground substantially repeats earlier grounds of appeal. However I should say that in any case I do not believe the Appellant was put at an evidentiary disadvantage. Through his own adviser he went to a considerable effort to discredit and challenge the results of both laboratories and the credibility of both Drs Vine and Duffield.

Ground 4(vii) contends that the Chairman of the Inquiry put leading questions to the Respondent's expert witnesses in an apparent attempt to elicit evidence favourable to the Respondents' case against the Appellant. The example given in support of this ground is set out in the Appellant's submissions at paragraph 18.1. The paragraphs refers to a question by the Chairman of the Inquiry at T20 which was as follows:-

> CHAIRMAN: " The plus or minus 1.2mmol/L I understand, Dr Duffield, that that's an agreement of the laboratories, is that a true reflection ... of uncertainty of measurement."

In my view the example itself is not a leading question. In any case, I am not persuaded that there is any merit in this ground when one considers the proceedings in their entirety.

Ground 4(viii) repeats Ground 5 which is a contention that there is reasonable apprehension of bias on the part of the Stewards. I will deal with that ground specifically when I come to Ground 5.

Ground 4(ix) contends that the Respondents ignored Mr Harper's request to have an independent laboratory test for sample BO1017 in circumstances where both ARFL and RASL are nominated laboratories of the WATC and as such might reasonably be inferred to have a pecuniary interest in continuing a good relationship with the WATC.

There is no provision under the Rules that entitles a trainer to insist upon a third laboratory providing an "independent" test. I must confess to having some difficulty with this ground of appeal in any event. It has not been suggested that either laboratory, when receiving blood samples from the Turf Club Stewards, had some interest in inflating the results so that there are more positive findings. Furthermore, there is no suggestion that the laboratories' pecuniary interest is served by not accurately recording their results and reporting them to the WATC.

In my view this ground fails for the above reasons.

Ground 4(x) contends that in calling two expert witnesses, both of whom led complex and controversial scientific evidence, the Respondents put Mr Harper in an extremely difficult position of having to refute or otherwise discredit that evidence. This ground in substance repeats earlier grounds. In my view, having regard to the Stewards' preparedness to allow Mr Harper to have both Drs Casey and Snow examine other expert witnesses during the course of the Inquiry, this ground is not made out.

**Ground 5: Reasonable Apprehension of Bias**

This ground challenges the long established practice of the Stewards whereby they conduct an inquiry into a potential breach of the Rules of Racing and if they consider there is sufficient evidence to charge a person, charge such person with a breach of the rule and proceed to hear and determine that charge.

Mr Owen-Conway QC stated that it was not a contention of actual bias, merely one of reasonable apprehension of bias.

There is authority for the proposition that the rules of natural justice are limited to actual bias when considering the conduct of a domestic or consensual tribunal: *Maloney v New South Wales National Coursing Association Ltd* [1978] 1 NSWLR 161.

The West Australian Turf Club Rules of Racing have coercive effect by virtue of their consensual and contractual nature, rather than by legislative force.

Mr Owen-Conway QC argued that the Stewards' inquiry constituted a "hybrid" between a consensual domestic tribunal and statutory tribunal. He argues that the Stewards exercise what is akin to a public power and

that consent to the non-statutory rules, in cases such as this, where the livelihood of a trainer depends upon membership, provides a good policy reason for requiring both the appearance and actuality of impartial decision-making. The Full Court of Western Australia in *Stampalia v RPAT, supra*, did not need to decide the question of whether or not in the case of the WATA Stewards' Inquiry the requirements of natural justice extend not only to prevent actual bias but also a reasonable apprehension of bias. However, the court in that case did proceed with a consideration of the matter on the assumption that the rules of natural justice did extend to vitiate deliberations of Stewards where there was a reasonable apprehension of bias established.

Even if Mr Owen-Conway QC's "hybrid tribunal" submission is accepted, it seems to me that it is relevant to take into account the particular circumstances in which the Stewards officiate at race meetings. They are appointed by the Club Committee: LR13. The Club Committee is elected by the members of the Western Australian Turf Club. The Stewards have a wide range of official functions which include regulating, controlling, enquiring into and adjudicating upon the conduct of licensed persons and punishing any such persons: AR8.

The Rules themselves therefore contemplate the multiple functions of the Stewards, namely the roles of inquiring into possible breaches of the Rules and adjudicating and punishing for breaches of the Rules.

In *Russell v Duke of Norfolk* [1949] 1 AllER 109 at 118 Tucker LJ said:-

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must attend upon the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is

> acting, the subject matter that is being dealt with, and so forth."

In *Hall v NSW Trotting Club Ltd* [1977] 1 NSWLR 378 at 386 Samuels JA said:-

> "The rules of natural justice are not immutable; they are influenced by the circumstances in which they are invoked."

At 387 Samuels JA said: -

> "The adoption by their members of a multiple role is inherent in the nature and function of many different kinds of domestic tribunals. In the present case, the stewards were charged by Rule 10 to ensure that the rules were 'observed and enforced in respect of all matters relating to racing' at any trotting meeting to which they were appointed. Without pausing to consider the precise ambit of this power, it is at least clear that the stewards were required to act as policeman and supervisors during the course of the meeting, in addition to the 'judicial' function which they might have to assume under .... The rules, therefore, contemplate that they might be bound to inquire into, and punish, conduct which they might themselves have discovered or observed."

And further down the page Samuels JA continued:-

> "That power may be excluded where a steward is so directly and personally involved in the matters under consideration that the only reasonable inference is that he must have an interest in the outcome of the proceedings."

At 388 Samuels JA said:

> "It is necessary first to establish what rules of natural justice the stewards were required to observe. In my view, they are these. The stewards were bound to inform the appellant of the nature of the accusations made against him, and to give him 'a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice'. .... Moreover, I respectfully agree with what Adam J said in *R v Brewer; Ex parte Renzella* [1973] VR 375 at 381; 'as it is the duty of the stewards to give a fair hearing to the person charged, they must of course until he has been heard in his defence keep their minds open in the sense of being ready and willing to be persuaded by the party charged."

At page 396 Mahoney JA said:-

> "I do not think that, because he acts upon his own observations or gives evidence of them, a steward is 'interested or affected' within rule ... It is, for example, part of the duty of the stewards to make observations as to the running of horses in races, and to take such action as may be appropriate. This does not, in my opinion, mean that a steward who observes and speaks as to an irregularity in the running of a horse is interested or affected in this way."

At 397-398 Mahoney JA observed:-

> "Stewards are contemplated as acting administratively as well as in a quasi-judicial fashion; when they exercise their

quasi-judicial functions, they may exercise them in the context of an 'inquiry'; and they are entitled to act upon their own observation and knowledge. In so far as they act in this way, the requirements of natural justice touching the composition of tribunals, which in courts and similar bodies, require the strictest observance, do not apply with the same rigour. In the case of courts, a judicial officer may be disqualified if he is involved in any way in the obtaining or giving of evidence. Stewards, as in the present case, have the function of themselves obtaining or receiving information, determining administratively whether and what should be taken in relation to it and generally acting in a manner administrative rather than judicial. In a proceeding which is of the nature of an inquiry, rather than an adversary procedure, the members of the tribunal may be required more directly to intervene in the obtaining of evidence."

At 402-403 Mahoney JA said:-

"The form of inquiry adopted by the stewards was one in which, in essence, they heard the evidence, both as to guilt or innocence and as to sentence, and then decided whether the plaintiff should be charged and with what offence. It was not argued, nor could it have been, that this, as a form of procedure, was not a proper one to be adopted. But, once it be accepted that the stewards could properly proceed in this way, it follows that, at the time when a general charge is made, the stewards will have formed a conclusion as to guilt or innocence of the plaintiff, and perhaps. the conclusion that the offence was of sufficient seriousness to warrant a charge being made.

> The dangers inherent in such procedure, from the point of view of natural justice, are twofold. First, because the charge is made after the bulk of the evidence has been led and such conclusions reached by the stewards, and because the accused person may not, before the charge is made, fully appreciate what evidence should be brought by him, the conclusion of the tribunal may have been formed upon part only of the evidence which is apt to be put before it. And, second, when, after the charge is made, the accused person leads additional evidence, the mind of the tribunal may then be already so closed against him that proper consideration is not given to that evidence. Such attraction as this argument has lies in its demonstration that the inquiry procedure has in it dangers of this kind.
>
> But, if it be accepted as an inquiry form of procedure is, if not stipulated for in the rules, at least open to be adopted by the stewards without the requirements of natural justice necessarily being infringed, then to demonstrate the existence of such dangers is not to demonstrate that the proceedings are vitiated. It is to demonstrate merely that there is a danger that the plaintiff may be treated with lack of the required degree of fairness. The question then becomes whether, because of such matters, the plaintiff has in fact been so treated."

In my view the procedure adopted by the Stewards does not lead per se to a reasonable apprehension of bias, although the Stewards must be careful not to allow the procedure they follow lead to a risk of them appearing to have pre-determined the matter before all of the evidence has been heard. That does not, of course, mean the Stewards cannot from time to time express tentative views and react to evidence (which is only human), but

they must not have closed their minds to the matter and must be open to persuasion throughout the process.

On a review of the entirety of the evidence and the entirety of the conduct of the Stewards I would not accede to the Appellant's contention that there was a reasonable apprehension of bias on the part of the Stewards.

In Ground 5(ii) it is contended the Respondents, in particular the Chairman of the Inquiry, had made up his mind that the Appellant was guilty of the charge before the evidence was concluded. In my view the Chairman of the Inquiry was not shown to have made up his mind that the Appellant was guilty of the charge before the evidence was concluded and the Stewards had deliberated. The Chairman of Stewards demonstrated a preparedness to allow the Appellant every reasonable opportunity to challenge evidence and to put contrary evidence before the Inquiry.

At T450-T451 the Chairman, having asked Mr Harper if he had any further evidence to call in support of the defence stated:-

> "Alright, thank you for that. Now look it is the intention of the Stewards to consider this matter. I say at this stage that it's a, it's been a lengthy hearing, which has (sic), which is evident. The Stewards have had a running Transcript throughout this Inquiry, each and every one of us, together with Exhibits and we have followed this through. Now we are going to sit down and discuss the matter and decide on this case. That will be, I can't give a time when we would come to that decision, it will be today, but I can clearly say to you now that it, our discussions, it won't be before five o'clock today."

In my view Ground 5(ii) is not made out.

For all of the above reasons, I would dismiss the appeal against conviction.

**Ground 6: Appeal Against Sentence**

This ground, in contrast to the grounds of appeal against conviction, received little attention from the Appellant's counsel in his submissions.

In my view, the contention that the Respondents failed to have regard or proper regard to the fact that the Appellant took all reasonable and proper precautions to prevent the administration of a prohibited substance does not arise for consideration in relation to the question of penalty since it would have been a matter the Respondents were required to have regard to when considering whether or not an offence had in fact been made out under Rule 178 since if all proper precautions to prevent the administration of a prohibited substance had been taken, no offence under Rule 178 would have been made out.

The second ground contends that no evidence was adduced, nor was there any suggestion that the Appellant did in fact administer orally or intravenously a narcotic poison or performance enhancing drug to the horse. The only evidence was that the horse was fed potassium citrate which had a potential alkalinising effect but that since only one teaspoon was fed to the horse, it could not have raised $TCO_2$ levels above the threshold of 36mmol/L. It has been stated on numerous occasions by both this Tribunal and it has also been stated by the Full Court that rarely will Stewards ever be able to adduce evidence of the trainer actually undertaking the administration himself. That does not detract from the seriousness of the offence. In this case there is a previous conviction for excessive $TCO_2$ levels. In my view, there is nothing put on behalf of the Appellant which would support the contention that the disqualification of

12 months was outside the discretionary range open to the Stewards in this case.

R J NASH - MEMBER


rjn\general\Harper2.doc

**APPEAL 479**

# DETERMINATION OF

# THE RACING PENALTIES APPEAL TRIBUNAL

| | |
|---|---|
| **APPELLANT:** | **GREGORY DONALD HARPER** |
| **APPLICATION NO:** | **A30/08/479** |
| **PANEL:** | **MR D MOSSENSON (CHAIRPERSON)**<br>**MR J PRIOR (MEMBER)**<br>**MR R NASH (MEMBER)** |
| **DATES OF HEARING:** | **25 AND 26 NOVEMBER 1999** |
| **DATE OF DETERMINATION:** | **4 APRIL 2000** |

---

**IN THE MATTER OF an appeal by Mr Gregory Donald Harper against the determination by Western Australian Turf Club Stewards on 15 November 1999 imposing a disqualification of 12 months for breach of Rule 178 of the Australian Rules of Racing.**

---

Mr J Hammond, instructed by Hammond Worthington, appeared for the appellant.

Mr F J Powrie appeared for the Western Australian Turf Club Stewards.

---

This is a unanimous decision of the Tribunal.

For the reasons published the appeal against both the conviction and penalty is dismissed.

The suspension of operation of the penalty automatically ceases.

Dan Mossenson

**DAN MOSSENSON, CHAIRPERSON**

Seal of the Racing Penalties Appeal Tribunal of W.A.

# THE RACING PENALTIES APPEAL TRIBUNAL

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

| | |
|---|---|
| **APPELLANT:** | **GREGORY DONALD HARPER** |
| **APPLICATION NO:** | **A30/08/479** |
| **DATE OF HEARING:** | **25 & 26 NOVEMBER 1999** |
| **DATE OF DETERMINATION:** | **4 April 2000** |

---

IN THE MATTER of an appeal by Mr GD Harper against the determination made by the Stewards of the Western Australian Turf on the 15 November 1999 imposing a 12 months disqualification for breach of Rule 178 of the Australian Rules of Racing

---

Mr S Owen-Conway QC assisted by Ms A Kurtze, instructed by Hammond Worthington, appeared for Mr Harper.

Mr RJ Davies QC assisted by Mr A Carr, instructed by Freehill Hollingdale & Page, appeared for the Western Australian Turf Club Stewards.

---

I have read the draft reasons for determination of the Member Mr Nash. I agree with those reasons and conclusions and have nothing to add.

Seal of the Racing Penalties Appeal Tribunal of W.A.

DAN MOSSENSON, CHAIRPERSON

61578985/187413

**APPEAL 479**

# THE RACING PENALTIES APPEAL TRIBUNAL

## REASONS FOR DETERMINATION OF MR J PRIOR (MEMBER)

| | |
|---|---|
| **APPELLANT:** | **GREGORY DONALD HARPER** |
| **APPLICATION NO:** | **A30/08/479** |
| **DATES OF HEARING:** | **25 AND 26 NOVEMBER 1999** |
| **DATE OF DETERMINATION:** | **4 APRIL 2000** |

---

**IN THE MATTER OF an appeal by Mr Gregory Donald Harper against the determination by Western Australian Turf Club Stewards on 15 November 1999 imposing a disqualification of 12 months for breach of Rule 178 of the Australian Rules of Racing.**

---

Mr S Owen-Conway QC and Ms A Kurtz, instructed by Hammond Worthington, appeared for the Appellant.

Mr R J Davies QC and Mr A Carr, instructed by Freehill Hollingdale & Page, appeared for the Western Australian Turf Club Stewards.

---

I have read the draft reasons of Mr Nash, Member. I agree with those reasons and conclusions and have nothing to add.

John Prior

Seal of the Racing Penalties Appeal Tribunal of WA

**JOHN PRIOR, MEMBER**