THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR RJ NASH (MEMBER)

APPELLANT:	**STEPHEN JOHN WOLFE**
APPLICATION NO:	**A30/08/585**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR RJ NASH (MEMBER)** **MR SL PYNT (MEMBER)**
DATES OF HEARING:	**25 FEBRUARY & 20 MAY 2003**
DATE OF DETERMINATION:	**1 DECEMBER 2003**

IN THE MATTER OF an appeal by Mr SJ Wolfe against the determination made by the Stewards of the Western Australian Turf Club on 5 December 2002 imposing a two year disqualification for breach of Rule 177A of the Australian Rules of Racing.

Mr TF Percy QC with Ms BJ Lonsdale and Mr S Gallacher, instructed by Dwyer Durack, appeared for the appellant.

Mr RJ Davies QC appeared for the Stewards of the Western Australian Turf Club.

Appeal against conviction

I have read the reasons of the Chairperson in relation to Ground 1 of the Appeal and for the reasons given by him I agree there is no merit in that ground.

Appeal against penalty

In relation to Ground 2A, I also agree with the reasons of the Chairperson and his conclusion that there is no merit in that ground. The standard of proof applicable before the Stewards is the balance of probabilities and accordingly I would dismiss Ground 2 of the Appeal, although I accept

that the evidence in a case like this must be scrutinised having regard to the principles set forth in Briginshaw.

In relation to grounds 4, 5, 7 and 8, I make the following observations:
The Stewards at 285 found that there was a "link or relation" between the administration of Phenylbutazone and the catastrophic fracture of the off foreleg of SAVAGE CABBAGE. The Stewards further found that that administration resulted in a clear and evident risk to both horse and rider.

That finding was stated by the Stewards to be based on the Stewards' preference of the evidence of Dr Vine, Mr Stenhouse, Dr Medd and Dr O'Hara to that of Professor Vine and Dr Hilbert. No reasons were given for the Stewards preferring the evidence of the first four mentioned witnesses.

The finding of the Stewards was described by Mr Davies QC, counsel for the Turf Club in the appeal before the Tribunal, as one which was based on circumstantial evidence. Mr Davies submitted that it was open in all of the circumstances of the case for the Stewards to make the finding. The Chairperson of the Tribunal, in his reasons for decision, quotes extensively from the submissions made by Mr Davies in this regard and it is unnecessary for me to repeat the detail of those submissions.

The Stewards' hypothesis of causation is that shin sore horses suffer painful symptoms which if masked by an administration of Phenylbutazone enable a horse to run at a full gallop during a race or trial without the same level of pain it would otherwise suffer. The result is that both the horse and consequently the rider are less likely to detect the fatigue damage and consequent leg weakness as the horse runs and therefore are less likely to detect the potential of a catastrophic fracture occurring as a consequence of fatigue damage.

I agree that the evidence in this case supports the finding that SAVAGE CABBAGE was suffering from shin soreness and, as a consequence, SAVAGE CABBAGE was more likely to suffer a catastrophic leg failure whilst running at a full gallop than a horse whose legs were sound. I also accept it was open on the evidence for the Stewards to find that there had been a more recent administration of Phenylbutazone prior to the race than the Appellant was prepared to admit and that the administration was in all probability given to alleviate the level of symptoms the horse was experiencing as a result of its shin soreness.

The issue that I have had some difficulty with is the finding of the Stewards that the administration of Phenylbutazone can be regarded, after having regard to all the circumstances of the case, as being causative (in the sense of the hypothesis of causation referred to above) of the catastrophic leg fracture of SAVAGE CABBAGE and consequent tragic death of Jason Oliver.

Neither Dr Vine nor Mr Stenhouse gave evidence in relation to whether there was any causal relationship or link between the presence of Phenylbutazone in a horse's system and the catastrophic fracture.

Dr Medd, the Western Australian Turf Club's veterinarian, gave evidence that Phenylbutazone is an anti-inflammatory which would reduce a horse's hypersensitivity to pain. She referred at 82 to Professor Tobin's view as to the therapeutic effect of Phenylbutazone which is that it is an anti-inflammatory and that any analgesic affect is secondary to its anti-inflammatory affect. She agreed that it was a non steroidal anti-inflammatory commonly used by a significant proportion of thoroughbred trainers on their horses.

Dr Medd at 158 stated that a significant portion of shin sore two year olds don't appear obviously lame at a trot which was probably because shin soreness is often bilateral.

Dr O'Hara, whose specialty was anatomic pathology, gave a report into the cause of the catastrophic fracture to the horse's leg which was read by her into evidence. The Stewards in their reasons for decision quoted her report at page 7:

> *"The catastrophic failure of the third metacarpal bone sustained in the right forelimb of this case (02-963) was associated with gross and histological evidence of chronic bone modelling, remodelling and periosteal new bone formation."*

However further down page 7 of her report by way of summary, being an aspect of the report not quoted by the Stewards in their reasons, she stated:

> *"...the presence of chronic bone modelling, remodelling and periosteal new bone formation in the right third metacarpal bone...does not definitively prove the bone fractured as a result of chronic fatigue damage. However, in the absence of any other pathological bone process...the presence of compromising levels of bone damage and bone remodelling cannot be eliminated as a predisposing cause of the fracture."*

At 155 she accepted that a cause other than the shin sore condition could not be eliminated either.

Dr O'Hara went on to say that studies have suggested up to 80 per cent of two year old thoroughbreds have some degree of shin soreness. At 149 she stated that there had been no studies to compare shin soreness in horses with the incidence of catastrophic fracture, although there is a broad opinion emanating from relevant literature that shin sore horses are more likely to suffer catastrophic stress fractures.

Dr O'Hara at 150 when asked about whether you would expect shin sore horses to show external symptoms stated that she was not a clinician but based on literature she had read "a lot of shin sore horses will only be, sort of one to two out of four lame, so it's not excruciatingly lame." Dr O'Hara conceded that there was nothing unusual about the nature of the shin soreness she detected from her examination of the horse's limbs for a two year old thoroughbred horse under training.

Professor Tobin, a Doctor of Pharmacology with the University of Kentucky, gave evidence that a number of states in the USA permit the use of Phenylbutazone on race day. When asked to comment on whether there was any correlation between those states that permitted the use of Phenylbutazone and the incidence of musculoskeletal injuries he stated at 214 "that there doesn't seem to be an increased incidence of musculoskeletal injuries in those states that permitted its use." He repeated that evidence again at 223 to 224. That evidence was not challenged nor contradicted by any other witness.

Dr Medd, asked Professor Tobin at the bottom of 222:

> "Would you have any comment for us on your perception of the ability of phenylbutazone to create a false sense of security for both the horse and the rider if the full perception of [pain] was not apparent?"

Professor Tobin responded:

> "Well again, I, if it was, my understanding is that the horse rode sound coming up to the event, and forgive me if it was wrong that part of the evidence, but if it is, and it passed veterinary examination, but certainly if the phenylbutazone was about three or four days out there would be no possibility of an effect. I can only repeat that our experience in the United States is that some states permit the use of these medications and we do not have an increased incidence of breakdowns."

Neither Dr Medd nor any of the Stewards nor the Appellant's counsel sought to ascertain of Professor Tobin what his response would be if the horse had been given Phenylbutazone much closer to the trial than three to four days and whether that would have increased the probability of catastrophic failure. This is regrettable. We are left with Professor Tobin's evidence that the experience in the United States is that there is no increased incidence of horse breakdowns where these medications are permitted to be used to those states that require drug free racing.

It was pointed out by Dr Medd to Professor Tobin at 224 that in Australia the breakdown rate of horses in races is 0.4 per thousand starters whereas in the United States it is 1.4 per thousand starters. Professor Tobin pointed out that he was comparing the breakdown rates in the United States where there "was no compelling difference" detected. It was not explored why in Australia the breakdown rate was almost three times lower and whether that was referable to the drug free racing policy or other factors.

Dr Hilbert, a veterinary surgeon of 31 years experience, gave evidence at 263 that it would be very dangerous to try to draw a link between masking of pain, metacarpal disease and the breaking of a leg . At 263 he stated that it may be that a horse would be a safer conveyance if it is able to run confidently and evenly than if it was sore or tried to avoid pain in one leg or another.

The approach of the Stewards in finding that there was a causal connection or relationship between the catastrophic fracture of the horse's foreleg and the administration of Phenylbutazone cannot be logically reasoned by simply purporting to prefer the evidence of Dr O'Hara and Dr Medd to that of Professor Tobin and Dr Hilbert. It was necessary for the Stewards to make a more detailed analysis of the content of each witnesses evidence and which aspects of it they did or did not accept before they could justify making such a serious finding. In this regard, it is my view that the approach taken by the Stewards in finding there was a "link or relation" between the presence of Phenylbutazone and the catastrophic fracture of the horse's leg does not withstand scrutiny when one considers the evidence in detail and has regard to the serious nature of the finding and the need for the evidence relied upon to be sufficiently clear and cogent so as to meet the Briginshaw standard.

It may be the Stewards' hypothesis of causation is correct but the evidence before them in this case was not, in my view, sufficient for them to convert that hypothesis into a finding of causation.

It would seem that the dreadful consequences of the break down of SAVAGE CABBAGE and the erroneous attribution by the Stewards of an established causal link between the administration of Phenylbutazone to the horse and the fracture to the foreleg resulted in the Stewards imposing the penalty which they did. Since I have found the Stewards erred in finding there was a causal link established on the evidence, I have concluded the penalty they imposed was manifestly and demonstrably excessive.

In relation to Ground 3, it is my view that if there had been established on the evidence a causal link between the fracture of the foreleg and the administration of Phenylbutazone, then it was open to the Stewards to have found the actions of the Appellant as grossly negligent. In my view, such a finding would have been relevant when assessing the circumstances surrounding the commission of the offence and what was an appropriate penalty, albeit "gross negligence" is not an element of the offence under Rule 177A.

However, any finding of negligence, gross or otherwise, can only, by definition, be made if there is a finding of a causal link between the breach of duty and the suffering of loss or injury. For the reasons set forth above, it is my view that it was not open to the Stewards, on the evidence that was before them, to find that there was an established causal link between the administration of Phenylbutazone and the fracturing of the horse's leg.

Accordingly, I find that the Stewards erred in imposing a penalty which was based or influenced by a finding of "gross negligence" and for that reason uphold Ground 3 of the appeal.

In relation to Ground 6, in my view the Stewards had good reason to be sceptical about the claim of the Appellant that the last administration of Phenylbutazone to the horse was made 4.5 days before the trial. In my view, there was nothing in the evidence of Professor Tobin that detracted from the findings of Dr Vine and Mr Stenhouse that there were high concentrations of Phenylbutazone in the horse's urine, albeit their tests were essentially qualitative rather than quantitative. The Stewards' finding that there must have been another administration closer to the time of the trial was a reasonable inference since, on the evidence before them, it was highly unlikely an administration 4.5 days prior to the trial would have resulted in the strength of concentrations of Phenylbutazone actually detected. A further factor in favour of this finding was

the apparent certainty the Appellant had expressed to the Stewards of the likelihood that the horse's urine would test positively to Phenylbutazone before the test was performed. In my view, there is no merit in Ground 6 of the appeal.

In my view, the Stewards were entitled to impose a penalty on the basis that there had been an administration of Phenylbutazone closer to the trial than had been admitted by the Appellant. Further, it was open to the Stewards to surmise that the reason for the administration was to provide symptomatic relief for shin soreness. However, for the reasons stated above, it was not in my view reasonably open, on the evidence before them, for the Stewards to find a causal link between the catastrophic leg fracture and consequential tragic death of Jason Oliver with the administration of Phenylbutazone to the horse some time prior to the trial.

It is for the above reasons I would allow the appeal against penalty, in particular Grounds 3, 4, 5, 7 and 8.

The Appellant's good record, long standing and excellent reputation within the industry were significant factors of mitigation. In my view the breach of the rules, albeit serious, did not warrant a suspension or disqualification but warranted a fine of $5,000.

ROBERT NASH, MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA

APPEAL - 585

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR SL PYNT (MEMBER)

APPELLANT:	**STEPHEN JOHN WOLFE**
APPLICATION NO:	**A30/08/585**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR RJ NASH (MEMBER)** **MR SL PYNT (MEMBER)**
DATES OF HEARING:	**25 FEBRUARY & 20 MAY 2003**
DATE OF DETERMINATION:	**1 DECEMBER 2003**

IN THE MATTER OF an appeal by Mr SJ Wolfe against the determination made by the Stewards of the Western Australian Turf Club on 5 December 2002 imposing a two year disqualification for breach of Rule 177A of the Australian Rules of Racing.

Mr TF Percy QC with Ms BJ Lonsdale and Mr S Gallacher, instructed by Dwyer Durack, appeared for the appellant.

Mr RJ Davies QC appeared for the Stewards of the Western Australian Turf Club.

I have read the draft reasons of Mr D Mossenson, Chairperson.

I agree with those reasons and conclusions and have nothing to add.

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

STEVEN PYNT, MEMBER

APPEAL - 585

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**STEPHEN JOHN WOLFE**
APPLICATION NO:	**A30/08/585**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR RJ NASH (MEMBER)** **MR SL PYNT (MEMBER)**
DATES OF HEARING:	**25 FEBRUARY & 20 MAY 2003**
DATE OF DETERMINATION:	**1 DECEMBER 2003**

IN THE MATTER OF an appeal by Mr SJ Wolfe against the determination made by the Stewards of the Western Australian Turf Club on 5 December 2002 imposing a two year disqualification for breach of Rule 177A of the Australian Rules of Racing.

Mr TF Percy QC with Ms BJ Lonsdale and Mr S Gallacher, instructed by Dwyer Durack, appeared for the appellant.

Mr RJ Davies QC appeared for the Stewards of the Western Australian Turf Club.

By a unanimous decision ground of appeal 1 is dismissed and the conviction is confirmed.

By a unanimous decision grounds 2A and 6 are dismissed.

By a majority decision ground 2 is upheld.

By a majority decision ground 3 is dismissed.

By a unanimous decision grounds 4 and 5 are upheld.

By a unanimous decision the penalty is quashed.

By a majority decision the matter is referred back to the Stewards of Thoroughbred Racing to redetermine the appropriate penalty after taking into account the Chairperson's reasons and such further evidence, if any, as the Stewards think fit.

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:	**STEPHEN JOHN WOLFE**
APPLICATION NO:	**A30/08/585**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR RJ NASH (MEMBER)** **MR SL PYNT (MEMBER)**
DATE OF HEARING:	**25 FEBRUARY 2003 & 20 MAY 2003**
DATE OF DETERMINATION:	**1 DECEMBER 2003**

IN THE MATTER OF an appeal by Mr SJ Wolfe against the determination made by the Stewards of the Western Australian Turf Club on 5 December 2002 imposing a two year disqualification for breach of Rule 177A of the Australian Rules of Racing.

Mr TF Percy QC with Ms BJ Lonsdale and Mr S Gallacher, instructed by Dwyer Durack, appeared for the appellant.

Mr RJ Davies QC appeared for the Stewards of the Western Australian Turf Club.

Background

Mr Stephen John Wolfe was the trainer of the unraced two year old SAVAGE CABBAGE which ran in an Official Barrier Trial over 400 metres at Belmont Park on 28 October 2002. Nearing the winning post SAVAGE CABBAGE fell. Its jockey Jason Oliver sustained fatal injuries from the fall. SAVAGE CABBAGE broke its off foreleg and was euthanased. A

post trial urine sample taken from the euthanased horse disclosed the presence of the prohibited substances Phenylbutazone and Oxyphenbutazone.

The Stewards commenced an inquiry into the matter on 29 November 2002. At the continuation of the inquiry on 2 December 2002 Mr Wolfe was charged in the following terms:

> *'...under Australian Rule of Racing 177A which reads:*
>
> *'When a horse is brought to a racecourse or recognised training track to engage in a trial or test for the purpose of obtaining a permit to start in the (sic) race whether after suspension or otherwise, and a prohibited substance is detected in any sample taken from it prior to or following the trial or test, the trainer or (sic) any other person who was in charge of the horse at any relevant time may be punished.'*
>
> *You are charged under that Rule with bringing the two year old chestnut colt SAVAGE CABBAGE to Belmont Park Racecourse on Monday, the 28th of October 2002 for the purpose of engaging in a trial and following a urine sample taken from the euthanased SAVAGE CABBAGE, the prohibited substances phenylbutazone and oxyphenbutazone were detected.'* (Stewards' Transcript ('ST') 196 at 1).

Mr Wolfe entered a conditional plea of guilty to the charge. At the completion of the inquiry the Chairman of Stewards announced findings as to the penalty in these terms:

> *'In assessing a penalty the Stewards have taken into account the submission of Mr Tom Percy QC. Also witnesses appeared and gave evidence. These witnesses being Mr G. Evans (Owner), Mr W. Biggs (Owner), Bryan Hilbert (Veterinarian), Mr B. Ryan (President of the Jockeys' Association), Mr G. Murphy (Tracks and Maintenance Manager). Professor Thomas Tobin gave evidence via telephone linkup from America. Statements were submitted by Mr M. O'Connor (Owner), Mr W. Robins (Owner). Further a video of the inner grass track of Belmont Park was viewed and Mr Wolfe gave evidence. The court determinations of Olbrich, Campbell, Blameable Causation and Munckton were submitted into evidence. The Stewards believe the following to be mitigating circumstances: 1) Mr Wolfe your guilty plea, 2) Your unblemished record in relation to breaches of the prohibited substances rules. Your career spans some 18 years as a trainer. Your personal circumstances and your commitment to the racing industry. Your remorsefulness. However, the Stewards have grave concerns in relation to this matter. In our opinion this is a serious breach of the rules. You have admitted that you caused to be administered 20 mls of Phenylbutazone to SAVAGE CABBAGE on Wednesday the 23rd of October, 2002, approximately 114 hours before the sample was taken from the euthanased SAVAGE CABBAGE. However in the Stewards' opinion, the evidence of Mr A. Stenhouse the Official Analyst, The Australian Racing Forensic Laboratory and Dr John Vine, the Laboratory Director of Racing Analytical Services Limited was compelling and highly significant. Both Senior Racing Chemists who are vastly experienced in this field have stated that Phenylbutazone, the parent drug in their detection methods, usually is not detectable after two to three days after administration. Dr Vine stated two to three days, Mr Stenhouse stated two days. Mr Stenhouse when*

questioned stated the level of Phenylbutazone was found to be in the vicinity of 12 micrograms per millilitre. Dr Vine stated that the level of Phenylbutazone was found to be in excess of 10 micrograms per millilitre. SAVAGE CABBAGE may certainly have had an injection of Phenylbutazone on the Wednesday preceding the trial but in our opinion another administration has taken place closer to the trial. The Stewards in accepting this, question why this level was present. Evidence produced has revealed that SAVAGE CABBAGE did have dorsal metacarpal disease, shin soreness. Dr J Medd's Veterinary Stewards' Report Exhibit E states in part 'directly below the carpus on the left dorsal-proximal cannon area a moderate boney prominence splint or buck was visible and palpable.' Due to the severity of the fracture to the right fore cannon Dr Medd could not give an accurate description in relation to the shin soreness in the off fore cannon bone. Dr O'Hara, Veterinary Pathologist from the Murdoch University stated in her comprehensive report, Exhibit V, that both forelegs were found to have moderate multi-focal nodular osteopathy: presumptive chronic periosteal reaction.' The radiographic reports states on part (sic) "the soft tissue swelling and periosteal new bone formation in the dorsal cortex of the left third metacarpal (bucked or sore shins) although this distribution is unusual (more commonly over the mid-diaphysial region). And further the presence radiographically visible periosteal new bone formation indicates that the reaction has been present for at least twelve to fourteen days." Dr O'Hara's histological report states the fore limbs were found to have moderate multifocal chronic polyphasic periosteal new bone formation and cortical bone modelling and remodelling. Jockey Paul King's evidence, Exhibit K and L states in part "Jason Oliver said I reckon this could be shinny too." The Stewards believe that SAVAGE CABBAGE was suffering dorsal metacarpal disease or shin soreness. Dr Medd examined the back legs of SAVAGE CABBAGE post euthanasia. The report states: "some superficial abrasions were visible on the hind legs that had occurred post mortem, from the winch cable as the body was being winched onto the float. No other significant gross abnormalities were noted on the inspection of the remainder of the body. Further Dr O'Hara's report states on page 7 "this catastrophic fracture of the third metacarpal bone sustained in the right forelimb of this case was associated with gross and histological evidence of chronic bone modelling, remodelling and periosteal new bone formation. Similar, but marginally less severe chronic bone modelling, remodelling and periosteal new bone formation was evident in the third metacarpal bone of the left forelimb. In the current literature it is thought that the majority of racehorse fractures are not spontaneous and many catastrophic fractures are the end result of progressive bone fatigue (C.M. Riggs, 2002, D. Ellis 2002)". At times of intense cyclical loading that is race training, a high rate of microscopic fatigue damage may stimulate intense bone remodelling. During the bone remodelling there is increased porosity of the bone associated with bone resorption. The increased porosity decreases the stiffness of the bone which further increases the strain on the bone and the straining is exacerbated by ongoing loading. Consequently during active remodelling intense loading and fatigue damage will predispose to the formation of the stress or catastrophic fracture (C.M. Riggs, 2002). In relation to the evidence of Dr Vine, Mr Stenhouse, Professor Tobin, Dr Hilbert, Dr Medd and Dr O'Hara, on consideration and in summation, the Stewards prefer the evidence of Dr Medd, Dr O'Hara and analyst Mr Stenhouse and Dr Vine to that of Professor Tobin and Dr Hilbert. In the opinion of the Stewards on the balance of probabilities there is a link or a relation between the shin soreness, the presence of Phenylbutazone and the catastrophic fracture of the off fore leg

of SAVAGE CABBAGE. Under these circumstances, there was a clear and evident risk to the horse and rider. The Stewards have heard evidence in regards to track conditions and design. After consideration that evidence and particular the evidence of Steward T. Rendell and Track and Maintenance Manager, Mr G. Murphy we are of the opinion the track surface and design were not factors in the fall of SAVAGE CABBAGE. Mr Wolfe, you stated to Mr O'Reilly in the presence of your legal counsel Exhibit S that you knew it was inappropriate to start a horse in a trial with the presence of a prohibited substance in its system. We are of the opinion that you have been grossly negligent in starting SAVAGE CABBAGE in Heat 2 at Belmont Park on the 28th of October, 2002. There have been tragic consequences of the fall. We have considered the provisions of AR196. In considering a penalty the Stewards are conscious of the mitigating circumstances. Without those mitigating circumstances we would see a disqualification of three years appropriate. At arriving at a penalty the circumstances of this case are exceptional, with no known precedent in Australian racing jurisdiction. After considering all the factors and those mitigating circumstances we believe that you should be disqualified for a period of two years.' (ST 282 at 7).

On 6 December 2002 Mr Wolfe lodged a Notice of Appeal and sought a suspension of operation of the penalty. After consideration of the papers before me and the Stewards' response to the application I refused the application. Mr Wolfe immediately sought and that day obtained from Justice Heenan of the Supreme Court of Western Australia an order staying the disqualification decision until further order of the Supreme Court.

The Original Appeal Hearing

The grounds of appeal as amended at the commencement of the hearing of the appeal on 25 February 2003 are relatively long and complicated. Some of the grounds as to the penalty raise overlapping issues. The amended grounds state:

'A. CONVICTION

1. The Stewards erred in ruling that the charge laid against the Appellant was one which was known to the Rules of Racing.

Particulars

(a) The provisions of rule ARR 177A provide for an offence when a horse is brought to a track to engage in a "trial or test for the purposes of obtaining a permit to start in a race".

(b) The charge laid against the Appellant was that he had brought the horse to the racecourse for the purposes of engaging in a trial.

(c) The charge contained no element of having brought the horse to the track for the purposes of engaging in a trial with a view to obtaining a permit to start in a race.

(d) *Unless the purpose is specifically that of trialling the horse with a view to obtaining a permit to start in a race, then the charge is one which is not caught by the provisions of ARR 177A.*

(e) *There was no evidence that the horse had been brought to the track for such a purpose.*

(f) *It is not an inflexible condition precedent to starting in a race that a horse must first trial to the satisfaction of Stewards. The eligibility of a horse to start in a race is subject to the discretion of the Stewards and/or the Committee, by virtue of the provisions of regulation 70.*

(g) *The charge on its face was accordingly not one which was known under the Rules of Racing.*

(h) *Before pleading to the charge Counsel for the Appellant demurred to the charge. The demurrer was refused by the Stewards and the Appellant thereafter entered a plea to the charge but made it clear through Counsel that it remained his position that there was no valid charge available to the Stewards under the relevant rule, particularly on the evidence before the Inquiry.*

(i) *In ruling against the demurrer the Stewards erred in finding that the correct interpretation of ARR 177A required a disjunctive reading of the word "or" in relation to the word "trial" and that the qualifying words "permit to start in a race" referred only to the word "test", which interpretation was incorrect.*

(j) *The Stewards accordingly erred in laying a charge which was unknown in the Rules of Racing and in proceeding to deal with the Appellant on the charge.*

B. PENALTY

2A. *The Stewards erred in admitting into evidence the results of the scientific testing performed by Dr O'Hara on the forelegs of the horse.*

Particulars

(a) *The forelegs of the horse were removed by the Club Veterinary Surgeon without the permission of the horse's owner or any person acting on their behalf.*

(b) *The Stewards are empowered to effect certain tests on a horse following euthanasia to remove blood or urine.*

(c) *There is no power to dismember body parts from a horse following its destruction for any purpose whatsoever.*

(d) *The power contained in Rule 201 of the Rules to destroy an injured horse does not extend to removing body parts.*

(e) *Rule 8(g) does not empower the dismemberment of a horse or the power to conduct a post-mortem examination without the permission of its connections.*

(f) *The analysis of the horse's forelegs was not carried out by an official racing laboratory as required by Rule 178B.*

The removal of the horse's forelegs was accordingly unauthorised and illegal and the evidence of the examination of them should have been excluded from the Stewards' consideration of this case.

2. *The Stewards erred in applying an incorrect standard of proof in their finding of aggravating circumstances for the purpose of imposing a penalty.*

Particulars

(a) *Given the seriousness of the offence and its potential consequences, the Stewards were required to have regard to a higher standard of proof than the bare balance of probabilities. They were referred to this proposition and the authorities in support thereof by Counsel in his sentencing submissions.*

(b) *In handing down penalty the Chairman of Stewards specifically stated that the aggravating features of the case had been established to the Stewards' satisfaction on the "balance of probabilities".*

(c) *The finding of any aggravating circumstances was required to be found on the Briginshaw standard given the circumstances of the case.*

3. *The Stewards erred in imposing a penalty having regard to the question of "gross negligence" which is an irrelevant consideration for the purposes of penalty under the provisions of ARR 177A.*

Particulars

(a) *The provisions of the Rule have no reference to negligence or mens rea and the concept of negligence was accordingly irrelevant.*

(b) *The offence under the Rule is complete upon the finding of a drug in the horse's system at the relevant time.*

(c) *The manner in which the drug came to be in the horse's system or the circumstances under which the horse was brought to the track or competed in the trial was not relevant to the question of penalty.*

(d) *The Stewards erred in considering the negligence of the Appellant as a seriously aggravating feature of the case.*

4. *The Stewards erred in rejecting the unchallenged evidence of Professor Tobin and Dr Hilbert as to the question of any causal link between the administration of the prohibited substance and the injury sustained by the horse.*

Particulars

(a) *Professor Tobin is the undisputed expert in the world on equine pharmacology and his credentials and evidence was unchallenged by the Stewards or their expert at the hearing.*

(b) *The professor testified that any suggestion of a causal link between the administration of the prohibited substance and the horses breakdown was not possible.*

(c) *This specific piece of evidence was never challenged by the Stewards at the hearing.*

(d) *The Chairman of Stewards in his reasons specifically found that there had been a causal link between the administration of the prohibited substance and the breakdown of the horse.*

(e) *The finding was accordingly unsupported by any evidence and contrary to the evidence of the worlds foremost expert in this field.*

(f) *The evidence of Dr Hilbert was to a similar effect and similarly rejected by the Stewards.*

5. *The Stewards erred in failing to give any or any sufficient reasons for their findings that their (sic) was a causal link between the administration of the prohibited substance and the horse's breakdown.*

Particulars

(a) *The Chairman of Stewards in his reasons stated that he preferred the evidence of Dr Medd, the Stewards' veterinarian and the other non-defence witnesses, to that of Professor Tobin and Dr Hilbert.*

(b) *The Stewards gave no reasons whatever to preferring the other evidence to that of Tobin and Hilbert.*

(c) *There was in any event, no contest on the evidence of Tobin and Hilbert on the question of any causal link.*

(d) *The finding of the Stewards on this point was accordingly void for failure to give reasons.*

6. *The Stewards erred in finding that there had been an administration of the prohibited substance closer to the time of the horse's breakdown than that was admitted by the Appellant, such finding being against the evidence and the weight of the evidence.*

Particulars

(a) *There was direct testimony from the Appellant and the witness Maureen Keay that the substance had been administered only once, at around 4:30pm Wednesday 23 October 2002.*

(b) *In relying on the results of the analysis of the urine samples to establish time of administration the Stewards were in error.*

(c) *The evidence relating to the analysis of the urine samples was qualitative rather than quantitative.*

(d) *Any estimate of time based on the tests was likely to be seriously in error.*

(e) *The urine samples were never specifically tested for levels of the prohibited substance.*

(f) *The Stewards accordingly erred in preferring a totally inexact estimate proffered by the analysts as to the timing of the administration which was at best speculative.*

(g) *The Stewards finding and preferring that evidence against the direct evidence of the Appellant and his witness was in all circumstances of the case perverse.*

7. *The Stewards erred in posing (sic) a period of disqualification rather than a fine*

Particulars

(a) *Disqualification must be reserved for the worst possible cases of presentation.*

(b) *The present case must be contrasted with infringements against ARR 177 which deals with horses returning positive samples following their race involving stake money and betting.*

(c) *The cases relating to trials and offences under ARR 177A must fall into a lesser category as they involve no unfair advantage in a race for stake money and element of deception of the public.*

(d) *The appropriate penalty in this case was a fine. There are numerous cases where fines have been imposed for more serious infringements of the more serious rule (ARR 177).*

(e) *There is no recorded case of a penalty other than a fine being imposed in a case relating to the infringement of ARR 177.*

(f) *The Stewards erred in failing to deal with the matter on the basis of their previous ruling in the matter of Strempel which*

on its facts was a more serious breach of the rule than in the present case and resulted in the imposition of fines.

(g) The case of Strempel was manifestly more serious than the present case in terms of essential elements of ARR 177 in that:

(i) the horse had a known history of leg problems;

(ii) the horse was administered with two specific prohibited substances;

(iii) the horse broke both forelegs;

(iv) the trainer pleading not guilty to the charges and showed no remorse; and

(v) there were no mitigating factors whatever.

(h) The decision of the Stewards to propose a period of disqualification was perverse in all circumstances of the case.

8. The Stewards erred in posing (sic) a period of two years disqualification which was in all circumstances of the case manifestly excessive.'

During the appeal hearing on 25 February 2003 Mr Percy QC for Mr Wolfe handed up a written outline of submissions and both counsel presented fairly detailed oral submissions. In addition Mr Davies QC called the Racecourse Investigator to give evidence addressing the admissibility of the medical evidence relating to the Murdoch University tests in order to address added ground 2A. Mr O'Reilly explained he was not present when SAVAGE CABBAGE fell but was in attendance when the course veterinarian removed the horse's forelegs. Mr O'Reilly had confirmed the brands and markings, refrigerated the limbs at the racecourse and subsequently took the forelegs to Murdoch University. At the conclusion of the February hearing the Tribunal reserved its decision.

The Further Appeal Hearing

Prior to a decision being handed down the solicitors for the appellant wrote a letter addressed to the Registrar of the Tribunal dated 18 March 2003 seeking a reconvening of the appeal proceedings to hear fresh evidence which they claimed had come to light subsequent to the February hearing. It was alleged that the fresh evidence would cast doubt on the continuity and integrity of evidence concerning SAVAGE CABBAGE's forelimbs and consequently on the result of the analysis of the forelimbs. It was argued this evidence, if accepted, would have a significant bearing on consideration of ground of appeal 2A.

At the further hearing, which was convened on 20 May 2003, leave was granted to the appellant to reopen the case. In so doing Mr Percy QC produced an affidavit sworn by Mr Wolfe on 13 March 2003 (ex 1). Mr Wolfe's affidavit addresses where and how the forelimbs were removed and the arrival of those limbs at Murdoch University. An affidavit from Mr Rex Skelton sworn on 6 March 2003 (ex 2) was also introduced. Mr Skelton works for a pet meat business. He had collected SAVAGE CABBAGE'S carcass shortly after the horse had been euthanased. This affidavit, which is very brief, refers to the use of the lifter on the truck which Mr Skelton was driving and to the subsequent removal of the forelimbs on the back of the truck by Dr Medd, the Veterinary Steward.

As a consequence of the fresh evidence called on behalf of Mr Wolfe the Stewards were also allowed to call further evidence. The thrust of the Stewards' evidence was to remove any doubts regarding the horse's condition and the fact that the limbs which were received by Murdoch University had in fact come from SAVAGE CABBAGE. Mr O'Reilly, the Racecourse Investigator, Dr Medd, Mr JA Zucal, the Chairman of Stipendiary Stewards and Dr O'Hara, a specialist Veterinary Pathologist, all gave evidence at the further hearing. In addition a video and photographs were presented. At the conclusion of the May hearing the Tribunal once again reserved its decision.

Appeal Ground 1 – The conviction

The first ground of appeal is the only ground against conviction. That ground asserts there is no offence of presenting a horse, for the purpose of engaging in a trial simpliciter, which happens to have a drug in its system. The following is a summary of the argument presented for Mr Wolfe in support of this ground:

- The substance is a mild palliative drug only which is not outlawed from use in the stable, on the beach and in the bush. There is an unqualified embargo on its use in races and qualified embargo using it in those trials for qualification or requalification for racing.
- There is no offence simpliciter of starting a horse in a trial with a drug in its system unless that horse is brought to the track exclusively for the purpose of starting it in a race.
- The decision to bring a horse to a recognised racecourse for a trial must be coupled with an intent that the horse thereby becomes qualified to start in a race.
- There are many reasons for trialling a horse other than qualifying it to start in a race.

- There was no evidence that the appellant had brought SAVAGE CABBAGE to the track for the purpose of trialling the horse in a race. The evidence only establishes that it did trial with a prohibited substance in its system.

- The Stewards erred in ruling that the word '*or*', which is contained within the operative provision of the relevant rule should be given a disjunctive interpretation.

- Although Mr Wolfe pleaded guilty to the charge and certainly committed the act in question, he is entitled to take the point that the charge was not one which was known to the Rules of Racing.

I am not persuaded by the arguments for the appellant on this ground. Rather, I agree with and adopt the propositions put in response by Mr Davies QC. If the interpretation submitted on behalf of the appellant were correct any horse once qualified to race which, for example, may be resuming racing after a spell, could return to the track and trial with impunity whilst heavily dosed with drugs. Clearly such a scenario is not contemplated and cannot be countenanced by the Rules which require drug free racing. If doped horses were allowed to trial with impunity both riders and their mounts would be at grave risk and there could well be adverse implications in terms of the form of horses with consequences for the betting public.

In ruling on Senior Counsel's submission to the Stewards at the inquiry as to the proper interpretation and application of Australian Rule 177A, the Chairman of the Stewards stated:

> *'It is the Stewards' opinion that ... the word 'or' has disjunctive affect, by that the words on either side of 'or' are not to be read together, but are treated as alternatives. In our view, for the word 'trial'; to be qualified by the words 'for the purpose of obtaining a permit to start in a race' is nonsensical. The clear intent of the Rules, in our opinion, is to ensure drug-free racing. ARR.178 deals with the case of a racehorse being brought to a racecourse for the purpose of engaging in a race. We believe ARR.178 is clearly designed to pick up other occasions when racehorses are brought to a racecourse other than to engage in a race. It would be pointless to limit the word 'trial' for only certain types of trial, leaving a gap in the events for occasions when the rule and structure of drug-free racing could operate. In any event, the procedure in Western Australia is that all unraced horses must trial to the satisfaction of the Stewards before being permitted to start in a race. I cannot recall a horse being allowed to start in a race in Western Australia without trialling satisfactorily. The format is outlined earlier in this inquiry is that horses after trialling, are automatically passed unless the trainer is advised accordingly by the Stewards.'* (ST200)

I have considered the appellant's counsel's argument by reference to various authorities he cited. Despite that I entirely agree with the Stewards' ruling on the interpretation of '*or*' in Australian Rule 177A. I am satisfied there is no other reasonable interpretation or application of the Rule open. To interpret ARR177A in the manner suggested for the appellant would lead to an absurd conclusion. The Rule in my opinion clearly addresses

separately both the situation where a horse has been bought to a racecourse or a recognised training track to be trialled from that where a horse is engaged in a test in order to qualify for a start.

I consider the charge was properly laid by the Stewards and Mr Wolfe's guilty plea clearly was therefore in respect of an offence duly specified in the Rules. I do not consider there to be merit in this ground of appeal and in the assertions contained in each of the supporting particulars. Mr Wolfe was properly convicted of the offence.

Appeal Ground 2A – The evidence of Dr O'Hara

This ground asserts that the removal of SAVAGE CABBAGE's forelegs was unauthorised and illegal and the Stewards erred in admitting the scientific evidence in relation to the examination of them by the Murdoch University veterinary pathologist. At the Stewards' inquiry the Stewards allowed Mr Percy QC to make a legal submission concerning the examination of the forelimbs of the horse (pp 192-195). The argument which was presented to the Stewards included the following propositions:

- The results of the post-mortem tests ought not have been admitted into evidence.
- Whilst there is power to destroy a horse under Rule 201 without consulting a horse's connections no such power exists to remove parts of its body which remains the property of owner.
- The Stewards may not perform any act not delegated to them under the Rules.
- The powers in Rule 8(g) are not wide enough to cover any post-mortem examination of the horse and *a fortiori* its dismemberment
- Not being specifically authorised by the Rules, the question remains as to whether the evidence ought to be admitted as a matter of discretion.
- Doubt therefore exists whether Dr O'Hara examined the forelegs belonging to SAVAGE CABBAGE.

The Rule referred to by senior counsel, Australian Rule 8(g), specifically empowers *'ordering the examination of any horse for the purpose of ascertaining its age or identity, or for any other purpose connected with the Rules'*.

I have carefully considered all of the evidence and arguments presented in relation to this ground and am fully satisfied there is no merit in the proposition that the Stewards improperly admitted Dr O'Hara's evidence. The Stewards are given wide powers under the Rules of Racing to enable them to perform their essential duties in assisting in the control of

racing. Without the Stewards or anyone else performing this critical role of policing and closely supervising the conduct of participants the public could have no confidence in an industry which is highly sensitive to any untoward behaviour. Racing clearly is an industry which depends on maintaining the confidence of the racing public in the integrity of the sport. Unfortunately that confidence all too often is shaken. The powers vested in the Stewards must be exercised properly and fairly both in the public interest, on the one hand, and to ensure fairness for participants whose livelihoods are at risk on the other. Those powers go well beyond the rules identified on behalf of Mr Wolfe. For example, Australian Rule 10 states:

> *'The Stewards may at any time inquire into, adjudicate upon and deal with any matter or incident relating to racing'.*

Whilst Australian Rule 8(g) may not go far enough to authorise post mortems and dismemberment the Stewards are specifically empowered by Australian Rule 10A:

> *'...to inquire into and adjudicate upon any incident or occurrence arising at any organised trial or training facility'*

including any suspected breach of the Rules. This includes *'taking any action deemed necessary in respect of any horse'* (Australian Rule 10A(2)(c)). These powers are no doubt deliberately expressed broadly to ensure the Stewards are enabled to perform their important duties in such manner as they consider appropriate without fetter, depending on the varied and sometimes very unusual circumstances confronting them.

I agree with Mr Davies QC's argument that, even if the removal of the horse's legs was not authorised by the Rules, evidence presented in relation to that action may still be admissible under the overriding public interest considerations that are relevant in a case like this. However, as I have just indicated, the Rules in my opinion do in fact clearly go far enough to sanction all of the actions taken by these Stewards in regard to the SAVAGE CABBAGE affair. It would not make any sense in the circumstances of this matter to read the Rules of Racing down. The Stewards should not be inhibited in the ability to collect relevant evidence. In this case it was obviously important that there was a proper examination of the carcass. The fact that permission of the owner was not sought should be no impediment or constraint from receiving into evidence and evaluating a proper and highly relevant piece of evidence as part of the inquiry process.

An official racing laboratory is clearly relevant for the purposes of analysing samples but not for undertaking dismemberment and post mortems. The reference to Rule 178B in particular (f) of this ground of appeal accordingly affords the appellant no assistance.

I am not persuaded by ground of appeal 2A.

Appeal Ground 2 - The standard of proof

This ground alleges the application of a wrong standard of proof by the Stewards associated with their findings of aggravated circumstances. The argument presented for Mr Wolfe in relation to ground 2 commences with the proposition that the onus is on the Stewards to prove any aggravating circumstances if they intend to rely upon them in reaching a decision on the question of penalty. These circumstances were stated in paragraph 2.2 of the appellant's written outline of submissions to be:

- *that the horse was shin sore;*
- *that the appellant knew that the horse was shin sore;*
- *that any shin soreness had a connection with its breaking down;*
- *that the administration of the Phenylbutazone had a connection with its breaking down;*
- *that the appellant had been "grossly negligent' in bringing the horse to the racecourse to trial.'*

It is argued all of the factors had been highly contentious and because of the seriousness of the case the Stewards were obliged to prove any aggravating circumstances on the standard of proof in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362, that is, that there must be '*clear and cogent proof*'. It is also claimed for the appellant the Chairman of Stewards erred by finding that the aggravating features of the case had been established to the Stewards' satisfaction on the '*balance of probabilities*'. Although the Stewards may have been entitled to conclude that, for example, there had been shin soreness, it is said their failure to apply a higher standard of proof vitiates their decision on the penalty. Further, it is submitted by Mr Percy QC the Stewards' questioning of the level at page 284 without making any finding of fact in that regard is indicative that they have used a very low standard of proof.

Clearly the Stewards bore the onus to the Briginshaw standard. The transcript of the inquiry clearly reveals the Stewards did explore and address the extenuating circumstances. I am satisfied the conclusions which the Stewards reached, at least in relation to the existence of shin soreness and knowledge of that fact by the appellant, were reasonably open to them on the evidence that emerged from their inquiry and were proven to the requisite level. However, taking into account the comments which are made later regarding grounds 4 and 5 I am unable to reach a conclusion whether or not it has been demonstrated that an incorrect standard of proof was applied in relation to the balance of the aggravating circumstances findings.

Appeal Ground 3 - The 'gross negligence' issue

According to how this ground is argued the Stewards were wrong in taking into account aspects of negligence, state of mind, how the drug found its way into the horse and the circumstance under which SAVAGE CABBAGE was brought to the track. For Mr Wolfe it is submitted the question of gross negligence is irrelevant for the purpose of Rule 177A. Further, the Stewards' finding of negligence appears to have been based on two factors:

> *'...(a) the level of the substance detected; and*
>
> *(b) the proposition that the horse was obviously shin sore.'* (appellant's written outline para 3.4)

It is said these were highly contentious and the subject of conflicting evidence. Whilst the Stewards articulated to some extent the basis of their finding as to shin soreness, according to the appellant's argument, the Stewards made no finding as to the second critical issue, that is, as to when the '*second*' administration occurred. According to senior counsel for Mr Wolfe the Stewards' questioning regarding the level present allegedly reveals further error and indicates that the Stewards made no such finding. It is not open and entirely inappropriate, so the argument goes, for the Stewards to penalise the appellant on the basis that he had been grossly negligent. It is necessary for the Stewards to have disclosed the route by which they came to their reasons. Insofar as the Stewards relied upon a '*second*' administration as an aggravating feature of the case, they were in error, as they failed to make any proper findings of fact on this highly contentious issue. Further, they failed to give any intelligible reasons in this regard. For the reasons to be advanced in relation to Ground 6 the Stewards' finding was, in any event, said to be contrary to the evidence and the weight of the evidence.

I cannot accept these arguments. I am satisfied from the evidence before them the Stewards were entitled to reach the conclusions which they did regarding all aspects covered by this ground. There was no dispute as to the first administration, indeed it was admitted. The findings of fact and the basis of reaching their conclusion on the second administration was clearly open to the Stewards on the evidence. It is rare that any precise findings as to the circumstances of an administration in a drug offence is made or is ever capable of being made due to the nature of the offence. In this particular case the Stewards were entitled on the evidence of the two senior racing chemists, Mr Stenhouse and Dr Vine, to conclude that another administration occurred closer to the time of the trial than the admitted original administration. The Stewards are not obliged to articulate fully their reasons in a judicial sense. The Stewards have enunciated their line of reasoning with sufficient clarity on all of the aspects relevant to ground 3. Gross negligence can be, and in this case is one of many factors which bears on Rule 177A. I am not persuaded by the argument in support of ground 3.

Appeal Grounds 4 and 5 - The unchallenged evidence regarding causal link and the lack of reasons.

Ground 4 asserts error by the Stewards in rejecting unchallenged expert evidence on the question of any causal link between the administration and injury to the horse. Ground 5 attacks the decision on the basis of the lack of reasons regarding the link. As these grounds overlap they can be dealt with together.

From the appellant's perspective ground 4 is supported by propositions which include the fact that the evidence of the experts Professor Tobin and Dr Hilbert was unchallenged, that there was no causal link between the administration of the prohibited substance and the accident and that the injury sustained by the horse was rejected for no reason. It is asserted for the appellant neither the Stewards nor Dr Medd challenged Professor Tobin's evidence about any causal link between the administration of the substance and the breakdown of the horse. According to the unchallenged evidence of Professor Tobin there was no evidence to suggest that administration of Phenylbutazone increased the incidence of injury in horses and it was not possible that there was a causal link between the administration of the prohibited substance and the horse's breakdown. Further it is argued, contrary to the evidence, the Stewards' finding that there had in fact been such a causal link between the administration of the prohibited substance and the breakdown of the horse was perverse and unsustainable.

Ground 5 criticises the lack of reasons given by the Stewards for finding a nexus between administration and SAVAGE CABBAGE's breakdown. In summary the propositions put for Mr Wolfe in relation to this aspect include:

- Although there is an obligation on the Stewards to give adequate reasons for their findings they failed to give reasons for preferring the evidence of Dr Medd and the other non-defence witnesses to that of Professor Tobin and Dr Hilbert.
- There was no contest on the evidence of Professor Tobin and Dr Hilbert on the question of any causal link between the administration of the Phenylbutazone and the breakdown of the horse. Dr Medd's questioning of Professor Tobin merely established that the administration of Phenylbutazone, regardless of the time of administration, would not have affected the horse's basal perception of pain.
- This was not a case where there were two different bodies of expert evidence as to causation. There was in fact unchallenged expert evidence that there was no causation. This evidence was completely rejected by the Stewards and contrary findings of fact made.
- The correct approach to the unchallenged expert evidence is set out by the Tribunal in *Miller* (RPAT No. 570).

As to the latter proposition I am satisfied that *Mr Wolfe's* case is distinguishable from *Miller*'s case both in terms of the circumstances of the offence and the nature of the evidence that was presented.

This question of the causal link between the administration of the prohibited substance and SAVAGE CABBAGE's breakdown is the most complicated aspect to the appeal. At the same time it is potentially a key to the ultimate outcome of the matter. To address the complex causation issue it becomes helpful firstly to examine in some detail the actual evidence in question which was presented to the Stewards. Following that it will be appropriate to summarise the case which Mr Davies QC presented to the Tribunal on the matters addressed by these two grounds.

The relevant medical evidence centres around the testimony of 3 experts, one called by the Stewards and the other two on Mr Wolfe's behalf. Dr Medd for the Stewards gave evidence that Phenylbutazone and Oxyphenbutazone are prohibited substances under the Rules of Racing.

> *'Phenylbutazone is classified as a non steroidal anti-inflammatory drug and it would act on the musculo skeletal system. ...*
>
> *Oxyphenbutazone is a metabolite of Phenylbutazone, it's an active metabolite so it too has anti-inflammatory properties and it too acts on the musculo skeletal system.'* (ST79 at 5)

In answer to the question regarding the pharmacological action of Phenylbutazone, Dr Medd responded:

> *'It's an example of a drug that is used primarily for inflammation of the musculo skeletal system. Non steroidal anti-inflammatory drugs have three main actions. They're anti pyretic, in other words they reduce fever, they're analgesic, in other words they reduce the hypersensitivity to pain, and they're anti-inflammatory. The reason by which they're anti-inflammatory occurs by virtue of prostaglandins synthesis inhibition. In other words inflammation in the body is mediated by the production of these chemicals called prostaglandins, and what an anti-inflammatory such as Phenylbutazone does, is that it inhibits the synthesis of these prostaglandins and as such it reduces the inflammation and subsequently provides relief from the pain that the inflammation causes.'* (ST80 at 4).

Shin soreness was described by the Veterinary Steward as:

> *'...an inflammation of the periosteum. The Periosteum is a tissue covering the bone in a horse and this periosteum is full of nerve endings, it's quite a highly sensitive area. If the periosteum becomes inflamed it is termed shin soreness or dorsal metacarpal disease and by giving an anti-inflammatory to a horse, the inflammation in the periosteum would be reduced and the hypersensitivity to pain in that area would also be reduced as a result of that anti-inflammatory.'* (ST81 at 6)

In response to a question from senior counsel for Mr Wolfe regarding the tendency of the drug to mask pain, Dr Medd explained:

> *It is not actually considered to be an analgesic in its primary form such as a narcotic analgesic, like morphine is a pure analgesic, which acts on the nervous system to actually minimise the sensation to the nervous system. Whereas this actually is primarily an anti-inflammatory. The analgesic effects are secondary to that.'* (ST82 at 5).

Professor Tobin gave evidence on behalf of Mr Wolfe by telephone linkage from the United States where he operates. The professor is a doctor of pharmacology who, according Dr Hilbert, is a world authority in veterinary science and veterinary pharmacology. Professor Tobin gave evidence:

> *'...that there doesn't seem to be an increased incidence of musculoskeletal injuries in those states (in the USA) that permit its use.'* (ST 214 at 3).

He then dealt with the effect of an administration of Phenylbutazone. After two days of administration the drug would have no palliative effect on an animal. Profession Tobin went on to state:

> *'If there was (inaudible) say administered at a twelve hour period prior to post, if the horse is a fit and I understand this was a fit horse and was not showing any signs of musculoskeletal injury, the general expectation is that there would be no effect. And the experience in the United States with, how I say, the twenty-four hour rule has been that there is no increase in musculoskeletal injuries in such states.'* (ST217 at 2).

Later in the proceedings he stated:

> *'...my understanding is that the horse rode sound and was sound coming up to the event, and forgive me if it was wrong that part of the evidence, but if it is, and it passed veterinary examination, but certainly if the phenylbutazone was about three to four days out there would be no possibility of an effect. I can only repeat that our experience in the United States is that some states permit the use of these medications and we do not have an increased incidence of breakdowns.'* (ST222 at 6)

I consider this evidence of Professor Tobin is not particularly relevant or directly helpful because his evidence was given on the basis that SAVAGE CABBAGE was fit. The Professor's evidence does not address the situation of a horse which was suffering from the condition which SAVAGE CABBAGE had been experiencing.

The other expert called on behalf of Mr Wolfe was Dr BJ Hilbert, a veterinary surgeon. His evidence I believe was more to the point. Dr Hilbert gave evidence to the effect that after a three day period there would be virtually no therapeutic effect of Phenylbutazone and its effect would be minimal after two days. When asked by senior counsel whether he was

aware of any connection between the use of Phenylbutazone and a horse's tendency to breakdown in the forelimbs he responded:

> *'No, I've never had any experience with that and I looked at the literature and I don't think there is any scientific evidence to suggest that there can be a caused relationship between the use of an amount of steroidal anti-inflammatory drug and a horse fracturing its leg.'* (ST262 at 3).

He went on to assert that there was no relationship with the presence of pain and a horse breaking its leg. When asked whether there could be a link between pain, masking of pain, dorsal metacarpal disease and breaking of the leg, he answered:

> *'I think it's very dangerous to try and make that link, Mr Chairman. I think it's too tenuous to say that that is a possibility of that. There are numerous other possibilities that we could make, you understand what I'm saying or propositions that we could make and that's just one of them and I think it's too dangerous to say those things follow. I think it is. But a person could almost say that the opposite would be true. That if you have a sore horse for some reason whether it had a joint or whatever and you gave it a non-steroidal, inflammatory drug which relieved inflammation and thereby was analgesic, and the other thing is that Phenylbutazone is not an analgesic, it is not classified as an analgesic. It's an anti-inflammatory drug. However, if you had a horse that was sore and you gave it an analgesic or an anti-inflammatory drug and the horse was able to run confidently and evenly, he might be a safer conveyance than a horse that was sore and tried to get away from pain in one leg or another. So I think there are a lot of tenuous things that we can say, I don't think, I think it's very dangerous just to say that.'* (ST263 at 1)

I now turn to detail the argument for the Stewards which was presented during the appeal hearing. It begins to be developed at the end of Mr Davies' submission in relation to the standard of proof, namely in respect of ground 2 commencing on page 64 at 17 of the transcript of proceedings before the Tribunal ('TT') on the first day of the appeal. Senior counsel proceeds to consider how the Stewards dealt with this issue in the context of the question of the evidence of proof (top of TT p65). The process of reasoning then crystallises with the proposition the '*...decision for the Stewards...*' is '*...what were the circumstances and the consequences of the presentation of this horse with this drug in it on the 28th of October to run in the trial that it ran in with the result that occurred.*' (TT66 at 10). As the argument develops the Tribunal is told:

> *'This is very much a circumstantial evidence case. ... But this is a mix of what facts you can get from the expert evidence, what limitations there are upon those facts as a result of the opposing expert evidence, what likelihoods and conclusions you can draw from the overall circumstances of the case and what conclusions the Stewards can draw from their knowledge of the way trainers operate, the way horses are raced, the significance to the owners of a young horse of having the horse successfully run its trial before it goes out for the spell; the inconvenience, indeed pain in the backside, that shin soreness is to the trainers of two year olds – all of this unique to the Stewards. They start this way,*

Mr Chairman and members; they start to look at the circumstantial factual matrix and this is what they find when they have to come to weigh these questions, not just to the expert evidence – (inaudible) the other expert evidence – but of their knowledge of racing and of the facts of this matter, and they get this: the horse fractured its offside front leg in circumstances where it was under no particular stress other than the fact that it was running. It's not as if it had to duck sideways quickly or pull up quickly or check or anything of the sort. All of the jockeys and/or apprentices who rode in the trial were called to give their observations, as wast he (sic) steward. And there was a film. Yes, horses can break legs; but Mr King, the reluctant Mr King who seems to have vacillated from Jockey King, from not wanting to say anything to wanting to say a lot, to wanting to then tone that down when he gets there, to wanting to add to his statement of Mr O'Reilly said this, This horse was in the second trial – I rode one for the appellant in the first trial. Went 100 metres, it was obviously shin sore and I sat on it and ran to the line and I got ticked off afterwards, in effect, by the trainer for not pushing it out. I don't think he was very pleased with me. And the evidence is it did turn out to be shin sore, although it had presented no symptoms of that except to Jockey King 100 metres into the trial and regrettably, Jockey Oliver is not available to tell us anything about how his felt when it got started. But he did have something to say about it. But before we get to that, Jockey King then says I was there and we had two in the next trial, Jason Oliver was on one, I was on another – I'll come to the exact words – but as he legged Jason up for him to go out he said something like 'make sure you ride this one right out'. That's when it went out onto the track. And then while they were together on the horses, Jason Oliver-King, I think, you can go to the evidence yourself, said something like that first one I rode was shin sore, to which Jason Oliver said yes, I reckon this one might be too. The Stewards know – you don't need evidence of it – that shin soreness is a grave problem in two year olds, it's the biggest pain in the neck for owners – you pay out for three months training. The horse gets a week off trials and the trainer rings up and he says 'this one's gone shinny too, ah well, out in the paddock, see if we can get it to the trials next time after another ten or twelve weeks' work'. So it is a problem. It put trainers under a bit of pressure. The Stewards, it would seem, are simply expected to accept the say-so of the appellant that he wouldn't do anything wrong. Life is not that simple, Mr Chairman and members. And it meant a lot to Mr Tobin – he said 'but I understand that it was vet-checked and it was alright before the trial'. See, he consistently ventures into areas that are not really what he was being asked. Even Mr Percy had to chop him off. In many other cases he had gone on forever, he's told you why the rules are no good and everything else. Yes, it was – Dr Medd sat in her vehicle down at the end and watched every horse that went in and out and believes that at the trots the best time to see if their lame and saw no sign of lameness in this horse, and she does remember looking at it because she thought the name was rather quaint. It's like something out of Dr Who, I suppose – SAVAGE CABBAGE. And that's what people meant when they said it was vet-checked. Dr Medd explained that afterwards, she's had considerable clinical experience with horses. If they're shin sore on both legs then they're not going to act lame on one or the other are they, because they are both hurting. And the only way to find out whether a horse is shin sore is by palpation, that is, you touch the sore part and the poor horse if he could talk, says 'oh shh-' and draws the leg away or he reacts. That's if he's still feeling it. So that's the starting point. This is the circumstantial evidence case, Mr Chairman, which

doesn't fall to be determined just upon the competition between the medical evidence.' (TT66 at 19 – TT68 at 30)

The argument is progressed further:

'So if you put that all together, the Stewards were entitled to conclude that at some time quite a bit closer than two days there had been a further administration. And they did.' (TT71 at 21)

...

'Not bute that causes you to break your leg, the question for the Stewards when they say there was a connection, was there a predisposition to that and in all the circumstances, circumstantially, do we find that there is a connection. I repeat; what they had was the King comments, including the comment from Oliver, the horse has had another dose, the product is highly suitable for helping with the management of shin soreness. With shin soreness, you've got a weakness in a leg which is less able to stand up to the stresses and the potential for fracture. You've got an otherwise unexplained fracture. And you put two and two together and get a fairly obvious four.

Now, may I rephrase that in terms of what this Tribunal has to look at. Can it be demonstrated that the Stewards, using all the evidence, not just the medical evidence, were not entitled to come to that conclusion. They're the ones to judge the facts and the proper inferences available from them. They then go to the seriousness of it in the passage that is criticised about recklessness or negligence. I'll come to that in a moment. No, Mr Chairman and members of the Tribunal, it's idle to say that the consequences of a particular set of conduct are not relevant to the seriousness of it.' (TT 77 at 4)

The argument continues at TT 78 onwards until Mr Davies' conclusion starting at TT 94 at 29 in these terms:

'There is nothing, in our submission, in the evidence of Professor Tobin and Dr Hilbert which mitigates against the Stewards in a humble way finding that this horse was given an administration closer to the trial, that the only possible reason for giving it is shin soreness, that that had the effect of allowing it to go to trials, that we now know from the examination afterwards that its legs were in such a condition that they were predisposed to a catastrophic effect, more predisposed than if it were not in that condition. It's the clear evidence of Dr O'Hara and in all the circumstances we make the finding that that is what happened. All this is not in relation to guilt, just penalty. If that's so, then you have a very serious case of taking the risk of sending this horse out in this condition treated. And the Stewards were entitled to find that the risk that people were put at was very, very substantial and the consequences horrific. It's no good going back to what the trainer said – that is out the door so far as this appeal is concerned because the Stewards were entitled to make the starting finding that he wasn't telling the truth about when it had it or why. That finding is not something that could ever be demonstrated to be not open to them and it all flows from there, with respect, Mr Chairman. The penalty of a fine in this case, slavishly saying the other ones were fines, would be, in my humble submission, a joke.'

Having analysed the most relevant evidence and the arguments it is now appropriate to draw some conclusions. I am more than satisfied from the evidence presented before the Stewards, as supplemented by the evidence before the Tribunal, that SAVAGE CABBAGE clearly was suffering from dorsal metacarpal disease or shin soreness at the time it ran its last trial. There was nothing of substance presented to the Stewards which should have led them to any contrary conclusion. I am satisfied from the medical evidence that the substance found in the horse may have had the potential, until the fall, to assist the horse to run its last trial despite its leg problems, at least to the extent the substance might have masked the pain.

I readily acknowledge this is not a case that simply involves conflicting medical evidence. I am persuaded in a matter like this the Stewards are entitled to draw conclusions based on an assimilation of all of the evidence coupled with their own undoubted knowledge and experience of racing. This process includes taking into account, so far as it is reasonably appropriate, relevant circumstantial evidence.

However, *'a person whose livelihood is being deprived by a decision of the Stewards in relation to a matter of this nature is entitled to know what the Stewards have addressed their minds to and the basis of fact on which the ultimate conclusion has been reached'.* (PJ Harvey Appeal 353 at 5). How then have the Stewards addressed their minds to the crucial medical evidence? On what basis of fact have the Stewards reached their conclusion as to the linkage between the substance found in the horse and the accident?

The only statement by the Stewards in their reasons relevant to these questions is as follows:

> *'In relation to the evidence of Dr Vine, Mr Stenhouse, Professor Tobin, Dr Hilbert, Dr Medd and Dr O'Hara, on consideration and in summation, the Stewards prefer the evidence of Dr Medd, Dr O'Hara and analyst Mr Stenhouse and Dr Vine to that of Professor Tobin and Dr Hilbert. In the opinion of the Stewards on the balance of probabilities there is a link or a relation between the shin soreness, the presence of Phenylbutazone and the catastrophic fracture of the off fore leg of SAVAGE CABBAGE. Under these circumstances, there was a clear and evident risk to the horse and rider'. (ST285 at 6)*

Whilst I agree with the argument presented by senior counsel for the Stewards that the evidence of Professor Tobin was not directly relevant, as it was addressing the circumstances in relation to fit horses, that still ignores the fact the Stewards have not given reasons why they rejected Dr Hilbert's evidence and preferred Dr Medd's. Indeed, the Stewards' reasons are entirely silent as to the substance of Dr Hilbert's evidence. This approach can be contrasted with the treatment by the Stewards of the medical evidence regarding the condition of SAVAGE CABBAGE's legs. Quite some detailed description of that aspect is to be found in the reasons. The answers to the questions posed a little earlier regarding the basis for the decision making on this aspect of the case cannot be found.

Consequently I am of the view the Stewards have erred. However, I do not believe the Tribunal itself is in a position to determine ground of appeal 4.

A similar problem emerges regarding the next ground. The appellant's argument in support of ground 5 appears to largely rely on the proposition that SAVAGE CABBAGE broke its leg as a consequence of the substance. As Mr Davies QC argues the horse fell because of leg weakness. Whilst the Stewards were obliged to evaluate the evidence on both sides and then to reach a reasonable conclusion on it they have not given any indication in their reasons what was the basis for their decision. The simple statement that there is a preference as to conflicting evidence gives no basis for concluding a causal connection has been established on the evidence between the drug in the horse and the frightful accident and consequent damage to the horse. No attempt has been made in the Stewards' reasons to analyse the evidence in question or to evaluate it in any way. The decision is devoid of any clues as to the process of reasoning to enable its appropriateness to be properly scrutinised. In my opinion, the Tribunal in these circumstances again cannot make a determination.

Appeal Ground 6 - The administration evidence.

The argument put for Mr Wolfe in relation to this ground in a nutshell is:

- The Stewards' finding that there had been an administration closer to the time of the horse's breakdown was against the weight of the evidence.
- The only evidence of the time of administration was from Maureen Keay and the appellant.
- In relying on the results of the analysis of the urine samples to establish the time of administration, the Stewards were in error.
- The Stewards could not have made any estimate of time based on the tests. Any finding as to the timing of the administration was at best speculative (particularly as the test was conducted in respect of a urine sample).

I am satisfied that it has not been demonstrated that the Stewards, using all of the evidence before them, could not properly have come to the conclusion which they did in regard to the administration of the prohibited substance. The propositions previously referred to by Mr Davies QC are compelling in my opinion. I would dismiss this ground.

Appeal Grounds 7 and 8 – Appropriate penalty

It is submitted for Mr Wolfe that cases of horses presenting with prohibited substances in trials are uncommon. Further, it is argued the Stewards (ST286 at 4) erred in stating that there was no known precedent comparable to the present case. Firstly, the Stewards in *Strempel* (RPAT No. 549 heard 28 November 2001) dealt with a somewhat similar case where fines of $1,000 and $2,500 were imposed following findings of administration of Methylprednisolone and Ketoprofen. That case was said to be more serious than the present case because:

- the horse REDIJEV was an old horse with documented leg problems.
- REDIJEV had administered to it two different types of prohibited substances.
- Mrs Strempel had pleaded not guilty.

Secondly, on 18 February 2000, the Stewards of the Western Australian Turf Club ordered that Mrs B Mooney, trainer of the horse APRO be fined $3,500 for the administration of the drug Dexamethasone. This was also asserted to be more serious than the present case in that:

- Mrs Mooney had a similar previous conviction.
- Mrs Mooney admitted that she had administered the drug.
- the horse broke a leg and had to be euthanased.

Finally, it is argued for Mr Wolfe in a case where it is not established that there was a causal link between the administration of a substance and the breakdown of a horse, it would be inappropriate to impose anything other than a fine.

In arriving at the penalty the Stewards in the first instance properly identified the mitigating circumstances. They identified 6 separate mitigating factors. This aspect was weighed up against all of the other relevant circumstances. The Stewards found a connection between the horse's physical condition (shin soreness), the presence of the prohibited substance and the injuries sustained from the fall. *'Under these circumstances there was a clear and evident risk to the horse and rider'* (ST 286 at 1). I agree with the Stewards that those findings together with the finding of *'...another administration has taken place closer to the trial'* (ST 284 at 1) in all the other relevant circumstances of this case clearly would constitute *'...a serious breach of the rules')* (ST 283 at 4). If all of these factors existed, or in other words all of these findings can be sustained, then I would agree the Stewards were clearly entitled to impose a severe penalty such as the lengthy disqualification which they did impose. As I stated in my reasons in the *Strempel* (supra) matter:

'This appeal involves the alleged administration of 2 prohibited substances to a horse prior to it trialing at Lark Hill. Rule 177A of the Rules of Racing makes it an offence for any prohibited substance to be present in horses which are being trialed or raced at recognised training tracks or race-courses. Lark Hill is a recognised training track. For the betting public to have confidence in the propriety of the racing industry this rule must be strictly enforced. When a drug is detected and proven to be present contrary to the prohibition in the rule the offender must be severely punished both for the misdemeanour itself and as a message to others in the industry. Through the sentencing process those in authority must demonstrate they are properly enforcing the rules. The Stewards are authorised to do this by regulating those licensed persons who fail to adhere to the terms of their licences. Once licensed, participants potentially may derive a livelihood from the sport, subject to continuing to observe the contractual terms of their licences.

Without a licence to train a trainer cannot pursue an involvement in the racing industry. Because of the serious consequences of taking away a trainer's licence both from an industry and an individual perspective Stewards cannot lightly convict. Upon convicting, Stewards have a discretion to deprive a trainer of an income. Other persons are also usually affected by the termination of a trainer's licence including owners and employees of trainers. Those other persons all depend on the integrity of the trainer with whom they are associated as well as continuity of that trainer's licence to enable the training establishment to continue operating. Equally, to be convicted and fined for a drug offence is a serious stain on a trainer's professional record. The adverse repercussions of such a conviction to the standing of a stable and on owners and the betting public at large can be significant.

Trainers themselves, as well as their employees and those owners who entrust their horses to those trainers, are entitled to expect those who make the decisions to convict for drug offences to have reached their conclusions only after first exercising their minds properly following fair hearings. An important element of any such hearing is the ability of the adjudicator to rely on the scientific evidence. There should be no room for substantial inaccuracy in scientific measurement or doubt about the reliability of the analysis process by the laboratories which carry out the testing.'

Whilst there is an admitted administration by Mr Wolfe that administration was clearly far too long prior to the fatal trial to have caused the high reading following that trial. I have already indicated I am satisfied it was open to the Stewards to find that another administration took place closer to the trial. The shin soreness was clearly proved. The Stewards were entitled to and did take properly into account Jockey King's evidence and the clear risk to both horse and rider. There is no dispute that the condition of the track did not contribute. Mr Wolfe acknowledged it was not appropriate to trial a horse with a prohibited substance in its system. The consequences of this type of conduct cannot be overlooked. According to Mr Davies QC the finding of gross negligence only means that it was a serious risk to send out a horse which was suffering from '*bad*' legs with the treatment in its system.

Leaving aside what I have concluded in relation to grounds 2, 4 & 5 regarding the overlapping issues dealing with causation, I am satisfied it has not been demonstrated that the Stewards were otherwise in error in their approach to penalty or in the ultimate outcome by imposing a disqualification. The *Strempel* case was quite different as there was no causation issue involved in that case. As the quotation above reveals *Strempel* turned on the failure to comply with the recognised procedures for collection of the drug samples. I cannot usefully comment on the *Mooney* case as it was not argued before the Tribunal and only limited information regarding the circumstances has been presented.

Conclusion

In this matter the trainer admitted he brought a race horse to trial which was found to have had a prohibited substance in it. His argument at the inquiry that it was not an offence under the Rules of Racing was rejected by the Stewards. For the reasons I have stated I would endorse the approach of the Stewards and confirm Mr Wolfe's conviction for breach of Australian Rule of Racing 177A. That Rule entitles the Stewards to impose a punishment. The complicated issue in the appeal is to determine the appropriate punishment.

During the appeal proceedings a substantial amount of fresh evidence was presented to the Tribunal in relation to various aspects of the penalty. For Mr Wolfe it is argued that the fresh evidence which was presented to the Tribunal reveals that:

- *'there were … problems with*

  - the continuity of the limbs;
  - the identity of the limbs,
  - the condition and integrity of the limbs post death/pre-examination' (TT122 at 10)

- there was something unfair in the way the Stewards conducted the hearing, and

- there was miscarriage which the Tribunal is asked to redress.

Contrary to that argument, I am in fact satisfied that the further evidence which the Tribunal heard actually confirms the appropriateness of some aspects of the approach adopted by the Stewards in their handling of this matter. For the reasons earlier explained I would dismiss part of the appeal on penalty as to grounds 2A, 3 and 6.

However there still remains the errors which I have identified both in respect of the medical evidence relevant to the linkage factor and the absence of reasons in addressing the causation issue. Because of those errors and for the reasons given earlier specifically in relation to grounds 2, 4 and 5, I would uphold the appeal as to penalty.

This is not the type of matter where it is simply appropriate or practical on appeal to quash the penalty imposed by the Stewards and for the Tribunal to substitute its own determination on penalty. Rather, I consider the proper course is to quash the penalty and for the matter to go back to the Stewards to redetermine the appropriate penalty to be imposed after taking into account these reasons and such further relevant evidence, if any, as they think fit.

DAN MOSSENSON, CHAIRPERSON