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ARTICLE

‘Don’t look a gift horse in the mouth’: regulating for integrity, what equestrianism can learn from Thoroughbred racing

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Abstract This article questions the current hegemony regarding the drafting of integrity measures such as anti-doping in modern equine-based sport. The examples of the Olympic equestrian sports and British Horse Racing Authority (BHA) regulated racing are used to illustrate the current flaws and the level of crisis facing integrity in horse sport. The regulations concerned differ in form, but they contain common ground such as a fondness for strict liability and reverse burdens of proof. It is evident that these concepts, particularly strict liability, are drawn from common law traditions as continental legal systems on the whole have only fault-based liability. It is also true to say that these concepts have been applied in regulations based on the WADA Code, such as the FEI’s EADCMRs and others with a similar function such as the Orders and Rules of Racing without much proper thought as to their suitability. The received truth appears to be that it is perfectly reasonable to apply a sanction to a human rider because there has been a doping infraction in the horse. This is because the horse is viewed as a piece of equipment that has been tampered with rather like a ski or a badminton racket. This view of the horse is challenged in this article as the horse has to be re-imagined in the context of post-modern human society. First of all, using evidence from military history and sports governance regimes themselves and the social science literature this article shows that the elite sport horse is now socially constructed as an ‘athlete’. It is therefore unconscionable that strict liability and reverse burdens should be applied in equine cases because the infraction happens in the body of a non-autonomous non-human athlete but the sanction is applied to the mind of an athlete of a different species altogether. A case study is presented of a CAS award just before the 2012 London Games in order to demonstrate the inequities present in horse sport regulation like no other. It is further evident that SGBs can no longer rest easy in the knowledge that they cannot be challenged on procedural grounds as they are not public bodies for the purposes of Judicial Review and human rights actions. There has been a gradual leaching of human rights, natural justice and Judicial Review concepts into private law actions which can now be clearly identified in current case law. It is therefore quite possible to foresee the decisions of SGBs being judicially reviewed through private law claims. There is, however, an alternative way of drafting regulations which British Thoroughbred racing has been presented with during a major review. It was suggested in this review that new Orders and Rules of Racing could be drafted according to a number of underpinning principles. The rules themselves should not be too detailed in order to allow them to be applied as flexibly as possible. This represents a real departure from the traditional methods of drafting sports integrity regulations which have mostly relied on literal interpretation. This article proposes this new method of drafting, coupled with purposive interpretation by tribunals, is the alternative hegemony horse sport desperately needs.

Keywords Equine · Regulation · Racing · Olympic · Doping · Neville

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1 Integrity issues in horse sport

There are quite separate governance arrangements in place for different kinds of horse sport.[1] This article concentrates on the discipline arrangements for Thoroughbred horse racing and separately the Olympic equestrian sports of show jumping, dressage, eventing (cross country) and Paradressage. Despite the different sports governing bodies it is clear that integrity issues raised in either equestrianism or racing have an effect on the other as the following paragraphs shall illustrate.

Horse sport has had its fair share of controversy over the last 15 years. Racing in the UK has undergone two major integrity reviews[2] since 2003 and the governing body of Olympic equestrian sport, the *Fédération Equestre Internationale* (FEI) has worked hard to deal with some very difficult doping issues since 2004. In the midst of this in 2009 the then FEI President, Princess *Haya* of Jordan spoke of a 'new leaf' being required to address the hitherto 'negligent' approach that the FEI had adopted with respect to doping.[3] Three riders had lost their gold medals at the 2004 Olympics due to adverse analytical findings and at the 2008 Games six horses also failed drugs tests.[4] Despite this position statement though there have been further scandals, some of which touched the horse sport empire of *Sheikh Mohammed bin Rashid Al Maktoum,*[5] ruler of Dubai and husband of Princess Haya. *Sheikh Mohammed* has vigorously defended his Godolphin Stables, the UK's largest flat racing operation, from the negative press caused.[6]

Furthermore, endurance racing has a growing following around the world but is very popular in the Middle East because of the particular suitability of Arab horses for the sport. Unfortunately, there has also been some disquiet about the activities of some owners and riders in that sport as well, with a feeling that the sport now faces an integrity 'crisis'.[7] One of the problems highlighted has been the particular conundrum of Endurance GB riders being 'prosecuted' by their governing body, the FEI, for substances found in their horses when the animal was in fact borrowed from a third party.[8]

In 2013 Border Agency staff seized potentially toxic and unlicensed drugs incorrectly labelled as 'tack' on a Dubai Royal Air Wing flight at Stansted Airport[9] and two stables in the Newmarket[10] area were found to have carried out doping infractions. One of them was the Godolphin yard and the British Horse Racing Authority (BHA) 'charged' trainer *Mahmood al-Zarooni*[11] regarding the doping allegations. The fact that horse racing has nothing to do with the FEI does little to insulate either sport when scandals occur because of the fact that owners and trainers and a raft of other animal care professionals operate with horses involved in both FEI and BHA governed sports. As an example also in 2013 it was reported that the FEI European Endurance Champion *Jaume Punti Dachs* ran a yard for *Sheikh Mohammed* at Moorley Farm East, UK which was raided by the Veterinary Medicines Directorate (VMD) and 'unlawful' drugs intended for horses were seized.[12]

In the same year it was revealed that *Mubarak bin Shafya*, banned from training endurance racing horses for doping with steroids and a former colleague of the now disgraced *Mahmood al-Zarooni* continued to train thoroughbreds from one of *Sheikh Mohammed's* Dubai stable complexes.[13] These revelations led to a growing sense that there was a 'conflict of interest at the top of the FEI'. In consequence the Swiss and Dutch Equestrian Federations opposed allowing *Princess Haya* to serve a third term of office[14] and she has since stepped down on the election of her successor, *Ingmar De Vos*.

Unfortunately, 2013 turned out to be an '*annus horribilis*' for horse sport with further cases at the high-profile

[1] For the purposes of this article 'horse sport' is used to mean Thoroughbred horse racing and equestrianism. Equestrianism encompasses all sports requiring the participation of a horse (other than racing), of which there are over eighty worldwide. See generally Steinkraus and Stoneridge (1987).

[2] The 2003 Joint Security Review and the 2008 Neville Review into Integrity in Racing.

[3] FEI Press Release http://www.prweb.com/releases/FEI_Equestrian/Lord_Stevens/prweb2824784.htm accessed on 11th July 2016.

[4] Charlish (2012), p. 1.

[5] Sheikh Mohammed is an endurance racing competitor in addition. Endurance racing is an FEI sport although not an Olympic one. Flat and jumps racing is not governed by the FEI, but in the UK by the British Horse Racing Authority (BHA).

[6] See for example, 'Sheikh Mohammed launches inquiry after police seize drugs from Dubai jet'. *The Guardian* 2013 http://www.theguardian.com/sport/2013/sep/29/sheikh-mohammed-inquiry-drugs-dubai accessed on 11th July 2016.

[7] Watkins (2013a, b, c), pp. 6–7.

[8] See for instance FEI v Alice Beet (11th September 2006), FEI v Sue Sidebottom (28th July 2008).

[9] 'Sheikh Mohammed launches inquiry after police seize drugs from Dubai jet'. The Guardian 2013 http://www.theguardian.com/sport/2013/sep/29/sheikh-mohammed-inquiry-drugs-dubai accessed on 11th July 2016.

[10] 'Newmarket trainer Gerard Butler faces horse racing steroids inquiry' 2013 www.bbc.co.uk/sport/0/horse-racing/22336037 accessed on 11th July 2016.

[11] 'Godolphin Stable Locked Down After Doping', Financial Times Online 2013 http://www.ft.com/cms/s/0/e0cc5a2e-accf-11e2-b27f-00144feabdc0.html accessed on 11th July 2016.

[12] Watkins (2013a, b, c), p. 6.

[13] 'Dubai case raises new questions for Sheikh Mohammed', The Guardian Online 2013 http://www.theguardian.com/sport/2013/sep/30/sheikh-mohammed-dubai accessed on 11th July 2016.

[14] Watkins (2013a, b, c), pp. 6–7.

Badminton and Burleigh cross-country events.[15] The winning horse ridden by *Jonathan Paget* tested positive for the banned sedative, *Reserpine*.[16] It was horse racing's turn the following year for an uncomfortable headline or two when one of Queen Elizabeth's prize winning racehorses, *Estimate*[17] also tested positive for morphine. This was considered most likely due to feed unintentionally contaminated during manufacture.

The problem is that in common with other 'human only' sports, even according to former WADA Chief Executive *David Howman*, only 'dopey dopers'[18] are being caught despite an entire global organisation and a huge annual budget dedicated to catching all drug cheats.[19] Separately the BHA has put a lot of effort and financial resources into a unit and policies designed to deal with the problem of doping and also betting related corruption. Despite this international scandals continue to emerge. Perhaps worse still, the 'repugnance'[20] of adverse tribunal findings against those who could never be proved to be morally culpable in any way continues. Outcomes as ethically troubling as those of *Răducan*[21] and *Baxter*[22] have happened in horse sport as well. A detailed case study will be presented later in this paper to explain this point further but the 2008 Beijing Olympics 'scandal' is worthy of note too.

On 21 August 2008 four horses tested positive for traces of a derivative of chilli peppers, *Capsaicin*, which as a liniment is found in *Equi-Block* a preparation often used to soothe sore muscles in a horse. For reasons to do with a side-effect the substance had only recently been added to the FEI prohibited substances list,[23] one of those horses was ridden by Irish international, *Denis Lynch* who was quite open about the fact that he had used the preparation, for its stated purpose, for about a year being unaware that it was prohibited. Amongst others Brazilian *Bernardo Alves* found himself in exactly the same situation and similarly penalised by the FEI tribunal. The salient point for this argument though is the way the Irish sporting establishment reacted. The response of *Pat Hickey*, the then President of the Olympic Council of Ireland was typical:

> 'I am sick and tired of our name being dragged through the mud like this…We have to get answers. The Irish Sports Council is responsible for the testing of athletes and they do a very good job of it. Procedures are followed rigorously. We want the same standards to apply to equestrian sports and, right now, that doesn't seem the case'.[24]

Hickey equates the actions of the Irish Equestrian team with cheating without regard to the circumstances much as *Juan Antonio Samarach* famously equated all doping to 'moral death'[25] encompassing the wilful with the inadvertent. To pare the actions of *Lynch* back to the bare essentials though, a plant extract was applied to an animal after intensive exercise. He was not aware that the substance had been recently banned. Because of the concept of strict liability, it was not necessary to prove who had applied the substance, nor what the motive was, nor what knowledge as to the side effects might have been held by *Lynch* and his team. In spite of this IOC members and consequently the press, were referring to 'another scandal for Ireland'. The language of cheating and low integrity is highly evident and at no time is there any consideration that the regulations, even with the extensive reform carried out by the *Haya* administration, are still wholly unsuitable for horse sport. This paper is arguing that the state of anti-doping and corruption counter measures in the horse sport world is so unsatisfactory it needs wholesale review to build a more effective, equitable framework.

2 The central argument

There are three main themes that have to be addressed in this paper. Firstly, that despite the relative distance in evolutionary terms that there is between *Homo sapiens* and *Equus ferus caballus* the two species must, for effective integrity regulation, both be considered as 'athletes'. This is as an alternative to the commonly accepted fallacy that the horse is analogous to other 'equipment' used by human athletes in sport such as the racing car, kayak or cycle. It is

[15] 'Jock Paget Suspended' The Daily Telegraph 2013 http://www.telegraph.co.uk/sport/10379298/Jock-Paget-suspended-after-Burghley-winning-horse-Clifton-Promise-tests-positive-for-banned-substance.html accessed on 11th July 2016.

[16] Watkins (2013a, b, c), p. 7.

[17] 'Queen's Gold Cup-winning racehorse Estimate tests positive for banned drug morphine', Telegraph Online 2014 http://www.telegraph.co.uk/news/uknews/queen-elizabeth-II/10984322/Queens-Gold-Cup-winning-racehorse-Estimate-tests-positive-for-banned-drug-morphine.html accessed on 11th July 2016. Although this does not concern the FEI, issues common to equestrian cases came to the fore, for instance the possibility of contamination at source in proprietary feeds. See also 'Oh, neigh: doping rules designed for humans are not fit for horses' The Conversation 2014 https://theconversation.com/oh-neigh-doping-rules-designed-for-humans-are-not-fit-for-horses-29687) accessed on 10th June 2016.

[18] Anderson (2013), p. 141.

[19] Connor and Mazanov (2009), pp. 871–872 cited in Anderson (2013), p. 141.

[20] Amos (2007), p. 18.

[21] CAS 2002/A/376.

[22] *Răducan v IOC,* Ad Hoc decision 2000/011.

[23] Wendt (2011), p. 71.

[24] Reuters News Agency 2008 http://www.reuters.com/article/2008/08/23/us-olympics-equestrian-ireland-idUSPEK30997520080823 accessed on 12th July 2016.

[25] Amos (2007), p. 1.

this fallacy that actually underpins the problematic application of a version of the WADA Code to the equestrian sports that the FEI is responsible for. In UK horse racing the same rather tired thinking can be identified behind the drafting of the relevant parts of the 'Orders and Rules of Racing'.

Secondly, it is necessary to problematise the way that anti-doping regulation, derived from the WADA Code and similar, has been applied to horse sport and make the case for change. This is done in large part via a case study from just before the London Olympics in 2012.

The final theme engages with a solution to the above problems. This would be derived from a little discussed but entirely new way to draft integrity regulation in equestrianism and horse racing.

3 Theme one: re-imagining the horse in a postmodern world

The importance of the horse in modern society has changed dramatically over the centuries. This paper argues, however, that its importance remains very significant but in a very different form. This change is what impacts so greatly on the way integrity in horse sport is managed. This is no flight of whimsy or tangential argument, considering the re-imagining of the social construct of the horse adds weight to the argument that this sport is special in that it is one athlete paired with another, albeit of a different species. This in turn justifies a wholly new approach to the protection of integrity through regulation in sports involving horses.

4 The example of equestrianism

A new competitor or horse owner entering the world of elite equestrianism will find that, prima facie, governance, discipline and sporting integrity rules are little different from those applied to human sports. Strict liability[26] is common as are reverse burdens of proof.[27] The WADA Code, albeit an adapted version, has been applied in an unthinking fashion to equestrianism and racing has fared little better. For the sake of simplicity, however, we should first concentrate on equestrianism. As FEI sports these are governed by three separate sets of doping rules, one for the doping of horses, one for controlled medication (collectively referred to as EADCMR) and one for the riders.[28] All three of which are very close approximations of the WADA Code. This complexity can be confusing for tribunal panels as was acknowledged in one appeal on the eve of the 2012 Games.[29] The only justification for applying a modified WADA Code, originally developed for humans, to horses is if one considers equestrianism as essentially a human sporting activity but where some aspect of the human capability is enhanced by a (living) piece of sporting equipment. The analogy would be with a pole-vaulter's pole, an athlete's spiked running shoe or a tennis racket.

The new rider would find this is paradigm quite at odds with the lived experience of being involved in horse sport with its unique nature. The horse is not an extension of the human participant like a hockey stick, bicycle or archer's bow is. These things operate solely as enhancements of the human being's natural attributes so it is understandable that the horse might be initially categorised in a similar way by the un-initiated. This is the product of insufficient depth of analysis; however, horses as highly intelligent animals, have their own agenda and successful riding requires the skill of making the wants and needs of the horse coincide with those of the human athlete astride it. Competition horses weigh in excess of half a metric tonne and are quite capable of killing their rider,[30] given the challenging courses at elite level this can often only be prevented by intense, often rapid negotiation between horse and rider. A complex 'body language' rather than speech is used which requires the cross-modal use of more than one sense at a time by the horse.[31] The correct analysis is not to view the human competitor as a 'pilot' any more than a relay runner is the pilot of the athlete to whom he or she hands the baton. Consequently, it makes much more sense to consider the elite-level horse as another athlete, albeit a non-human athlete. Ironically this construction of the horse as athlete is already espoused by the FEI in its regulations[32] and also in its case decisions[33] which should have produced a more enlightened approach to the drafting of the EADCMR. This will be discussed further under the next

[26] See for example Article 3 'Proof of *ECM Rule* Violations', specifically 3.1 'Burdens and Standards of Proof'.

[27] Orders and Rules of Racing, Rule (A) 30, 'prohibited association'.

[28] FEI Clean Sport 2016 http://www.fei.org/fei/cleansport accessed on 12th July 2016.

[29] CAS 2012/A/2807 Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale/CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale at para 1.12.

[30] This does not require any deliberate action by the animal. The sport of eventing has a particularly bad record when it comes to rider deaths, see generally Cripps and O'Brien (2004), this study identified almost 60 rider deaths in this Olympic sport 1993–2000.

[31] See Proops and McComb (2012), p. 3131.

[32] The FEI had on its former 'Clean Sport' webpage in 2012, 'Equestrian sport is a unique case of a sport that involves animal and human athletes working together as a team' http://www.feicleansport.org/ accessed on 22nd August 2012.

[33] CAS 2012/A/2807 Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale/CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale at para 6.24.

theme but the construction of the horse as an athlete, even an 'athlete-celebrity' has a long evolutionary track and if anything, is gaining momentum. This is no animal rights discourse though and has nothing to do with according the horse any greater status than animal. It has everything to do with societal and cultural development in the developed world over many centuries however.

4.1 The 'special relationship': justifying the constructing the horse as 'athlete'

The importance of the horse is not merely residual, historic or nostalgic in nature but retains a pivotal cultural, social and economic role which in turn is derived from a 'special relationship' with human kind, entwined as it is with our own civilization's development. This 'special relationship' is central to an emergent social construct. This relationship has a very long history and an account of that is crucial to this discourse.

The relationship between horse and man reached a pivotal moment around 3000 BC where it begun to be used for transport[34] instead of prey. The use of the horse in combat is important because a considerable amount of traditional horsemanship and even some competitions, like eventing, have military roots. There are still some, albeit very small, operational mounted infantry[35] and cavalry[36] units for special conditions[37] and most armed forces worldwide maintain a mounted capability for ceremonial duties. What is interesting for this paper is that here is the root of the concept of the horse as a comrade rather than a piece of equipment. This particular relationship, encouraged by military high command and by propagandists[38] was captured in a First World War painting where a private comforts his dying horse, entitled 'Goodbye Old Man'.[39] 'Pals' by C. T. Howard[40] featured a soldier and his horse as did 'The Wounded Chum—a case for the Blue Cross'.[41] The use of language was carefully chosen to elevate the war horse to the status of 'brother in arms'. Trust between rider and mount, driver and team and vice versa meant survival was more likely than if no such faith existed. The British Army knew this and nurtured the relationship.[42] This notion of the horse has been carried through into sport and morphed into 'brother athlete'.

Social scientists have also begun to formulate theory on the athlete–horse. Gilbert[43] explores the social processes that have led to the re-classification of horses as athletes in equestrian sport. Gilbert concentrates on a specific breed for analysis. In exploring the *sport pony* as an athlete one of the theoretical resources utilised is work by Latimer and Birke.[44] The meanings generated around the identity of a specific type of horse are the culmination of specific breeding practices and the changing use of the horse is also a factor in this identity transformation. These changing uses are shaped by evolving social structures'.[45] As discussed in the next sections the language of horses qua athletes has now found its way into FEI regulations and CAS arbitral awards, for instance in the *Sharbatly* and *Al Eid* case studied later, '[a] central and distinctive feature of equestrian sport is that it involves a partnership between two types of athlete, one human and one equine'.[46]

5 Why acknowledging the new construct matters for horse sport

If the real place of the horse in modern society is acknowledged this reveals the right way to govern integrity in horse sport. Currently, the regulations concentrate on wrongdoing by the autonomous human athlete and the horse is a mere appendage or piece of equipment used by that athlete. The real position is that the horse is a team member albeit one with no autonomy and few rights. In that light what is required is a new way of drafting integrity regulations, like anti-doping rules, to deal with current inequities and future challenges.

[34] Clutton-Brock (1992), pp. 67–68. See also Barclay (1980), p. 25, both cited in Crossman (2010) 'The organisational landscape of the English horse industry: a contrast with Sweden and the Netherlands' PhD thesis by Dr Georgina Crossman, University of Exeter.

[35] See Field Manual No. 3-05.213 'Special Forces Use of Pack Animals', Headquarters, Department of the Army, Washington, DC, 16 June 2004.

[36] Indonesian Army, Cavalry Website 2015 http://denkavkud-pussenkav-tniad.mil.id/kata-sambutan-dandenkavkud-pussenkav/ accessed on 6th October 2015.

[37] 'New horsepower for war zones: Special Forces saddle up', USA Today 2014 http://www.usatoday.com/story/news/nation/2014/06/22/horses-marines-afghanistan/10744395/ accessed on 12th July 2016.

[38] Flynn (2012), p. 28.

[39] 'Goodbye Old Man: An Incident on the Road to a Battery Position in Southern Flanders' painted by Fortunino Matania 1916.

[40] "Pals!" by British artist C.T. Howard. Postcard printed and published by J. Salmon, Sevenoaks, England.

[41] 'The Wounded Chum – a case for the Blue Cross' painted by Stanley Wood.

[42] See Dierendonck and Goodwin (2005) in de Jonge and van den Bos (2008) and Keaveney (2008), pp. 444–454 cited in Flynn (2012), p. 27.

[43] Gilbert and Gillett (2012), pp. 634–635.

[44] Latimer and Birke (2009), pp. 1–27.

[45] *Ibid.* p. 8.

[46] CAS 2012/A/2807 Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale/CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale at para 6.24 (see also Appendix 1).

6 Theme two: problematising modern equine anti-doping regimes

The discussion then should turn to the current inequities arising from the adoption of the WADA Code and similar in equine sports. A case heard under the FEI's regulations just before the London Olympics make a very useful case study to base the arguments on. There is a legitimate debate ongoing as to whether anti-doping regulation generally is quasi-criminal, indeed on that basis whether generally CAS is a suitable arbitral body to be trying matters with such punitive outcomes.[47] The discourse in this paper looks at these issues through the unique lens of sports involving the non-human athlete; however. The discussion centres on the FEI's 2012 regulations and some later amendments.

7 Strict liability and reverse burdens in equine cases are an affront to justice

The debate on strict liability and rules of evidence in human doping cases has been well aired[48] but the reason why the Olympic equestrian sports provide any further need for discussion in these areas is that sports involving human/animal combinations are fundamentally different from those involving only human athletes in several key respects. As the FEI puts it on its 'Clean Sport' webpage, 'Equestrian sport is a unique case of a sport that involves animal and human athletes working together as a team'.[49] The key problem is that particularly doping *sanctions* operate on the *mind* of an athlete that is of a completely different species to the athlete within whose *body* the rule infraction was discovered, albeit that the non-human athlete can have no liability whatsoever.

Before moving on to the arguments in detail it is first necessary to consider the purposes of the equine-focused regulations in both Olympic equestrianism and horse racing. Although the Rules of Racing are rather cumbersome and in need of simplification[50] there are distinct elements of those that are animal welfare orientated such as the Schedule 6 restrictions on the use of the whip during a race.[51] In equestrianism, however, the rules that concern anti-doping are quite separate from those that control the use of medication on a horse. The FEI Equine Anti-Doping (EAD) Rules are separate to the Controlled Medication (CMR) Rules (together the EADCMR as previously mentioned)[52] but are presented as two sections in the same document. Whilst doping a horse can have negative consequences for its health the main thrust of the CMR is animal welfare orientated. For example, medication may be given to mask an injury so that the horse performs as normal (as opposed to at an enhanced level), but in doing so exacerbates that injury. Both these anti-doping focussed and controlled medication/animal welfare orientated rules together with those produced by the BHA are entirely dependent on strict liability and reverse burdens of proof however. Therefore, the arguments in this paper which relate to regulations constructed to defeat illegal performance enhancement also relate to those with an animal welfare focus. It is important not to lose sight of animal welfare concerns in the process of arguing for human justice and the following discussion shall bear that in mind.

Firstly, the arguments on the strict liability points are complicated by the fact that a horse may be doped by an owner, rider or coach who wishes it to do better than its competitors. The animal can have been interfered with by a number of individuals not necessarily at the behest or even with the knowledge of the person who ultimately could benefit and/or who may face liability under current rules. Secondly, an owner (for tactical reasons) a rival (for obvious reasons) or someone who wishes to benefit from a 'spot bet' may dope the horse to underperform or deliberately medicate it in breach of the rules to contrive a disqualification. This is a much more difficult situation to detect than should the equivalent happen to a human athlete, not least because the horse cannot deliberately communicate its own state of health to humans. The horse cannot form, nor communicate 'suspicions', beyond a basic level of distrust, about those humans it interacts with.

It goes without saying that there is no basis for holding the horse liable for its actions, legally or morally. The horse is not autonomous nor accountable, Regan uses the term 'moral patient' to distinguish the animal from the human 'moral agent'. For Regan, 'moral patients lack the prerequisites that would enable them to control their own behaviour in ways that would make them morally accountable for what they do'.[53] If, however, the non-human athlete horse fails a doping test then the rider faces a potential ban, irrespective of who administered the

[47] Downie (2011), pp 16–17.

[48] See for example Wise (1996), pp. 1161–1163 and Young (1994) 'Problems with the definition of doping: Does lack of fault or the absence of performance-enhancing effect matter?', conference proceedings: Sports Marketing: Law, Tax and Finance, IOC Museum, Lausanne.

[49] FEI Clean Sport 2016 http://www.feicleansport.org/ accessed on 12th July 2016.

[50] Para 1.24, Neville Review Executive Summary—BHA Press Releases 2008 http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf accessed on 28th October 2016.

[51] Specifically BHA Rules of Racing, Schedule 6, Part 2, Para. 6.1.

[52] FEI Clean Sport 2016 http://www.fei.org/fei/cleansport accessed on 12th July 2016.

[53] Regan (2003) in Armstrong and Botzler (2003), p. 17.

substance to the horse, rendering the combination ineligible to compete. Top level competition horses can be so valuable they are often owned by a syndicate, for example London 2012 Team GB's Charlotte Dujardin's gold medal winning dressage mount *Valegro*.[54] Although competitors do spend an enormous amount of time with their animals they are not inseparable and apart from the aforementioned stakeholders, there are a number of individuals, from stable hands to physiotherapists, veterinarians and others, involved in every part of the horse's life. These facts represent yet one more removal from the human athlete 'norm' of an autonomous being wholly responsible for all that goes into his or her body. Equine competition is also unique in the world of sport because one part of the athlete team has rights[55] but not *human* rights. This all adds further weight to the argument that the pairing of equestrian athlete and horse athlete is without precedent. The accepted view is that strict liability is justified in human only sports in large part because the human athlete's autonomy, it is also accepted that some sanction, such as forfeiture of prizes, can fall on athlete B as a consequence of athlete A failing a drugs test. This would occur for instance when a 400 m relay team is stripped of their medals because one of their number gives a positive result. It is argued in this paper though that given the number of variables and the lack of autonomy of the non-human equine athlete it is unconscionable to apply strict liability to *humans* in equine cases. When it is applied, human rights, natural justice and due process in respect of the *human* athlete are not adhered to. What recourse there might be given that SGBs are not considered public bodies will be discussed but first a consideration of reverse burdens.

8 The problem with reverse burdens in equine cases

Reverse burdens are another concept from English criminal law found in equine anti-doping regulations such as the EADCMR. In domestic law, purely evidential burdens placed upon the defendant have been found to be in accordance with the principles of Article 6(2) ECHR.[56] However, the picture is much less clear with full persuasive burdens placed upon a defendant such as in misuse of drugs cases and drink driving charges. In summary, in English cases much appears to turn on the potential consequences for the defendant,[57] a position taken by the ECtHR as well.[58] The conjoined appeals in *Sheldrake v DPP; AG's Ref (No 4 of 2002)* [2005] 1 AC 264 are key to trying to establish the current legal position on the compatibility of full reverse burdens are.

In *Sheldrake* the charge was one of being drunk in charge of a motor vehicle contrary to s5(2) RTA 1988. There is a burden placed upon the defendant to prove that there was no likelihood of him driving the motor vehicle, upon successful discharge of which he must be acquitted. In this case the then House of Lords ruled unanimously that there was no need to 'read down' the provision and that the imposition of the burden was justifiable. In *AG's Ref (No 4 of 2002)*, however, a case concerning charges of 'belonging or professing to belong to a proscribed organisation' under s11(1) Terrorism Act 2000 the House of Lords reached a different view. There is a statutory defence to this charge if the person charged proves 'that the organisation was not proscribed on the last…occasion on which he became a member….and…that he has not taken part in the activities of the organisation at any time while it was proscribed.[59]'

Here the finding was that the provision should be interpreted to require the accused to bear an evidential burden of proof only.[60] This is to give effect to European Court of Human Rights (EctHR) jurisprudence that 'the means employed have to be reasonably proportionate to the legitimate aim to be achieved'.[61] Thus full reverse burdens will not be compatible with the Convention if the consequence of conviction is substantial. It follows then that full reverse burdens in WADA Code compliant sport regulations could come under similar scrutiny. Those in the Orders and Rules of Racing and in the EADCMRs, which latter proved to be an important feature of the *Al Eid* and *Sharbatly* defences[62] ought to be considered in breach of those rights. This is so because it is difficult to over-estimate the severity of the consequences of a doping or misuse of medication 'conviction' on any professional athlete and no less so a professional equestrian. This is also because of the unique situation where the infraction takes place, i.e. in a different species of athlete to that of the athlete whose mind suffers the sanction.

The counter argument to this position is that these matters are not criminal no matter how penal in effect and therefore neither Article 6(2) nor any fundamental rights discourse applies because in addition no public bodies are involved. This position should be considered next.

[54] Valegro Biography in Horse and Hound 2016 http://www.horseandhound.co.uk/tag/valegro accessed on 12th July 2016.

[55] See for example Bermond (2003) in Armstrong and Botzler (2003, p. 79) and Cavalieri (2003) in Armstrong and Botzler, p. 30.

[56] *A-G's Ref (No 1 of 2004)* per Lord Woolf.

[57] *Ibid.*

[58] *Salabiaku v France (1988) 13 EHRR 379* see also *Janosevic v Sweden (2004) 38 EHRR.*

[59] Section 11(2) Terrorism Act 2000.

[60] Dennis (2010), pp. 473–474.

[61] *Janosevic v Sweden (2004) 38 EHRR 473.*

[62] See for instance Article 3.2.1 CMRs.

9 The public/private divide and sport

It is necessary now to take a short journey around the possibilities available to a sportsperson in terms of challenging a decision made by any SGB. The complexities, which are considerable, are key to the arguments in this paper because if an SGB cannot be challenged on procedural grounds then it is of little consequence that rights have been infringed.

9.1 The traditional view

For Code-compliant equestrianism, since the *Elmar Gundel* case[63] it is clear that the Court of Arbitration for Sport (CAS) is a real arbitral court, governed by Swiss Federal Law, which is impartial, with an international jurisdiction and which can render final and enforceable judgments.[64] There are lines of argument which could over time drive significant inroads into that position, *Matuzalém*[65] which seems to suggest the Swiss Federal Tribunal (SFT) can hear an appeal on substantive grounds and the *Pechstein*[66] proceedings which, so far unsuccessfully, has sought to challenge the international legality of the CAS arbitration clause. Nevertheless, for the time being CAS would be the ultimate appeal venue for an equestrian. In contrast a racing jockey would have to exhaust BHA rights of appeal before attempting to bring a case, under the greatly restricted causes of action against an SGB allowed in the English Courts. Irrespective of appeal route, what would be the recourse if the regulations themselves were to be questioned as the arguments in this article maintains they should?

Despite doubts expressed in *Modahl v British Athletics Federation* (No 2) [2002] 1 WLR 1192, relationships between sports personalities, their clubs and indeed governing bodies derive primarily from the law of contract, either explicit or as part of a wider 'contractual nexus' created by the practicalities of the way sporting events are organised and held. Sometimes the contractual relationship can exist by conduct. In *Davis v Carew-Pole* [1956] 1 WLR 833 it was the fact that Davis attended the disciplinary hearing of the National Hunt Committee at all that amounted to the required conduct. In any event for Gardiner even where no contract exists the position was clarified by *Bradley v Jockey Club* [2004] EWHC Civ 2164 (QB)[67] in which it was accepted that the decisions of SGBs are susceptible to scrutiny by the courts under a private law supervisory function, albeit with limits.

Turning to Judicial Review[68] per se, the way appears blocked, quite firmly, by a series of decisions that sports governing bodies are not public bodies. The closest that a Judicial Review decision has come to deciding to the contrary is in *R v Disciplinary Committee of the Jockey Club, ex parte Massingberd-Mundy* [1993] 2 All ER 207 because of the 'near monopolistic' powers of the Jockey Club. Nevertheless, it is quite clear that there is a divide between private and public law and has been since *O'Reilly v Mackman* [1983] 2 AC 237. Prior to this case, 'duties of legality, fairness and rationality were imposed in certain cases on private bodies taking private decisions', Oliver cites, among others, *Nagle v Fielden* as examples of that.[69] Since *O'Reilly* the test has been refined now to the point that to be judicially reviewed a decision must be of a 'governmental' nature not merely be part of a public function.[70]

There are certain inalienable constitutional rights that have hitherto been protected in judgments made outside Judicial Review proceedings. For example the 'right to work' coupled with a capricious or arbitrary rejection of an application for a training licence was sufficient to establish liability in *Nagle v Fielden* [1966] 2 QB 633 for restraint of trade. The fact that the SGB concerned, the Jockey Club, operated as a monopoly was key to that finding. The 'right to a fair trial' *(audi alteram partem)* is also a fundamental constitutional right in English Law and long predates the modern incarnation of human rights. Since *Ridge v Baldwin* [1964] AC 40, the type of hearing that right may apply to has been extended to those in which the *effect* of a decision is judicial. This is irrespective of whether the tribunal in question is operating in an executive or administrative capacity. This can be seen in a sporting context in *Russell v Duke of Norfolk* [1949] 1 ALL ER 109, a case again involving licences to train race horses.[71] In any event according to Lord Loreburn in *Board of Education v Rice* [1911] AC179 'anyone who decides anything' is obligated to apply the principles of natural justice.

Turning away from Judicial Review, the question remains, however, as to whether such as a doping

[63] *Gundel v FEI/CAS* 4P.217/1992 (1993) (Switz.).

[64] Gardiner et al. (2011), p. 243.

[65] For commentary see for example Vallon and Pachmann 2012 http://www.mondaq.com/x/184712/Sport/The+Landmark+Matuzalem+Case+And+Its+Consequences+On+The+FIFA accessed on 31st October 2015.

[66] Landgericht München, judgment dated February 26, 2014, file no. 37 O 28331/12.

[67] Gardiner et al., p. 112.

[68] The term is used here to denote the process as used in the English and Welsh jurisdiction and is discussed on the basis of applicability to decisions made under that jurisdiction by SGBs or such as the National Anti-Doping Panel (NADP), see http://www.sportresolutions.co.uk/ accessed on 25th September 2013.

[69] Oliver (1999), pp. 80–81.

[70] See *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 and *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909.

[71] Gardiner et al. (2011), pp. 193–194.

'conviction' at CAS or under BHA disciplinary procedures could be challenged on human rights grounds. In *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 however, it was held that the test for amenability to judicial review under Part 54 of the Civil Procedure Rules, is essentially the same as the test for a 'functional public authority' under S6 Human Rights Act 1998. For Gordon as well, 'whether the courts define a 'public authority' under s.6 [HRA] broadly or narrowly' is key.[72] In *Poplar HARCA v Donaghue* [2002] Q.B. 48, (paras 58–60), Lord Woolf stated that '…the courts have acknowledged the need for the definition of a public authority to be given a generous interpretation'.[73] For Boyes though at the inception of the Act, bodies governing sport were always going to be considered to be private,[74] generally taking the form of incorporated or unincorporated associations[75] and the courts were prepared to move beyond the traditional notion of the contractual nexus in order to provide a remedy but only in exceptional circumstances.[76]

Herlin-Karnell makes a useful contribution to this discourse. She acknowledges that 'horses are special and so is sport'.[77] She does look at the degree to which sport has 'specificity' under Article 165 Treaty of the Functioning of the European Union (TFEU) albeit to a more restrictive degree[78] since cases like *Delige*[79] and *Bosman.*[80] Her arguments regarding the unique nature of horse sport reflect those in this paper, for Herlin-Karnell these are the only sports 'that involve[s] two athletes: the horse and rider'.[81] She goes on to argue that EU law might be the way to mitigate the harshness of strict liability in some cases. However, she phrases this as an open question without exploring the position fully. It is true to say that the right to a fair trial is protected under the Charter of Fundamental Rights,[82] that a disciplinary finding by the FEI could be challenged under Art. 49 as disproportionate when the offence is based on say contamination as it was in *Al Eid and Sharbatly* or the Queen's prize winning racehorse *Estimate*. It is correct that recent European Union (EU) decisions are suggesting that the Charter could have a wider scope than just controlling the activities of EU institutions and member states and could in the future be directed therefore at SGBs as she suggests.[83] This is, however, conjecture on Herlin-Karnell's part and there is no discussion of how this 'proportionality test' might have worked in cases that are already decided under current rules, nor concrete examples of this test being applied in cases where the tribunal challenged is one operating under the auspices of a non-state actor like an SGB. The most significant failing is that this argument takes no account of the different governance arrangements for horse racing, instead it is discussed under the general heading of equestrianism[84] which is a mistake. The BHA governs horse racing and, although other national racing authorities look to it as a world leader[85] for sports integrity management its jurisdiction begins and ends in the UK. There is no true ISF for horse racing[86] so post what is most likely to be a 'Hard' 'Brexit'[87] there will be no applicability of any EU Treaty provisions. Even a 'Soft' Brexit leaves too many imponderables for this proposition to be much more than an unproven hypothesis. Herlin-Karnell acknowledges this herself when she says that this is an 'idea that needs to be researched further' particularly in reconciling with the principles of animal protection.[88]

A successful challenge then on pure human rights grounds, whether ECHR/HuRA or EU based, looks unlikely therefore, however that does not mean neither human rights nor Judicial Review can have any part to play.

9.2 A 'Third Way'?

Given the apparent stalemate, Oliver's argument that the old public versus private debate is redundant is very attractive. Oliver suggests that 'there are many areas where laws which might be regarded as 'public' mingle with private law'.[89] She takes the theme further in exploring

[72] Gordon (2003), p. 21.

[73] *Ibid.*

[74] Boyes (2000), pp. 517–518.

[75] Beloff (1989), p. 96.

[76] Boyes (2000), p. 518, a position supported by *Bradley v Jockey Club*, [2004] EWHC Civ 2164 (QB).

[77] Herlin-Karnell (2013), p. 168.

[78] Restrictive in that now only truly 'rules of the game' are not affected by EU law.

[79] Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL (2000), Joined Cases C-51/96 and C-191/97.

[80] Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman (1995), Case C-415/93.

[81] Herlin-Karnell (2013), p. 170.

[82] European Union Charter of Fundamental Rights (2000), Article 47.

[83] Herlin-Karnell (2013).

[84] *Ibid.* p. 168.

[85] Para. 1.9, Neville Review Executive Summary—BHA Press Releases available at: http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf (accessed on 28/10/16).

[86] The International Federation of Horse Racing Authorities (IFHRA) does attempt to provide some consistency in racing governance across the globe, but it does not have the true status of an ISF.

[87] Watts (2016) 'Theresa May indicates 'Hard Brexit' and dismisses free movement deal to secure single market access', *Guardian Online* available at: http://www.independent.co.uk/news/uk/politics/theresa-may-hard-brexit-soft-article-free-movement-deal-single-market-access-a7341886.html (accessed on 28/10/16).

[88] Herlin-Karnell (2013).

[89] Oliver (1999).

'five values which…are commonly protected by both public and private law, namely individual dignity, autonomy, respect, status and security'.[90] Oliver goes as far as to cite K.E. Klare in saying 'there is *no* public–private distinction'.[91] In fact before *O'Reilly v Mackman* [1983] 2 Ac 237 there was no such divide, courts felt obliged to assess the legality, fairness and rationality of private bodies taking private decisions as well.[92] Decisions now seem to indicate there is such a public/private split but that said, rights protected by public law, such as propriety and rationality in decision making, cited in the *GCHQ* case, are evident in private law as well.[93] Other examples include the requirements of procedural fairness and reasonableness on the part of the employer in making dismissal decisions.[94] In *Stevenage Borough Football Club Ltd v Football League Ltd* (1996) Times, 1 August, the club sought to challenge the criteria for promotion to the third division, a remedy was refused on the basis of delay and prejudice to third parties but Carwarth J saw 'no reason why the tests applied to the exercise of discretion by regulatory bodies should be materially different from those applied to bodies subject to Judicial Review'.[95]

Turning specifically to human rights, Oliver notes that some cases under the Convention have raised issues to do with the breaches of fundamental rights by private bodies such as the 'closed shop case' of *Young, James and Webster v UK* (1981) 4 EHRR 38. She is of the view that, as for Philipson, over time the courts will develop the common law incrementally without creating new causes of action.[96] In this way then private law actions would have to be decided with reference to due process, human rights and natural justice in the same way as public law litigation. Indeed, her view is borne out in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700. This case did involve a public body—HM Treasury but was not a human rights claim. Nevertheless, the right to a fair trial was a central plank of the arguments as to whether a closed hearing, where only one party is present, would infringe the European Convention on Human Rights (ECHR)/Human Rights Act (HRA) principle of, or indeed the common law right to, a fair trial. Thus the incremental development of private law claims to take account of human rights and Judicial Review principles appears to have begun.

There is a logic in this development, ever since the Human Rights Act (HuRA—to distinguish it from the Horse Racing Authority in this piece) was enacted there has been the principle of indirect 'horizontal effect', whereby given that courts are 'public authorities', they must act in a way which is compatible with the Act. For Phillipson it was clear that s3 HuRA would require all legislation to be interpreted in a way which is compatible with the Convention, what is still not clear though is the extent to which this has been applied to the common law.[97] Indirect horizontal effect may apply, however, if a private law action were brought alleging a breach of a Convention right in, say, a breach of contract. In this context that breach could be a breach of an implied term to ensure a 'fair (disciplinary) trial' in the contract between an equestrian athlete and the FEI. Bamforth initially doubted that horizontal effect would have any great force in practice, not least because the Act makes no clear sanction available against a court for failure to act in accordance with Convention rights.[98] It is true that there has not been any great swathe of cases utilising the horizontal effect to bring an action against non-public bodies and individuals since 2000; however, it is possible to glean evidence of this jurisprudential thinking in a decision like *Bank Mellat.*

Even if a human rights challenge to an SGB like the FEI were possible on the basis that it carried out a public function, or utilising horizontal effect, the main obstacle thereafter could still be that of judicial deference, the tendency of the judiciary to bow to the expertise of the body or person making the original decision. Edwards argues that this principle, justified by the lack of democratic legitimacy of the judiciary and the 'institutional incompetence' of the courts to deal with the socio-economic issues which frequently arise, is a 'firmly established feature of judicial review in cases involving the HuRA[99]'. He concludes by saying that judicial deference is so entrenched it is in danger of frustrating one of the basic purposes of the act—'bringing rights home'.[100] The position is far from clear therefore but there is a clear discernible movement towards SGB decisions being challenged in the UK courts.

10 Appropriate remedies in these cases

For the sake of absolute clarity, it is important to consider what a sportsperson who is the subject of injustice is seeking. Clearly the loss can be financial and then the proper remedy is damages, when Diane Modahl had cleared her name and returned to competition in 1996 she then spent 6 years and more money than she or the British

[90] *Ibid*., pp. 29, 60–70.
[91] *Ibid*., p. 248.
[92] *Ibid., p. 81.*
[93] *Ibid*., p. 84.
[94] *Ibid*., p. 146.
[95] *Ibid.,* p. 211.
[96] *Ibid.,* p. 241.

[97] Phillipson (1999).
[98] Bamforth (2001).
[99] Edwards (2002).
[100] *Ibid.* p. 882.

Athletics Federation (BAF) could afford unsuccessfully seeking £450,000 for breach of contract.[101] This, however, is extreme and unusual and of course inappropriate if what has been lost is medals, trophies and associated sporting prestige. Even then though given the commercial value of sport that is likely to mean considerable lost sponsorship and merchandising revenue as well. The more likely remedy is either seeking to overturn the SGB's decision or seek injunctive relief to prevent it from exercising some function considered unfair. The BHA is engaged in one such example at time of writing. A trainer, *Jim Best* was accused of telling jockeys to 'stop' horses, in other words cause them to underperform, on two occasions. On appeal the Appeal Board upheld *Best's* contention that there was apparent bias in the original panel in that one member was also engaged by the BHA separately to do consultative work. The result was a re-hearing scheduled to be heard in November 2016.[102] In the meantime, acknowledging that their panel selection procedures where open to criticism engaged Christopher Quinlan QC to conduct a review. The recommendations were published on 30th September 2016. A key part of the scope of this report was to:

> '3.1.3.1 ensure that the disciplinary, licensing and appeal functions remain legally robust and would withstand legal challenge;
> 3.1.3.2 ensure that proceedings before such bodies comply with the highest standards of procedural fairness…'[103]

This entailed considering compatibility with Convention principles such as the right to a fair trial, and older constitutional principles like the rule against bias and so on. In asking for this work to be done and in Quinlan carrying out the comparison it is evident that the BHA themselves are alive to the possibility of a challenge under the *Bradley v Jockey Club* principles and the possibility of ECHR provisions being taken account of in such a private law claim. In these situations a jockey, trainer or equestrian is fighting for their livelihood and reinstatement of prizes or even damages may be a poor second in their consideration. The remedy here is simply forcing the SGB concerned to reconsider its decision or change its processes and procedures.

Given the foregoing, a private law claim with ECHR principles embedded and/or in reliance on the over-arching supervisory jurisdiction outlined in *Bradley* remains the strongest possibility for the aggrieved equestrian or jockey, trainer and the like. However, generally the decisions of English courts in such cases have tended to recognise the specific expertise that a disciplinary panel in an SGB has. Cases like *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 lead to the conclusion that, although there are exceptions, the courts prefer to leave the enforcement of the rules of sport in the hands of the expert bodies set up for their regulation. Intervention is only likely, and then reluctantly, when there is something demonstrably wrong with the process or outcome. The contention in this paper is that there is something demonstrably wrong with applying strict liability and such as reverse burdens of proof in equine cases as the forthcoming case study shall further demonstrate.

11 *Vanhoeve* and *Lobster 43* at CAS: a case study

On the eve of the 2012 London Olympics, 71,649 tests had been carried out on potential Olympians in the previous 6 months resulting in 107 sanctions.[104] The 2012 games themselves have been noted as the most tested ever, with 4770 tests at Beijing in 2008 with 20 failures (including 6 horses), and 2149 tests at the winter games in Vancouver in 2010, including 3 failures.[105] At least two of the 2012 figures quoted involved drugs administered to show jumping horses.

The allegations in this case were that a breach of the Controlled Medication Rules (CMRs)[106] had occurred, which are equine welfare orientated. These together with the Equine Anti-Doping Rules (EAD) are referred to as the EADCMRs. *Sharbatly* and *Al Eid* were 'charged' because of the presence of Phenylbutazone and Oxyphenbutazone, both commonly known as "Bute"[107] in *Vanhoeve* and *Lobster 43* without an Equine Therapeutic Use Exemption (ETUE). The tests were carried out at other events earlier that year. *Al Eid* and *Sharbatly* were brought before an FEI Tribunal which handed down a decision on 23rd May. Each appellant received a period of ineligibility of eight months effectively precluding their involvement in the 2012 London Olympics. A single CAS arbitrator heard an expedited

[101] Modahl v British Athletics Federation (No 2) [2002] 1 WLR 1192.

[102] 'Jim Best may seek High Court ruling over rehearing dispute with BHA', *Guardian Online* 2016 https://www.theguardian.com/sport/2016/aug/28/jim-best-high-court-ruling-rehearing-bha accessed on 20th October 2016.

[103] Quinlan Review, Terms of Reference 2016 available at: http://www.britishhorseracing.com/wp-content/uploads/2016/06/TERMS-OF-REFERENCE-Review-of-DP-AB-and-LC-01-06-16.pdf (accessed on 20/10/16).

[104] 'London 2012: Selsouli to miss Games after failed drugs test', BBC Sport Online available at: http://www.bbc.co.uk/sport/0/olympics/18985217 accessed on 31st October 2015.

[105] Charlish (2012), p. 1.

[106] CAS 2012/A/2807 Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale/CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale para 1.1.

[107] In common use in leisure horses but banned for competition use.

appeal in London with a decision announced on 11th June 2012. The arbitrator found that the FEI Tribunal applied an excessive sanction[108] having conflated the provisions of the two sets of rules, the EAD rules and the CMR. Periods of 2 months' ineligibility for each of the appellants were substituted.

The outcomes of the *Sharbatly* and *Al Eid* case is analogous to criminal proceedings where a conditional discharge is considered the most appropriate sentence. The accused is found guilty as charged but, because of various mitigating circumstances they receive a punishment which allows them to get on with their daily lives. In that analogy of course the accused would receive a stain on their character and would have a criminal record, so it is with *Sharbatly* and *Al Eid*. They are 'guilty' persons and quite apart from any moral stigma, previous 'convictions' of this nature affect the way that future transgressions of FEI rules are 'tried', under the EADCMRs a person with a 'record' for substance misuse of this nature would not be able to elect to have the allegations against them heard under the Administrative Procedure, also referred to as the 'Fast Track'.[109] This could have serious repercussions should a further allegation be made in the future as the potential delay close to a prestige event could be catastrophic. There is therefore a palpable consequence to the athlete if an adverse finding under the EADCMR is made irrespective of the fact that the sanction can be eliminated or mitigated if there is a finding of no, or no significant, fault or negligence.[110] The analogy is with a Magistrates court making a finding of guilty, but due to mitigation imposing a less significant sentence (such as a suspended one) on the accused. The fact remains that such a person may well risk losing, or being unable to gain, paid employment and of suffering a social stigma.

11.1 Issues of concern in the *Sharbatly* and *Al Eid* case

Having highlighted at the outset of this theme that due consideration should be given to animal welfare concerns as well as preventing injustice, it is worth pointing out that this case involved the CMR portion of the EADCMRs and was thus primarily concerned with whether the animals had been medicated to mask an injury rather than 'doped' in the true sense.

In this case neither *Sharbatly* nor *Al Eid* disputed the nature of the substance nor the positive result the samples gave. *Al Eid* contended that the 'Bute' found in *Vanhoeve's* sample was the result of inadvertent ingestion of powdered residue that was present at *Vanhoeve's* destination stable, most probably because the stall and wall-mounted feed bucket had not been cleared properly by local staff due to flooding. *Al Eid* denied any deliberate administration of the substance, being supported in that assertion by *Dr. Philippe Benoit*, the Saudi Equestrian team veterinarian. In addition, an expert witness employed by *Al Eid* confirmed that this was a plausible explanation.[111]

Sharbatly in turn accepted that, 'for the purposes of Article 10.4.1 of the ECM Rules, he [could not] establish how the substances entered into *Lobster 43's* system'.[112] *Sharbatly* and *Dr Benoit* asserted that, given the care that they and the Saudi Equestrian team used in complying with the EADCMR the only possibilities were contamination or sabotage. Contamination was confirmed as a plausible explanation by the same expert witness as used by *Al Eid* who further noted that the finding of '12 ng/ml (or 12%) above the FEI Reporting Level of 100 ng/ml was very low in comparison with the levels more commonly encountered in positive post-competition and post-race…samples.[113],

Al Eid relied upon Article 10.4 of the ECM Rules covering elimination or reduction of a period of ineligibility justified by "Exceptional Circumstances" based on a finding of 'no fault or negligence' on the part of the accused person. This is analogous to a criminal trial where an accused pleads guilty but disputes the facts as presented by the prosecution, usually because the defendant's version of events, if accepted, could lead to a reduced sentence. Such a dispute in a criminal trial would be settled by means of a so called *Newton* hearing.[114]

At the time of the hearing just before the 2012 Games, in controlled medication cases, if the sample from the horse tests positive the accused has to plead guilty because of the strict liability principle. If they then contend 'no fault or negligence' under Article 10.4.1 CMRs the wording stipulated that ineligibility or sanctions may be eliminated, not however the finding itself. In order to do this, however, the 'accused' '…must also establish how the Controlled Medication Substance entered the Horse's system'.[115]

[108] CAS 2012/A/2807 Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale/CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale at para 1.12.

[109] EADCMRs 2012 Article 8.3.1 http://www.feicleansport.org as at 2012 accessed 12th September 2012.

[110] *Ibid.* Article 10.4.1/10.4.2.

[111] CAS 2012/A/2807 Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale/CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale, Paras 3.11-3.14.

[112] *Ibid.* 3.26.

[113] *Ibid.* 3.29.

[114] *R v Newton* (1983) 77 Cr. App. R. 13.

[115] Article 10.4.1 CMRs 2013 http://www.feicleansport.org as at 2013 accessed on 15th August 2013.

The wording remains substantially the same after later revisions to the Rules so a full reverse burden still rests on an accused person. Article 10.4.2 CMR allowed for a reduced sanction if no significant fault or negligence is 'established' by the accused. It should be noted that automatic disqualification of individual results can never be eliminated once an ECM (or EAD) violation is found. So any award, up to and including an Olympic gold medal could still be forfeited on the basis of an error of judgment by, say, a stable hand, thousands of miles away from the sportsperson accused.

In a criminal *Newton* hearing the judge, sitting alone, is a finder of fact and the burdens and standards of proof are exactly as they are in a Crown Court trial, the burden is on the prosecution to prove their version of events so that the judge is 'sure[116]' they are true. In a controlled medication case, as *Al Eid* found, the requirement for the accused to 'establish' that they bear no fault or negligence means that they must prove they did not have the equivalent of the criminal concept of mens rea. Furthermore, the requirement to 'establish' how the controlled medication entered the horse's system must also be construed as a full burden of proof falling upon the accused.

Al Eid and *Sharbatly* were successful in having their bans reduced due to a confused interpretation of the EADCMRs at the original hearing.[117] Notwithstanding this outcome they remain recorded as guilty of a 'doping' offence and it remains that the EADCMRs as drafted are seriously flawed. They contain strict liability and reverse burdens of proof which would not stand up to scrutiny when considered in the light of Article 6(2) ECHR, Judicial Review principles or common law rights. This is of particular concern because as this paper proves, SGBs are no longer immune to such a claim if it comes as a strand of a private law claim. In any event it is objectionable that a person can suffer such a serious outcome and stain on their character when, as in this case they were nowhere near the scene of the 'crime'. Not to mention that, as accepted by this tribunal, the 'accused' had no knowledge of the infraction which took place in another athlete which was of a different species.

Returning to the issue of animal welfare for a moment, the argument must be that when a horse is doped and in particular when 'illegal' controlled medication is used to mask an injury, equal consideration must be given to whether justice is afforded to the human athlete as well as whether the welfare of the equine has been safeguarded. The discourse so far has proven that serious injustice is possible if not probable with the regulations as currently drafted; however, the welfare element should be addressed. Here the arguments for strict liability in particular draw heavily on those used in the criminal law based on strict liability viewed as a deterrent. If an act is very socially harmful such as breaches of health and safety rules or improper or dangerous driving, then offences are drafted with strict liability so that such behaviour is deterred. This is because prosecutions can easily be brought and concluded without the need to prove mens rea.[118] In this way the criminal justice system is rendered more efficient in that rational actors are persuaded to take more precautions.[119] There is a parallel here with animal welfare focused regulations under both the FEI and BHA, for example as highlighted here in the CAS award in *Al Eid and Sharbatly*:

> 'One of those [equine and human] partners is unable to speak for itself, and therefore the FEI has assumed responsibility for speaking on its behalf, by taking every necessary step to ensure that, in every aspect of the sport, the welfare of the horse is paramount'.[120]

This is unquestionably the right aim but the problem remains the same as with the regulations that have the prevention of cheating as their main focus. Securing animal welfare at the expense of injustice to humans does nothing to promote the cause of animal welfare. Furthermore, as with the WADA Code itself and the closely derived FEI EAD Rules there will need to be a consideration, in an adversarial setting, of the human participant's moral fault. As we have seen from the *Al Eid and Sharbatly* case this is used to determine the length of sanction and the wording is substantially the same after the 2015 revisions:

> 'If the Person Responsible and/or member of the Support Personnel (where applicable) establishes in an individual case that he or she bears No Fault or Negligence for the ECM Rule violation, the otherwise applicable period of Ineligibility and other Sanctions may be eliminated in regard to such Person'.[121]

This is in all but name a determination of mens rea, and there is no reason not to link this to the finding itself rather than to the 'sentencing phase' other than a blind adherence to a paradigm which is not working. With this in mind it

[116] The more modern formulation of 'beyond a reasonable doubt'.

[117] CAS 2012/A/2807 Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale/CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale.

[118] Simester (2005), p. 28.

[119] *Ibid.,* p. 33.

[120] CAS 2012/A/2807 Khaled Abdullaziz Al Eid v. Fédération Equestre Internationale/CAS 2012/A/2808 Abdullah Waleed Sharbatly v. Fédération Equestre Internationale at para 6.24.

[121] Article 10.4.1 CMRs 2015 http://inside.fei.org/fei/cleansport accessed 15th October 2016.

would be far better for animal welfare as well as the prevention of cheating if fault were to be considered. That is not to say necessarily that some form of mens rea ought to be simply injected into the current regulations with a little redrafting. As discussed below sports' 'ruling class' is likely to have none of that. The way around this is apparent impasse is a completely new approach to drafting these kinds of regulations, something to be discussed more fully later in this paper.

12 Theme three: a new era of regulation for horse sport

According to Coe, 'we cannot, without blinding reason and cause, move one millimetre from strict liability—if we do, the battle to save sport is lost'.[122] This is typical of the unswerving support that sport's ruling elite give to strict liability. In a Gramscian analysis sport's 'ruling class' have a 'coercive power' which results in an '…acceptance by the ruled of a conception of the world which belongs to the rulers'.[123] Thus it is difficult for the ordinary sports participant to challenge the edifice. The preceding sections have, however, shown that common law concepts like strict liability and reverse burdens of proof are inequitable in horse sport cases. This section suggests an alternative hegemony based on an often overlooked paragraph in one of many Thoroughbred racing integrity reviews and postulates its application to all sports involving horses.

13 The Neville Review into integrity in racing: a 'breath of fresh air'

The Neville Review of 2008 was chaired by Dame Elizabeth Neville QPM, a former chief constable and consisted of another senior police officer, Michael Page QPM and Anglo-American multi-national law firm DLA Piper as legal advisers. Initially the review was to; 'carry out a Post Implementation Review of the Recommendations of the 2003 Security Review with a view to assessing inter alia how such measures have protected the integrity of racing'.[124] The terms of reference were expanded, however, to include an assessment of when and how SGBs should proceed with sports disciplinary matters that disclose breaches in the criminal law, prompted by the collapse of the corruption trial of Rodgers, Fallon, Williams and Lynch.[125]

In summary, the Neville Review congratulated the BHA in its implementation of the findings of its predecessor's review of 2003. It remained critical of some remaining failings such as physical security of stabling and CCTV siting and usage together with flaws in intelligence gathering. The review considered that this made wider threats like organised crime and use of unidentified techniques or drugs to enhance or depress equine performance harder to identify.[126]

Of particular interest though is that the Neville Review criticises the Orders and Rules of Racing as being too large and lacking in clarity after years of amendment. These Rules contain provisions relating to employment conditions as well as doping, anti-corruption provisions and also animal welfare,[127] the breadth is quite staggering. The Review recommended streamlining and focusing the document radically, and Paragraph 1.24 of the Executive Summary is in large part reproduced here because of its unexpected departure from the norms prevalent in sports regulation:

> '…ideally, rules should be based on a set of underpinning principles. The rules themselves should not be too detailed in order to allow them to be applied more flexibly. The recommended model would be to have a set of principles supported by codes of conduct with rules which sit under them. A breach of a principle or a code of conduct can lead to a liability to disciplinary sanction, even if there is no specific rule. This gives flexibility and means that it is not necessary to try to cater for every eventuality in the rules'.[128]

This is ultimately presented as Recommendation 'R5' of the report. There are two points of note that flow from this short paragraph tucked away in this review. Firstly, if fully implemented it would represent the paradigm shift that is necessary to address many of the potential shortcomings of anti-doping and integrity regulations found in all major equine sports. This is a wholly new approach which could provide a basis for a new set of Rules of Racing rewritten from first principles, which then could be a template for all

[122] Sebastian Coe, *We Cannot Move From Strict Liability Rule*, Daily Telegraph Online 2004 http://www.telegraph.co.uk/sport/othersports/drugsinsport/2373729/We-cannot-move-from-strict-liability-rule.html accessed on 12th July 2016. See also Houben (2007), p. 10.

[123] Berberoglu (2005), p. 57.

[124] BHA Press Release 2008 http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf accessed on 30 the July 2015.

[125] 'Fallon race-fixing trial collapses' The Guardian Online 2007 http://www.theguardian.com/uk/2007/dec/07/sport.ukcrime accessed on 30th July 2015.

[126] BHA Press Release 2008 http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf accessed on 30th July 2015. para. 1.21.

[127] *Ibid.,* para. 1.23.

[128] *Ibid.* para. 1.24.

of horse sport. The newly drafted anti-doping and anti-corruption measures have the potential to recognise the unique nature of human/equine athlete teams. This can be achieved by the new rules being based on underpinning principles that actually address the question so often absent from the consideration of technical rule breaches at both CAS and the BHA Appeal Board. That question is '*did the athlete, owner or trainer cheat or intend to cheat/act contrary to animal welfare principles*?' In addressing this question in this way it is possible to at worst mitigate strict liability and at best side-step the resistance to a fault-based system so entrenched in sports regulatory bodies completely. There are models for this kind of principles based regulation already in force, the Solicitors Regulation Authority (SRA) already operates principles based professional regulation[129] and the Bribery Act 2010 contains a 'due diligence' defence which utilises core principles.[130] This latter is an important analogy because the Act's aims are to combat international corruption, much as sport's aims should be.

This article has already established how the distinction between integrity issues in FEI sports and Thoroughbred horse racing is more apparent than real. There is therefore a clear and present need to bring major elements of the integrity regulation of FEI sports, non-FEI horse sport and horse racing into line with each other. Anti-doping would be the main commonality, but anti-corruption elements should be to the fore as well in any equine sports using Forrest's analysis of sports not traditionally associated with betting culture. Harmonising the rules across all equine sports based on a wholly new way of drafting such as Dame Neville suggests would have the potential to make the inequities demonstrated by the *Sharbatly* and *Al Eid* case a thing of the past. The same would be true of racing examples like the Queen's *Estimate*.

The second point of note from Dame Neville's Recommendation R5 is the departure from literal modes of interpretation that is implicit therein. There is currently a mixture of common law and civil law concepts in sports regulation, for example 'comfortable satisfaction' which is much more familiar to civil code lawyers sits with a kind of loose stare decisis which is in the common law tradition. Despite this there is an overwhelming reliance on literal interpretation which is a cornerstone of common law theory and practice.[131] Dame Neville's suggestion relies far more heavily on the purposive approach, alien to English common law for centuries but gaining acceptance largely due to the accession of the UK to the European Union in 1973.[132] This is because, with the exception of Eire, all of the other EU member states and certainly all of the founding members operate under a civil code and have a Romano-Germanic legal tradition.[133] Consequent on this much EU law bears greatest resemblance to that found in civil code jurisdictions rather than common law ones as much of the framework for Community law was laid in place prior to 1973. The WADA Code and the EADCMR derived from it require a literal rather than a purposive interpretation and considering the arguments put forward in the *Sharbatly* and *Al Eid* case as typical, literal interpretation reasoning is clearly applied in CAS tribunals, those modelled on it and the BHA Appeal Board.[134] Counsel for both riders in the CAS case here advanced arguments which were in fact equivalent to mitigation in sentencing, the only route available given the strict liability principle. These arguments centred on the degree of negligence displayed by each rider, as fault *is* an element in relation to sanction. The degree to which unintentional contamination could have happened via a third party's lack of stable management protocol was also considered, all in relation to the exact wording of the then Article 10.4.1 of the EADCMRs. A move to a more purposive style could prevent some of the decisions, the like of which Amos refers to with 'repugnance'[135] from being repeated with regard to equine cases.

Given the likelihood of 'Brexit' now, however, it would be worth considering whether the arguments above would be rendered null and void post the UK's withdrawal from the EU. 'Principle' based drafting could still be effectively applied in that event however. English common law has long recognised a close cousin of the purposive approach to interpretation. The Mischief Rule is an established process by which the true meaning of statute can be discerned. The case of *Smith v Hughes*[136] illustrates how this works in domestic law, soliciting in public had been recently outlawed so prostitutes hailed potential clients from windows which, taking a literal interpretation cannot be regarded as in public. Nevertheless, this behaviour was well within the 'mischief' the act was designed to discourage so, applying the Mischief Rule, the prostitutes were convicted. The requirements for this kind of interpretation lend themselves

[129] The SRA's 'Ten Principles' 2016 http://www.sra.org.uk/solicitors/handbook/handbookprinciples/part2/content.page accessed on 28th October 2016.

[130] Bribery Act 2010, s7(2).

[131] See for example Ward and Akhtar (2008), p. 48, Slapper and Kelly (2014), pp. 167–170.

[132] See for example R v Bentham [2005] UKHL 18.

[133] Keenan (2004), p. 203.

[134] See the *It's a Man's World* Case 2012 (also referred to as the Appeals of Maurice Sines, James Crickmore, Peter Gold, Nick Gold and Kirsty Milczarek) for an example of common law principles in use http://www.britishhorseracing.com/resource-centre/disciplinary-results/disciplinaryappeal-hearings/disciplinary/?result=535a309cb33ebfaa5320ed66 accessed on 28th October 2016.

[135] Amos (2007), p. 18.

[136] [1960] 1 WLR 830.

to any new equine sports regulations based on broad principles rather than the current approach which tries to deal with every eventuality. This is because the emphasis is overwhelmingly on what the law was trying to prevent or encourage. *Heydon's Case*[137] is the seminal one on this rule and with minor amendments this approach could be used is sporting tribunals:

- What was the [old rule, if any] before [the rules were rewritten]?
- What was the mischief and defect for which [old rule, if any] did not provide?
- What was the [new rule and principle/s] passed to cure the mischief?
- What was the true reason for the [new rule and principles]?

Such an approach in integrity cases, whether equestrian or horse racing, FEI or other SGB, could drill down to the central question very quickly without getting lost in complex and often contradictory regulatory provisions. The central question should be '*did the athlete, owner or trainer cheat/act contrary to animal welfare principles or intend to do so*?' but this is rarely the case as things stand. In doping cases proved forensically to be from unwitting contamination of non-human athlete feed at source for instance, the finding would be most likely to be that the humans involved did not cheat. For example, one reading, although admittedly a potentially contested one, of the *Equi-block*[138] cases at the 2008 Games might be that a substance was used for therapeutic purposes without thought as to its potential for cheating. Such a case is likely to be hard fought but at least a finding that the athlete need not be labelled as a cheat is *possible*, unlike under current regulations.

14 Is racing a special case?

There is no doubt horse racing occupies a special position because of its unique funding formula in the UK. The sport and betting are heavily inter-dependent, Deloitte Accountants found that 15% of UK horseracing's annual income comes from betting[139] and in the US states that enacted a prohibition on track-side betting in every case all race tracks closed.[140] This symbiosis gives rise to the need for integrity regulation which at the moment is of little concern to equestrianism, that relating to race fixing. A number of BHA Appeal Board hearings have concerned activities which attempt or succeed in engineering the outcome of a race. This has become a very important issue since the advent of legalised 'lay' betting where it is possible to bet on a horse to lose. This is something which is much easier to bring about than a win, usually by a jockey not riding a horse to its best advantage so that it tires early or even has to pull up. The BHA's integrity team are very good at 'reading' races and on investigation linking telephone conversations, text and even social media messages to connect the jockey's actions with betting activity on *Betfair* or other betting exchanges.[141] There are, however, two reasons why the unique relationship between betting and horse racing does not detract from the central theme of this paper, that a unified set of integrity principles and rules could be created for all equine sports. The first reason is that the Neville Report itself makes it clear that a set of rules based on principles allows that '[a] breach of a principle or a code of conduct can lead to a liability to disciplinary sanction, even if there is no specific rule',[142] this means that a broader approach can be taken to anything which threatens the integrity of the sport. If the principle concerned is in essence a prohibition on cheating that can be applied to doping in showjumping just as it can to 'stopping' a horse during a race. In the same vein if the principle is essentially maximising the welfare of the horse, that is applicable to overuse of a whip in a race or a showjumping ring just as it is to illegal medication in a Grand Prix dressage horse or a Derby winner. The second reason that it is illogical to treat horse racing as different to other horse sports because of its relationship with betting is the fact that equestrianism ought to have more regard for the dangers of 'spot' and 'lay' betting than it currently does. One problem is that crime is much more of an international phenomenon than it used to be before modern technology and travel. In 2012 the Director General of WADA made a call for a new global sports integrity agency along the lines of WADA in order to combat

[137] [1584] EWHC Exch J36.

[138] Discussed in **1.1**, a horse muscle relaxing liniment containing an extract of chili-peppers. This was a banned substance, but four riders at the 2008 games from different nations maintained they had no knowledge of this.

[139] 'The Full Picture—Measuring the economic contribution of the British Betting Industry 2014 published by the Association of British Bookmakers Ltd available at http://abb.uk.com/wp-content/uploads/2014/09/The_full_picture-_2nd_editionMeasuring_the_economic_contribution_of_the_British_Betting_Industry__March2013_HI-RES.pdf accessed on 25th October 2016.

[140] Forrest (2006) in Andreff, and Szymanski, p. 40.

[141] For a particularly complex but successful case brought by the BHA see the *It's a Man's World* Case 2012 http://www.britishhorseracing.com/resource-centre/disciplinary-results/disciplinaryappeal-hearings/disciplinary/?result=535a309cb33ebfaa5320ed66 accessed on 28th October 2016.

[142] BHA Press Release 2008 http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf accessed on 30th July 2015, para. 1.24.

'doping, betting, bribery and corruption'.[143] David Howman went on to make the point that if even state-level law enforcement struggles to fight organised trans-national crime then SGBs operating independently is unlikely to cope. Howman quotes estimates that criminal gangs 'control' at least 25% of world sport.[144]

Forrest points out that some SGBs have commissioned reports on this very problem and that the IOC now requires all Olympic athletes to declare that they have no involvement in betting. He notes that UEFA now has a very sophisticated system for monitoring global betting patterns and that the UK Government has now 'set out policy requiring sports to defend themselves against fixers'.[145] Furthermore, the UK Department for Culture Media and Sports policy is not aimed solely at the obvious sports such as horse racing and football; all sports are expected to be taking betting-generated corruption seriously. Forrest has studied cricket, basketball, tennis, baseball, darts and snooker and found opportunities for participants to influence the outcome or 'in-play events' in return for money.[146] Specifically, this is because of an increase in 'proposition' or spot betting due to new technology and changes in UK legislation.[147] The timing of the first foul or a sending off are examples but there are situations in sports like equestrianism which would lend themselves to this kind of behaviour. Especially where there are distinct stages in a sport, like that in eventing so that a combination might be bet on to not go beyond say the cross-country phase. Even without phases, such as in showjumping, a relatively high number of faults or even an elimination through a fall would be easy to procure by a bribed rider and that bribe might well exceed the financial rewards expected by the rider participating 'cleanly'. Consequently, it is not that regulations designed for horse racing have elements which do not apply to equestrianism, but that to comply with UK government policy and for the sports own good, a broader fight for integrity should be undertaken than just anti-doping.

15 Conclusion

If we draw the three themes together we can see that, first of all the regulations across all major horse sports differ in form, but they contain common ground such as a fondness for strict liability and reverse burdens of proof. It is evident that these concepts, particularly strict liability, are drawn from common law traditions as continental legal systems on the whole have only fault-based liability.[148] This is despite the main arbitral body, CAS having a mix of continental and common law thinking in its procedures and jurisprudence. It is also true to say that these concepts have been applied in regulations based on the WADA Code, such as the FEI's EADCMR and others with a similar function such as the Orders and Rules of Racing without much proper thought as to their suitability. The received truth appears to be that it is perfectly reasonable to apply a sanction to a human rider because there has been a doping infraction in the horse. This is because the horse is viewed as a piece of equipment that has been tampered with rather like a ski or a badminton racket. This view of the horse is challenged in this paper as the horse has to be re-imagined in the context of post-modern human society. Using evidence from history, social science literature and equine sports governance itself the modern day the elite horse is shown to be now constructed as a 'non-human athlete'. Specifically in regard to the latter the non-human athlete appears in the language of the FEI's own 'Clean Sport' Programme and in case decisions, such as the case study above on *Al Eid* and *Sharbatly* from 2012. It is therefore unconscionable that strict liability and reverse burdens should be applied in equine cases because the infraction happens in the *body* of a non-autonomous non-human athlete but the sanction is applied to the *mind* of an athlete of a different species altogether. The argument that strict liability is justified because the athlete is autonomous and responsible for all substances that enter his or her body no longer holds up. This is because there are too many variables in the care and transportation of horses competing at the elite level.

It is further evident that SGBs can no longer rest easy in the knowledge that they cannot be challenged on procedural grounds as they are not public bodies for the purposes of Judicial Review and human rights actions. Oliver saw a leaching of human rights, natural justice and Judicial Review concepts into private law actions as far back as 1999 and this train of thought is vindicated in the *Bank Mellat (No. 2)* decision of 2014. It may well be possible to overturn an SGB's decision in the courts via a claim for say breach of contract if the allegation is framed such that the internal regulations or proceedings breached Article 6 ECHR or was due to bias or restraint of trade. These are not an exhaustive list however.

There is, however, an alternative way of drafting regulations which British Thoroughbred racing has been presented with during a major review in 2008. Dame Neville suggested that new Orders and Rules of Racing could be drafted according to a number of underpinning principles. 'The rules themselves should not be too detailed in order to

[143] Howman (2012), p. 247.

[144] *Ibid.*

[145] Department for Culture Media and Sport (2010).

[146] Forrest (2011) in Anderson et al. 2011 p. 23.

[147] *Ibid.* pp. 18–22.

[148] Spencer and Pedin (2005) in Simester (2005), p. 281.

allow them to be applied more flexibly',[149] this is a significant move away from the current rigid application of precise technical wording irrespective of motive or 'guilty mind'. Dame Neville's suggested version would allow for a purposive interpretation much more likely to discern whether or not a rider did actually intend to cheat. Currently, the morally innocent can find themselves severely sanctioned and the technologically sophisticated can escape detection altogether, as the Neville Review goes on to say '[a] breach of a principle or a code of conduct can lead to a liability to disciplinary sanction, even if there is no specific rule'.[150]

There are many reasons to revisit the regulations that horse sport uses; to avoid litigation, to cut costly and divisive tribunal matters which are career destroying and to restore faith in integrity in the various sports. The chief reason though is that the current paradigm for writing equine integrity rules across the major equine sports has the capacity to be unjust and that in itself is enough for a rethink, as Martin Luther King said 'injustice anywhere is a threat to justice everywhere'.[151]

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[149] BHA Press Release 2008 http://www.britishhorseracing.com/wp-content/uploads/2008/05/Neville-Review-Pr-Rel-Exec-Summ-Recomm-City-of-Lon-May-08.pdf accessed on 30th July 2015, para. 1.24.

[150] *Ibid.*

[151] King (1929–1968).

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