QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Queensland All Codes Racing Industry Board v Thomas* [2016] QCATA 82
PARTIES:	Queensland All Codes Racing Industry Board (Applicant/Appellant) V John Thomas (Respondent)
APPLICATION NUMBER:	APL344-15
MATTER TYPE:	Appeals
HEARING DATE:	19 February 2016
HEARD AT:	Brisbane
DECISION OF:	**Justice Carmody**
DELIVERED ON:	17 June 2016
DELIVERED AT:	Brisbane
ORDERS MADE:	**THE APPEAL TRIBUNAL ORDERS THAT:** **1. The appeal is dismissed.**
CATCHWORDS:	APPEAL – LEAVE TO APPEAL – GAMING AND LIQUOR – RACING – RACING COMMISSIONS, BOARDS AND TRIBUNALS – FUNCTIONS AND POWERS GENERALLY – Where the respondent was a licensed racehorse trainer – where a prohibited substance was found in the system of a horse he was in charge of – where stewards "convicted" or penalised the respondent – where the Racing Disciplinary Board (RDB) overturned the conviction and penalty – contractual or consensual nature of the Australian Rules of Racing – the scope of strict liability in the context of sporting rules – meaning of the words "may be penalised" – whether the respondent was automatically liable to sanction for a presentation offence irrespective of the circumstances – whether the RDB misconstrued the rule in question or made factual findings based on no or insufficient evidence

Australian Rules of Racing articles 2, 4, 7, 8, 177, 17, 196

Criminal Code 1899 (Qld) ss 36, 289

Criminal Code Act 1995 (Cth) ss 9.2, 12.5

Racing Act 2002 (Qld) ss 9AF, 149ZE(3), 149ZX(1)(b), 155(2), (5)

Penalties and Sentences Act 1999 (Qld) s 4

Australian Iron and Steel Pty Ltd v Environment Protection Authority (No. 2) (1992) 29 NSWLR 497

Bita v Racing Queensland [2014] QCAT 460

Bonsor v Musician's Union [1945] 1 Ch 479

Caddigan v Grigg [1958] NZLR 708

R v City of Sault Ste Marie (1978) 85 DLR (3d) 161

R v Disciplinary Committee of the Jockey Club; ex parte Aga Khan [1993] 1 WLR 909

Finance Facilities Pty Ltd v Federal Commissioner of Taxation (1971) 127 CLR 106

Gasser v Stinson [1996] EWCA Civ (20 December 1996)

Harmer v Grace [1980] Qd R 395

Harper v Racing Penalties Appeal Tribunal of Western Australia (1995) 12 WAR 337

Hafza v Director General of Social Security (1985) 6 FCR 444

He Kaw Teh v The Queen (1985) 157 CLR 523

House v The King (1936) 55 CLR 499

Leach v R (2007) 230 CLR 1

Lee v Showmen's Guild of Great Britain [1952] 2 QB 329

Lewis v Jones 4 B.&C. 506

Lim Chin Aik v R [1963] 1 All ER 223

MacQueen v Frackleton (1909) 8 CLR 673

MacDougall v Paterson (1880) 5 App Cas 214

Maynard v Racing Penalties Appeal Tribunal of Western Australia (1994) 11 WAR 1

Meyers v Casey (1913) 17 CLR 90

Military Rehabilitation and Compensation Commission v May [2016] HCA 19

Peacock v The King (1911) 13 CLR 619

Proudman v Dayman [1941] 67 CLR 536

Rogerson v Racing New South Wales (Sydney, Monday 25 June, 2007)

Traverner's Case (1681) T Raym 446

Tucker v Auckland Racing Club [1956] NZLR 1

R v Wadley; ex parte Burton [1976] Qd R 286

Wallace v Queensland Racing [2007] QDC 168

Webb v Racing Queensland [2011] QCAT 44

Wilander v Tobin [1996] EWCA Civ (20 December 1996)

APPEARANCES and REPRESENTATION:

APPLICANT/APPELLANT	A C Freeman, Counsel for applicant.
RESPONDENT	D P Strong, Counsel for respondent.

REASONS FOR DECISION

[1] Racing Queensland (RQ)[1] appeals as of right by way of rehearing against a decision of the Racing Disciplinary Board (RDB) on a question of law.[2]

[2] The key question to be decided is whether the respondent is legally liable to be penalised for an anti-doping violation under the Australian Rules of Racing (AR's).

The context

[3] RQ is the former control body for all codes of racing within the State. At the time in question it administered the sport for the benefit of the industry as a whole.[3] This relevantly involved making and enforcing the AR's, conducting inquiries into racing-related matters and imposing or annulling any penalty for rule contraventions.[4]

[4] It goes without saying that RQ's statutory rule-making authority and regulatory autonomy should not to be arbitrarily interfered with by an external body on the basis of its own subjective beliefs about their content, but that does not mean it can unilaterally make and enforce any rules it

---

1 Renamed and reconstituted as the Queensland Racing and Integrity Board under the *Racing Integrity Act* 2016 (Qld).

2 *Racing Act* 2002 (Qld) ("*Racing Act*") ss 155(2), (5).

3 Ibid s 9AF.

4 AR.7(iii)(b)-(d),(f),(i).

likes. There are significant fairness, reasonableness and policy constraints.

[5] The respondent is a licensed trainer who "agreed" to be bound by the AR's as a condition of his participation in racing[5] even though he is obviously not in a position to reject or vary any of them if he wanted RQ to issue him with a licence.[6]

[6] RQ has disciplinary jurisdiction and powers over him authorising it to "sit in judgment" [7] on his conduct, derived from his submission submit to the AR's.[8]

[7] RQ's investigative and penalising functions were discharged by stewards.[9] Subject to appeal rights, a penalty imposed by stewards on behalf of RQ for an AR[10] contravention is final.[11] The details of any disciplinary action taken against a participant by RQ may be publicised in the media.[12]

[8] Publicity is a penalty in its own right and plays an important role in ensuring other penalties are effective but, of course, the most powerful potential penalty for a rule violation in regulated regimes like the racing industry are disqualification of a horse and revocation or suspension of license.

[9] After winning a race at the Ipswich Turf Club in 2014, a horse the respondent was in charge of returned a positive test for the prohibited muscle relaxant, hyoscine. AR.178 provides:

> "… when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time **may be penalised.**" (emphasis added)

[10] Despite an "exhaustive examination of all possibilities", neither the quantity nor likely source of the hyoscine could be identified.

[11] The respondent conceded presenting a contaminated horse for racing but complained that the stewards' investigations were carried out at:

> "such a late point in time after the event that it must lead one to a conclusion that there was a distinct possibility that the substance could have been ingested … through the feed that had been purchased from a (reputable) feed merchant or through the grazing on the grasses and parts of the plant crab-apple that were known to constitute traces of

---

5 AR.2.
6 cf *Caddigan v Grigg* [1958] NZLR 708.
7 *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329.
8 *Harper v Racing Penalties Appeal Tribunal of Western Australia* (1995) 12 WAR 337.
9 AR.8(e),(g),(j).
10 Under AR.196, standard penalties for a rule violation include disqualification, suspension, reprimand or fine.
11 AR.4.
12 AR.8(x).

> hyoscine in differing degrees and at differing times of maturity … and had been removed from the parklands area on which (the horse) grazed on a regular basis…".

[12] The stewards "convicted" and fined the respondent $2,000 for a so-called presentation "offence" against AR.178 based on the apparent understanding that liability for breaching AR.178 arises on proof of the physical act of presentation (a positive analytical result) irrespective of how, why or how much of the drug was in the horse's system, or to what effect, intended or otherwise.

[13] Dissatisfied with such a narrow interpretation of the rule, the respondent appealed to the RDB[13] contending that his obligation to observe the AR's does not extend to being held liable for breaching them on the basis of a misinterpretation or misapplication.

[14] The RDB appeal was heard by way of rehearing on the original, and any additional, materials allowed.[14] This means the RDB's role is to conduct a full review and, regardless of proven error,[15] make any decision that the stewards could have in the first place.

[15] The respondent argued that he was not liable for a sanctionable presentation because there was evidence capable of supporting the conclusion he had "personally done nothing wrong".

[16] The RDB found that:

(a) "some purely unknown element had been the contributing factor to the existence and the finding of the substance in question";

(b) "… all the evidence provided by the (the respondent on appeal) would indicate that at the relevant time there more likely than not was hyoscine in either the feed utilised in the stable or in the grasses and crab-apple weeds upon which the horse grazed … (and);

(c) "… the presentation of that substance was more likely than not as a result of that feed or grass material and not by anything done by the trainer in question".

and set aside both the conviction and penalty on the basis that:

(i) the phrase *may be penalised* in AR.178 "allows the stewards the opportunity of not imposing a penalty and, at the same time, of not recording a conviction", and

---

13 Since abolished and replaced by a system of internal and external review.
14 *Racing Act* s 149ZE(3).
15 Ibid s 149ZX(1)(b).

(ii) the penalisation power was exercisable only where "the stewards can be satisfied that there is no other possible (presumably innocent) explanation for the finding of the substance".

[17] This unexpected outcome is criticised by RQ as legally wrong because it (a) misconstrued AR.178, (b) reversed the onus of proof and (c) reached unreasonable conclusions on no or insufficient evidence. On this basis, it argues for the conviction to be reinstated and the discretion as to penalty be re-exercised under s 146 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (the "QCAT Act").

The rival submissions

[18] As a matter of both logic and law, the penalisation power conferred in AR.178 is contingent on an evidence-based finding of liability which, in turn, depends on (a) the provable coexistence of both the physical and any mental components of defined misconduct and (b) the non-existence of any available defences.

[19] According to RQ, AR.178 is widely accepted in the industry to be a strict liability offence, and points to a concession to that effect made in *Bita v Racing Queensland*,[16] and also cites *Webb v Racing Queensland*,[17] in support of that position.

[20] What it means by "an offence of strict liability" is more fully explained at [21] of RQ's written submissions:

> "… **if there is evidence of a horse having been presented at a racecourse for racing with a prohibited substance in its system, the person in charge of the horse has committed a breach of the rules and is therefore liable to be penalised**. There is no onus on the stewards to establish any intent or actual administration of the prohibited substance by the person. It simply requires proof of such a substance in the horse's system at the time of presentation." (emphasis added)

[21] And at [24]:

> "Hence the correct approach in interpreting Rule 178 is to firstly consider whether there is sufficient evidence of a horse being presented for racing with a prohibited substance in its system. If there is such evidence, as there was in the current matter, then a breach of the rule has been made out. Then it is a matter of considering whether any mitigating circumstances are present which might call for the trainer to be treated more leniently in terms of penalty than would ordinarily be the case."

[22] In other words, a positive result constitutes, not just evidences, a contravention; and the act a person in charge of a racehorse is liable for

---

16 [2014] QCAT 460 [4].
17 [2011] QCAT 44.

under AR.178 is voluntarily allowing (or not preventing) the detection of a prohibited substance in the system of a racehorse before or after racing.

[23] On this basis, it is immaterial whether the presentation was desired, intended, accidental, foreseen or even foreseeable. Effect, timing, quantity, source and purpose are all irrelevant to liability even if the respondent can establish that he had not acted intentionally or negligently. The only role fault or blameworthiness plays is as an aggravating or mitigating penalisation factor.

[24] The thrust of RQ's argument seems to be that, because AR.178 is aimed at stopping cheating and protecting animal welfare, it imposes an onerous and active – not merely passive – duty of care on trainers and other racehorse handlers to take effective steps to prevent the ingestion or administration of prohibited substances.[18] To ensure that duty is met, proof of presentation (a failed drug test) breaches AR.178 and enlivens RQ's power, coupled with an imperative command, to penalise the culprit.

[25] This concept of strictness goes much further than establishing a presumption of guilt. It tends to conflate the very different notions of liability and penalty by, in effect, making a horse handler *absolutely* (not merely *strictly*) liable to a mandatory sanction for a presentation offence despite a reasonable excuse or extenuating circumstances.

[26] The respondent argues against such a restrictive approach on the ground that it is likely to produce unjust results, especially where neither proven culpability nor actual negligence is involved. He proposes a much more nuanced test under which the degree of mental fault is the key determinant of the incidence of both liability and penalty.

The liability principles

[27] Although we are all morally answerable to each other for the natural consequences of what we do, a person is not normally held personally liable to any formal penalty or state-sanctioned punishment for unwilled acts (or omissions) or unintended events; and cannot be held accountable to the rest of the community for prohibited conduct (*actus reus*) unless it is (a) contrary to a regular law or rule (*nulla poena sine lege*) and (b) morally guilty or culpable (*mens rea*).

[28] Thus, some degree of fault is invariably presumed to be a pre-condition of any sort of penal liability unless the contrary is clearly stated – as is often done in public health and welfare based regulations where liability lies somewhere between full fault (i.e. the default position) and no fault (or absolute).

[29] There is, of course, a middle path under which liability and any automatic consequences for a positive post-race analytical result (e.g. loss of

---

[18] cf the comments of Bingham MR in *R v Disciplinary Committee of the Jockey Club; ex parte Aga Khan* [1993] 1 WLR 909, 914.

prizemoney and disqualification of the horse)[19] is automatic with the question of personal liability to a penalty of the person in charge of the horse (such as a fine or suspension) depending on the assessed degree of fault.

[30] This approach reflects the prevailing social consensus that punishing a person based solely on what he or she did and ignoring what was intended, known or believed is a primitive response inconsistent with basic norms and values governing the construction of punitive statutes.

[31] But "guilt" is not always measured in exactly the same way in all cases and there is a danger in uncritically transposing principles derived from one area of the law to another.[20]

[32] Conduct meriting social denunciation and the odium of moral turpitude is the in another province of the criminal law.[21] Culpability is the key determinant. The fault element for liability to criminal punishment for an offence is usually intention or knowledge. Where an intention to cause a specific result is required, knowledge, belief or foresight of the likelihood (recklessness) of the result being produced by particular conduct is not sufficient proof.

[33] Negligence (falling short of the expected standard of care involving varying degrees of unacceptable risk-taking) does not generally give rise to criminality[22] unless clearly stipulated or necessarily implied.[23]

[34] Since the enactment of Queensland's *Criminal Code* in 1899, the principles governing non-negligent criminal responsibility apply equally to all offences against statute-based laws within the State.[24] The effect is that defences such as accident, insanity and intoxication can relieve a person from liability because they incapacitate free will and displace volition or mental control and, therefore, moral fault; while duress, mistake and self-defence either fully or partially justify illegal conduct or excuse the person responsible (or liable) from any legal consequences.

[35] As the High Court explained in *He Kaw The v The Queen* (a drug importation case), under this regime, a person will not be guilty of a statutory or regulatory **offence** if the prohibited act (e.g. selling cars or driving without a licence) was committed "… under an honest and reasonable mistake as to the existence of facts which, if true, would have made his act innocent."[25]

---

19 cf AR.177.

20 Lauri Tarasti, 'The Athlete's Liability for Doping' (2005) 43, *Bulletin of International Consul of Sport Science and Physical Education*, 3.

21 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, No. 95 (2002) 25.

22 *Proudman v Dayman* [1941] 67 CLR 536, 538-541.

23 See for example *Criminal Code* 1899 (Qld) s 289.

24 Ibid s 36.

25 (1985) 157 CLR 523.

[36] The word "offence" is traditionally reserved for criminal breaches of the law dealt with by the courts. Contravention are more commonly used to classify civil wrongdoing or regulatory noncompliance. Because breaching AR.178 is not an "offence" against the statue law of Queensland[26] the provisions of the *Criminal Code* relating to criminal responsibility (including recognised criminal excuses) do not apply.

[37] In this respect, AR.178 can be compared with the Australian Harness Racing Rules. Rule 190(1) requires a horse to be presented for a race free of prohibited substances. Sub-rule (2) provides that if a horse is presented for race otherwise than in accordance with sub-rule (1), the trainer is "guilty of an offence".

[38] Despite their legislative source and designated status as a statutory instrument,[27] the AR's create a voluntary association of individuals bound together by their terms in much the same way as a church congregation[28] intended to have "coercive effect (at least in theory) consensually or contractually, not by legislative force"[29] but in practice are "more like by-laws"[30] than a contract between mutually consenting equals.

[39] Fundamentally, the AR's are a mechanism to regulate the racing industry via their capacity to enforce compliance with industry aims by insisting on higher standards of care.

[40] They are directed at "the smooth running of social and economic structures" in regulated industries or human activities rather than flexing state muscle for public law and order objectives.[31]

[41] Although the Australian concept of mistake does not traditionally include the "due diligence" doctrine,[32] strong grounds would be needed for implying an intention into AR.178 to expose reproachless people at risk of economic loss or reputational damage for not meeting industry standards and club expectations despite good stable security and best husbandry practices. Thus, a respondent who is able to show that all reasonable preventative steps were taken to avoid the offending conduct,[33] arguably, should not be penalised any more than a non-negligent one should be.

[42] As Lord Evershed suggested in *Lim Chin Aik v R*,[34] where the defendant could not avoid the possibility of committing the offence taking all the care in the world, "there is no reason in penalising him and it cannot be inferred

---

26 *Wallace v Queensland Racing* [2007] QDC 168.
27 *Racing Act* s 79.
28 *MacQueen v Frackleton* (1909) 8 CLR 673.
29 *Harper v Racing Penalties Appeal Tribunal of Western Australia* (1995) 12 WAR 337.
30 *Bonsor v Musician's Union* [1945] 1 Ch 479 (Denning LJ).
31 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, No. 95 (2002) 25 [2.30].
32 cf *Criminal Code Act* 1995 (Cth) ss 9.2 and 12.5.
33 cf *Australian Iron and Steel Pty Ltd v Environment Protection Authority (No. 2)* (1992) 29 NSWLR 497, 509-10; *R v City of Sault Ste Marie* (1978) 85 DLR (3d) 161, 169-174.
34 [1963] 1 All ER 223.

that the legislature imposed strict liability merely in order to find a luckless victim".

[43] Though closely allied with criminal punishment regulatory penalties are different in nature and function. Their main concern is not to repudiate innate immorality or denounce and discourage socially repugnant behaviour violating the collective interest of the community but to use the educative, protective, preventative and deterrent value of the penalty for control purposes.

[44] Moreover, because non-compliance with rules can be due to carelessness as much as design it is common to see fault in the regulatory field displaced or varied as a criterion of liability, the onus of proof lightened (or even reversed) and the standard of proof lowered with a much heavier reliance placed on assumed or implied facts and circumstances.

Strictness in sport

[45] In international sports, human anti-doping rules tend to favour absolute (no fault) rather than strict (minimum fault) liability with the main focus on the degree of care and caution taken by the athlete to avoid the risk of a positive test result.

[46] In *G v FEI*,[35] for instance, a rider who left her horse in a box without cleaning out the previous occupier's litter or fodder was found to be negligent and therefore guilty of a doping offence under the International Equestrian Federation (FEI) Rules when the horse's sample tested positive for a banned substance.

[47] The World Anti-Doping Code (WADC 2.1.1), adopted by the International Swimming Federation (FINA)[36] and International Amateur Athletics Foundation (IAAF)[37] as well as most other sporting control bodies, is just as uncompromising in its stance:

> Article 2.1.1 "It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, (f)ault, negligence or knowing (u)se on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under DC 2.1.
>
> [Comment to Article 2.1.1: An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's fault is only taken into consideration in determining the consequences of this anti-doping rule violation under Article 10.]"[38]

---

35 (Award dated 15 January 1992) (1998) 91/53 *Digest of CAS Awards 1986-1998* 79, 89.
36 FINA, *Doping Control Rules*, DC 2.1.1.
37 International Amateur Athletics Federation, *Competition Rules*, Article 32.2(a)(i).
38 *World Anti-Doping Code*, Article 2.1.1.

[48] The Court of Arbitration for Sport (CAS) applied WADC 2.1.1 on the basis that requiring the governing body to prove fault (and thereby allowing an athlete to avoid liability based on the lack of it) created uncertainty and was unfair to other competitors, forensically difficult and certainly too expensive.

[49] In *N v FINA*,[39] a CAS panel did not even draw the line at the wrongful acts of third parties; concluding that FINA's anti-doping rule (MED 4.3, as it then was) prevented a "competitor from establishing his innocence by showing conclusively that the presence of a prohibited substance in his bodily fluid was the product of an ingestion which was neither intentional nor negligent, where his drink is spiked".

[50] The presence of a prohibited substance was enough in *Raducan v IOC*[40] under the Olympic Movement Anti-Doping Code. A residual amount of a prohibited substance in the athlete's sample after taking Nurofen for a headache was all that was needed even though it would not have resulted in a competitive advantage.

[51] The panel in *P v FINA*[41] rejected exculpatory evidence tendered by the athletes that their food had been tampered with (including a 'confession' by the culprit) as irrelevant.

[52] A similar approach has also been taken to anti-doping rules in England. In *Wilander v Tobin*,[42] two professional tennis players alleged in the English Court of Appeal that a disciplinary rule was an unreasonable restraint of trade and therefore void.

[53] Rule 53 of the International Tennis Federation Rules imposed mandatory penalties for returning a positive drug test result. Lord Woolf rejected the argument that the rule lacked proportionality, and therefore legality, merely because guilt or innocence was determined by a regularly conducted test and analysis result.

[54] In *Gasser v Stinson*,[43] the International Amateur Athletics Federation (IAAF) imposed a two-year ban on an athlete after traces of an illicit substance on the World Anti-Doping Code (WADC) list was found in her urine sample. Scott J ruled that the IAAF's strict liability rules were reasonable even though they had an automatic effect regardless of fault or even negligence.

[55] However, there are decisions going the other way, too. In the American Arbitration Association ("AAA") case of *Foschi v United States Swimming*

---

39 CAS 98/208, award dated 22 December 1998, paras 12-17, *Digest of CAS Awards II 1998-2000* (2002, Kluwer), p 234.

40 CAS Sydney 2000/011, award dated 28 September 2000, *Digest of CAS Awards 11 1998-2000* (2002) Kluwer), p 665.

41 CAS 97/180, award dated 14 January 1999, para 9, *Digest of CAS Awards II 1998-2000* (Kluwer 2002), pp 184, 195.

42 [1996] EWCA Civ (20 December 1996).

43 [1988] EWHC (Ch) (15 June 1988) (Scott J).

Inc ("USS"),[44] for example, a member of the US swim team tested positive in 1995 for an anabolic steroid prohibited under international swimming rules. She honestly did not know how the substance entered her body but it was possible that she could have ingested it unwittingly.

[56] The USS Board initially imposed a two-year ban, notwithstanding the lack of proven fault and distinct chance of a total lack of intent, but later reversed it in favour of a short period of probation.

[57] Foschi successfully reviewed the decision. Mandating a sanction on proof of a positive test result and making known facts and circumstances relevant only as to the severity of penalty was held to be ultra vires (illegal) because it was unprincipled and disproportionate in effect.

[58] The AAA Tribunal concluded that:

> "… a fair reading of the rules at issue[45] and the testimony of the Vice president of FINA and the President of USS is that once an athlete tests positive there really is no way, absent a showing that the sample was not the swimmer's or there was a defect in the chain of custody of the sample or the laboratory tests, for the athlete to exculpate her or himself and a sanction is the inevitable result… the purpose of this interpretation of the (FINA) MED rules is, in essence, to ensure that not one guilty party go free, albeit that innocent parties are punished…"

but went on to hold that imposing any sanction on an athlete who was "innocent and without any fault" under the rules of strict liability was contrary to due process requirements and

> "…so offends our deeply rooted and historical concepts of fundamental fairness so as to be arbitrary and capricious".

[59] Fault and the benefit of the doubt were also held to be prerequisites of liability for a rule breach in *Krabbe*.[46]

Strictness in racing

[60] Because RQ has a monopoly over licensing and discipline in racing, it has (or should have) a special obligation to act in such a way so as to avoid needless damage to the reputations and employment interests of "innocent" participants.

[61] This responsibility heavily informed the decision in *Maynard v Racing Penalties Appeal Tribunal of Western Australia* (*Maynard*).[47] In that case, stewards convicted a horse trainer of administering a prohibited substance contrary to the local racing rules, even though it was for a legitimate veterinary purpose unlikely to have enhanced performance on race day. He appealed, asserting that he should have been given the benefit of the

---

44 CAS Lausanne 96/156 (Award dated 10 January 1997).
45 FINA Rule Med 4.17.3.
46 LG Munchen, 17 May 1995 Spu Rt (Zeitschnift fur Sport und Recht) 1995, 61.
47 (1994) 11 WAR 1.

mistake of fact excuse equivalent to s 24 of the Queensland *Criminal Code* (or similar).

[62] The majority of the court, Ipp and Wallword JJ, upheld the appeal reasoning from the basal principles of fairness[48] and the High Court decision in *He Kaw Teh v The Queen*[49] about the need for proven fault as a presumed precondition to (criminal) responsibility unless the contrary is stated or unmistakably intended.

[63] However, the same argument failed to find favour with the Full Bench of the court in a later trotting case, *Harper v Racing Penalties Appeal Tribunal of Western Australia* (*Harper*).[50]

[64] Anderson and Owen JJ apparently took the view that "as long as cheats don't prosper", the relevant concept of fairness did not prevent measures aimed at protecting the racing industry against corruption even if it meant that, from time to time, innocent trainers may suffer. Their Honours said:

> "…the financial well-being of the industry depends significantly on the maintenance of betting turnover, the need to maintain integrity in horse racing, and to do so manifestly, is easily seen to be imperative and of paramount importance…unless racing is to be fair and honest, people may be discouraged from betting. This might be thought to justify stringent controls in respect to the administration of drugs to horses and the enforcement of those controls by peremptory means."

[65] Likewise, in *Tucker v Auckland Racing Club* (*Tucker*),[51] a trainer was held liable for contravening a New Zealand Rule of Racing based solely on post-race tests which revealed the presence of strychnine in a specimen of his horse's urine. The relevant rule[52] provided that the person in charge of a horse found on a racecourse with any trace of a drug or stimulant in its body "may" be disqualified unless the committee was satisfied he had taken all proper precautions to prevent it.

[66] Shorland J effectively construed "may" as meaning "must" be disqualified even if the drug was administered therapeutically for bona fide medical purposes in small doses unlikely to give the horse any unfair advantage.[53]

Interpreting AR.178

[67] As I see it, the Tribunal's task is to find the more preferable construction of the available alternatives; that is, the one that best gives practical expression to the intention of the AR's ascertained from its text and, if necessary, its context, having regard to its legitimate policy purpose, subject matter and the minimum requirements of fairness – including a

---

48 Ibid, 13.
49 (1985) 157 CLR 523.
50 (1995) 12 WAR 337.
51 [1956] NZLR 1.
52 New Zealand Rule of Racing 103(8).
53 Ibid, 17.

person's entitlement to know with reasonable certainty the adverse consequences of the choices they make.[54]

[68] Where, as here, the alternative options are finely balanced, the advantage may lie with the reading which strikes a balance between RQ's legitimate industry goals such as public confidence in the integrity of racing and the competing or conflicting economic and reputational interests of participants.[55]

[69] Because trainers and other participants have no real choice but to agree to adhere to the AR's if they want to work in the industry, their terms are interpreted *contra proferentem* (strictly against the maker) and are invalid to the extent they do not accord with what is fair and reasonable or are contrary to public policy.[56]

[70] For all relevant intents and purposes ordinary English words and phrases are construed in much the same way in statutes, contracts, other instruments and formal rules. Their intent is discerned primarily from their ordinary, usually literal, meaning unless the context and policy goals indicate that a different – even opposite – one was really intended.[57]

[71] The ordinary meaning and effect of the phrase "may be penalised" in AR.178 is a question of fact.

[72] To me, the word "may" in AR.178 means no more or less than what it usually does to most people. There is no contextual or policy indication that it means "must". It therefore, has discretionary not imperative effect[58] and it expressly confers a power, not an implied duty, to penalise for a presentation offence.[59]

[73] Thus, the RDB was more or less correct in reading AR.178 as "allow(ing) the stewards the opportunity of not imposing a penalty and, at the same time, of not recording a conviction". Otherwise, AR.196 could reasonably have been expected to refer to a person "required" instead of "authorised" by the Rules "to penalise any person".

[74] There is nothing odd about stewards having the option of excluding, exempting, excepting or excusing a person in charge of a doped racehorse from liability on the grounds of a swapped sample, irregular testing procedures or flawed analysis. Likewise, in cases where the horse was presented with a prohibited substance in its system under compulsion

---

54 *Lewis v Jones*, 4 B.&C. 506, 512 cited by Isaacs J in *Meyers v Casey* (1913) 17 CLR 90.

55 cf the comments of Bingham MR in *R v Disciplinary Committee of the Jockey Club; ex parte Aga Khan* [1993] 1 WLR 909, 914.

56 cf *Traverner's Case* (1681) T Raym 446,447; 83 ER 233,234; *Tucker v Auckland Racing Club* [1956] NZLR 1, 15-16.

57 *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19 [10]; *Hafza v Director General of Social Security* (1985) 6 FCR 444.

58 *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 (Windeyer J).

59 Cf *MacDougall v Paterson* (1880) 5 App Cas 214 (Jervis CJ).

(force), duress (fear), accidentally (mistake) or as a consequence the unauthorised and perhaps unpreventable intervention of a third party (nobbling).

[75] On this construction, a person in charge of a horse found (or presenting) with a prohibited substance in its system on a racecourse is liable to be penalised for infringing AR.178 without proof of culpability (intent or knowledge) but not on a no fault basis. Negligence inferred from a positive analysis is all the fault required.

[76] It is not necessary to show conclusively how the horse came to be contaminated but reasonable (not improbable) excuses – for example, honest mistake – have to be negatived before the penalisation power is exercisable.

[77] Consequently, a respondent is not liable to a penalty if an overall assessment of the evidence rebuts the no fault inferred from a positive test and reasonably supports a finding that he or she acted under an honest and reasonable mistake that the horse being presented to race was drug-free or alternatively, had done all they could to stop the horse from testing positive for a banned substance.

[78] As McGill DCJ explained in *Wallace v Queensland Racing*:[60]

> "If there was evidence that a course of husbandry had been followed with the horse which would not have produced (an elevated total plasma carbon dioxide) reading, and that care had been taken to prevent the horse from being doped, then knowledge of that course of husbandry and that care potentially could have provided reasonable grounds for a belief that the horse was not so affected at the relevant time."

[79] Although consistent with *Maynard*, this conclusion is at odds with *Harper* and *Tucker*, as well as *Leach v R*,[61] where "may" preceding the phrase "refuse to fix a non-parole period" was held not to give a discretion but to vest a power, coupled with a mandatory duty, to exercise it if all preconditions were satisfied.

[80] This divergence of opinion is regrettable but the inevitable result of application of the same interpretive principles of interpretation and liability by reasonable minds that have ultimately reached contrary conclusions without any of them being demonstrably right or manifestly wrong.

[81] However, reading or applying sporting rules too strictly and imposing mandatory sanctions unrelated to moral blame[62] to achieve objectives such as prevention of cheating (via the loss of any unfair competitive advantage) animal protection and the reputation of racing at the expense of blameless victims seems morally questionable.

---

60 [2007] QDC 168 [40].
61 (2007) 230 CLR 1.
62 Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (Butterworths, 2008) 949.

[82] My interpretation of AR.178 is not incompatible with the removal of the due diligence defence from AR.178 which as an express proviso to liability, presumably applied to the exclusion of all other excuses. While it is arguable the change intended to make AR.178 even *stricter* by depriving a trainer charged with a presentation offence of even limited defences, it may have had the reverse effect of allowing for a wider variety of explanations excuses such as mistakes of fact.[63]

[83] That said, a due diligence type defence would not assist a respondent where the offending conduct was substantially attributable to inadequate stable management, control or supervision.

[84] Requiring proof of low-level fault for a presentation offence is not inimical to the implementation of an effective anti-doping policy either – it just makes it a fair one as well. Acting on evidence-based exculpatory circumstances in an inquiry into a person's liability to a penalty will not logically reduce compliance levels or encourage false defences.[64]

[85] This is because "a mere assertion of lack of fault by an athlete who has tested positive is unlikely to be successful and it would be open to the tribunal to draw the natural and proper inferences that arise from the evidence. At the very least the athlete would bear an evidential burden in relation to a contention of lack of fault and, in the absence of credible evidence, would run the risk of a determination of guilt". [65]

[86] There is no reason why the admission of a possibility of the proof of innocence should derail the disciplinary process when conducted with scepticism by experienced tribunals[66] especially where the respondent has a genuine ability to rebut what is (or should be) only the prima facie prescription or inference arising from a positive test result.

[87] As Lauri Tarasti says:[67]

> "Explanations of what might have happened are as a rule not credible. Only facts count. The [positive] finding is normally the only fact the sports organisations have at their disposal. The counter-evidence must also be facts, not beliefs or claims."

Applying AR. 178

[88] The respondent was liable to a penalty under AR.178 for a negligent violation of its terms unless he had a satisfactory explanation for the horse's failure of the drug test or a reasonable excuse for the presence of the hyoscine in its system, but because he was "wholly ignorant" of the banned substance's presence in his horse and – conjecture and

---

63 cf *Wallace v Queensland Racing* [2007] QDC 168 [48]; *Rogerson v Racing New South Wales* (Sydney, Monday 25 June, 2007) (Thorely J).

64 See *He Kaw Teh v The Queen* (1985) 157 CLR 523,567-568.

65 Paul McCutcheon, 'Sports Discipline, Natural Justice and Strict Liability' (1999) 28 *Anglo-American Law Review* 37,67.

66 Above n 43.

67 Lauri Tarasti, *Legal Solutions in International Doping Cases* (SEP Editrice, 2000) 112.

speculation aside – was at a loss to innocently explain the existence of the state of affairs on which liability depends – the positive analytical result – he was technically liable to be penalised by the stewards on the findings they made.

[89] Thus, it was wrong for the RDB to conclude that the penalisation power is exercisable only "where the stewards can be satisfied that there is no other possible explanation for the finding of the substance". The respondent had (at least) a positive evidentiary burden to sufficiently raise the excuses of mistake, accident or due diligence before the stewards had the affirmative burden of negativing it. He did not meet that challenge.

[90] There is a criminal law principle derived from *Peacock v The King*[68] that, in circumstantial cases, a jury must acquit unless the facts are not only consistent with guilt but inconsistent with any other rational conclusion. But that rule does not apply in civil cases. An alleged breach of contract, for example, is made out if it is a reasonable explanation for what happened. It does not have to be the only one.

[91] There was no – or insufficient – evidence to support the RDB finding that it was most likely due to contaminated feed or ingestion of weeds than anything done by the respondent but there was no indication that lax stable practices failed to detect it either. The preponderance of the available evidence did not "indicate that at the relevant time there more likely than not was hyoscine in either the feed utilised in the stable or in the grasses and crab apple weeds upon which the horse grazed" or that there was any other credible cause beyond the scope of the respondent's reasonable control.

[92] On the contrary, the available evidence was intractably neutral on the question and forensically incapable of logically supporting the inferences drawn by the RDB in the respondent's favour. The finding – that some "purely unknown element" was responsible for, or, at least, substantially contributed to the test result – was not rationally open on the evidence.

[93] Accordingly, the stewards had power (but not a duty) to penalise him. They could easily have exercised their discretion to overlook his liability in the circumstances by deciding against the imposition of any penalty without error.

[94] On review, however, the RDB did not have to follow the stewards lead and were perfectly entitled to reach different – even opposite – but no less reasonable conclusions on the same body of evidence.

[95] Put another way, it was open to the RDB to infer an actual, honest and reasonable, but mistaken belief on the respondent's part about the presented horse's blood chemistry (a state of things)[69] and, therefore, he was not even liable to – much less, deserving of – any penalty.

---

68 (1911) 13 CLR 619.

69 *Harmer v Grace* [1980] Qd R 395,399.

[96] Although the RDB was not asked to (and did not) specifically consider or make findings about whether the respondent's prima facie liability was excused on the basis of a mistake of fact in accepting that the respondent did nothing wrong, it impliedly found he had shown that he had done all he could to ensure against a prohibited presentation and (based on standard practices) had no reason to believe the horse was non-compliant.

[97] As the proven facts were equally capable of being held to contravene AR.178 as not it should be inferred, that the RDB properly understood and applied the rule[70] and, therefore, did not make any appellable error of law in proceeding as it did.

The power to convict

[98] A conviction is a technical legal concept used in criminal contexts to refer to a finding of guilt or a guilty plea as a precondition to the power of a court to sentence for an offence.

[99] As AR.178 is not a statutory provision enforced by a court[71] relating to the law of racing in Queensland[72] the penalty discretion does not invest the stewards or RDB with any power to "convict"[73] and it is wrong to use the term in connection with the penalisation power for a breach of the terms of rules of a sporting association[74] especially when the participants have not agreed to it as a consequence of a rule violation.

[100] Rule 256(6) of the Australian Harness Racing Rules, by contrast, specifically state that one or more of specified penalties may be imposed on a person, club or body guilty of an **offence** under the rules, but a **conviction** need not necessarily be entered or a penalty imposed although an offence is proven.

The inadequacy ground

[101] Not every infraction can or should be penalised; especially if the violation was trivial or the basis of liability more careless than culpable. Deterring the respondent and others from contravening for the first time (or again) is the main aim. This is achieved by providing a powerful disincentive against the failure to prevent the use of performance enhancing or inhibiting substances. Therefore, if a trainer is not culpable, there is no need to punish if he or she has an uncontradicted reasonable excuse or innocent explanation for non-observance.

[102] The penalisation discretion, in this case, had to be exercised according to the principles of necessity, proportionality and utility for the purpose of prevention, protection and deterrence – on the basis that, although

---

70 *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329.

71 *R v Wadley; ex parte Burton* [1976] Qd R 286.

72 Ibid [21] cf the offences in the *Racing Act* Ch 8 (for which a conviction may be recorded).

73 All the stewards can do is publish the fact that a penalty was imposed under AR.8(x)

74 *Penalties and Sentences Act* 1999 (Qld) s 4.

unexplained, the presence of hyoscine in the horse was not shown to be due to the respondent's fault or neglect. Thus, it was for the stewards (and later the RDB) to choose whether (and what) penalty should be imposed having regard to the respondent's assessed culpability and other relevant circumstances.

[103] Brennan J noted in *He Kaw Teh*[75] that the conventional policy purposes of regulating activities (e.g. crime prevention and law enforcement) are unlikely to be promoted by imposing criminal (or penal) liability on those who did not know the wrongfulness of their actions or could not have effectively avoided them. As His Honour pointed out:

> "The penalties of the criminal law cannot provide a deterrent against prohibited conduct to a person who is unable to choose whether to engage in that conduct or not, or who does not know the nature of the conduct which he may choose to engage in or who cannot foresee the results which may follow from the conduct (where those results are at least part of the mischief at which the statute is aimed). It requires clear language before it can be said that a statute provides for a person to do or to abstain from doing something at his peril and make him criminally liable if his conduct turns out to be prohibited because of circumstances that that person did not know or because of results that he could not foresee."

[104] The salient penalisation factors are not spelled out in the AR's but clearly include the character and the degree of culpability of the applicant which, in this case, the RDB found was such as to warrant the transgression being overlooked and any penalty waived.

[105] Considerations irrelevant to liability, such as good character, lack of knowledge, accident or carelessness and even unexcluded possibilities may mitigate, if not sufficient to excuse or support a forensic finding consistent with innocence.

[106] The RDB was within its rights in re-exercising the discretion to choose not to impose any penalty at all, because the respondent was "a man of senior years with an unblemished record throughout his (long) history", he was "forthright in his approach", at the mercy of a rule "somewhat predatory in its conclusiveness", held in "great respect" by the stewards, not morally culpable, not even partially suspended from training, and already financially disadvantaged by the horse's disqualification. There is no *House v The King*[76] error evident in this approach and, therefore, no power to disturb it.

Summary

[107] The respondent was held by the RDB not to be liable to a penalty for a presentation "offence" against AR.178 because he had rebutted the implied fault element of liability. Even on the stewards' liability finding, the

---

75 (1985) 60 ALR 449,481.
76 (1936) 55 CLR 499.

imposition of a personal penalty was not inevitable, but remained a discretionary one.

[108] However, neither the stewards nor the RDB have a power (much less a duty) to "convict". All they have is a discretion to penalise the applicant because he agreed to abide by the terms of AR.178 in consideration for being able to participate in Queensland's horse racing industry.

[109] Therefore, despite misconstruing AR.178 in part, the RDB reached the substantially just result by removing the stigma of a "conviction" that was mistakenly recorded against him in excess of power and relieving him of any liability for a penalty because of extenuating circumstances.

[110] For these reasons the appeal is decided against RQ and dismissed accordingly.