

APPEALS – 717 AND 720

**DETERMINATION OF THE
RACING PENALTIES APPEAL TRIBUNAL**

APPELLANT: SHANE LOONE

APPLICATION NOS: A30/08/717 and A30/08/720

PANEL: MR D MOSSENSON (CHAIRPERSON)

DATES OF HEARING: 19 APRIL, 5 MAY AND 13 MAY 2010

DATE OF DETERMATION: 18 MAY 2010

IN THE MATTER OF appeals by Mr Shane LOONE against the determinations made by the Racing and Wagering Western Australia Stewards of Harness Racing on 25 February 2010 imposing a three month disqualification for breach of Rule 187(2) of the Rules of Harness Racing and disqualifying the horse FLYING VILLAGE LORD from the race at Bunbury on 6 October 2009 pursuant to Rule 195.

Mr P R Matters was granted leave to appear for Mr Loone.

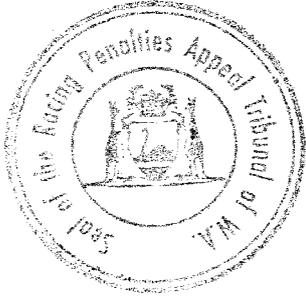
Mr R J Davies QC represented the Racing and Wagering Western Australia Stewards of Harness Racing.

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- 1 The appeal against Mr Loone's conviction is dismissed.
 - 2 The appeal against Mr Loone's penalty is dismissed.

- 3 The appeal against the disqualification of FLYING VILLAGE LORD is dismissed.



DAN MOSSENSON, CHAIRPERSON



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Introduction

Mr S A Loone appealed two decisions of the Racing and Wagering Western Australia ('RWVA') Stewards of Harness Racing which were made on 25 February 2010. One decision was personal to Mr Loone in his capacity as a licensed trainer and driver (Appeal 717). The other (Appeal 720) related to the disqualification of FLYING VILLAGE LORD which Mr Loone was helping train at the relevant time. Mr Loone was part owner of the horse.

At the time of lodging his appeals Mr Loone also sought a suspension of operation of his penalty. The grounds for this application were:

'Penalty too severe

First offence

Mitigating circumstances causing guilt

Loss of earnings and opportunities due to a disqualification instead of a fine.'

After receiving written submissions from both parties I granted the stay application. However, at the direction's hearing on 18 March 2010 I ordered the immediate cessation of the suspension of operation of the penalty.

The two appeals were heard together on 19 April, 5 May and 13 May 2010 after which I reserved my decisions. I dismissed both appeals on 18 May 2010. I now publish my reasons for having done so.

Background

After FLYING VILLAGE LORD competed and won at Bunbury on 6 October 2009 it was swabbed. Two approved racing laboratories found the presence of aminocaproic acid in the horse's urine sample. This led to a Stewards' inquiry which commenced on 10 February 2010 and was completed 25 February 2010. Mr P O'Reilly, the principal investigator for RWWA gave evidence at the inquiry and produced a report of his investigations into the matter. On 2 November 2009, accompanied by Harness Steward Mr B Sumner and RWWA veterinarian Dr P Symons, Mr O'Reilly attended the Gosnells stables of Mr James Currie. Mr Currie was served an irregularity notice which outlined the detection of the substance by analysis of the sample. Mr Currie was video interviewed as was Mr Loone. Mr Loone was working for Mr Currie as a stable hand at the time. Mr Loone admitted he prepared FLYING VILLAGE LORD prior to its 6 October Bunbury race. Mr Loone told the investigators that:

'... the only administration Flying Village Lord had received - was a drip purchased from Kim Rose 24 hours earlier.

Mr Loon (sic) said he was familiar with aminocaproic acid as he knew of recent cases in South Australia that involved persons known to him.

Mr Loon (sic) said that he did not administer anything to Flying Village Lord prior to the race in Bunbury on October 6th.

Mr Loon (sic) supported Mr Currie's history of the horse following its first start in Northam in September and treatment it had received by Kim Rose's Practise (sic).

Mr Loon (sic) stated it was he, who had administered the drip to Flying Village Lord on October 5th and suggested that if the horse had returned a positive swab it must have been some form of drug supplied in that drip'. (pages 1 and 2 Exhibit D)

Three days later Mr Currie telephoned Mr O'Reilly and confessed to him that he had not been honest during this initial visit to the stables. Consequently he was requested to attend Mr O'Reilly's office to set the record straight. This occurred on 25 November 2009. Mr O'Reilly was advised that Mr Loone had asked Mr Currie to obtain Amicar the day before FLYING VILLAGE LORD raced at Bunbury. Mr Currie had gone to Dr K Rose's veterinary practice in Ascot and purchased a bottle of Amicar from an attendant at the business which he brought back to the stables. Mr Currie was present subsequently when Mr Loone injected FLYING VILLAGE LORD with the Amicar. This treatment occurred '*... after tea the night before the horse raced in Bunbury ...*' Later, after the horse won the race and it was known '*... you are in trouble they are swabbing for it ...*', Dr Rose told Mr Currie to inform the Stewards that Dr Rose had given Mr Currie a drip to administer to the horse (third page (wrongly numbered as 'p2') Exhibit D).

Stewards' Inquiry

The Stewards received evidence regarding the taking and testing of FLYING VILLAGE LORD'S urine sample. There was no dispute by Mr Loone in regard to any aspect of the sampling and testing processes both at the Stewards' inquiry and subsequently during the course of the appeal.

Dr Medd, the RWWA industry veterinarian, in answer to the question what is an aminocaproic acid and how does it fit into the prohibited substance definition, told the Stewards:

'Well one of the systems in part 1(a) of that rule is the cardiovascular system and aminocaproic acid is classed as an anti-fibrinolytic drug. What that means is that it acts to stabilize blood clots that form within the vascular walls to help heal and repair those vessels walls. In this way the drug has an action to repair the vascular system so there's an integral relationship there where the clots, if the vessel walls break and in the case aminocaproic acid is used in racehorses for the prevention of bleeding or EIPH for the lungs and what happens in that condition is the vessels walls within the lungs break and bleed and aminocaproic acid has been used to assist in the stabilizing of clots in the vessel walls so that they are less likely to break and bleed when the horse exercises.' (Stewards' Transcript page 6 ('ST.6'))

Dr Medd went on to explain that this substance acted '*... on particularly the vascular system of the cardio vascular system*'. (ST.6) This evidence of Dr Medd related to the prohibited substance rule of the RWWA Rules of Harness Racing which states:

'188A. Prohibited substances (numbering amended GG effective 1/06/05)

(1) *For the purpose of these rules, the following are prohibited substances:*

(a) *Substances capable at any time of acting on one or more of the following mammalian body systems:*

the central and/or peripheral nervous systems

the cardiovascular system
the respiratory system
the alimentary digestive system
the musculo-skeletal system
the uro-genital system
the endocrine system;

(b) *Substances falling within the following categories of substances:*

acidifying agents
adrenergic blocking agents
adrenergic stimulants
alkalinising agents
anabolic agents
analgesics
antiangina agents
antiarrhythmic agents
anticholinergic agents
anticoagulants
antidepressants
antihistamines
antihypertensives
anti-inflammatory agents
blood coagulants
bronchodilators
bronchospasm relaxants
buffering agents
central nervous system stimulants
cholinergic agents
corticosteroids
diuretics
general anaesthetics
haematopoietic agents
hormones (including trophic hormones) and their synthetic counterparts
hypnotics
local anaesthetics
muscle relaxants
narcotic analgesics
neuromuscular agents
plasma volume expanders
respiratory stimulants
sedatives
tranquillisers
vasodilators
vitamins administered by injection; and

- (c) *Metabolites, artifacts and isomers of the prohibited substances prescribed by paragraphs (a) and (b).*
- (2) *The following substances when present at or below the levels set out are excepted from the provisions of sub rule (1) (G.G. 9th August 2002)*
- (a) *Alkalinising Agents, when evidences by total carbon dioxide (TCO₂) present at a concentration of 36 millimoles per litre in plasma*
- (b) *Arsenic at a concentration of 0.30 micrograms per milliliter in urine;*
- (c) *Dimethyl sulphoxide at a concentration of 15.0 micrograms per millilitre in urine or 1000 nanograms per millilitre in plasma;*
- (d) *In male horses, other than geldings, 5a (alpha) -estrane-3β, 17a-diol in urine (including both the free substance and that liberated from conjugates) at a concentration equal to or less than that of 5(10)-estrene -3β, 17a (alpha) -diol in urine (including both the free substance and that liberated and that liberated from its conjugates).*
- (e) *Salicylic acid at a concentration of 750 micrograms per millilitre in urine or 6.50 micrograms per millilitre in plasma;*
- (f) *Free hydrocortisone at a concentration of 1.00 micrograms per millilitre in urine;*
- (g) *Testosterone (including both free testosterone and testosterone liberated from its conjugates):*
- (i) *In geldings: at a concentration off 200 micrograms per litre of urine.*
- (ii) *In fillies and mares: at a concentration of 55 micrograms per litre in urine.*
- (h) *3-Methoxytyramine (including both free 3-methoxytyramine and 3-methoxytyramine liberated from conjugates) at a concentration of 4.0 milligrams per litre in urine*
- (i) *Boldenone in male horses other than geldings, (including both free boldenone and boldenone liberated from its conjugates) at a mass concentration of 15 micrograms per litre in urine. [added May 07]*
- (3) *The following are not prohibited substances:*
- Antiparasitics (worm drenches)*
- Antimicrobials (antibiotics and other anti infective agents) except Procaine Penicillin.*
- Vaccines and antisera for the prevention of disease,*

Mucolytics (added GG March 2006)

- (4) *A trainer must notify the Stewards no later than 1 hour prior to the scheduled starting time of a race if the trainer's horse has been treated with Antimicrobials (antibiotics and other anti infective agents) except Procaine Penicillin, Vaccines and antisera for the prevention of disease, or Mucolytics within the preceding 7 days.*
- (5) *A trainer who fails to comply with sub-rule (4) is guilty of an offence. (sub-rules (4) and (5) added GG March 2006)*

As to the effective time to administer aminocaproic acid Dr Medd stated:

'Anecdotally it is given not long prior to exercise so that the drug can be having the maximum affect on the clots on the vascular system in the lungs when the horse actually is put under the stress of exercise and its most likely to bleed. Anecdotally reports from you know veterinarians within the industry I've heard over a number of years, is that the drug is given 2-3 hours prior to exercise or that their recommendation to clients from veterinarians is to give it 2-3 hours prior to exercise, to have its maximal affect when the horse is exercising and this could be during trackwork days, you know, you can give 2-3 hours prior to fast work on the Thursday morning or a Wednesday morning or something like that.' (ST.7)

According to Dr Medd the drug would be excreted within 24 hours. It is a therapy to reduce bleeding in the lungs. *'... it's working on the repair of the vascular system ... It stabilises the clot that forms, so that when the vessel wall breaks a blood clot forms to plug that hole so that it doesn't keep bleeding. ... Within the vascular system.'* (ST.9)

Later in the Stewards' inquiry Dr Medd gave evidence that aminocaproic acid has never been registered as a product for use on horses in Australia. It has not been registered as a veterinary preparation as it has only ever been in the past a registered human preparation for use on humans. Aminocaproic acid is the drug name and Amicar was the common name of the human medication in Australia, the trade name.

During the course of the inquiry Mr Loone told the Stewards that he had administered the horse all of the contents of the 20 ml bottle of Amicar which he claimed definitely occurred the night before rather than on the day of the race. Mr Loone expressed his remorse for his actions in the following terms:

'... I regret that I lied, I just felt at that time that I had to go with what Mr Currie said considering the circumstances. I fully accept where I've erred in my judgment and I apologise for that.' (ST.95)

Offences and penalties

As a consequence of what was revealed during their lengthy hearing into the matter the Stewards laid charges against Mr Currie, as the trainer of FLYING VILLAGE LORD, and Dr Rose, Mr Currie's veterinary physician. As mentioned at the outset, Mr Loone was also

charged in relation to his role in the affair. In Mr Loone's case it was with a breach of Rule 187(2) which appears under the heading 'Offences – inquiries'. Rule 187(2) states:

'A person shall not refuse to answer questions or to produce a horse, document, substance or piece of equipment, or give false or misleading evidence or information at an inquiry or investigation.'

The particulars of this charge were that Mr Loone:

'... gave false evidence to RWWA Principal Investigator Mr P O'Reilly when Mr O'Reilly interviewed you on November 2, 2009 in connection with a swab irregularity returned from pacer FLYING VILLAGE LORD (NZ).' (ST.94)

Mr Loone pleaded guilty to the charge. When called on to respond in relation to penalty Mr Loone explained:

'... I'm employed by Mr Currie to work there, I reside at the property as well, he gives me a wage to stay there and he told me the story to stick to. He's the Trainer and so, I did as I was told to'. (ST.94)

Mr Loone went on to acknowledge as a licensed trainee and driver he is *'... required to tell the truth.'* (ST.95)

The Stewards' sentencing remarks were as follows:

The Stewards have considered the matter of penalty, taking into account your submissions. This is a serious matter, involves a positive swab, returned from the pacer FLYING VILLAGE LORD. The Stewards place enormous importance and concern when a positive swab is returned. The Principal Investigator Mr Phil O'Reilly, Steward Brendan Sumner and RWWA Veterinarian Peter Symons visited the stables of Trainer Jim Currie on 2 November 2009. You were interviewed and asked specific questions regarding this matter. You knowingly gave false evidence. This was not a spur of the moment decision, but one that was concocted with Mr Currie some weeks before. It was planned. Stewards and Officials are appointed to regulate and control the Racing Industry. It is essential that licensed persons are truthful when questioned. Your actions in not telling the truth strikes at the heart at (sic) the administration of racing and adversely effects the ability of the Stewards and Officials to properly perform their functions. Any penalty must include a deterrent factor both personal and general. A clear message needs to be sent to all participants that persons must be truthful when involved in an inquiry or investigation. You are relatively young and have been involved in the industry for 10 years. You pleaded guilty to the charge and your personal circumstances has been taken into account. Your record has been reviewed and it is clear in relation to breaches of this nature. Stewards have considered the option of a fine, suspension and disqualification. As stated from the outset the Stewards place a matter of this nature in the serious category. You are a Licenced (sic) Trainer and Driver in your own right and fully

aware of the Rules of Racing. You had a clear option of telling the truth. The Stewards recognise however that Mr Currie was the Licenced Trainer (sic) and therefore had added responsibilities in relation to this incident. Mr Loone after considering all factors the Stewards are disqualifying you for a period of 3 months effective immediately.’ (ST.113 and ST.114)

The Stewards, acting under the provisions of Harness Racing Rule 195, also disqualified FLYING VILLAGE LORD and amended the placings. Mrs Currie was the other part owner of FLYING VILLAGE LORD with Mr Loone. Mrs Currie did not participate in the appeal but acknowledged in writing she would be bound by the Tribunal’s ruling. As stated in the introduction, Mr Loone appealed to the Tribunal against both decisions.

Appeal 717 grounds and the amended ground

Initially Mr Loone’s grounds of appeal against his disqualification simply were the penalty was too severe and there were mitigating circumstances. During the course of the appeal Mr Matters applied to add to the grounds of appeal. Leave was granted to add another ground which, although not formally drafted, in substance was to the effect that the Stewards had acted ultra vires as at no time had there been a valid inquiry or investigation. In the course of his opening remarks Mr Matters verbalised the new ground in these terms:

‘The amendment is that the stewards acted ultra vires. There was not a valid investigation or an inquiry and the stewards in their determination misdirected themselves in regard to that issue. We seek a determination of this tribunal to quash that determination and to end the disqualification at the point of determination.

...

If I could perhaps just add to that. We did – in the grounds of appeal which I submitted to the directions hearing – indicate that a critical issue in regard to a finding that there was an invalid ultra vires inquiry is that the substance that was being investigated was in fact not a prohibited substance. The two appeals which have been run concurrently both rest on that very issue and our appeal rests on the issue as to whether aminocaproic acid was a prohibited substance at the time of the stewards’ conversation with Mr Loone.’ (transcript of appeal hearing 19 April 2010 page 7 (‘April AT.7’)).

In accordance with his usual instructions, Mr Davies QC on behalf of the RWWA Stewards did not object to the amendment. During his closing address senior counsel submitted that the question whether or not aminocaproic acid was a prohibited substance was not relevant to the first appeal but only relevant to Appeal 720. Although Mr Matters was given the right to reply to the Stewards’ closing he did not challenge that proposition. After reserving my decision and having considered the matter I reached the same conclusion which had been pressed by senior counsel. I was satisfied the amendment was in substance only relevant to the appeal against FLYING VILLAGE LORD’S disqualification. However, in view of my conclusions and findings on the nature of the substance, which I set out later in relation to my treatment of Appeal 720, the amended ground clearly would also fail in relation to Appeal

717. I will defer dealing with the merits of the amended ground of appeal until later in relation to my detailed consideration of the horse's disqualification.

Appeal 717 findings

This appeal, when considered without the complication of the amended ground, is relatively straightforward. I was completely satisfied the Stewards were entitled to make the findings they did on the evidence which was presented before them. It is clear in their reasons for decision the Stewards have identified relevant key elements in relation to both conviction and penalty. Clearly this is a serious case of misconduct by a licensed person who knowingly gave false evidence to various persons all of whom were authorized under the Rules to investigate a detected substance in a winning horse. There can be no room in racing for licensed persons to deliberately lie to hide the truth from racing officials who are specifically charged with the responsibility of helping to ensure proper practice prevails in the industry. The untruth which led to the charge and ultimately the conviction of Mr Loone was not told in isolation. Nor was it a spur of the moment falsehood which was blurted out spontaneously by Mr Loone when he was first confronted by officials asking unpalatable questions of a culpable party. Rather, it was a premeditated answer. It was an answer which was given in concert with the two other persons who were also being investigated over the same set of circumstances. The Stewards needed to conduct an in depth inquiry which appropriately lead to all three culprits subsequently being charged and convicted. As a consequence of this combined web of deceit a considerable amount of RWWA resources was required to be expended in delving into the matter, uncovering all of the relevant facts and circumstances and ultimately bringing the wrongdoers to justice. There can be no question as to the appropriateness of any of the actions and findings of the Stewards, and the elements of Mr Loone's offence which they identified. The conclusions reached by the Stewards, that Mr Loone's '*...actions in not telling the truth strikes at the heart at (sic) the administration of racing and adversely affects the ability of Stewards and officials to properly perform their functions*' (ST.113) cannot be challenged. I fully endorse the Stewards' further conclusions in their sentencing remarks as to the need in this case for both personal and general deterrence as well as signaling to industry participants the necessity for truth in relation to industry inquiries and investigations.

In arriving at my determination as to the appropriateness of the penalty I also took into account the fact that Mr Loone's only source of income, as confirmed and elaborated on by the evidence he gave at the appeal, was derived from Mr Currie. As has already been acknowledged, at the relevant time Mr Currie was training Mr Loone's horse. The Stewards' reasons reveal they clearly took into account the relationship aspects. Other mitigating factors, including the plea of guilty and of Mr Loone's personal circumstances, were also considered. All of these considerations weighed in favour of Mr Loone when it came to evaluating sentence. Despite these positive considerations I was not persuaded it had been shown the Stewards fell into any error in their determination of the penalty. I was satisfied all the mitigating circumstances were appropriately taken into account in helping to reduce the disqualification which was otherwise inevitable for such a serious breach of the Rules. The period of three months disqualification was not shown to be unreasonable, plainly unjust or

otherwise excessive to the point where any error could be said to have been exposed which justified interfering with the sentence.

Mr Matters did argue that the penalty was excessive because Mr Currie, as the trainer and employer, told Mr Loone to lie. This proposition needs to be evaluated in the light of all of the relevant circumstances. Those circumstances include such facts, as earlier stated, that Mr Loone in his own right was a licensed person, both as a trainer and driver. Mr Loone was a part owner of the horse in question and directly stood potentially to benefit from any treatment to his horse. It was Mr Loone who chose this particular substance. He did so without the benefit of professional advice. It was Mr Loone who administered the substance to his own horse which he helped train. Further, it was Mr Loone who asked Mr Currie to obtain the Amicar from Dr Rose. Mr Loone knew he was obliged to tell the truth. In the light of all of these circumstances, far from the penalty being too severe, I considered it was not inappropriate. If anything arguably it could be said to be a little light on.

In the case of *Wayne Hogan* (Racing Appeals Tribunal of New South Wales, Racing Appeal Reports Digest Issue 53 p.5617 (23 September 2009)) the registered trainer was charged with giving false and misleading evidence to a Steward in breach of Greyhound Racing Rule 86(d). The disqualification of six months imposed by the Stewards was confirmed on appeal. Whilst I acknowledge Mr Hogan's case related to a different racing code, the circumstances were somewhat analogous. I consider the Hogan penalty does have some relevance in putting into perspective Mr Loone's penalty.

Appeal 720

The other appeal, as to the horse's disqualification, involved far more complicated considerations with the addition of the amended ground. The original ground of appeal against the horse's disqualification was that aminocaproic acid was not a prohibited substance under the Rules of Harness Racing.

Mr Matters did argue in his reply to Mr Davies' closing submissions that there was no power under the Rules to investigate this matter at all unless it involved a prohibited substance. Such an argument in my assessment completely lacked merit. If such an interpretation were to apply to the Rules it would emasculate the very persons charged with scrutinizing and investigating possible wrongdoings. If Mr Matters' proposition were correct on this issue the effect could only be that the power to supervise and exercise control over the harness racing industry would be severely eroded. The ability to act on leads or follow up suspicions of possible wrongdoings, to pursue the truth regarding possible racing industry malpractice and obtain information which might expose misconduct relevant to or potentially leading to an inquiry conducted under the Rules would be so curtailed as to make the ongoing proper operation of the industry virtually unworkable. It would deny the industry's investigators, prosecutors and adjudicators their much needed powers and associated resources given to them by the Rules to enable proper performance of their functions and carrying out of their essential roles. It would virtually mean no new or previously undetected drug which was first discovered in a sample could properly be investigated and ultimately ruled upon.

The Rules understandably need to and do in fact endow Stewards with very wide powers. Rule 15(1) inter-alia empowers Stewards:

- (b) to entertain and determine all matters under question or in dispute at or arising out of a meeting or race, or concerning the meaning or application of these rules, or concerning any aspect of the harness racing industry.*
- (k) to inspect, examine or test in such manner as they consider appropriate any person, horse, stable, ... or substance;*
- (ac) to engage the assistance or services of any person as a deputy or in any other capacity;*
- (ae) to do anything else reasonably necessary to the performance of their duties.'*

Local Rule 15 deals specifically with the 'Power to enter premises'. It states inter alia:

- (1) Without limiting rule 15, the stewards have the power at any time to enter upon the premises occupied by or under the control of a licensed person and used in any manner in relation to any licence (hereinafter referred to as the premises) to:*
 - (a) Inspect and search the premises*
 - (b) Examine anything on the premises and also search any licensed person thereon.*
 - (c) Take extracts from or make copies of, or download or print out, any documents found in the course of the inspection;*
 - (d) Photograph or film anything on the premises*
 - (e) Secure against interference anything that can not be conveniently removed from the premises*
 - (f) Require any person who is on the premises to*
 - (i) state his or her full name and address*
 - (ii) answer (orally or in writing) questions put to them that are relevant to the investigation*
 - (iii) give any information in the person's possession or control that is relevant to the inspection*
 - (iv) operate equipment or facilities on the premises for inspection purposes*

- (v) *give any translation, code, password or other information necessary to gain access to or to interpret and understand any document or information located or obtained by the Steward in the course of the inspection relevant to the investigation*
 - (vi) *give other assistance that the Stewards reasonably requires to carry out the inspection.*
- (2) *A Steward who enters and remains upon the land or premises under this rule, shall not thereby commit a trespass thereon and no action shall be brought or maintained against the steward or the Controlling Body for any damages or relief in respect of such entry or remainder.'*

Local Rule 15A deals with the 'Powers of investigator' and reads:

'Any investigator or investigators appointed by the Controlling Authority shall have powers mutatis mutandis as are given to the stewards under Rules 15(k), (p) and (x), 187 and LR15 (G.G. 21 October 2003)'

Rule 187, which has only been quoted in part to date, deals with 'Offences – inquiries' and states:

- (1) *A person who is directed to do so by the stewards shall attend an inquiry or investigations convened or conducted by them.*
- (2) *A person shall not refuse to answer questions or to produce a horse, document, substance or piece of equipment, or give false or misleading evidence or information at an inquiry or investigation.*
- (3) *A person shall comply with an order or direction given by the stewards.*
- (4) *A person shall undergo any inspection, examination or test required by the stewards.*
- (5) *A person shall not abuse, intimidate or be deliberately obstructive of the stewards.*
- (6) *A person shall not frustrate or endeavour to frustrate an inquiry or investigation.*
- (7) *A person who fails to comply with any provision of this rule is guilty of an offence.'*

Clearly the RWWA investigator, RWWA harness racing Steward and RWWA veterinarian were validly exercising their powers when they came onto Mr Currie's stables on 2 November 2009 to serve the irregular notice and carry out the video interview.

I will address this aspect again later on in the context of Mr Matters' closing submissions.

Appellant's evidence - Dr Rozen

The appellant's case basically relied on the medical evidence which was given at the appeal hearing. This fresh evidence meant Mr Loone presented a substantially different and far more sophisticated case on appeal to that which he advanced in person to the Stewards during the course of their inquiry. This new evidence comprised Dr Leon Rozen's report dated 6 February 2010 (Exhibit 1) as supplemented by Dr Rozen's oral evidence. I was told the report had in fact been prepared and used in the appeal of *W Watson* (Tasmanian Racing Appeal Board No 6 of 2009/10, 8 and 9 February 2010) which also involved the detection of aminocaproic acid. I will refer to that case later in some detail.

Dr Rozen is clearly a highly experienced medical practitioner, based on the introduction to his report, which states:

'I am a Fellow of the Royal College of Pathologists of Australasia specialising in Haematology. My professional career has included work as a Transfusion Medicine Specialist, provision of medical support for and clinical development of anti-thrombotic and anti-coagulant therapeutics and my current role is with CSL Bioplasma providing medical support for plasma derived products as well as clinical development of the same including coagulant products derived from plasma. As part of this role I am required to maintain up to date knowledge on coagulation, disease due to coagulation disorders and their management. I am also a Pharmaceutical Physician and a member of the Executive of Australian Pharmaceutical Physicians Associations. I am writing this report in my capacity as a private medical consultant and not as an employee of CSL Limited.'

The report refers to how drugs act and the coagulation system. It continues with a description of aminocaproic acid in the following terms:

'Aminocaproic acid, or 6-aminohexanoic acid, binds to a specific region on the surface of the plasmin molecule and prevents the attachment of plasmin to fibrin. This attachment takes place at a lysine residue on the fibrin and aminocaproic acid is also known generally as a lysine analogue. The prevention of attachment ensures that the plasmin cannot act to cleave the fibrin so that clot stability is maintained.'

Dr Rozen concludes his report as follows:

'In summary, aminocaproic acid is an antifibrinolytic which has no effect as a coagulant and cannot be classified as one as it does not function to produce clots. It functions by enhancing the stability of already formed clots and so is used in situations where there is an imbalance favouring excess fibrinolysis compared to coagulation. Its action is on plasmin, which is part of the blood, and so it is characterised as acting upon the Blood and Blood Forming Organs. Its effects may be widespread around the body due to the ubiquitous nature of blood but it could not

be characterized as having an action on either the cardiovascular or respiratory system.'

The supporting attachments to the report were indecipherable. That point was made clear during the course of the hearing. As the attachments were not subsequently referred to or replaced by the appellant I could only assume they had no relevance.

Dr Rozen gave his oral evidence by telephone link up from Melbourne. Consequently I did not have the opportunity of observing this key witness whilst he gave evidence. This situation was unfortunate. Appeal 720 turns on which sides' expert evidence should be preferred. In that context I do acknowledge all of the witnesses called for the RWWA Stewards appeared at the hearing and they were all impressive in the witness box.

Mr Matters supplemented the report by having Dr Rozen comment on Dr Medd's evidence and describe in technical terms the meaning of such terms as '*action*' and '*acting*', '*mechanism*' and '*effect*'. The thrust of Dr Rozen's oral evidence in summary was that:

- in scientific literature the words '*action*' and '*effect*' are not used interchangeably;
- '*... aminocaproic acid does not act in more than one way on more than one body system*' (April AT.21);
- the clotting mechanism does not work on the cardiovascular system but rather within it to plug a leak. In other words it works within rather than on the system;
- the cardiovascular system consists of the heart and the blood vessels. The blood within the cardiovascular system is not part of the cardiovascular system, as the blood is a distinct body system;
- the coagulation system is not a component of the cardiovascular system;
- whilst the drug has no action on the cardiovascular system, by preventing bleeding and loss of blood it has effect on a system but no action on it.

Dr Rozen was taken to the reports which had been prepared in response on behalf of the RWWA Stewards. Dr Rozen identified the numerous expressions of opinion and conclusions contained in those reports with which he did not agree. Consequently the battle lines were quickly drawn between the two diametrically opposing points of view. However, Dr Rozen acknowledged he had not read, and therefore could not comment on various papers which had been relied on by some of the opposing witnesses. Mr Matters submitted that Dr Rozen should be given the opportunity to read and form an opinion on those papers. In the exchange which took place on the first day of the hearing in relation to setting a relisting date it was clear I had anticipated the prospect of Dr Rozen being given that opportunity as I had expected he would need to react to the papers and be recalled. As matters transpired

however, Dr Rozen was not recalled and no expert comment was made in relation to them on behalf of the appellant.

Under cross examination Dr Rozen acknowledged that his argument entirely depended on the distinction he drew between *'acting upon'* and *'affecting'*. In other words, he agreed this crucial distinction which he had relied on would fall away if his definitions and distinction between *'action'* and *'effect'* are *'... not considered, or is not appropriate or correct'* (April AT.50).

Dr Rozen supported his proposition that blood is a separate system to the cardiovascular system based on how such systems are considered in hospitals, where there are haematologists or specialists in the blood system, who are separate from cardiologists who specialise in the cardiovascular system. Further, he asserted at medical school it was taught blood was not part of the cardiovascular system. Dr Rozen also relied on the World Health Organisation classification system to support his position.

Stewards' evidence

Dr Rozen's evidence was met by a formidable team of witnesses for the Stewards. The first was Dr Ross Ian Baker, a haematologist at Royal Perth Hospital, Director of Haemophilia Centre of Western Australia and consultant physician and haematologist to the Mount Medical Centre. Dr Baker is a past president of the Australian Society of Thrombosis and Haemostasis, past counsellor of the Haematology Society of Australia and past member of the Haematology Discipline Advisory Board of the Royal College of Pathologists of Australia. Further, he was an invited expert to the World Health Organisation sub-committee on deep vein thrombosis. Dr Baker's credentials and experience are most impressive.

In his report (Exhibit 3) Dr Baker states *'It is very clear in my mind that e (epsilon)-aminocaproic acid acts on the vascular system ...'*. This was clarified in cross examination when asked:

'You said "vascular" not "cardio"? --- But cardiovascular – vascular is in the cardiovascular so it's really in the context of that; that this drug works on the cardiovascular system. So that was in black and white and before my eyes regarding the act.' (April AT.79)

Dr Baker disagreed with Dr Rozen's opinion that aminocaproic acid had no effect on the cardiovascular system. Dr Baker stated he did not see any great distinction between *'... acting upon and having an effect upon? ... because these processes are intimately involved'*. (April AT.60)

Dr Baker considered blood was part of the cardiovascular system because *'Its intimately involved and part of my specialty as a haematologist on (sic) a specialist interested in thrombosis and haemostasis ...'* (April AT.61) . Dr Baker gave evidence that he had not been taught at medical school that blood was not part of the cardiovascular system.

However, certain parts of haematology were acknowledged to be separate from that system, such as lymph nodes and leukemia, but not when dealing with thrombosis and haemastosis.

In re-examination Dr Baker explained he used the two words interchangeably in respect of the action and effect of aminocaproic acid. Dr Baker concluded as follows in response to Mr Davies' following question:

'And at the end of all this Dr Baker, is aminocaproic acid a substance capable at any time of acting on one or more of the following mammalian body systems, the relevant one being the cardiovascular system? --- Yes, that's on the cardiovascular systems with the inference on vascular because it involves the vessel wall.' (April AT.95)

The next witness called was Dr James Alexander Reynoldson, doctor of philosophy in pharmacology, who both taught and researched in the field of pharmacology. In his report (Exhibit 5) Dr Reynoldson asserted the drug in question '*... has an action on at least on the cardiovascular system ...*'. The vessel wall, according to the witness, was clearly part of the cardiovascular system and was critical to the process. Dr Reynoldson stated at the end of his report:

'... An interesting analogy is aspirin. Aspirin also acts on the blood and blood forming organs but in an opposite way to aminocaproic acid. Aspirin blocks the function of thromboxane A₂, present in the blood elements called platelets. Thus aspirin prevents the effects of collagen on platelet aggregation and causes enhanced bleeding in many circumstances, an effect clearly leading to loss of integrity of the vessel wall; another example of an action dependent on the intimate relationships between the blood elements and the vascular wall.

In addition to the discussion concerning the effects of aminocaproic acid (ACA) on the elements of the blood interacting with the vascular wall it is clear that the drug also has some considerable effects on the cardiovascular system via its actions on one of the key elements controlling that system – the sympathetic nervous system and smooth muscle cells in the wall of blood vessels. Anden et al (1968) and Reis and Scivoletto (1979) demonstrated an indirect release of the neurotransmitter noradrenaline, an action of ACA similar to that of amphetamine, on the heart of several species of animal (rat, cat and rabbit). Similarly, Nolan et al (1968) also showed an increased cardiac performance in dogs with ACA and attributed that effect to release of the neurotransmitter at the site of the heart itself. It is therefore my view that these findings alone, indicating noradrenaline release and depletion similar to that seen with some amphetamine-like drugs, should be sufficient to establish aminocaproic acid as a prohibited substance under the rules of racing.

In summary, I accept that aminocaproic acid acts on the blood and clot fragments described but strongly believe that the intimate relationship between the blood elements and the vascular wall, particularly the endothelium and its condition, represent a significant effect on the cardiovascular system as a whole and that the

molecular action of aminocaproic acid must not be taken in isolation when considering its effect on the racing animal.'

As to Dr Rozen's proposition regarding blood not being part of the cardiovascular system Dr Reynoldson responded *'I couldn't disagree more. I think that in the live mammalian animal cardiovascular system without any blood in it was not a logical concept.'* (April AT.98). Dr Reynoldson expressed his professional opinion that aminocaproic acid was capable of acting on the cardiovascular system on a mammalian animal and in his experience as a pharmacologist the terms *'acting upon'* and *'effecting'* were used *'... totally interchangeably'* (April AT.99). In cross examination he stated he thought their interchangeability was *'... self-evident'* (April AT.106).

Dr Judith Clare Medd then gave evidence and produced her report which became Exhibit 7. Dr Medd had experienced a decade of private equine practice, was the RWWA Racing Industry Veterinarian (since 2002) and was currently fulfilling the role of Secretary of the National Equine Integrity Welfare & Advisory Group. Blood formed part of the cardiovascular system according to Dr Medd. Exhibit 7 was produced in response to Dr Rozen's report and supported Dr Medd's opinion which had previously been given to the Stewards that *'... defining aminocaproic acid as a prohibited substance under the Australian Rules of Harness Racing by virtue of its action on the cardiovascular system.'* The report concluded with the following :

'There are a number of published studies describing aminocaproic acid as having further direction action on the cardiovascular system in addition to the previously described anti-fibrinolytic action. These studies show that administration of aminocaproic acid produces sympathomimetic effects (increase in blood pressure, heart rate and heart muscle contractility) in mammals as a result of stimulation of noradrenaline release, and therefore aminocaproic acid can also be classified as having adrenergic stimulating properties. Under HR 188A(1)(b) adrenergic stimulants are listed as a specifically prohibited category of substances. A summary of these papers in addition to full references are listed in attachment 1'

Dr Cristy Jane Secombe, Senior Lecturer Equine Medicine of ten years standing at Murdoch University and 15 years of equine clinical practice, stated in her report:

'... The coagulation system is therefore a component of the cardiovascular system and any drug acting on the coagulation system irrespective of which component will have a direction action on the cardiovascular system.'

Dr Secombe produced a number of other documents, being articles, which became Exhibits 11 to 17.

Mr Matters' closing submissions

In closing Mr Matters relied on his extensive written submissions which were dated 11 May 2010 and described as *'Applicant's Submissions'*. Mr Matters chose not to speak to them

apart from correcting some errors. Later, at the end of the hearing he briefly replied to Mr Davies' closing address.

In reviewing the case for the appellant it is worth noting that quite early on during the course of the evidence being called Mr Matters had advanced the argument that *'the crux of this whole case is the scientific evidence'* (April AT.46). This was apparent from the following key propositions which subsequently were repeated in the *Applicant's Submissions* under the heading *'Appellant's Contentions and the Threshold Issue'*:

5. *It is the contention of the appellant that RWWA misdirected itself in fact and law in its findings against the appellant.*
6. *Specifically on the threshold issue as to finding that the substance Aminocaproic Acid is a prohibited substance under Rule 188A(1) of the Australian Harness Racing Rules [hereafter 'the Rules'] the appellant contends that the substance Aminocaproic Acid:*
 - (i) *acts and has the potential to act at any time only on the hematological system;*
 - (ii) *does not act and does not have the potential to at any time act on the cardiovascular system;*
 - (iii) *does not act and does not have the potential to at any time act on the respiratory system;*
 - (iv) *does not act and does not have the potential to at any time act on any mammalian system prescribed in rule 188A(1)(a);*
 - (v) *is not a prohibited substance; and*
 - (vi) *that there was no breach of any relevant rule by the appellant in the presentation of the standard bred harness horse Flying Village Lord at the time and place determined by RWWA; and therefore;*
 - (vii) *the investigation and the inquiry by the WA Racing Stewards was oppressive without any foundation in the relevant empowering legislation and relevant rules and therefore ultra vires; and*
 - (vii) *the findings, determinations and penalties of the RWWA Stewards are void*
7. *The appellant seeks in regard to the Rule 187(1):*
 - (a) *a declaration that the investigation and inquiry concerning the appellant by the RWWA was ultra vires; and*

(b) a declaration that the findings of RWWA were void

The appellant seeks in regard to the Rule 195:

(a) a declaration that the substance Aminocaproic Acid is not a prohibited substances; and

(b) a restoration of the race placings and restitution of prize monies in relation the horse Flying Village Lord (NZ)

8. *It is therefore the submission of the appellant that all findings of breach of the relevant Rules be declared void and the imposition of penalties against the appellant by RWWA be quashed by the Tribunal.'*

The inquiry and investigation

There is no doubt the Stewards were validly dealing with a matter that had, prior to the commencement of their inquiry, been appropriately investigated in accordance with the Rules. There is no validity in the argument that the Stewards acted ultra vires in this case, or would be so acting in any case when conducting a bona fide inquiry or investigation prompted by some irregularity to do with racing, cause for concern regarding a licensed person's behaviour or other suspected breach of the Rules. The specific Rule in question is Rule 181 which reads as follows:

'The Stewards may, and when directed by the Controlling Body shall, conduct inquiries or investigations in such manner as they think fit into any occurrence or matter at or arising out of or connecting with a meeting, race or event, or into any aspect of the harness racing industry, or into anything concerning administration of enforcement of these rules.'

Mr Davies put this provision in context with his comments on it in closing as follows:

'So it's inquiries and investigations. It so happens that the course followed in this is exactly the same as the course that has been followed, as you know, in every other drug inquiry matter that has come before you on appeal. They may do it in any manner they think fit and the manner they think fit is to get a preliminary result to send the racecourse investigator along with a steward and the vet – that's Dr Symons, Mr O'Reilly and Steward Sumner – to start an investigation into the matter.' (transcript of appeal hearing 13 May 2010 page 17 ('May AT.17'))

Had there not been an investigation conducted into this case following the results of the sample taken from FLYING VILLAGE LORD becoming known, which in turn resulted in a Steward's inquiry, it would have been a case of dereliction of duty by the racing officials. The investigation and inquiry which followed the sampling were both totally necessary and appropriately conducted.

The charge which was laid against Mr Loone related to his falsehood. It was not that of administering a prohibited substance, nor of administering within 24 hours of a race. Based on the evidence that emerged during the inquiry both such charges would have been legitimate and would most likely have succeeded based on the material before me, unless further or other evidence were presented to rebut them. These circumstances obliged the officials in question to do their duty and to pursue the matter in the manner in which they did.

Findings in relation to Dr Rozen's evidence

Each of the witnesses called for RWWA Stewards were eminently qualified in their respective fields to give expert testimony. As I have already acknowledged, each was impressive and credible in the witness box. I accepted without reservation the collective body of evidence of the witnesses called by the RWWA Stewards save to the extent any of them addressed the ultimate issue. I rejected Dr Rozen's evidence on the key issues. The haematological, pathological and pharmacological evidence presented on behalf of the RWWA Stewards all supported the evidence which had been given by Dr Medd both before the Stewards and subsequently before me.

I now set out the following specific findings on the key medical and scientific issues, based on the evidence that was presented before me:

1. in the proper interpretation of the Rules of Harness Racing '*action*' and '*effect*' mean the same thing and can therefore be used interchangeably. I was satisfied such an approach is entirely consistent with Rule 308 (which I quote later).
2. aminocaproic acid does act on the mammalian body system at least so far as the cardiovascular system is concerned;
3. blood is part of the cardiovascular system of mammals;
4. the coagulation system is a part of the cardiovascular system;
5. aminocaproic acid is a prohibited substance for the purpose of the Rules of Harness Racing.
6. The propositions contained in paragraphs 6(i) –(vi) of the Applicant's Submissions are rejected.

The Small appeal

In the appeals of *Geoffrey Small and ATC Trust 2006 Syndicate* (NSW Racing Appeals Tribunal v Harness Racing NSW (18 December 2009) a post race swab detected the presence of tranexamic acid. The appellant was charged with breaching Rule 190 parts (1), (2) and (4) (being presenting offences). Mr Matters appeared for the appellants in that case and ran a similar argument to the one he presented in this appeal in relation to mammalian cardiovascular system, affect and acting. The New South Wales Tribunal was persuaded to Mr Matters' point of view as to the technical meaning of '*acting on*'. Dr Suann's evidence

before that Tribunal was rejected. Dr Rozen also gave extensive evidence before the New South Wales Tribunal.

Despite its outcome, the *Small* decision is of no assistance in the determination of Mr Loone's appeal. As the following passages from pages 16 and 17 of *Small* reveal:

'It is significant that no definitions similar to that accepted by Dr Suann were placed before the Tribunal by the Respondent. There were no definitive statements produced from any textbooks, articles or any other source which concurred with the definition accepted by Dr Suann.

The Tribunal finds that the most acceptable definitions of the cardiovascular system are those advanced by the experts called by the Appellants.

It appears to the Tribunal that there are two separate systems, the cardiovascular system and the blood system, including the blood system within the respiratory system. The Tribunal is persuaded that TA acts solely on the blood within the cardiovascular system or the respiratory system and not on any component of the cardiovascular system or respiratory system.

It follows that TA is not a prohibited substance in that it is not capable of acting on (a) the cardiovascular system or (b) the respiratory system. Accordingly, there was no breach of rule 188A(1)(a).

The appeal by Mr Geoffrey Small is upheld and his disqualification is quashed.

The appeal by the Syndicate is upheld. The findings and orders of the stewards disqualifying Changeover NZ from its first placing in the Len Smith Mile and consequently amending the placings are set aside. The original placings are to be restored.

This is not a decision involving any matter of principle or general application. It depends solely upon the facts peculiar to it and the evidence placed before the Tribunal. It is the firm view of the Tribunal that it should not be regarded as any form of precedent or any statement of principle and that it should have no bearing upon any matters awaiting determination involving any other drug or substance which may have been detected in the swabbing process.

The Tribunal does not consider that it has made any statement which could in any way impact upon any outstanding hearings or appeals which involve any other substances, such as aminocaproic acid.'

There can be no argument the *Small* case was decided based specifically on the evidence there presented. That evidence, excluding Dr Rozen's evidence, was not comparable to the overwhelming opposing evidence which had been presented before me in relation to Mr Loone's appeal.

Further comments

Based on the evidence presented in the first instance before the Stewards I reached the conclusion the Stewards were entitled to come to the determination which they did. The fresh evidence presented by the respondents' witnesses I accepted. That evidence overwhelmingly led me to the conclusion to dismiss both appeals despite Dr Rozen's contradictory evidence. I was therefore entirely satisfied with the appropriateness of the decisions of the Stewards in relation to both matters.

I agreed with Mr Matters' proposition this case did turn on the scientific evidence. However, the overwhelming body of that evidence supported the position of the Stewards.

I also agreed with Dr Rozen's proposition that his argument depended on accepting the distinction between acting and having an affect.

I was completely satisfied the scientific evidence to be accepted was that presented on behalf of the Stewards and the distinction drawn by Dr Rozen should be rejected.

As already mentioned, in the appeal of W Watson (supra) the Tasmanian Racing Appeal Board, Dr Rozen also gave evidence. In that matter a horse was presented to race with aminocaproic acid in its system. A nine month in globo penalty was imposed by the Stewards for breaches of Rules (194) (holding drugs unlawfully), 190(1) and (2) (failing to present drug free) and 196(1)(ii) (administering a prohibited substance). The grounds of appeal in that case were:

- 'a) *Aminocaproic acid acts and has the potential to act at any time only on the haematological system;*
- b) *does not act and does not have the potential to at any time act on the cardiovascular system;*
- c) *does not act and does not have the potential to at any time act on the respiratory system;*
- d) *does not act and does not have the potential to act on any mammalian system prescribed in Rule 188A(1)(a);*
- e) *is not a prohibited substances; and*
- f) *that there was no breach of any relevant rule by the appellant in the presentation of the standardbred harness horse Angus McGregor at the time and place determined by RST.'*

The Board found aminocaproic acid is not a prohibited substance pursuant to Rule 188(1) nor a substance within the categories of substances set out in Rule 188A(1)(b).

It was common ground between the parties in that appeal :

- '12. ... that from a scientific perspective aminocaproic acid does not have an 'effect' on one of the mammalian system set out in Rule 188A(1)(a), namely the respiratory tract, but that because the rule requires the substance to 'act' on one of the systems, the appellant says, if it does not act or is not capable of acting on one of them it is not a prohibited substance.
13. Although the appellant has set out numerous grounds of appeal, what is left to be determined is the following proposition:

If aminocaproic acid does not act or is not capable of acting on one or more of the seven mammalian body systems set out in Rule 188A(1)(a), despite being capable of having an effect on one of those systems, it is not a prohibited substance.'

This appeal was ruled upon in the following terms:

- '22. We accept Dr Rosen's evidence insofar as we find that aminocaproic acid does not 'interact' by chemical process in any mammalian system other than the haematological or blood system, but we do not find that the absence of 'interaction' by chemical process resulting in physiological change in a constituent part of one of the seven mammalian systems, in particular the respiratory system, does not constitute acting or capable of acting on that system for the purposes of Rule 188A(1)(a).
23. In our view a commonsense approach to interpreting the meaning of "capable at any time of acting on" should be preferred to a scientific approach.
24. The word 'act' means something done, being done or to be done. Commonsense, in our view, dictates that if the aminocaproic acid does something or is capable of doing something to one of the listed mammalian systems it is a prohibited substance.
25. The prevention of bleeding within the respiratory tract by the retardation of blood clotting is, in our view, something done to the respiratory tract. This is so despite the root cause being the physiological change to blood cells within another system, namely the haematological system, which is not prescribed under Rule 188A(1)(a).
26. It is not necessary to subject an ordinary word such as 'act' to extraordinary analysis. Similarly it is not necessarily to look at the underlying purpose of Rule 188A for assistance, although we note that the interpretation submitted by the appellant would narrow the scope of the rule. Such an approach would not promote the purpose of the Rules to ensure that trainers present horses free from prohibited substances.

27. *The appellant submits that the word 'act' should be ascribed a technical meaning consistent with Dr Rosen's evidence.*
28. *'Act' is not an uncommon word. It is not a technical word. That a technical interpretation may be applied to it does not make it a technical word not does it mean that those who drafted the rules contemplated that it be used in a technical sense. To ascribe the meaning we have adopted would not make the interpretation of Rule 188A absurd. There is no inherent conflict between using the word 'act' in its technical or common sense. The word has not been defined in the Rules nor is there is any part of Rule 188A which provides that a technical or scientific definition applies to the phrase "capable at any time of acting".*
29. *If by administering aminocaproic acid a psychological change occurs within the blood cells of the haematological system, which, in turn, results in the prevention or minimization of blood in the respiratory tract, aminocaproic acid has acted on the respiratory system.*
30. *Accordingly, the appeal against the findings of the breaches contrary to AR 190(1) and (2) and AR196A(1)(ii) is dismissed.'*

I agreed with the proposition made in the Tasmanian case that the Rules should be interpreted in a common sense manner. Further, assistance in interpreting Rule 181 is to be found in the Rules themselves in Part 21 dealing with 'General Matters' where Rule 308 is to be found. That Rule specifies:

'Regard to be had to purpose

In the interpretation of a rule a construction that would promote the purpose or object underlying it, whether expressly stated or not or which would facilitate or extend its application, is to be preferred to a construction that would not promote that purpose or object or which would impede or restrict its application.'

The interpretation I have placed on Rule 188A(1)(a) in reaching my findings is not only consistent with the evidence, but I believe also promotes the purpose or object of the Rule and facilitates or extends its application.

It is interesting that I reached the same end conclusion, namely that aminocaproic acid is a prohibited substance, but in respect of a different mammalian body system to that determined in the Tasmanian case. It is also worth noting it was contended in the Tasmanian case the period of disqualification there imposed was excessive and disproportionate. Nine months disqualification was the penalty in that case. Mr Watson's appeal failed in regard to the severity of the penalty as well. This outcome puts my comments earlier regarding Mr Loone's penalty, as being arguably a little light on, into further perspective.

Two further appeal cases outside this jurisdiction are worth referring to. In both it was resolved aminocaproic acid is a prohibited substance. The first is the appeal of *Steven*

Cowan to the South Australian Racing Appeals Tribunal (Racing Appeals Reports Digest at 5576, 8 October 2009). In that appeal a nine month concurrent suspension of the driver's licence for each count for breach of Rules 190(1) (not presenting a horse to race free of a prohibited substance) and 196A(1) (not administer any prohibited substance) was imposed in relation to an admitted administration of aminocaproic acid six days prior to the race. On appeal the penalty was found to be appropriate following the finding that:

'Aminocaproic Acid is a banned substance and in fact, is not legally available to the Veterinary industry in South Australia, in that it has not been approved for use in Australia'.

The second is the appeal by *Ken Gully*, also to the South Australian Racing Appeals Tribunal (Racing Appeals Reports Digest at 5577, 15 October 2009). Mr Gully, an A grade trainer, was suspended on two counts for nine months to be served concurrently for failing to present a horse to race free of prohibited substances and having administered a prohibited substance to a horse. Mr Gully admitted administering the substance between three and four hours before the horse race. The substance in question was aminocaproic acid. The appeal was against the severity of the suspensions. The Tribunal repeated the finding quoted above in the *Steven Cowan* appeal. The suspension was reduced to six months, but a suspended sentence of a further six months was imposed and a \$2,000 fine levied.

The two South Australian decisions do not go into any detail as to the evidence which was produced or the basis upon which the findings regarding aminocaproic acid were reached.

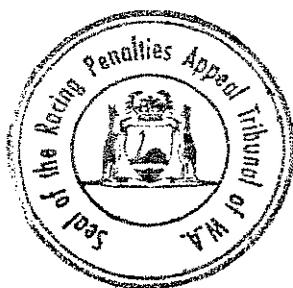
Ultimate issue argument

At the outset of the appeal Mr Matters had objected to passages in various expert reports of witnesses who were to be called for the Stewards who had expressed opinions as to whether the substance was prohibited under the Rules. Mr Matters submitted many of the other side's witnesses had purported to answer the ultimate issue in stating that the particular drug was a prohibited substance. I admitted all of the evidence in question and now offer a brief explanation for having done so. It has always been common practice, from my experience in dealing with appeals involving drug offences for nearly two decades, that veterinary stewards in giving evidence in Stewards' inquiries of a substance found in a horse both describe the effect the substance has and proceed to express an opinion in terms of whether the substance is a prohibited one in accordance with the rules. To that extent the veterinary and other evidence objected to in this appeal was nothing different. The admission of such evidence also appears to be entirely consistent with common practice in other racing appeal tribunals which allow the expert witnesses to express such opinions. But even if, for technical or other reasons, that practice were considered to be improper I state for the record I did reach my own conclusion that the substance was a prohibited substance under the relevant Rule. I did not rely on and was not influenced by the purported expressions of opinion on the ultimate issue of such evidence which had in the first instance, been given before the Stewards, and subsequently were confirmed and corroborated in the appeal by various witnesses.

Conclusions

For the above reasons I found and now declare:

1. the determinations of the Stewards were valid, and not void as alleged on behalf of the appellant;
2. the investigations and inquiries which were conducted into this matter were valid and appropriate; and
3. the substance aminocaproic acid is a prohibited substance under the Rules of Harness Racing.



Dan Mossenson

DAN MOSSENSON, CHAIRPERSON