Brennan Revisited: Trainer's Responsibility for Race Horse Drugging

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Originally published in the KENTUCKY LAW JOURNAL
70 KY.L.J. 1103 (1982)

Brennan Revisited: Trainer's Responsibility for Race Horse Drugging

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INTRODUCTION***

The sport of horse racing, which yields more than $608 million in state revenue annually,[1] is confronting substantial integrity issues.[2] The most serious integrity problem involves those few who attempt to alter the outcome of a race through the abuse of permitted medications and the use of illegal drugs.

The drugging of race horses has received enormous attention within the racing industry itself and from the public at large. Bills to impose federal controls over both the medication of horses and post-race testing are presently being considered by the U.S. Congress.[3] State racing officials, however, maintain that they have the ability under appropriate rules and comprehensive testing programs to control drugging.[4]

The various state racing commissions have adopted some form of trainer responsibility rule in an effort to prevent drugging. One form is the absolute insurer rule which, in its more pristine form, provides:

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*** The views expressed herein are those of the authors and do not necessarily reflect the views of the Illinois Racing Board.

[1] THE NATIONAL ASSOCIATION OF STATE RACING COMMISSIONERS' [hereinafter cited as NASRC] 1981 REPORT, PARI-MUTUEL RACING: STATISTICAL SUMMARY.

[2] *See* Acceptance Speech of Charles E. Schmidt, Jr., as newly-elected President of the NASRC, *reprinted in* 48 NASRC BULL. 17:I (April 29, 1982); *see also* THOROUGHBRED RACING PROTECTIVE BUREAU, 1980 ANNUAL REPORT; Berube, *Lack of Uniformity Among States*, 1982 THE BLOOD-HORSE 3057.

[3] S. 1043, 97th Cong., 1st Sess. (1981) H.R. 2331, 97th Cong., 1st Sess. (1981).

[4] Testimony of Dr. Joseph C. O'Dea, First Vice-President NASRC, on S. 1043, *reprinted in* 48 NASRC BULL. 21:1 (May 27, 1982).

> The trainer shall be the absolute insurer of, and be responsible for, the condition of horses entered by him in a race regardless of the acts of third parties. Should the chemical or other analysis of saliva, or urine samples, or other tests, prove positive, showing the presence of any narcotic, stimulant, chemical, or drug of any kind or description, the trainer of the horse may be suspended or ruled off.

The absolute insurer rule reflects two contradictory notions. First, the words "absolute" and "insurer" suggest notions of liability without fault. On the other hand, the concept of trainer responsibility suggests traditional tort principles of culpability and exercise of due care.

In 1969, the Illinois Supreme Court in *Brennan v. Illinois Racing Board*[5] held that the absolute insurer rule was an unconstitutional deprivation of due process of law. The decision in *Brennan* has been rejected by various courts and followed by none.[6] However, the current trend among racing states is toward adoption of trainer responsibility rules that require trainers to guard their horses against drugging.

This Article will examine the public policies that have prompted racing commissions to adopt trainer responsibility rules based upon either absolute liability or fault. The decision in the *Brennan* case will then be reviewed in light of the divergent lines of authorities that are embodied in its majority and minority opinions. In conclusion, an analysis and evaluation will be made of the issue of whether state racing commissions can curb drug violations in the absence of an absolute insurer rule.

I. DRUGGING—WHO DOES IT?

There are, of course, numerous ways to affect the outcome of a horse race which do not involve the use of drugs.[7] Drugging,

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[5] 247 N.E. 2d 881 (Ill. 1969).

[6] *See* Division of Pari-Mutuel Wagering v. Caple, 362 So. 2d 1350 (Fla. 1978) (upholding suspension for possession of needles, syringes and vitamins in unlocked cabinet); Jamison v. State Racing Comm'n, 507 P.2d 426 (N.M. 1973) (chemical analyses showing ritalin in sample); O'Daniel v. Ohio State Racing Comm'n, 307 N.E.2d 529 (Ohio 1974) (post-race samples contained oxyphenbutazone).

[7] The Commission on the Review of the National Policy Toward Gambling identified the following general methods of race fixing: bribery, use of "ringers" (substitution of

however, strikes at the heart of racing—the public's perception of its fairness and legitimacy. The horse that competes under the influence of a drug has a hidden advantage not available to the other horses. Likewise, a drugged horse is dangerous to other horses and riders.[8] The four types of race horse drugging are: drugging to win, drugging to lose, therapeutic doping and inadvertent or accidental doping.[9]

Drugging to win involves the use of stimulants to improve a horse's speed or performance. It also may involve the use of powerful pain killers to permit a sore or lame horse to race faster than it would have been able to race had it felt the pain.[10] Drugging to win also may involve minute quantities of tranquilizers used to calm a fractious horse in the starting gate so as to permit the horse to start the race more competitively. Drugging to win is usually an "inside job" by the trainer or by someone in the trainer's immediate employment.[11]

Drugging to lose, which is a more pernicious problem to regulate, involves the use of tranquilizers, depressants or other drugs to slow the horse's speed. Such druggings often involve more than one horse in the race as the economic investment in fixing a race is safer and surer when the gambler-fixer knows which horses will lose and can then bet alternate choices to win.[12] Drugging to lose is usually considered an "outside job."[13]

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faster horse for slower one of similar appearance) and use of prohibited drugs. The Commission, created by Congress in the Organized Crime Control Act of 1970, published its final report, GAMBLING IN AMERICA, in 1976.

[8] *See* 127 CONG. REC. E878 (March 21, 1981) (remarks of Congressman Bruce F. Vento, D. Minn.) *See also* Simmons v. Division of Pari-Mutuel Wagering, 407 So. 2d 269, 271 n.5 (Fla. Dist. Ct. App. 1981) (quotes findings of Florida legislature).

[9] Clarke, *Dope and Doping*, MED. SCI. & L. 218 (Oct. 1969).

[10] Tassistro v. Louisiana State Racing Comm'n, 269 So. 2d 834, 838 (La. App. 1972), *cert. denied*, 271 So. 2d 874 (La. 1973). *See also* Commonwealth v. Webb, 274 A.2d 261 (Pa. Commw. Ct. 1971), *appeal dismissed*, 284 A.2d 499 (Pa. 1971) ("It is naive to say that an analgesic such as Butazolidin does not affect the speed of a horse which has a sore ankle").

[11] Only the trainer is in a position to discover the correct dose for a particular horse and to administer it at the right time.

[12] Report by John Dailey to the New York Racing and Wagering Board, *Analysis of Gimmick Betting* (Jan. 22, 1980).

[13] Trainers retain clients by winning races for them. Trainers generally receive 10% of a winning purse, in addition to the daily training fee. Thus, trainers have an economic incentive to win, and they have much easier and less risky ways to lose. A bucket of cold

Therapeutic drugs may be of two kinds: first, those which may be administered to a horse entered to race under the rules of a particular racing commission; second, those which are not permitted but are generally recognized by equine practitioners as being useful. As beneficial as the latter may be, the presence of these drugs in a post-race sample is often prohibited.[14]

Examples of inadvertent drugging include the story of the horse that ate a candy bar out of a patron's hand and tested positive for theophylline, a prohibited drug.[15] More recently, a leg paint whose label did not disclose the presence of benzocaine was administered. The post-race urine sample contained this drug. Further investigation disclosed that the product used did contain benzocaine,[16] possibly the result of airborne contamination at the manufacturing plant.

Prohibited drugs are usually administered in three ways: (1) as a result of carelessness or accident; (2) by disgruntled former employees[17] and jealous competitors, or (3) by Martians in the middle of the night. Review of the cases discloses no other source

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water or a word to the jockey may accomplish a loss without the risk of post-race testing. In harness racing where trainer and driver are often the same person, a loss can be accomplished in the race through skillful failure to urge the horse to win.

Racing commissions have trouble dealing with fixing to lose because generally it is the winners, not the losers, of horse races that are routinely tested. No racing commission in the country, whether funded directly by the legislature as in Illinois, Florida and California, or funded indirectly by the race tracks, as in New York, has a sufficient budget for post-race testing of every horse in every race. *See* Jacobs v. Kentucky State Racing Comm'n, 562 S.W.2d 641 (Ky. Ct. App. 1977) ("The testing of all winners of races without testing other horses . . . is a legitimate classification based on long standing custom and practices in the racing industry").

While pre-race testing does involve all horses in a race, not all drugs can be detected in pre-race blood samples. VETERINARY-CHEMIST ADVISORY COMMITTEE, AN EVALUATION OF PRE- AND POST-RACE TESTING AND BLOOD AND URINE DRUG TESTING IN HORSES (Report submitted to the NASRC Mar. 16, 1978).

[14] 11 ILL. ADMIN. REG. 509.40.

[15] In Illinois, when the rules permitted the pre-race administration of aspirin, a trainer administered a popular, over-the-counter medicine containing aspirin but he did not read the label. The product also contained caffeine—a prohibited stimulant.

[16] Stewards' Ruling # 42, Maywood Park Race Track, Dec. 14, 1981.

[17] *See* State *ex rel* Paoli v. Baldwin, 31 So. 2d 627 (Fla. 1947) (groom had placed bets on the day the drugged horse raced, cashed tickets immediately after the race, and quit without notice when trainer suspended); Brennan v. Illinois Racing Bd., 247 N.E.2d at 881 (fired employee seen near drugged horse on day before the race); Maryland Racing Comm'n v. McGee, 128 A.2d 419 (Md. 1957) (fired employee had threatened to make trouble for McGee and was working in same barn as drugged horse).

of illicit drugs. Martians constitute the largest category because in most cases trainers do not know how the drug was adminstered or who administered the drug, but they are certain they did not. The reasons for the trainers' alleged ignorance are many, not the least of which are that administering drugs to race horses is a crime in many states[18] and that administrative proceedings often result in severe penalties.[19]

II. THE TRAINERS—WHO THEY ARE AND WHAT THEY DO

To understand the drugging cases, it will be helpful to first review the trainer's role in the racing industry and then examine briefly how a typical drugging case comes to the attention of the racing commission.

The barn area, also known as the "backstretch" of a race track, houses hundreds of horses and horse-care workers. At most race tracks, the barn area swarms with people early in the morning. Where racing occurs in the afternoon, training hours are from 6:00 to 10:00 a.m. Horses are fed at an earlier hour, brought to the track for exercise, walked until they have cooled down, bathed, brushed and returned to their stalls.

As the overseers of the training process, trainers move from the barn to the track and back again, watching horses work out, clocking their times, instructing grooms, conferring with the veterinarian[20] and ordering feed. Exercise riders or drivers are used to exercise horses. Grooms move from stall to stall, cleaning,

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[18] Administering drugs to race horses is a crime in the following states: Delaware, DEL. CODE ANN. tit. 28, § 705 (1974); Florida, FLA. STAT. ANN. § 550.24(2) (West 1972 & Supp. 1982); Illinois, ILL. ANN. STAT. ch. 8, § 37-36 (Smith-Hurd Supp. 1982); Louisiana, LA. REV. STAT. ANN. § 4:175 (West 1973); Maine, ME. REV. STAT. ANN. tit. 8, §§ 280, 332 (1964); Massachusetts, MASS. ANN. LAWS ch. 128A, § 13B (Michie/Law. Co-op. 1981); New Jersey, N.J. STAT. ANN. § 5:5-71 (West 1973); Pennsylvania, PENN. STAT. ANN. tit. 18, § 7102 (Purdon 1973). Drugging is neither a felony nor a misdemeanor in Arizona, Arkansas, California, Colorado, Idaho, Kentucky, New York, Ohio, West Virginia and Wyoming.

[19] *See, e.g.*, Solimena v. State, 402 So. 2d 1240, 1243 (Fla. Dist. Ct. App. 1981) (upholding both suspension of trainer's license for four years and six months and $5,000 fine against trainer because Sublimaze was found in six post-race urine samples).

[20] The veterinarians move from barn to barn examining horses, taking blood samples, using portable X-ray equipment, performing minor surgery, worming, prescribing and injecting medication, dispensing advice and soliciting new clients.

scrubbing, massaging or bandaging tender legs. Where mechanical walkers are not used, hotwalkers slowly walk the horse around the inside of the barn. Owners occasionally stop by the barn to offer a carrot or confer with the trainer.

In the midst of the hectic activity, trainers must study the "condition book" or the "overnight"[21] and then enter the horse in the race which they believe the horse is most able to win based upon its age, sex, race record and general skill. The entry is made by completing the appropriate forms in the racing secretary's office.[22]

Aside from their duty to prevent a horse from being drugged, trainers have numerous other responsibilities prescribed by the rules of various racing commissions. When trainers enter a horse in a race, they must be present in the paddock and supervise the saddling. They also must get the horse to the paddock on time. Trainers generally are required to make certain that they use licensed help and that the horse's owner is licensed. If a trainer is going to be absent from the track a replacement trainer, licensed and approved by the stewards, must be found to take over the duties.[23]

The trainers are not only the general superintendents in the barn area; they also are public relations officers. When owners come to watch their horses race, trainers are the ones who accompany them. Being with the owner requires clean clothes and a presentable appearance. Most trainers, therefore, will clean up and change clothes after morning workouts. Thoughtful, conscientious trainers will make certain that their horses are not left alone during the interim.

III. HOW DOES A CASE GET TO THE RACING COMMISSION?

Each of the thirty states with pari-mutuel wagering on horse

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[21] A condition book is published by the race track and describes the type of races that the track plans to offer during the next two weeks. The harness tracks publish a condition sheet, or overnight, which lists proposed races for the next few days.

In the harness industry, or where thoroughbred racing is at night, the morning activities are similar to those described in the text although they tend to start at a later hour.

[22] Entries for afternoon races are usually made in the morning. Where racing is at night, entries are usually made in the early evening. Most thoroughbred entries are taken 48 hours before a race, while most harness entries are made 72 hours before a race.

[23] *E.g.*, 810 KY. ADMIN. REGS. 1:008 (1982).

racing has established a state racing commission to regulate racing. Each commission promulgates its own racing rules and procedures as prescribed by the state's racing statute and administrative procedure act. There are, however, many similar rules among the thirty racing states.

The regulatory authority of the various racing commissions extends to every facet of racing and includes setting standards for licensing, testing equine urine and blood samples and protecting the public from cheating. Each commission is empowered to impose a civil penalty against a licensee of that state for violation of the racing law and rules. The penalty imposed by one commission is, in almost all instances, honored by all other racing states.

The typical drugging case comes to the attention of the racing commission in the form of the laboratory report. The report will disclose the presence of a prohibited drug in the sample but precious little else. In the normal case, the testing laboratory cannot determine how a drug was administered (whether by intravenous, subcutaneous, or intra-muscular injection, oral administration, topical administration or rectal infusion), when a drug was administered or how much drug was administered. The more unusual or exotic the drug, the more difficult it is to find.[24]

Evidence regarding the pharmacological effects of illicit drugs is equally difficult for racing commissions to acquire. Most commissions do not have a specialist in equine pharmacology on

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[24] Lewis E. Harris, President of the Association of Official Racing Chemists, has said:

> There is a continuous flow of new human or animal drugs being introduced in the United States, Canada, and other countries . . . . For example, during 1981, there were 27 new drug entities approved by the Food and Drug Administration for marketing in the United States . . . . To this list can be added those new drug products which were introduced in other parts of the world.
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> Another problem which confronts the racing chemist is the use of drug compounds which are in the research and development stage and are not yet marketed . . . . A few years ago, the drug Pemoline was detected in urine from horses at one of the tracks. This drug was not marketed; however, investigations suggested that one or more persons from a research laboratory were providing the experimental drug to certain individuals for use in racing animals. In a more recent case the drug Clembuterol was involved. The drug is not marketed in the United States but was being supplied to veterinarians for clinical investigation.

Speech by Lewis E. Harris, *reprinted in* 48 NASRC BULL. 17:III (Apr. 29, 1982).

their staffs. The veterinary literature contains very little on the effects of illegal substances upon race horses.

Although procedures vary from state to state, the laboratory report is normally transmitted by the laboratory to the stewards.[25] Often, the stewards will order a search[26] of the trainer's barn area before the trainer is notified of the laboratory report. If hypodermic needles, syringes or drugs are found during the search, the trainer may face a disciplinary proceeding involving both drugging and possession charges as well as criminal proceedings.[27] Drugs found in a search of the trainer's stable area provide some evidence of the trainer's knowledge of the drugging, particularly if the drugs are similar to those contained in the post-race sample.[28]

Once notified of the positive[29] laboratory report, the trainer is summoned to appear before the stewards.[30] In almost every state, the legislative scheme or the commission regulations recog-

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[25] Stewards generally have supervisory power with respect to racing matters over track management, racing commission employees, and all licensees at each track. Like referees and umpires in other sports, they determine when fouls occur in the contest (the race). As importantly, they also enforce the racing commission rules. In most states, stewards have the power by statute or rule to impose civil penalties and to suspend licenses.

[26] *See* Wilkey v. Illinois Racing Bd., 423 U.S. 802 (1975) (mem.) (judgement of three-judge federal court upholding the constitutionality of warrantless administrative searches on race tracks was affirmed).

[27] *See* State v. Dolce, 428 A.2d 947 (N.J. Super. Ct. 1981) (warrantless search after a post-race blood sample contained Butazolidan revealed hypodermic needle, syringe and Sublimaze, Innovar and Ritalin, controlled substances).

[28] Jones v. Superior Ct. of Orange, 170 Cal. Rptr. 837 (1981); Wilkey v. Board of Business Regulation, Dep't of Business Regulations, 374 So. 2d 17 (Fla. Dist. Ct. App. 1975); Fioravanti v. State Racing Comm'n, 375 N.E.2d 722 (Mass. App. Ct. 1978); Imprescia v. State Racing Comm'n, 371 N.E.2d 1389 (Mass. App. Ct. 1978).

[29] Post-race testing chemistry relied, in its infancy, on crystal tests and color reagent tests. When drugs were present, the crystals or colors reacted in a "positive" manner. For a description of various laboratory tests, see Kentucky Racing Comm'n v. Fuller, 481 S.W.2d 298 (Ky. 1972) and Tassistro v. Louisiana State Racing Comm'n, 269 So. 2d at 834. While such tests are rarely used today, the word "positive," meaning a laboratory report indicating the presence of a prohibited drug in a test sample, has become a part of the industry's vocabulary.

[30] While the proceeding before the stewards is generally referred to as a "hearing" or "inquiry," that proceeding is generally an informal one where stewards investigate, summon witnesses, and then impose civil penalties. The formality of these initial proceedings varies from track to track and state to state.

A survey by the authors reveals that none of the stewards in the United States are lawyers, although a few have practical training in the law.

nize the desirability of informal, prompt determinations. Provision is made for a *de novo* hearing if the matter is appealed to the racing commission.[31]

Because of the useful work done by the stewards, the admitted therapeutic and accidental[32] drugging cases rarely reach the racing commission. Where penalties are severe, the trainer may ask the racing commission for leniency but admit responsibility for the drugging. Few of these cases are litigated beyond the trial court level, probably because the costs preclude further appeals. Since it is difficult to detect drugs that tranquilize, most of the reported drugging cases involve stimulants and pain killers, i.e., drugging to win.

IV. GENESIS OF ABSOLUTE INSURER DOCTRINE

The earliest reported[33] racing case involving the drugging of a race horse is *Carroll v. California Horse Racing Board*,[34] decided in 1939 by a California District Court of Appeals, wherein a post-race saliva sample tested positive for an alkaloid resembling the stimulant strychnine. The regular trainer of the horse was ill at the time of the race. Carroll,[35] an employee of the trainer, was substituting for him on that day. The California Horse Racing Board (CHRB) ordered, without notice or hearing, that Carroll's license be suspended.

At the time of the *Carroll* case, the California rules prohibited the administration of any drug or chemical (other than food and water) within twenty-four hours of a race. The rules also provided as follows: "Should the [pre- or post-race saliva] exam-

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[31] *See* Baker v. Illinois Racing Bd., 427 N.E.2d 959 (Ill. Ct. App. 1981); Berry v. Michigan Racing Comm'n, 321 N.W.2d 880, 885 (Mich. Ct. App. 1982).

[32] Penalties imposed by the stewards in these cases tend to be light or non-existent. Hacker v. Pennsylvania Horse Racing Comm'n, 405 A.2d 1379 (Pa. Commw. Ct. 1979), is an exception to this proposition.

[33] While the racing industry waits for answers to many legal questions, some appellate courts have assumed that racing cases are not worthy of publication. Fortunately, the manifest interest of all racing commissions in such opinions has persuaded at least two appellate courts in recent years to publish opinions originally scheduled as "not for publication." They are Jacobs v. Kentucky State Racing Comm'n, 562 S.W.2d at 641 and Baker v. Illinois Racing Bd., 427 N.E.2d at 959.

[34] 93 P.2d 266 (Cal. Dist. Ct. App. 1939), *rev'd*, 105 P.2d 110 (Cal. 1940).

[35] Nothing in the record indicated that Carroll administered the strychnine.

ination prove positive, and the test show the presence of a prohibited drug or chemical, owner and trainer of the horse shall be ruled off for life."[36]

The principal issue in the case was whether the trainer had a right to notice and opportunity to be heard prior to the suspension of his license. In holding that Carroll had no right, the California District Court of Appeals concluded that the CHRB had "just cause for its action" because of the drugging. Although the words "absolute" and "insurer" were not in the CHRB rules, the appellate court used these words twice in holding that the trainer had "absolute" final responsibility for the condition of the horse in the race and became thereby the "insurer" of the condition of the horse.[37] The opinion of the California appellate court appears to be the genesis of what later was incorporated in racing commission rules as the so-called absolute insurer rule.

Carroll appealed to the California Supreme Court which reversed and held that the California statute required that the trainer be given notice and hearing.[38] The Supreme Court, however, did not discuss the issue of the trainer's responsibility for the condition of his horse.

V. IRREBUTTABLE PRESUMPTION RULE

Maryland became the next testing ground for a commission's drugging rule. In *Mahoney v. Byers*,[39] the Maryland Racing Commission suspended the license of a trainer when a post-race analysis revealed benzedrine, a stimulant, in the saliva of a horse trained by him. The Maryland rule provided that if the Commission found that a drug was administered within forty-eight hours prior to a race,

> the trainer shall be subject to the penalties [provided in the rules], whether or not he administered the drug, or knowingly or carelessly permitted it to be administered. The fact that the analysis shows the presence of a drug shall be conclusive evi-

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[36] 93 P.2d at 269. The term "ruled off" means not only that a license is suspended or revoked, but also that the licensee is barred from being physically present on a race track.

[37] *Id.* at 274.

[38] 105 P.2d at 110.

[39] 48 A.2d 600 (Md. 1946).

> dence either that there was knowledge of the fact on the part of the trainer or that he was guilty of carelessness in permitting it to be administered.[40]

Despite protests by the racing Commission that the rule created merely a prima facie presumption of liability, the Maryland Court of Appeals held that the rule was unconstitutional because it created an irrebuttable presumption which "destroyed the right of [the trainer] to offer evidence to establish his innocence."[41]

The Maryland Racing Commission also attempted to justify the suspension by arguing that Byers' carelessness had permitted the horse to be drugged because the horse was not kept under guard before the race. The court refused to accept that argument because the Commission then had no rule requiring horses to be guarded.[42]

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[40] *Id.* at 602.

[41] *Id.* at 603.

[42] There was evidence in *Byers* that some trainers kept guard over their horses and others did not. From this evidence the court concluded that the racing Commission must have been aware of the situation and condoned it by failing to adopt a rule which required guarding.

The Maryland court's attitude in *Byers* was apparently influenced by the facts adduced in another racing case, Brann v. Mahoney, 48 A.2d 605 (Md. 1946), decided the same day, in which the court focused on the nature of the proceedings before the Maryland Racing Commission. The trainers in *Brann* alleged that the Commission gave them short notice of a hearing and refused to specify charges. The Commission did not disclose until the hearing started that the drug involved was morphine, a stimulant. Information about the case was obtained by the newspapers and radio before it was received by those charged. The Commission chair was alleged to have stated to a reporter for a world-wide news service that the five trainers "would be suspended for one year 'regardless of additional facts yet to be revealed at the hearings.'" *Id.* at 608. The constitutionality of the drugging rule was not considered in *Brann*.

In *Byers*, the court justified its conclusion that the Maryland rule was not a prima facie presumption by stating, "It is sufficient to say that the comments of the Chairman of the Commission, made during the course of the hearing before it, and its final order, show that the irrebuttable presumption set up in the rule was applied to this case." 48 A.2d at 604.

While *Byers* and *Brann* were pending in Maryland, a drugging case was litigated in New York. Both the Appellate Division and the New York Court of Appeals merely found that "while the trainer was not present when the medicine was applied, there was evidence from which responsibility for the treatment could be found to have been established." Smith v. Cole, 62 N.Y.S.2d 226 (App. Div.), *appeal granted*, 68 N.E.2d 888 (N.Y. 1946).

VI. INSURER RULE HELD IN EFFECT IRREBUTTABLE PRESUMPTION

In *State ex rel. Paoli v. Baldwin*,[43] the Florida Supreme Court, by a vote of four to three upon rehearing in 1947,[44] held that the state's absolute insurer rule violated the due process clause of both the Florida and federal Constitutions. Unlike the Maryland rule in *Byers*, the Florida rule did not refer to the matter of presumption.[45] Nevertheless, the Florida court, which was "influenced decisively" by the opinion in the *Byers* case, held that the Florida rule "in effect" made proof of a positive urine sample irrebuttable evidence that the trainer had administered the prohibited drug regardless of the acts of third parties.[46] The horse's groom, who had been employed by Paoli for only a few weeks before the fixed race, placed bets on the drugged horse, cashed his winning tickets immediately after the race and left Paoli's employment without notice after Paoli was suspended because of the benzedrine in the urine sample.

VII. STRICT LIABILITY WITHOUT FAULT

Although absolute liability had been imposed in tort cases and under public welfare regulations for many decades,[47] the

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[43] 31 So. 2d 627 (Fla. 1947), *overruled*, Division of Pari-Mutuel Wagering v. Caple, 362 So. 2d 1350 (Fla. 1978).

[44] The Florida Supreme Court, by a vote of four to two, initially upheld the constitutionality of the insurer rule in Florida. Upon rehearing, the court reversed its earlier vote after a new justice came to the court and another justice changed his position.

[45] Similar to the pristine version of the absolute insurer rule, the text of the rule may be found at 31 So. 2d at 630.

[46] The Florida court in *Paoli* did not consider whether the state under its police power could constitutionally enforce strict liability upon the trainer for the condition of the horse. Note, however, that Division of Pari-Mutuel Wagering v. Caple, 362 So. 2d at 1350, overruled *Paoli*, holding that strict liability under the absolute insurer rule is "both reasonable and constitutional." *Id.* at 1355.

[47] The law of torts began with a legal obligation imposed without fault and evolved into liability based upon culpability or negligence. For a historical review, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS 641-44, 657-58 (4th ed. 1971). However, the original concept of liability without fault was continued for abnormally dangerous activities, such as blasting, and handling explosives or other dangerous substances. See the early English cases of May v. Burdett, 9 Q.B. 101, 115 Eng. Rep. 1213, 3 ERC 108 (1846) (absolute liability upon keeper of wild animals); Rylands v. Fletcher, 3 H.L. 330 (1860) (absolute liability for water collected in quantity in dangerous places); and RESTATEMENT (SECOND) OF TORTS, §§ 508, 519-20 (1965).

first case upholding a state's power to impose strict liability upon a trainer without proof of fault was *Sandstrom v. California Horse Racing Board*,[48] where a post-race urine sample disclosed the presence of a caffeine-type alkaloid. In this landmark racing law case, the Supreme Court of California in 1948 interpreted that state's absolute insurer rule as a reasonable imposition of liability on a trainer. Treating the rule as creating strict liability without proof of fault, the court held that the trainer would be found liable upon proof that he was the trainer and that the horse was drugged.

The majority in *Sandstrom* noted that the state, in the exercise of its police power, had undertaken to regulate wagering on horse racing. It further noted that the California rule had been promulgated by the CHRB in the exercise of its regulatory authority over racing and was therefore subject to judicial review only to the extent of determining whether such rule was reasonable. The test of reasonableness, according to the majority opinion, "depends on the character or nature of the condition to be met or overcome."[49] The court, in applying the reasonableness test to the absolute insurer rule in question, concluded: "The closer the supervision to which the trainer is held, the more difficult it becomes for anyone to administer a drug or chemical to the horse. The exaction of the ultimate in that regard is justified by the peril to be avoided."[50] The Court held that the rule did not contain an irrebuttable presumption but warned that strict liability without fault may not be imposed "by inference, or indiscriminately, or upon persons having but a minor part in an activity."[51]

In a short dissent, Justice Edmonds stated that a trainer could take every precaution but still be held liable under the rule

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During recent years, the concept of strict liability in tort has been extended, without proof of negligence or privity of contract, to manufacturers of products whose defective condition makes them unreasonably dangerous to the user or consumer. *See, e.g.*, Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 900 (Cal. 1963); Suvada v. White Motor Co., 210 N.E.2d 182, 186-88 (Ill. 1965); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[48] 189 P.2d 16 (Cal.), *cert. denied*, 335 U.S. 814 (1948).

[49] 189 P.2d at 21.

[50] *Id.*

[51] *Id.* at 22.

for the acts of others over whom he had no control.[52] Justice Schauer, in a concurring opinion that responds to the dissent, suggested that a trainer could protect himself from strict liability under the rule simply "by protecting the horse and by checking its condition at the last reasonable possible moment before the race."[53]

In his lengthier dissent, Justice Carter accused the majority of "specious reasoning" and remarked that the rule "may appropriately be labeled as 'un-American.'" He further stated, "Certainly, there can be no difference in legal effect between absolute liability and a conclusive presumption."[54]

Justice Carter twice raised the spectre of a possible vigilant trainer whose horse is drugged by "stealthy culprits" without the trainer's knowledge. He noted that, contrary to Justice Schauer's view, trainers under such circumstances could not protect themselves from liability by scratching the horse because they would have no knowledge of the tampering by the stealthy culprits.[55] Drawing upon his own experience in the training of non-racing horses, Justice Carter took judicial notice that "a trainer does not sleep with his horse, nor is with him during all his waking hours."[56]

The principle and rule announced in *Sandstrom* were followed and applied by the Supreme Court of Appeals of West Virginia in *State ex rel. Morris v. West Virginia Racing Commission*,[57] where an owner-trainer was suspended upon discovery of drugs[58] in the urine sample. The West Virginia rule did not contain absolute insurer language but did provide that "the trainer shall be held responsible for the condition of his horse."[59]

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[52] *Id.* at 25 (Edmonds, J., dissenting).

[53] *Id.* at 24 (Schauer, J., concurring).

[54] *Id.* at 26, 27 (Carter, J., dissenting).

[55] *Id.* at 29, 31. *Sandstrom* was followed that same year by the California Appellate Court decision in Taylor v. Wright, 191 P.2d 73 (Cal. Dist. App. Ct. 1948).

[56] *Id.* at 29. Justice Carter ignores the vital distinction between what really happens in racing and what racing commissions have a right to expect will happen.

[57] 55 S.E.2d 263 (W. Va. 1949).

[58] The sample contained "Atropine, Hyoscyamine or Hyoscine and possibly some other drug." *Id.* at 269.

[59] *Id.* at 264.

The West Virginia court, in testing the reasonableness of that state's trainer responsibility rule, stated:

> [W]e think it imperative that, in the conduct of racing in this State . . . there should and does exist the power to make rules which will effectually guard against fraud and deception in racing, which may be effected through administering drugs or narcotics, or by any other means . . . Every consideration surrounding the business of operating a race track, and the racing of horses thereon, seems to us to call for firm and rigid rules placing responsibility and imposing penalties for their violation. Conceding that the rule . . . is harsh and may, in some instances, result in injustice to innocent people, we think the rule can be justified on the grounds of public policy, because it is the only effective means by which fraud and deceit in connection with horse racing can be minimized.[60]

The trainer's defense in the *Morris* case was somewhat novel. She maintained that the racing Commission, rather than the trainer, was responsible for protecting the horses from drugging. She alleged that the Commission had failed to furnish twenty-four-hour police protection as required by its own rules and that, as a result, there was no way to prevent the public from going to the barns and tampering with the horses.

In fixing responsibility upon the trainer, rather than the commission or track,[61] for the condition of the horse, the West Virginia court stated:

> [T]he power to assure fairness in racing must rest somewhere, and responsibility therefor must be definitely fixed, if any practical results are to be expected . . . No one, we assume, will contend that the drugging of race horses . . . is not an evil which must be scotched wherever present, and by any reasonable and adaptable method. Making the owner-trainer or the trainer responsible . . . is one way, and perhaps the best way,

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[60] *Id.* at 274-75.

[61] *See* Ohio Thoroughbred Racing Ass'n v. Ohio State Racing Comm'n, 180 N.E.2d 276 (Ohio Ct. App. 1961) (held absolute insurer rule was unlawful and unreasonable as applied to race track operators). Racing commissions have insisted that race track operators participate in efforts to prevent druggings. However, the track operators alone can no more prevent this problem than the police can prevent thefts from unlocked homes and automobiles.

> of assuring the racing authorities, and the track patrons, that the race will be fair.[62]

There were three dissenters in *Morris*, including Justice Hammond, who wrote the unanimous opinion two years later in *Spiker v. West Virginia Racing Commission*,[63] reaffirming the earlier decision in *Morris*. In *Spiker*, the horse Lucky Linda, drugged with procaine, was suspended and the purse won by her was redistributed.[64]

The Ohio absolute insurer rule was upheld in *Fogt v. Ohio State Racing Commission*,[65] six years[66] after a harness horse raced with "Duracillin," a drug containing penicillin and procaine, in its system. Fogt admitted that he administered the drug but denied that he violated the rule intentionally.

In regard to guilty knowledge or intent, the Ohio Court of Appeals said:

> Horse racing, at its best, is difficult to control, and would be practically impossible to regulate if every governing rule and regulation was made dependent for validity upon the knowledge or motives of the person charged with a violation.
>
> Guilty knowledge or intent are not necessarily indispensable to the validity of a regulation designed for the protection and general welfare of the public.

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[62] 55 S.E.2d at 271.

[63] 63 S.E.2d 831 (W. Va. 1951).

[64] The constitutionality of the purse redistribution rule, which is common to all racing jurisdictions, was sustained in Edelberg v. Illinois Racing Bd., 540 F.2d 279 (7th Cir. 1976). South Dakota is perhaps the only racing state that still requires suspension of a horse. Its rule has not been judicially challenged.

Ignetio, the two-year-old thoroughbred champion of Puerto Rico in 1970, was suspended from racing after post-race tests revealed the horse had been doped. The owner, who was adjudged innocent, alleged that his property had been confiscated in violation of federal due process. In Suarez v. Administrator Del Deporte Hipico de Puerto Rico, 354 F. Supp. 320 (D.P.R., 1972), the court denied the administrator's motion to dismiss and convened a three-judge court to consider the constitutional issue.

[65] 210 N.E.2d 730 (Ohio Ct. App. 1965).

[66] Joshua Bigg, chief investigator of the law firm of Tabatchnick, Orsini, Reilly & Teitelbaum, said: "I came to realize that there are two kinds of time. One has sixty minutes to an hour, twenty-four hours to a day, moving along at a fast clip. And then there is legal time, oozing so sluggishly that movement can scarcely be noted." L. SANDERS, THE TENTH COMMANDMENT 15 (1980). *See, e.g.*, Briley v. Louisiana State Racing Comm'n, 410 So. 2d 802 (La. Ct. App. 1982) (more than eight years elapsed between the Commission's decision and the appellate court decision).

> Manifestly, it would be almost impossible to prove guilty knowledge or intent in cases of this kind, and the futility of prosecutions under a rule requiring probative evidence of guilty knowledge and intent would eventually leave the public interest and welfare to the mercy of the unscrupulous.[67]

Although the Ohio appellate court cited no precedents on trainer responsibility, the above language has been frequently quoted, perhaps because it so aptly answers a trainer's claimed lack of *mens rea*.

VIII. FAILURE TO GUARD

As California changed its drugging rule between *Carroll* and *Sandstrom*, so did the Maryland Racing Commission after *Byers*. By 1957, when *Maryland Racing Commission v. McGee*[68] reached Maryland's highest court, the conclusive presumption language had been deleted from the Maryland racing rules. Having learned from its defeat in the *Byers* case, the Commission delineated in its rules[69] the high standard of care which the Commission expected of trainers, i.e., do whatever is necessary to prevent horses from being drugged.

McGee is the first reported case that involved the suspension of a trainer for failure to guard a horse to prevent drugging. McGee employed a seventy-nine-year-old night watchman who was on duty from 6:00 p.m. until McGee's foreman arrived at

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[67] 210 N.E.2d at 733. *Contra* Battles v. Ohio State Racing Comm'n, 230 N.E.2d 662 (Ohio Ct. App. 1967) (held that scienter must be proved, even under an absolute insurer rule, where the drug does not affect the horse's racing ability). This distinction, not readily apparent from the language of the rule, is no longer valid in Ohio after the decision in O'Daniel v. Ohio State Racing Comm'n, 307 N.E.2d at 529 (upholding absolute insurer rule).

[68] 128 A.2d at 419.

[69] The revised Maryland rule stated:

> No person shall administer, or cause or knowingly permit to be administered, or connive at the administration of, any drug to any horse entered for a race.
>
> Every owner, trainer, or groom must guard, or cause to be guarded, each horse owned, trained or attended by him in such manner as to prevent any person or persons from administering to the horse, by any method any drug prior to the time of the start of the race which is of such character to affect the racing condition of the horse.

Id. at 420.

5:00 a.m. Since the horses were stabled in three separate barns, the drugged horse Morning After had been left unguarded for at least twenty minutes while the watchman fed the other horses.[70]

Like Paoli before and Brennan after, McGee suggested that a former employee had drugged Morning After.[71] McGee had a dispute over pay with the employee, who "threatened to make trouble for McGee and to get his money one way or the other."[72] Several days before the race, McGee learned that the disgruntled former employee was working on the other side of the barn where Morning After was stabled. Unlike the *Paoli* and *Brennan* courts, the *McGee* court was not persuaded by this argument.

The post-race urine sample disclosed the presence of caffeine, a stimulant, in Morning After. The trainer maintained the caffeine came from coffee or coca-cola spilled on Morning After's straw or in his drinking water after the race. Morning After's owner, however, described either possibility as "an outside one, 'a thousand to one shot.'"[73] The court held that the "Commission was not required to accept such odds."[74]

McGee contended that Maryland's failure-to-guard rule was the equivalent of the former rule creating an irrebuttable presumption and that so construed would be unconstitutional under the *Byers* case. The court rejected this argument and upheld the rule as reasonable.

IX. RIGHT-PRIVILEGE DISTINCTION

Ten days before the decision in the *Brennan* case was an-

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[70] McGee had 20 horses in training at Laurel Race Course. He vanned them to Bowie for racing. Although most of the horses were in one barn, there were some in two other barns. One of the night watchman's duties was to feed all the horses at 3:30 a.m.

[71] McGee also argued that the only way the horse could have been drugged was by someone taking advantage of the opportunity afforded by the absence of lights in the barn. He testified that the watchman could not have been expected to stand at the door of the horse's stable in 25° weather. The court found that McGee "acknowledged that the seventy-nine year old watchman, whose physical condition and faculties are not disclosed by the record but could be evaluated by the Commission, could not properly guard the horse, MORNING AFTER, even while he was on the premises because of weather conditions and inadequate lighting at the barn." *Id.* at 425.

[72] *Id.* at 422.

[73] *Id.*

[74] *Id.* at 425. McGee's arguments about spilled coffee or Coca-Cola are standard defense claims in cases involving caffeine positives.

nounced, the New Mexico Supreme Court, in *Sanderson v. New Mexico Racing Commission*,[75] upheld the constitutionality of both a rule imposing strict liability as a condition for an owner-trainer's license and a rule requiring the person in charge of the horse to guard against the administration of drugs. In upholding the rules, the court held that they neither created a presumption nor deprived the trainer of any constitutional right.

The *Sanderson* case is particularly significant because of the New Mexico Supreme Court's strong reliance upon the right-privilege distinction. The court characterized the trainer's license as a privilege rather than a property right protected by the due process clause of the state and federal constitutions. However, there is a division of authority on this issue.[76]

X. *BRENNAN* VIEW OF ABSOLUTE INSURER RULE

In 1969, the Supreme Court of Illinois, by a four to three vote, in *Brennan v. Illinois Racing Board*,[77] invalidated Illinois' absolute insurer rule.[78] The majority in *Brennan* relied upon the

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[75] 453 P.2d 370 (N.M. 1969). The urine sample contained procaine which had come from the use of a topical ointment on the horse.

[76] Robert S. Hammer states that a trainer has a property interest in a license only if the regulatory scheme creates such an interest. Hammer, *Licensee Discipline and Due Process*, 12 CONN. L. REV. 870, 875 (1979-80). Under his analysis, a regulatory-licensing scheme may be devised that does not create property interests, thereby allowing license terminations without rigorous due process requirements. *Id.* Hammer also suggests that the outdated right-privilege distinction was given new life by Barry v. Barchi, 443 U.S. 55 (1979), which upheld a summary suspension of a trainer's license pending full administrative hearing where a post-race urine sample contained Lasix. Hammer, *supra* at 872 n.11. Hammer served as counsel in the *Barchi* case. His view is shared by Kent Hollingsworth, distinguished editor of THE BLOOD-HORSE. Hollingsworth, *U.S. Supreme Court Rules on Racing Administrative Procedure*, 1979 THE BLOOD-HORSE 3308. *But see* Phillips v. Graham, 427 N.E.2d 550, 555 (Ill. 1981) ("There is no question that the license of the plaintiffs to pursue an occupation, as a trainer, owner and driver of harness horses, is a property interest given protection by the due process clause").

[77] 247 N.E.2d at 881.

[78] The rule read as follows:

> The trainer shall be the absolute insurer of and be responsible for the condition of horses entered by him in a race regardless of the acts of a third party. Should chemical or other analysis of saliva or urine samples, or other tests, show the presence of any drug of any kind or description, the Board may in its discretion suspend or revoke the license of the trainer, the stable foreman in charge of the horse, the groom, and any other person shown to have had the care or attendance of the horse.

Id. at 882.

Paoli and *Byers* cases but made no attempt to reconcile those cases with the contrary line of authorities in other jurisdictions.[79] The *Paoli* decision has since been overruled and Maryland's highest court has distinguished its *Byers* decision upon the ground that the rule there involved an irrebuttable presumption.[81] The precedents upon which the majority in *Brennan* based its opinion, therefore, have been cut from under it, leaving the opinion without precedential foundation.

The post-race urine sample of Brennan's horse contained ritalin, a psychic stimulant. Trainer Brennan placed the blame upon a former employee, whom he had fired but who had been seen around the premises before the race. There was no proof that the trainer knew of the doping of his horse or participated in it.

The issue was whether the absolute insurer measure could be upheld as a legitimate exercise of the state's police power. The majority applied the following two-pronged test: (1) whether the means employed under the police power bear a real and substantial relation to the public welfare, and (2) whether the means employed are essentially reasonable. Under the majority's analysis, the absolute insurer measure failed both tests and was held to be arbitrary, unreasonable and a deprivation of due process.

In regard to the public welfare, Justice Klingbiel, speaking for the majority, stated:

> It would seem that the only applications of the rule which would not be equally covered by one based on fault would be to situations which the trainer could not have prevented anyway. We see little if any tendency in penalty-without-fault provisions to reduce the frequency of the crime.[82]

The majority found the absolute insurer rule unreasonable because a trainer could be penalized without fault for someone else's crime. Justice Klingbiel concluded that a drugging rule

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[79] *E.g.*, Sandstrom v. California Horse Racing Bd., 189 P.2d at 16; Fogt v. Ohio State Racing Comm'n, 210 N.E.2d at 730; State *ex rel.* Morris v. West Virginia Racing Comm'n, 55 S.E.2d at 263. For a discussion of the cited cases upholding the absolute insurer rule, see notes 48-67 *supra* and accompanying text.

[80] Division of Pari-Mutuel Wagering v. Caple, 362 So. 2d at 1350.

[81] Maryland Racing Comm'n v. McGee, 128 A.2d at 423-33.

[82] 247 N.E.2d at 884.

based upon "traditional principles of culpability" and the "exercise of due care" would be more appropriate than a rule of absolute liability or a rule of strict liability without fault.[83]

Writing for the minority, Justice Schaefer maintained that the majority had usurped the authority of the legislature in the exercise of its police power.[84] He cited the *Sandstrom*, *Morris* and *Fogt* cases, all of which sustained rules similar to that invalidated in *Brennan*. In support of the rule, Justice Schaefer also cited *United States v. Dotterweich*[85] and *United States v. Balint*,[86] wherein federal criminal statutes were interpreted to create strict liability without proof of intent.

Justice Schaefer recognized that the betting public cannot protect itself against drugging, as the winning bets are paid off immediately after the race. Under these circumstances, the minority believed that the legislature was justified "in imposing upon the trainer the duty to take whatever steps are necessary" to insure that his horse is free of drugs.[87]

The *Brennan* case addressed the classic conflict in all prior drugging cases between absolute liability or strict liability and liability based upon fault. For many years after the decision was

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[83] *Id.* Justice Klingbiel explained:

> Under a rule based on traditional principles of culpability the circumstances prevailing in the horse racing business may be such as to require a showing of close supervision on the part of a trainer before he can be found to have been free of negligence. Indeed, there is virtually nothing a trainer is in a position to do that could not be required in a particular case, as having been necessary in the exercise of due care of the horse.

Id.

[84] *Id.* at 885 (Schaefer, J., dissenting). At this point, it is perhaps appropriate, if not lacking in temerity, to suggest the horse racing *qua* professional wrestling theory. That theory notes that professional wrestling matches are supposed to be fixed. With fixing as the basic premise, the theory presumes that courts are unwilling to deal seriously with the "fixers." Moreover, a survey in 1974 by the Commission on the Review of the National Policy Toward Gambling revealed that non-bettors, legal bettors and illegal bettors alike perceived horse-race fixing as something that occurs between "sometimes" and "pretty often." There is no explicit judicial recognition of the racing *qua* wrestling theory; but the theory, coupled with the public's perception of racing, may explain why judicial attitudes toward racing vary from state to state. *Compare, e.g.*, Kentucky State Racing Comm'n v. Fuller, 481 S.W.2d at 308-09 (court defers to agency findings of fact) *with* Wilkey v. Illinois Racing Bd., 381 N.E.2d at 1387-88 (court reviews agency findings of fact).

[85] 320 U.S. 277 (1943).

[86] 258 U.S. 250 (1922).

[87] 247 N.E.2d at 885 (Schaefer, J., dissenting).

announced, the majority's apparent lack of concern about the commission's ability to regulate racing overshadowed all else about the opinion. This gloomy perception by some commissioners and staff[88] forestalled immediate recognition of the court's guideposts for effective regulation—a rule requiring trainers to exercise due care for the horse.

XI. POST-*BRENNAN* DECISIONS AND RULES

The *Brennan* decision reflected a distinct minority view when issued. All state supreme courts[89] and all state appellate courts[90] which have passed upon the constitutionality of absolute insurer or strict liability rules during the post-*Brennan* era have upheld the validity of such rule. This trend of decisions clearly

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[88] *See id.* at 884. ("The Board claims it would be practically impossible to regulate horse racing 'if every rule and regulation was dependent upon knowledge or motives of a person charged with a violation.' *But even if we assume the statement to be an accurate one*, it is no answer to the plaintiff's arguments. Administrative convenience is not a constitutional substitute for the rights of individuals") (emphasis added).

As late as the mid-1970s, members of the Illinois Racing Board were considering resurrection of the absolute insurer rule in Illinois.

[89] *See* Division of Pari-Mutuel Wagering v. Caple, 362 So. 2d at 1350; Jamison v. State Racing Comm'n, 507 P.2d at 426; O'Daniel v. Ohio State Racing Comm'n, 307 N.E.2d at 529. *See also* Hodges v. Alberta Racing Comm'n, No. 14068 (Alberta, Can. Ct. of App. Dec. 9, 1982); Schvaneveldt v. Idaho State Horse Racing Comm'n, 578 P.2d 673, 676 (Idaho 1978).

[90] *See, e.g.*, McFarlin v. Department of Business Regulations, 405 So. 2d 255 (Fla. Dist. Ct. App. 1981), *appeal dismissed*, 411 So. 2d 383 (Fla. 1981) (rule upheld against argument that it unconstitutionally delegated legislative power); Solimena v. State, 402 So. 2d at 1240 (suspension of three trainers for Sublimaze positives under absolute insurer rule upheld against challenge that rule invalidly delegated legislative power); Briley v. Louisiana State Racing Comm'n, 410 So. 2d at 802 (La. Ct. App. 1982) (involved amphetamines; absolute insurer rule upheld against due process and equal protection challenges); Fiorvanti v. State Racing Comm'n, 375 N.E.2d at 722 (upheld absolute insurer rule as rational exercise of police power and sustained trainer suspension where horse drugged with apomorphine). *See also* Imprescia v. State Racing Comm'n, 371 N.E.2d at 1369 (amphetamines positives); Berry v. Michigan Racing Comm'n, 321 N.W.2d 880 (Mich. Ct. App. 1982) (absolute insurer rule upheld as proper exercise of police power advancing a valid public purpose and providing a remedy reasonably related to that public purpose). The *Berry* court, in affirming the two year suspension of a trainer for two apomorphine positives, held the absolute insurer rule "simply does not concern itself with assigning fault, but instead requires the trainer, as a contingency of being licensed by the state, to bear the responsibility for the horses' condition." *Id.* at 882.

demonstrates "a perceived change in the jurisprudence throughout the country in this area of strict liability."[91]

Several racing commissions, however, have adopted rules imposing liability upon trainers based upon traditional principles of culpability and the exercise of due care for the horses.[92] These provisions in general require trainers to protect and guard their horses against the administration of any drug before they can be found free of negligence. Under these rules, proof of the presence of a drug in a post-race sample is considered *prima facie* evidence that a trainer has been negligent in the handling of the horse. The rules based upon culpability and due care have been challenged in various courts during the post-*Brennan* era but always upheld.[93]

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[91] Division of Pari-Mutuel Wagering v. Caple, 362 So. 2d at 1352.

[92] *E.g.*, 11 ILL. ADMIN. REG. 509.20. After *Brennan*, the Illinois Racing Board adopted a trainer responsibility rule requiring trainers to guard their horses against drugging and creating a rebuttable presumption that the trainer is negligent in guarding where laboratory test shows that the horse was drugged. Ironically, Jean Brennan, the trainer in the celebrated *Brennan* case, was suspended and penalized in 1979 under the new rule, the first suspension in Illinois for a Sublimaze positive. The suspension was upheld by the Circuit Court of Cook County in Holthus & Brennan v. Illinois Racing Bd., 79 CCH 504 (April 17, 1979).

[93] *See* Barchi v. Sarafan, 436 F. Supp. 775 (S.D.N.Y. 1977), *aff'd in part, rev'd in part sub nom.* Barry v. Barchi, 443 U.S. 55 (1979) (trainer's summary suspension upheld where proof of Lasix in sample established rebuttable presumption that trainer had been negligent regarding horse's care); Harbour v. Colorado State Racing Comm'n, 505 P.2d 22 (Colo. Ct. App. 1973) (suspension based upon apomorphine positive upheld where there was no evidence indicating trainer was without fault); Tassitro v. Louisiana State Racing Comm'n, 269 So. 2d at 834 (suspension based upon phenylbutazone upheld where trainer had only a dog to guard horse the night before the race, horse left unattended from 5:30 to 6:00 a.m. on day of race, and trainer failed to emphasize security in his instructions to employees); Dare v. State, 388 A.2d 984 (N.J. Super. App. Div. 1978) (suspension based upon phenylbutazone positive upheld against due process claims where trainer had attempted to protect the horse by hiring a groom); Hacker v. Pennsylvania Horse Racing Comm'n, 405 A.2d 1379 (Pa. Commw. Ct. 1979) (fine upheld where horse ingested phenylbutazone, an analygesic, from hay in the stall); Johnson v. Commonwealth State Horse Racing Comm'n, 290 A.2d 277 (Pa. Commw. Ct. 1972) (suspension upheld where trainer admitted administering phenybutazone in West Virginia before trainer learned horse was entered to race in Pennsylvania); Conway v. State Horse Racing Comm'n, 276 A.2d 840 (Pa. Commw. Ct. 1971) (trainer's assertion of care held insufficient to prevent administration of indomethacin where eight other horses committed to his charge were given same drug); Commonwealth v. Webb, 274 A.2d 261 (Pa. Commw. Ct. 1971), *appeal dismissed*, 284 A.2d 499 (Pa. 1971) (guarding rule sustained against due process and equal protection challenges where trainer suspended on phenylbutazone positive). *See also* Cooney v. American Horse Shows Ass'n, 495 F. Supp. 424 (S.D.N.Y. 1980) (private asso-

In *Barchi v. Sarafan*,[94] New York's trainer responsibility rules were upheld on their face by the U.S. District Court for the Southern District of New York. These rules not only require trainers to guard their horses against the administration of drugs, but also create a rebuttable presumption that a trainer is negligent where drugs are detected in the trainer's horse. In *Barchi*, a post-race urinalysis revealed the drug Lasix[95] in Be Alert, a harness horse trained by John Barchi at Monticello Raceway. Barchi's license was suspended for fifteen days without a pre-suspension hearing.

The trainer brought a civil rights action under 42 U.S.C. section 1983 in which he challenged the summary exclusion procedure. He also claimed that New York's rules created an impermissible presumption of the trainer's guilt in cases where drugs are detected in a horse's system.

The three-judge federal district court upheld the constitutionality of the New York trainer responsibility rules and found that:

> The . . . duty of a trainer to oversee his horses is sufficiently connected to the occurrence of tampering to support the presumption established by the trainer's "insurer" rules. The state's definition of trainer responsibility is reasonably related to the interests involved and, given the rebuttable nature of the . . . presumption, the high standard of accountability is not unconstitutional.[96]

However, the panel held the summary suspension unconstitutional as violative of the trainer's right to due process.

On appeal, the United States Supreme Court reversed the three-judge court by a five to four vote and upheld the summary suspension of Barchi's license pending a full administrative hearing.[97] Barchi did not cross appeal the district court's ruling that

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ciation's trainer responsibility rule upheld). *But see* Taylor v. Ontario Comm'n, 1 Ont. 400 (Ont. Ct. App. 1970) (suspension and fine reversed because of insufficient notice to trainer of charges and no evidence of failure to guard where horse's veterinarian administered the drug).

[94] 436 F. Supp. at 783-84.

[95] Lasix, the trade name for furosemide, is a powerful diuretic. It may also mask the presence of other drugs.

[96] 436 F. Supp. at 784.

[97] Barry v. Barchi, 443 U.S. at 55.

the New York trainer responsibility rules were constitutional. Nevertheless, Mr. Justice White, in speaking for the majority, indicated the Court's approval of the presumption:

> As for Barchi's culpability, the New York trainer's responsibility rules, approved by the District Court, established a rebuttable presumption or inference, predicated on the fact of drugging, that Barchi was at least negligent. In light of the duties placed upon the trainer by the trainer's responsibility rules, we accept this inference of culpability as defensible . . ."[98]

Mr. Justice Brennan, in a dissent with which three justices concurred, maintained that the Supreme Court did not have to address the issue concerning the trainer's responsibility rules in the absence of a cross appeal.[99]

In *Commonwealth of Pennsylvania v. Webb*,[100] the Pennsylvania guard rules were upheld against claims based upon the due process and equal protection clauses of the state and federal constitutions. The Pennsylvania appellate court declared that the guard rules are "less oppressive and far less objectionable" than absolute insurer rules and "provide ample opportunity for an embattled trainer to demonstrate his innocence."[101]

XII. CRIMINAL PROSECUTIONS AS AN ENFORCEMENT TOOL

Some contend that an absolute liability rule is not necessary to protect the racing public from being cheated, especially where there is a statute which makes it a crime to administer a drug to a horse entered to race with intent to prearrange the outcome of the race.[102] This argument is rather hollow, in part because such key racing states as Arkansas, California, Kentucky, New York and Ohio do not have statutes that make drugging a criminal vio-

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[98] *Id.* at 65.

[99] *Id.* at 69 n.1 (Brennan, J., dissenting).

[100] 274 A.2d at 261.

[101] *Id.* at 266.

[102] *E.g.*, Note, Brennan v. Illinois Racing Board: *The Validity of Statutes Making a Horse Trainer the Absolute Insurer for the Condition of His Horse*, 74 DICK. L. REV. 303, 315 (1969-70).

lation. Since the wave of criminal convictions in the 1930s, there have been very few, if any, criminal convictions for the administration of drugs in those states where such act is criminal.[103]

Procedural protections and more stringent burden of proof requirements make criminal conviction for administering drugs less likely than the imposition of civil penalties. As indicated in *Fogt*, "the futility of prosecutions . . . would eventually leave the public interest and welfare to the mercy of the unscrupulous."[104]

CONCLUSION

Despite the conflict in the trainer responsibility cases over the basis and nature of liability, there is general agreement that responsibility for protecting the horses from drugging must be definitely fixed. There also is agreement that this responsibility should be placed upon trainers,[105] who have control over their horses and are in a position to guard and protect them from the risk of drugging.[106] Moreover, trainers will ordinarily have the most interest in not having their horses barred from the race or participating in the sport.[107]

Effective regulation of racing requires that trainers be encouraged to maintain vigilant supervision of their horses and to institute reliable guarding procedures to safeguard against the risk of drugging. The placing of this responsibility upon trainers seems both fair and apt to prevent tampering with a horse. As Keene Daingerfield, Senior State Steward for the Kentucky Rac-

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[103] However, there have been a few convictions for related offenses, such as bribery and conspiracy. *See, e.g.*, People v. Robinson, 24 N.E.2d 375 (Ill. 1939); Commonwealth v. Nelson, 346 N.E.2d 839 (Mass. 1976) (new trials ordered for three persons convicted of conspiracy to fix race by paying trainers for permission to drug their horses with acetophenazine); State v. Ciulla, 351 A.2d 580 (R.I. 1976) (defendants convicted of conspiracy to corrupt twelve trainers who accepted bribes from professional "hit" man to drug their horses with acepromazine); State v. Capone, 347 A.2d 615 (R.I. 1975) (trainer who doped his horse with acepromazine convicted of unlawfully accepting $200 gratuity from professional "hit" man).

[104] 210 N.E.2d at 733.

[105] *E.g.*, Morris v. West Virginia Racing Comm'n, 55 S.E.2d at 275; Brennan v. Illinois Racing Bd., 247 N.E.2d at 881.

[106] Division of Pari-Mutuel Wagering v. Caple, 362 So. 2d at 1356 (rule requiring drugs be kept in locked storage constitutes reasonable means of eliminating illegal drugging "by placing responsibility on trainer as person most capable of controlling problem").

[107] Morris v. West Virginia Racing Comm'n, 55 S.E.2d at 275.

ing Commission, has observed, "[S]omebody must be responsible, and by all logic and justice the licensed trainer is the man under the gun."[108]

A trainer responsibility rule that imposes either absolute liability or strict liability without proof of fault not only is consistent with long-established legal precedent concerning public welfare regulation,[109] but also affords the public a maximum of protection against horse drugging. On the other hand, effective regulation of racing is not dependent solely upon such a rule. Racing commissions need and require a full array of powers to license and discipline licensees guilty of misconduct and to exclude from racing those whose conduct is detrimental to the sport.[110] A conscientious racing commission can maintain the integrity of racing, as many commissions have demonstrated, under a trainer responsibility rule based upon the fault and culpability of the trainer.

The currend trend among the racing states is toward adoption of trainer insurer rules requiring trainers to guard their horses against drugging and creating a rebuttable presumption that the trainer whose horse is drugged was negligent in guarding. These rules, based upon the traditional tort concepts of negligence and foreseeability, comport generally with the guideposts suggested by the majority in *Brennan*.

Although the *Brennan* decision is contrary to legal precedents and unsound as legal interpretation, many racing commissions have adopted rules that embrace the recommendation of the ma-

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[108] Daingerfield, *Trainer Qualifications and Duties*, THE RACING COMMISSIONER'S MANUAL 140-44 (1966).

[109] *E.g.*, Sandstrom v. California Horse Racing Bd., 189 P.2d at 20; Maryland Racing Comm'n v. McGee, 128 A.2d at 423-24; State *ex rel.* Morris v. West Virginia Racing Comm'n, 55 S.E.2d at 271.

[110] A comprehensive security program would also include: a criminal statute making unauthorized possession of drugs, needles, and syringes on race tracks a criminal violation; provision for warrantless search of licensed personnel; a computerized data bank maintained by NASRC and containing the names of all persons against whom official rulings have been made; imposition of substantial penalties by the Commission upon proof of serious violations; and provision preventing any stay of license suspension pending hearing and formal decision. *See* Hubel v. West Virginia Racing Comm'n, 513 F.2d 240, 243 (4th Cir. 1975) (upholds summary suspension of trainer stating: "The combination of strict liability . . . and immediate suspension without the possibility of stay, deters tampering and promotes care").

jority in *Brennan*—a requirement that trainers exercise a high standard of care in guarding their horses. Significantly, the philosophy of the obiter dicta of *Brennan* but not the legal precedent has now revisited the racing industry.