

THE RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF
MR D MOSSENSON (CHAIRPERSON)

APPELLANT: JOHN JAMES MILLER JNR
APPLICATION NO: A30/08/537
PANEL: MR D MOSSENSON (CHAIRPERSON)
MR J PRIOR (MEMBER)
MS A BRADDOCK SC (MEMBER)
DATE OF HEARING: 29 NOVEMBER 2001
DATE OF DETERMINATION: 23 JANUARY 2002

IN THE MATTER OF an appeal by John James Miller Jnr against the determination made by the Stewards of the Western Australian Turf Club on 27 July 2001 imposing a \$15,000 fine for breach of Local Rule 70B(i).

Mr JJ Miller appeared in person.

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

BACKGROUND

THURSTON, trained by the appellant, ran second in Western Australia's premier distance race, the BMW-Perth Cup at Ascot on 1 January 2001. The Australian Racing Forensic Laboratory in New South Wales reported a TCO₂ level of 37.0 mmole/L + or - 1.2 mmole/L for uncertainty in the blood sample taken from THURSTON prior to competing in the race. After allowing for the level of uncertainty, the Australian Racing Forensic Laboratory did not refer the reserve portion of the blood sample to another approved laboratory as the threshold of 36.0 mmole/L under the Australian Rules of Racing had not been exceeded.

On 19 January 2001 the Stewards of the Western Australian Turf Club opened an inquiry into:

- 1 *A report made by Racecourse Investigator, Mr P O'Reilly into the reason for Veterinarian Dr Peter Adamson alighting from the rear of the horse float containing "THURSTON" and driven by Licensed Trainer, Mr J J Miller (Jnr.) when that gelding arrived at Ascot Racecourse on 1 January 2001 for the purpose of engaging in the race; and*
- 2 *The plasma total carbon dioxide level in the blood sample taken from "THURSTON" prior to competing in the race.*

The Stewards' inquiry proved to be a complicated and drawn out affair. Further sittings were held on 5 February, 8 February, 9 March, 27 March, 30 April, 28 May, 15 June and 29 June before concluding on 13 July 2001. As a result of the inquiry the Stewards were satisfied that there was no evidence to support any wrongdoing by Dr Adamson. Much of the focus of the inquiry related to the statement made by one of Mr Miller's stablehands, Mr Bruno Malatesta to Mr O'Reilly on 8 January 2001 at Mr Miller's stables. The statement reads:

"Bruno Malatesta

STATES

I am 34 years of age and reside at 22 Coventry Road, Shoalwater.

On Perth Cup Day I prepared Thurston for the Cup with John Miller, my boss.

I call him JJ. I've worked for JJ for 17 years this year.

I awoke about 3.30am. I was here all night.

I was here with Rebecca, Mark and Johnny.

I was present when JJ drenched Thurston in the stall at the stables.

I held the twitch while JJ did the rest.

JJ had a tube, bucket and funnel.

The liquid was a milky colour.

That was about 30 minutes prior to us leaving the property to go up to Ascot.

Dr Peter Adamson was not present at the time. He arrived just as we were about to leave.

I don't know what was in the drench.

I have read this statement and it is true and correct to the best of my knowledge and belief.

SIGNED : Bruno Malatesta Dated 8.1.01

WITNESSED : P. O'Reilly Dated 8.1.01

Statement Continued

Thurston was the only runner we had in that day.

I have been here since the first day he arrived. I know the horse was drenched on race day and I know the horse was Thurston.

SIGNED : Bruno Malatesta Dated 8.1.01
WITNESSED : P. O'Reilly Dated 8.1.01

I understand that my statement may be required at a Stewards Inquiry.

SIGNED : Bruno Malatesta Dated 8.1.01
WITNESSED : P. O'Reilly Dated 8.1.01

On Perth Cup Day JJ told me he was going to drench Thurston at a particular time before we left for Ascot.

I was looking at my watch and about the time that JJ said, I walked him over to the stall where the drenches are always done.

JJ was not ready when I got to the stall. I was walking him around.

I don't know what was in the drench and I don't want to know. One thing I've learnt is to not stick my nose in where it doesn't fit.

I don't ask questions.

Statement Continued

I have read this statement and it is true and correct to the best of my knowledge and belief.

SIGNED : Bruno Malatesta Dated 8.1.01
WITNESSED : P. O'Reilly Dated 8.1.01

I understand my statement may be required at a future Stewards Inquiry.

SIGNED : Bruno Malatesta Dated 8.1.01
WITNESSED : P. O'Reilly Dated 8.1.01

I know that it was Perth Cup Day because it was the 1st day of the year and I always stay here on New Years Eve and act as security for the horses as well.

I have no doubt of the time and day Thurston received this drench.

SIGNED : Bruno Malatesta Dated 8.1.01
WITNESSED : P. O'Reilly Dated 8.1.01"

Mr Malatesta appeared at the Stewards' inquiry on 8 February 2001 and gave evidence that his original statement was wrong. Mr Miller produced to the inquiry a new handwritten statement from Mr Malatesta as follows:

"My statement was I feel wrong due to the fact that I had the days wrong. At the time of the interview I was put under pressure which had confused me. I was told

that Mr Miller (J.J.) had made a statement which he had drence (sic) Thurston which lead (sic) me to belive (sic) that I had to make one on which I belive (sic) got wrong.

When I was asked about the drence (sic) I did not no (sic) what was in it believing (sic) it to be a salt drence (sic).

SIGNED : Bruno Malatesta 8.1.01"

After hearing evidence from other stable employees, associates of the Millers, Mr O'Reilly and various other witnesses, the Stewards charged Mr Miller on 27 March 2001 in the following terms:

"Mr Miller the Stewards have considered all that has been said at the Inquiry and there are some Rules of Racing that I wish to read to you. Australian Rule of Racing 8(e) it says, "To punish any person committing a breach of the Rules or refusing to obey, or failing to obey any proper direction of any Official, or whose conduct or negligence has led, or could have led, to a breach of the Rules." And there is a Local Rule of Racing and that is Local Rule 70B(1) "No horse, which has been nominated for a race or a trial, may be stomach tubed within 24 hours of the commencement of such a race or trial, unless prior approval has been granted by the Stewards."

Alright and based on the evidence before us, the Stewards believe that you should be charged under Australian Rule of Racing 8(e) with a breach of Local Rule of Racing 70B(i), the particulars being:-

That you stomach tubed THURSTON on January 1, 2001 within 24 hours of the gelding competing in the BMW-Perth Cup over 3200m at Ascot Racecourse on January the 1st, 2001 Mr Miller."

Mr Miller pleaded not guilty to the charge. After hearing further evidence the appellant was advised by letter dated 29 June 2001 by the Chairman that the Stewards had found Mr Miller guilty of the offence. Mr Miller was advised that the Stewards would provide reasons for the finding in due course. Those reasons were provided by letter dated 3 July 2001 as follows:

"At the previous sitting of this inquiry on Friday, 29 June 2001 you were informed that it was the intention of the Stewards to determine this matter in finality. During this inquiry you were given several opportunities to present further evidence. You advised the Stewards that you did not wish to submit any further evidence in the absence of Dr S. Stanley of the Australian racing Forensic Laboratory.

You were requested to leave the Inquiry room whilst the Stewards considered the charge against you. The Stewards were unable to provide you with reasons for their finding of guilt as you left the offices of The Western Australian Turf Club without our knowledge or approval and failed to return.

We hereby advise you of the following reasons for the decision to find you guilty of the charge under ARR 8 (e) for breaching LR 70B (i).

- *The Stewards believe that the initial statement taken from Licensed Stable Employee, Mr Bruno Malatesta by Racecourse Investigator Mr P O'Reilly at your property on the 8th of January 2001 (Exhibit E) was accurate and therefore reliable. Racecourse Investigator Mr P O'Reilly has considerable experience in his previous position within the Western Australian Police Service and we are of the opinion that the interview, which resulted in a statement from Mr Malatesta, was conducted appropriately and with consent. Page 215 of the transcript of evidence reveals that Mr Malatesta was following the statement as it was being recorded. We believe that Mr Malatesta's original statement to Mr O'Reilly was spontaneous and truthful. It is clear from the signed statement that Mr Malatesta understood the nature and content of his statement.*
- *In accepting that Mr Malatesta's original statement was truthful, the Stewards then had to consider whether his statement was inaccurate or unreliable due to later assertions that the events he described to Mr O'Reilly actually occurred on the day before. Based on the entirety of evidence, we do not accept this proposition. The events as described to Mr O'Reilly by Mr Malatesta were provided in clear detail. It is also apparent from the evidence that his final statement to Mr O'Reilly was given after what the Stewards believe, to be a considerable amount of pressure from yourself. It is significant to the Stewards that, despite this, Mr Malatesta did not resile from his initial description of events. Having had the benefit of observing and listening to Mr Malatesta during this inquiry, the Stewards do not agree that his suggested inadequacies such as his level of comprehension or intelligence are responsible for what, in the opinion of the Stewards, would be an extremely unlikely and illogical mistake.*
- *There are obvious differences between the two days in question. An example of such difference is the time disparity and number of people allegedly involved in the stomach tubing of Thurston on December 31, 2000. Mr Malatesta slept at the property on New Years Eve to act as a guard for a horse that he knew very well. His position as a full time stable employee and strapper required him to prepare and present Thurston to compete in one of Western Australia's most publicised and prestigious races. Due to the overall nature of events and importance of January 1, 2001 it is highly improbable that Mr Malatesta could legitimately claim that he confused the days.*
- *The Stewards believe that the phone conversation between Deputy Chairman of Stewards, Mr B Lewis and Mr B Malatesta on the 8th of January is of significant importance and provides further evidence in support of the charge. The details discussed in this phone conversation were very similar to the original statement taken from Mr Malatesta and in our opinion, corroborates Mr Malatesta's initial evidence as recorded by Mr O'Reilly in Exhibit E.*

- *We accept Mr Malatesta's initial statement of evidence as given to Mr O'Reilly in preference to his own later evidence and that of all other witnesses who gave evidence to the effect that Thurston was not stomach tubed on January 1, 2001.*
- *Dr Peter Symons in his position as Veterinary Steward with the WATC has considerable knowledge and experience in relation to plasma total carbon dioxide levels and provided this inquiry with noteworthy evidence. Dr Symons, on page 74 of the transcript of evidence stated:- "I think Australia wide, they average 31.5 for horses presented on race day, and that was over quite a few thousand horses in, I think four different States." He also stated on Page 262 of the transcript:- "Well if it was a milkshake, sodium bicarbonate, three and a half hours before a race, would be the ideal time to drench a horse to get an elevated level when the horse raced." The Australian Racing Forensic Laboratory, an Official Racing Laboratory under the Rules of Racing, conducted the testing of Thurston's pre-race blood sample. The Stewards have no reason to doubt the accuracy of the reported result or the quality or integrity of the blood sample taken from Thurston prior to competing in the Perth Cup. Further, no evidence was presented to this inquiry that suggested the measured level of plasma total carbon dioxide in the blood sample taken from Thurston on January 1, 2001 was incorrect. The evidence reveals that on January 1, 2001, Thurston recorded a measured level of 37.0 millimoles per litre of total carbon dioxide in plasma. This level was significantly higher than previous and subsequent race starts and resting samples taken between the 10th and 12th of January, 2001 when the horse was impounded at the Caversham Veterinary Clinic. It is apparent that a significant amount of alkalinizing agent is needed before a horse will record a measured level of 37.0 millimoles of total carbon dioxide in blood plasma. There is no evidence to suggest that Thurston has a naturally high level of plasma total carbon dioxide. We do not believe that a combination of various physiological, psychological, dietary or other factors as put forward by yourself were responsible for the significant elevation in the level of plasma total carbon dioxide recorded by Thurston on January 1, 2001. The timing of the stomach tubing and subsequent level of plasma total carbon dioxide is indicative of an administration of alkalinising agents.*
- *In Summary, the Stewards believe that Mr Malatesta's statement when taken in context with Thurston's measured level of plasma total carbon dioxide on January 1, 2001, provides clear and adequate proof of the charge."*

The Stewards then invited Mr Miller to make submissions with respect to penalty. ARR.196 states "Any person or body authorised by the Rules to punish any person may, unless the contrary is provided, do so by disqualification, or suspension, and may in addition impose a fine not exceeding \$75,000, or may impose only a fine not exceeding \$75,000". The appellant requested a fine rather than suspension or disqualification. After the Stewards deliberated on the matter the Chairman of the inquiry announced sentence in these terms:

"Mr Miller, in determining a penalty the Stewards have taken into account your own verbal submission and the following factors that we believe to be relevant in consideration of a fair and appropriate penalty. We are satisfied that the substance administered to THURSTON by a stomach tube contained alkalinising agents although this administration did not result in the detection of a prohibitive substance, we believe that the stomach tubing was a deliberate and calculated act designed for the purposes of attempting to provide THURSTON with an advantage over other competitors in Western Australia's feature distance race. This race provided total stake money of \$364,000 plus trophies. As such, there was considerable financial benefit on offer. The record shows that THURSTON finished second in this event, beaten only by the official margin of a long head. The Stewards make this point in regard to the race itself purely to illustrate the importance and significance of the event in question and how close THURSTON came to winning that race. Local Rule 70B part (i) was set in place by the Committee of the Western Australian Turf Club in April 2000 to prevent the unlawful act of stomach tubing horses with prohibitive substances prior to competing in a race. This act is commonly known as milkshaking and is considered to be a very serious problem within the Racing Industry. Offences of this nature have the potential to significantly erode public confidence within the sport, the integrity of racing is seriously questioned when such offences are committed. The maintenance of a proper image is vital to the continuation and prosperity of thoroughbred horse racing. The public and competitors alike, must be entirely satisfied that all horses are able to compete in a race on an equal basis. The stomach tubing of a horse within a close amount of time to a race can only serve to ruin this entitlement and general perception. For these reasons the Stewards view this offence as a very serious breach of the Rules that should result in the imposition of a significant penalty. It is difficult for the Stewards to assess what is the normal tariff for an offence of this nature as this is only the second conviction under this particular Rule. The first offence was committed in May 2000 by Mr T Bettsworth. On that occasion the Stewards imposed a penalty of twelve months disqualification. This was later reduced to six months disqualification by the Racing Penalty Appeals Tribunal. Although this particular offence is similar in some respects, it is not sufficiently comparable with that of Mr Bettsworth and we therefore believe that a period of disqualification is not justifiable when considering the circumstances of this particular offence. Despite our opinion that a disqualification is not appropriate, we believe that the penalty should not only achieve specific deterrents, but more importantly send a clear message to all participants within the Racing Industry that offences of this nature will not be tolerated. In saying this, the Stewards are not entitled to increase an otherwise appropriate penalty for this reason, however, we believe the penalty should be such that it will discourage other (sic) from committing similar offences. There is an obligation on all of licensed persons to obey and abide by the Rules of Racing. We believe this responsibility becomes even more onerous on a person with your experience and status within the Racing Industry. As an Open Class and senior trainer, you are expected to conduct yourself professionally at all times and set a good example. It reflects poorly on the Racing Industry on (sic) a whole that a person of your standing and position is prepared to display a total disregard for the Rules. The Stewards have considered your record, which we view as good, we've taken into account your personal circumstance and the effect that any of the penalties as referred to ARR.196 would have on you. After

consideration of all these penalties, we believe that a disqualification or suspension is not appropriate. We believe a fine is the appropriate penalty on this occasion Mr Miller, and the level of that fine is to be one of \$15,000."

THE APPEAL

Mr Miller appeals against both the conviction and the severity of the penalty in the following terms:

"That there was no evidence that I stomach tubed the horse Thurston on the 1st January 2001 upon which the Stewards could find me guilty, the finding is against the evidence. I anticipate further grounds of appeal will be added.

I also appeal against the Severity of the Penalty imposed by the Stewards on the 13th July 2001. The Grounds of Appeal is having regard to my excellent trouble free record as a trainer. I should not have been fined to the extent that I have been. I expect further grounds to be added to my appeal."

As it transpired no further grounds were in fact added.

In supporting his appeal Mr Miller took the Tribunal to a great number of passages in the lengthy transcript of the Stewards' inquiry. Mr Miller presented his arguments in a slow and rambling manner. Many aspects of the Stewards' inquiry were covered. Mr Miller's submissions canvassed, amongst many other things:

- the fact that the level of total carbon dioxide was not above the threshold
- that, according to Mr Miller, *"there was not a shred of evidence it was stomach tubed"*
- the fact that only 1 sample was taken
- that THURSTON is difficult to stomach tube
- the events which occurred at the stables prior to departing for the Cup Race
- the inconsistencies and conflicts in the evidence
- the change in Mr Malatesta's testimony evidence and the type of person he is
- the fact that Mr Miller was allegedly denied a number of his requests by the Stewards.

Senior Counsel for the Stewards at the outset in reply went into some detail regarding Mr Malatesta's evidence, the change in his statement and the basis for the Stewards reaching their conclusions as to which of the conflicting versions to believe. I accept the propositions advanced that:

- the Stewards were in a good position to assess credibility, having heard and seen the parties appear before them
- the Stewards were entitled to take into account all of the surrounding circumstances including the elevated TCO₂ level

- it is entirely a matter for the Stewards to determine whether to accept evidence and rely on it
- the Stewards evaluated the evidence and determined matters of credibility in 'an entirely appropriate, thorough and meticulous' manner.

DETERMINATION

I have read and considered all of the passages in the transcript as well as the relevant exhibits which Mr Miller referred to during the course of his argument at the appeal hearing. I am satisfied the matter was dealt with by the Stewards with great patience and attention to detail. Despite Mr Miller's protestations to the contrary the transcript reveals the Stewards did display a more than reasonable amount of concern to ensure Mr Miller's rights were not encroached upon during the proceedings. The Stewards were both fair and thorough and responded properly to all of Mr Miller's reasonable requests. The line of reasoning adopted by the Stewards and their care in enunciating their reasons in my opinion highlight an exemplary approach to this difficult factual scenario.

Bettesworth (Appeal 504) is the only other case which involves this Rule. In that matter, the 12 month disqualification imposed by the Stewards was reduced on appeal to 6 months. In the appeal reasons I came to a conclusion that a 12 month disqualification may be appropriate in some cases. However Mr Bettesworth was unaware of the introduction of the new local rule which prohibits stomach tubing prior to racing. Further in the notice to the industry advising of the introduction of this new rule no date of effectiveness had been published in the May 2000 Racing Calendar. The Tribunal took these factors into account as the race had been run on 22 May 2000.

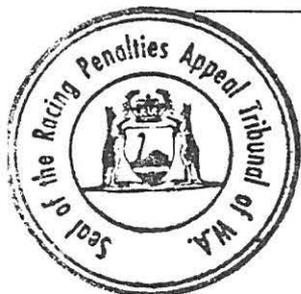
The Rule was introduced to help control racing. The Rule clearly is intended to outlaw tubing horses prior to their racing. In THURSTON's case it was a most important race and the horse ran second. Clearly the matter is a very serious one which in the appropriate circumstances could support a lengthy disqualification.

I agree the Stewards were entitled to convict Mr Miller of the offence. I am satisfied it has not been demonstrated the Stewards fell into any error in convicting Mr Miller. I am more than satisfied in all of the circumstances that the Stewards in their wisdom did not treat Mr Miller harshly. If anything the penalty from some aspects could be said to be rather light. However, the penalty is of sufficient severity taking into account the matters personal to Mr Miller. At the same time it sends the appropriate message to the industry.

For those reasons I would dismiss the appeal.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON



THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF
MR J PRIOR (MEMBER)

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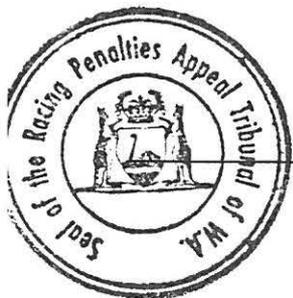
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Mr JJ Miller appeared in person.

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 conclusion and have nothing to add.



John Prior

JOHN PRIOR, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF
MS A BRADDOCK SC (MEMBER)

APPELLANT: JOHN JAMES MILLER JNR
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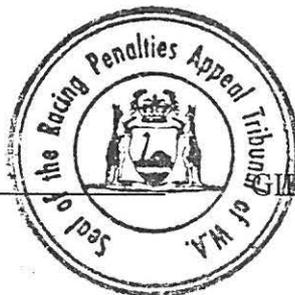
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A Braddock



GILLIAN BRADDOCK, MEMBER

DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

OFFICE OF
RACING, GAMING & LICENSING

30 JAN 2002

APPELLANT: JOHN JAMES MILLER JNR
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Mr RJ Davies QC appeared for the Stewards of the Western Australian Turf Club.

This is a unanimous decision of the Tribunal.

For the reasons published the appeal is dismissed.



DAN MOSSENSON, CHAIRPERSON

