Prosecuting culpable and intentional riding offences

Introduction

The Stewards in Australia have a number of different Australian Rules of Racing that deal with rides which may give rise to an inquiry and/or charge. It is possible to distinguish between at least three different types of riding offences as follows:

(a) where a rider commits an error of judgment for which the rider is culpable and deserving of punishment; and
(b) where a rider commits an intentional act which:
    (i) places the safety of other horses and riders at risk; and/or
    (ii) prejudices the chances of other horses in the race ("improper" riding); and
(c) where a rider commits an intentional act during the course of a race which corruptly affects the outcome of that race (note: this type of offence is not a focus of this paper).

The prosecution of 'culpable' as against 'intentional' riding offences requires a different approach for each type of offence.

This paper will examine what constitutes a 'culpable' ride as opposed to a ride that is deemed 'improper' in Victoria, Australia, and some relevant factors involved in the prosecution of such rides. Further, this paper will examine how technology is providing the Stewards with the information needed to detect rides that require further investigation, such as the case involving jockey Danny Nikolic. In addition, the paper will look at how technology has assisted Stewards in Australia in prosecuting two recent improper riding cases involving jockeys Chad Schofield and Hugh Bowman.

Failing to take all reasonable and permissible measures

The most well-known Australian Rule of Racing that deals with a jockey's ride where an error by the rider when observed objectively is potentially deemed as being culpable and deserving of punishment is AR 135(b), which states:

> "*(b) The rider of every horse shall take all reasonable and permissible measures throughout the race to ensure that his horse is given full opportunity to win or to obtain the best possible place in the field*."

In Victoria, AR 135(b) is classed as a serious offence and must be prosecuted before the independent Racing Appeals and Disciplinary Board (**RADB**) by the Stewards. Whilst the Stewards can initiate an inquiry and question relevant parties as well as considering any

relevant evidence, once a charge has been laid it must proceed to the RADB in the first instance for hearing.

AR 135(b) imposes an objective standard of care and takes into account, amongst other things, the views and explanations of the rider and the views and opinions of the Stewards, but is not determined by them.[1]

The classic interpretation of the rule, which has been followed on numerous subsequent occasions by Tribunals all over Australia, is that made by Judge Goran in *Honan* (1983) Racing Appeals Reports 11-12. His Honour made the following observations:

(a) The rule does not permit the mere substitution of the Stewards' view as to how a particular horse should have been ridden for the view of the rider.

(b) The rule does not seek to punish a mere error of judgment during the race on the part of the rider.

(c) The rule attempts to ensure not merely that the horse has a winning chance in a race but that, assuming an inability to win, it will still do the best it can in the circumstances.

(d) The rider's conduct must be culpable in the sense that objectively judged it is found to be blameworthy.

The other leading statement setting out the principles of AR 135(b) was provided by Mr T E F Hughes AC, the then chairman of the New South Wales Racing Panel involving an appeal by jockey Chris Munce on 5 June 2003. Mr Hughes QC stated:

> "The task of administering this rule is not always easy. One must keep in mind that on its true interpretation it is not designed to punish a jockey unless on the whole of the evidence in the case the tribunal considering a charge under the rule is comfortably satisfied that the person charged was guilty of conduct that, in all the relevant circumstances, fell below the level of objective judgment reasonably to be expected of a jockey in the position of the person charged in relation to the particular race. The relevant circumstances in such a case may be numerous. They include the seniority and experience of the person charged was riding in the particular race. They include any practical necessity for the person charged to make a sudden decision between alternative courses of action. The rule is not designed to punish jockeys who make errors of judgement unless those errors are culpable by reference to the criteria that I have described."

Judge Nixon in the former Victorian Racing Appeals Tribunal in *Nikolic* (2005) Racing Appeals Reports 4554 at 4555 commented:

[1] *Matson* (1999) Racing Appeals Reports (RAR) 2719 at 2720; *Justice v. S.A. Trotting Control Board* (1989) 50 SASR 613 at 623; and, the various decisions of Judge Thorley and Justice Perrignon in N.S.W. in cases like *Wilkins* RAR 3045 at 3046; *Lewis* RAR at 2209; and *Gallagher* RAR at 3419.

> "Rule 135(b) imposes an objective standard of care that takes into account all the circumstances including the evidence and opinions as provided by the stewards, and the explanations given by Mr Nikolic in his evidence and in the evidence of his witnesses, and the totality of the evidence, including all opinions, is under the spotlight. It is well settled that a mere error of judgment is not a sufficient basis for finding that the rule has been breached. The test to be applied is whether the ride is culpable. The jockey's conduct must be culpable; that is, culpable in the sense that objectively viewed I am satisfied that it was blameworthy for a breach of the rule is established."

Former County Court Judge Russell Lewis, who is the current Chairman of the RADB, in an appeal by apprentice jockey Talia Rodder on 1 December 2011, provided further commentary on the principle:

> "The onus is on the Stewards to prove that the appellant has been in breach of the Rule. The appellant is, in the circumstances, required to give an explanation for his/her actions. However, the onus always remains with the Stewards. This is a serious offence. The standard of proof is that referred to in the well-known High Court case of Briginshaw v Briginshaw, 1938, CLR, 336. The standard is on the balance of probabilities. However, the board must have a reasonable degree of satisfaction that the charge has been proved. It is not a matter of mechanical comparison between competing views. Matters which the board must take into consideration include the seriousness of the allegation and the gravity of the consequences flowing from the particular finding.
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> The rule imposes an objective standard of care. The standard of care takes into account, among other things, the views and explanations of the rider and the views and opinions of the stewards. A mere error of judgment is not a sufficient basis for a finding that the rule has been breached. The rider's conduct must be culpable, in the sense that, objectively judged, it is found to be blameworthy."

To achieve this objective standard, what is required is that the rider shall take all reasonable and permissible measures during the course of the race. Again, both the concepts of reasonableness and permissibility are necessarily objective and require an assessment of what a rider acting reasonably would or could or should have done in the circumstances; and, that the failure so to act was culpable in the sense of being blameworthy warranting a penalty.

Judge Williams sitting in the Victorian Racing Appeals Tribunal in *McCullum* on 18 December 2002 approved the following passage from the decision of the Tasmanian Racing Appeals Tribunal in *Watts* (2001) Racing Appeals Reports 3285 at 3287 dealing with the comparable rule in the Harness Racing Rules:

> "In some races however there may be a number of alternative tactics open to a driver. On any given day, one of these alternate strategies may turn out to be not the correct one. At stewards' inquiries and appeals such questions are often judged with the benefit of hindsight. Read literally, Rule 149(1) requires the driver to take *all* (our emphasis) reasonable and permissible measures. In a race, however, a driver may be faced with deciding between

> two measures or ways of driving, each of which may be reasonable and permissible. The failure to adopt one such measure could not be a breach of the rule, even if the measure adopted ultimately turned out to be unsuccessful. We believe the intention of the rule is to allow a penalty to be imposed on a driver when he or she fails to take some measure which was either the only reasonable and permissible measure open to him or her or so clearly the measure that he or she should have adopted as to make the failure to do so deserving of punishment."

The Stewards' observations are fundamental to a prosecution under AR 135(b) and consideration must be given to what other evidence would be admissible in such a case sought to be prosecuted by the Stewards. The rule does not require every possible available run to be taken or any particular riding tactic to be followed. Instead it relevantly requires a rider to have a reasonable justification for taking the measures which he did in the sense that the measures in fact taken were adopted by the rider for the purpose of winning or obtaining the best possible place in the field for his mount.

This rule does not deal with a rider who deliberately pulls a horse up or does something intentional to impede the winning chances of the horse. This position was confirmed in the South African appeal case involving jockey S'Manga Khumalo who was found guilty by Stewards for a similar rule to AR 135(b). In the Appeals Board's reasons delivered on the 14 March 2014, Chairman Jonathon Witts-Hewinson commented on the submission of Mr Khumalo's attorney Mr Bloomberg:

> "We understand Mr Bloomberg to have suggested that a conviction under Rule 62.2.1 ought not follow under circumstances where an improper motive or inducement has not been established in the course of the inquiry proceedings. We disagree. There is nothing in the particular rule which requires that any such element or motive be proved.....Evidence of an inducement having been offered or received by a jockey would in fact justify an even more serious charge..."

Even though the application of AR 135(b) does not suggest there has been a deliberate act on behalf of the jockey, an interesting question arises as to the admissibility of betting information or the form of the horse. Obtaining immediate betting information or form analysis is critical and might help initiate an inquiry which may lead to a charge being issued under AR 135(b); however, depending on the circumstances of the case the betting may not have any relevance or could potentially be prejudicial.

Clearly, to accompany the views of the Stewards in an AR 135(b) case, the footage of the race is paramount and having the appropriate camera angles that set out the matters that are being alleged is crucial. Whilst the Stewards may have concerns about a particular ride the analysts in the Raceday Control Room can run its full suite of tools to provide background

information to the Stewards in a timely manner which otherwise would not be available to the them in the traditional Stewards' room on raceday.

In a case where the Stewards did not act on observations of a jockey's ride, an investigation was triggered by Stewards at the Mornington race meeting in Victoria on 8 January 2010, after jockey Danny Nikolic rode *Finishing Card*. The investigation followed Racing Victoria Stewards being alerted by Betfair to suspicious lay betting activity on this race by Betfair. The Stewards have live access to Betfair's betting transactions and they have established a relationship where any suspicious activity is communicated directly to the Stewards by Betfair.

As a result of this report, the Stewards launched an investigation into Nikolic's ride. That investigation broadened as Betfair alerted Racing Victoria to suspicious 'lay betting' by a punter and various associates on a number of mounts ridden by licensed jockey Mr Nikolic. All of those rides were subsequently reviewed by Racing Victoria. The investigation determined that, following communications between Mr Nikolic and Mr Clements (and/or his associates), lay bets were placed by Mr Clements on Mr Nikolic's mounts whereby a profit would be made if those mounts lost.[2]

For Mr Nikolic's part, the allegations were obviously serious. Whilst he was not ultimately charged in respect of any of his rides, he was charged with various breaches of the Rules, alleging that he engaged in a 'dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing' and, alternatively, 'conduct prejudicial to the image, or interests, or welfare of racing'.[3] However, RADB[4] dismissed the charges against him as it was not satisfied to the requisite standard that the communications were of the nature alleged by the Stewards.[5]

This case led to a closer analysis of the use of betting information in reviewing the rides of jockeys. Whilst the Nikolic case did not lead to charges for the rides themselves, it was apparent that if Stewards were to receive credible real-time betting information regarding suspicious trends, this may lead to greater scrutiny to rides by the Stewards on race-day. This case was one of the drivers to establish Racing Victoria's Control Room which filters critical betting, racing patterns and race analysis trends to the race-day Stewards in real time.

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[2] *Racing Appeals and Disciplinary Board Reasons for Decision, Mr Neville Clements, 24 March 2010, 2.*
[3] AR 175(a) and AR 175A: Ibid, 3.
[4] An independent tribunal established under the Local Rules of Racing to deal with serious matters and appeals from the penalties imposed by the Stewards (see LR 6 of the Racing Victoria Rules of Racing (2011) http://www.racingvictoria.net.au/asset/cms/Rules%20of%20Racing%20PDF/Updated%20Rules%20of%20Racing/Updated%20Rules%20of%20Racing%20-%201%20June%202011v4.pdf).
[5] *Clements*, above n 27, 5.

Improper riding

In Australia, AR 137(a) provides that a rider may be penalised if, in the opinion of the Stewards:

> *He is guilty of careless, reckless, **improper**, incompetent or foul riding.*

Improper riding has the element of deliberate or intentional conduct that, in all the circumstances, is found to be contrary to how a horse ought to have been ridden by a competent jockey and which had the possible consequences of:

(i) creating danger for others (rider or horse); and/or
(ii) prejudicing the chances of other horses in the race.

Furthermore, the RADB in the appeal of jockey Chad Schofield stated:

> *"There is no definition of "improper riding" in the Rules of Racing. However, the Board accepts Dr Pannam's characterisation that it involves an element of deliberate or intentional conduct which creates danger or potential for danger.*
>
> *The Stewards took the view that in all the circumstances, the appellant's riding took him outside the boundaries of competitive riding and represented an egregious example of improper riding."*[6]

Given the RADB interpretation of improper riding in the Schofield appeal the presence of deliberate or intentional conduct which created a danger or a potential for danger were critical considerations in determining this case. This case clearly distinguished the 'improper' riding offence contained within AR 137(a) from the careless, reckless or incompetent riding offences also contained in AR 137(a).

In the case of Jockey Luke Nolan in 2006 before the RAD Board, the Chairman, former Judge Russell Lewis referred to the AR 137(a) in the following terms:

> *"There is no definition of careless, reckless, improper or foul riding in the Rules of Racing, however it is clear that taken in order these represent a hierarchy of forbidden conduct."*[7]

Although this observation provides some general guidance to the operation and interpretation of the Rule, this interpretation has difficulties as it is hard to see how

[6] Schofield, appeal (improper riding) to RAD Board, Chairman Russell Lewis, 2014, pg 3.
[7] Nolan, appeal (reckless riding) to RAD Board, Chairman Russell Lewis 2006, pg 1.

'incompetent riding' could be regarded worse than 'improper riding' and just short of 'foul riding'. Taking this observation further, in some cases, 'reckless riding' could be seen as equally serious as 'improper riding' especially where the actions of the rider may have catastrophic effects on others, through injuries to riders and/or horses.

Having made this observation it would be accepted as a general proposition that foul riding would be considered a more grave offence than improper as pointed out by His Honour Forrester J:

> *"It seems to me that foul riding must be more serious offence than improper riding. What is improper may not necessarily be foul, but what is foul riding must, I think, almost of necessity be improper riding. So far as racing is concerned, it seems to me that foul riding must show a substantial degree of departure from the rules in the normal standards that are applied to a jockeys riding in races. Put another way, the degree of villainy must be of a high nature to sheet home a charge of foul riding as opposed to improper riding."*[8]

Whilst the construction of the Rule does not give rise to a true hierarchy, it is clear there are different elements that are needed to prove a charge under some of the separate elements of this rule.

Schofield and Bowman cases and technology

In two recent cases in Victoria the Stewards charged two high profile riders with improper riding given the rider's actions in two separate races.

In a recent case in September 2014 involving Jockey Chad Schofield, which was briefly referred to above, the Racing Victoria Stewards laid a charge against Schofield for improper riding where his mount Saguaro when passing the 1100 metre mark and in a three wide position Schofield turned his mounts head in and made contact with another jockey's mount who was one of the fence. Over approximately the next 200 metres Schofield placed pressure on the other jockey's mount until that jockey surrendered the position and went to the fence.

There was much media criticism about the decision of the Stewards to charge Schofield with improper riding, as many thought this was just competitive riding. However, through the addition of camera technology by the use of the "Hawkeye" system which provides the Stewards with greater granularity of normal vision, Stewards were able to demonstrate the

[8] Hartnett, Queensland Racing Appeals Tribunal, Judge JH Forrester 2006, pg 6.

pressure placed on the other jockey's mount by Schofield's actions, by demonstrating the two horses heads making contact. This ability through "Hawkeye' to zoom in on this incident highlighted the potential danger that Schofield's deliberate manoeuvre placed the other jockey's mount in.

Schofield was found guilty of improper riding by the RADB and then appealed this decision to the Victorian Civil and Administrative Tribunal, where his appeal ultimately failed.

Another similar case in October 2014, Stewards charged champion jockey Hugh Bowman with improper riding in similar circumstances, where his manoeuvre by placing pressure another jockey's mount deliberately pushed that jockey's mount to the fence. Given the decision in Schofield, Bowman only appealed against the severity of the penalty to the RADB and he accepted being found guilty of the charge. Again in this case the "Hawkeye" technology was able to demonstrate that the deliberate actions of Bowman placed other horses and/or jockeys in potential danger.

Conclusion

Within the Australian Rules of Racing there are various Rules which deal with riding matters and require different legal interpretation and elements to prove charges under these Rules. Stewards carry the main responsibilities of policing these matters through their observations. However, given racing in Australia is seven days a week, it is critical Stewards receive the appropriate information and intelligence to support their observations to justify taking actions in these matters. Also with the advent of the "Hawkeye" technology this has allowed Stewards to be more sophisticated in their scrutiny of a jockey's ride ensuring technology will play a significant role in developing Racing Victoria's integrity regime.