

**REASONS FOR DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL**

APPELLANT: PAUL JAMES HARVEY
APPLICATION NO: A30/08/615
PANEL: MR D MOSSENSON (CHAIRPERSON)
DATE OF HEARING: 1 JULY 2004
DATE OF DETERMINATION: 1 JULY 2004

IN THE MATTER OF an appeal by Paul James Harvey against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 11 June 2004 imposing 3 months suspension for breach of Rule 137(a) of the Australian Rules of Racing.

Mr L P Luciani was granted leave to appear for the appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

This appeal was heard and determined on 1 July 2004. The appeal both as to conviction and penalty was dismissed and I indicated I would publish reasons in due course, which I now do.

Background

Following the meeting held at Belmont Park on Saturday, 29 May 2004 the Racing & Wagering Western Australia Stewards of Thoroughbred Racing opened an inquiry into an incident which occurred near the 200m in Race 4 run over 1600m. ON TARGET, ridden by

Paul Harvey, finished second and THERMO KING, ridden by John Claite, finished fifth in the race. Both jockeys were called to the inquiry.

At the commencement of proceedings the Chairman of the inquiry asked Mr Claite to describe what happened to him at the 200m. He replied by stating:

'... , I was angling for a run which at the start was there and as I loomed up beside Mr Harvey's mount tended to get pressure from him. After viewing the film I realised there wasn't, the horse in front of me drifted out also but my main concern was Mr Harvey's horse's head came in towards me and his elbow coming up on a couple of occasions and making contact with me.' (T1)

Mr Harvey in response gave a lengthy explanation of the incident as follows:

'I think I, I just got this stick into my left hand, Chris Stelmach said the horse always wants to sort of find the rail so I don't know really whether the horse was laying in that much at the time, it's just because she had mentioned it as more of a precaution, you know, so I was on top of it, you know before he did, did try to lay in, probably getting to the line at the finish he did shift in a bit I think when he got clear of the other runners, so she's probably correct in saying that. I'd never ridden the horse before so I don't know too much about it. You know I probably picked up the horse, put the stick in the hand, give it one crack and then John's horse was coming out at me, you know it was gonna, I was keeping what I thought was a pretty true line outside of Mr Brown and when he's ,when he's sort of coming out at me I've grabbed, grabbed my horse again just so I could, you know, put weight on the rein because I had the stick in the left hand so I could put weight on the rein to hold my ground because he was sort of coming out, you know, like he was sort of going to bump me and he was probably, it was a strong enough outwards movement where he was going sort of try shifting me and I was trying to keep my line. I, I don't know how it looks from John's point of view. The only thing I could, could say is I had a pretty long hold on this horse when I have grabbed the rein it's sort of been a rushed attempt to grab the rein and I've probably had a bit longer hold of the rein. I've probably, you know, got further back so when I'm putting weight on my inside rein maybe my elbow is further back than, you know, than when you've got a tight, shorter hold on it. I've probably got the rein a bit further back and I am trying to hold my ground. It, you know, it was just, as far as I'm concerned, competitive riding. To suggest it's anything improper, you know, like John did, I, I was very offended by it and you know I have been charged with that Rule in the past and I'm over it quite frankly, that's not me. I was riding competitively and that's all there was in it. You know, I don't know how it looks from other jockeys' point of view. There is the situation of Mr Knuckey on Thursday at Northam. You know, he come into the Stewards and said the same thing. The Stewards viewed it and said there was nothing in it. It's, you know, but I, I can see where John's coming from, I did have the, a long hold on the horse, a sort of Danny Miller hold if you like and yes, my arm was probably back at my hip instead of being forward and being in more control, I was back on the rein with probably less control. And my elbow may have come out but it, it, there was no malice in it whatsoever and as I said, I'm over that sort of thing. I've been there before and it's not me and it hasn't been me for a long time, I think.' (T2)

The Chairman subsequently in turn called on Mr Delaney, Thoroughbred Provincial Chief Steward, and Mr Lewis, Thoroughbred Acting Chief Steward to give their observations of the incident. Mr Delaney observed the incident from a head-on tower while Mr Lewis was in the main tower past the finishing post. Their observations (at T7) were:

DELANEY 'Yes Mr Chairman. Leading up to this incident THERMO KING had shifted out wider on the track. At that stage ON TARGET was, was wider on the track and off it. As the field progressed down towards the 200m mark I felt that at that stage THERMO KING was maintaining a line and ON TARGET appeared to shift inwards at that stage. STAR TREK was rolling around in front of THERMO KING but as the incident developed I felt THERMO KING essentially kept its line although ON TARGET did shift in and as the horses got close together, that is THERMO KING and ON TARGET, I did note Mr Harvey extend his left arm. Now the arm wasn't fully extended but it was an unusual movement in that it, it appeared to be extended considerably further than what one would normally expect and there did appear to be contact to the upper body and shoulder of Mr Claite at that point, Mr Chairman.'

LEWIS 'Yes, Mr Chairman. Watching the race I was quite concerned with Mr Harvey's riding from about the 225m. I felt Mr Claite, as has been stated by Mr Delaney, he had secured the run to the inside of Mr Harvey but at that stage there was a slight shift I felt from Mr Harvey to the outside and just rolled maybe half a horse, that made the run very tight for Mr Claite. I felt at that time Mr Harvey's elbow was, was extended and I felt purposefully extended and that extension I felt went on for about five or six strides, Mr Chairman, probably over a distance of about 50 metres and I felt the action looking at the race, was to impede the progress of Mr Claite.'

Further sittings were held on 1 and 4 June 2004. At the hearing on 4 June Mr Harvey produced a veterinary report from the Collie Veterinary Hospital which stated:

*'RE: "On Target"
STELMACH RACING*

The chestnut thoroughbred gelding was examined by me on 25.05.04. At the time of examination it was noted that the gelding had 2 supranumery lateral incisors top and bottom on the right side causing malalignment of the 3rd top and bottom incisors.

The supranumery teeth were extracted at the time of examination.

*Dr Jules Vandenberg BSc BVMS
Attending Clinician
27.05.04'*

At the resumption on 11 June 2004 Mr Harvey submitted to the inquiry a report addressed to the Chairman of Stewards from Associate Professor Timothy Ackland, School of Human Movement and Exercise Science, University of Western Australia. Professor Ackland was not available to give evidence at the Stewards' inquiry.

The report which is dated 10 June 2004 is broken into different sections dealing with methods, qualifications, opinions and a curriculum vitae. In addition the report states:

'INTRODUCTION

I have been asked by Mr Harvey to view digital images of an incident that occurred during the running of Race 4 at Belmont Park on Saturday, 29 May 2004 (the subject of your inquiry), and to provide my opinion in regard to several matters that are pertinent to your deliberations. The digital images (DVD and CDrom files) were supplied by CFM Productions of Newcastle St, West Perth.

Mr Harvey brought the DVD to my offices and described the events as they occurred from his perspective, and showed me footage of another race held at Belmont Park on 17 May 2003, in which he was riding using the same 'urging style' using his left arm with the horse on a long a rein. Furthermore, I have read the written extracts of the Stewards' Inquiry into this matter conducted on 29 May 2004 and 1 June 2004.

...

CONCLUSIONS

Based on my observations of the two races, and measurements taken using SiliconCoach Pro software, I am of the opinion that:

- *Just prior to, and at the time contact is made between Mr Harvey and Mr Claite, Harvey's mount On Target does not move inward toward the rail. In fact the outward motion of Thermo King and Star Trek impact upon Harvey's racing line and eventually force On Target wider still.*
- *The arm action used by Mr Harvey to urge his horse on at the time contact was made with Mr Claite, did not differ substantially from actions observed prior to this incident as well as toward the end of the race. Similar urging motions were observed by Mr Harvey on 17/5/03.*
- *Contact between Mr Harvey's left arm and Mr Claite's right shoulder is clearly made part way down the straight. This contact is maintained for approximately two seconds.*
- *Could this action have been made and maintained by any means other than deliberate action? I believe this is entirely possible. In fact, the observations I have made support Mr Harvey's claim that the contact was unintentional and simply the result of the close proximity of both horses and riders.'*

Dr Medd, the Racing and Wagering Western Australia Veterinary Surgeon gave evidence at the inquiry in respect of the report from the Collie Veterinary Hospital. When asked to comment on the report and the fact that the teeth were extracted four days prior to the race in question, Dr Medd made the following observations:

'This indicates to me that the horse has had two incisor teeth removed. The word supernumerary indicates that they were probably young teeth, baby teeth, so the incisors they have a baby teeth and then these are replaced by adult teeth at periods throughout their life when they're two, three and four. The only comment I'd made is that these teeth, the baby teeth, usually just sort of fall out on their own and are replaced by the adult teeth coming through and that this generally doesn't cause any distress to the horses as such. It's a normal procedure, it's like children losing baby teeth and being replaced. The other, I guess the only other point that I'd make from this report is that, is that if there's any suggestion that perhaps the pulling out or the extraction of these teeth caused the horse any discomfort on raceday, the raceday was four days later, so there's a reasonable period of time elapsed there.'

It was established at the inquiry that Mrs Stelmach, the trainer of ON TARGET, had not brought the extraction of the teeth to the attention of Dr Medd, either before or after the race. Mr Harvey declined to question Dr Medd.

Mr Harvey produced a video of BROWN ARCHER when it raced on 17 May 2003. This was played in order to demonstrate Mr Harvey's riding style when using the whip in the left hand.

After adjourning to consider the evidence, the Chairman laid a charge against Mr Harvey in these terms:

'Mr Harvey, at this stage of the inquiry the Stewards have decided to charge you under Australian Rule of Racing 137. I'll read that rule to you. "Any rider may be punished if in the opinion of the Stewards (a) he is guilty of careless, improper, incompetent or foul riding." You're charged under that Rule with improper riding. The improper riding being that in the opinion of the Stewards when riding ON TARGET in Race 4 The Italian Day At Belmont 1600m run at Belmont Park on Saturday the 29th of May 2004, near the 230m which equates to approximately 1.23.18 on the film, when racing on the outside of THERMO KING (J. Claite) you have intentionally withdrawn, lifted and extended your left arm making contact with the right shoulder of Jockey Claite, unbalancing that rider.'

Mr Harvey pleaded not guilty.

In announcing a guilty finding, the Chairman stated:

'Mr Harvey, the Stewards have considered the charge and all the evidence placed before them in relation to this matter. The evidence consists of:

- 1) Stewards inquiry on Saturday, 29 May 2004
- 2) Tuesday, 1 June 2004
- 3) Friday, 4 June and today's hearing
- 4) Stewards' patrol video of the incident
- 5) Associate Professor Ackland's report
- 6) Video of BROWN ARCHER
- 7) Vet report relating to ON TARGET

This charge has been levelled for a section of racing near the 230 metres. As stated, this equates to 1.23.18 on the Stewards' video....The Stewards believe that

prior to this incident ON TARGET clearly moves across to race outside THERMO KING. Whilst both ON TARGET and THERMO KING are racing in close proximity, we are of the opinion that there is adequate racing room for both horses. THERMO KING and ON TARGET are approximately one and a half lengths off STAR TREK which is racing in front of them. It's at this point the Stewards believe that you've ridden improperly. At that point you have lifted, withdrawn and elevated your left arm, eventually making contact with Jockey Claite. Much has been said of your left arm action and the Stewards believe it is clearly extravagant and deliberate. Your video of BROWN ARCHER, in our opinion, is of little assistance to this incident as your left arm action in that video is proper and you've no other horses in close proximity. The Stewards acknowledge that latterly LEMONADE DASH and STAR TREK have laid out which further compounds Jockey Claite's riding. However, the Stewards believe your riding at the 230m when the left arm is lifted constitutes improper riding. Professor Ackland's report is interesting. However, we make the following comments. The Stewards have heard the evidence in total and believe they are in a superior position to judge this matter. For example, Professor Ackland in relation to point 2 of his report which states: "Did Mr Harvey use an unusual action to urge on ON TARGET during Race 4 at Belmont Park on the 29th of the 5th, 04? Comments: "The urging motion of Mr Harvey's left arm while holding the horse on a long rein begins with the arm moving backward with respect to shoulder extension. Then he moves the arm out to the side, abducts quite considerable and finally flings the hand forward, flexes the arm at the shoulder. Prior to moving the hand forward, the elbow is well away from Mr Harvey's trunk. On viewing the DVD from these races, it is clear that Mr Harvey has used a similar action to urge on the horse BROWN ARCHER during Race 8 at Belmont Park on 17 May 2003. At this time BROWN ARCHER was near the rail for a distance in the straight and no other horse was adjacent to it on the inside, though the horse leading at this point is closer to the rail." The Stewards cannot agree with this observation as in our opinion there is a considerable change in riding styles of Jockey Harvey in Race 4 on 29th of May 2004. In relation to the veterinary evidence relating to ON TARGET, we do believe that it is of little relevance as explained by Dr Medd. Mr Harvey after considering all the evidence, the Stewards find you guilty as charged.'

Mr Harvey declined to put anything before the Stewards in respect of penalty.

The Chairman announced penalty in these terms:

'Mr Harvey, in relation to penalty the Stewards make the following comments:

- 1) Your record reveals that you have three prior convictions for improper riding. 1) 6.4.94 – six weeks reduced to four weeks' suspension. 2) 13th of September '97 – three months, dismissed on appeal. 3) 9.3.2000 – one month, no variation.
- 2) Race riding is a high risk pursuit at the best of times. Any intentional jostle or contact can clearly be dangerous. The safety of riders is paramount and to be found guilty of riding improperly is a very serious matter. Improper riding cannot be tolerated. We acknowledge that you're the state's leading rider and as such are in great demand and we also

acknowledge that your earning capacity is high and time out of the saddle impacts on that capacity to earn.

- 5) *(sic) The range of penalty for improper riding ranges from three weeks to three months.*
- 6) *(sic) Any degree of improperness is serious because previously stated it places other riders at risk.*

After consideration the Stewards believe that under these circumstances that you be suspended from riding in races for a period of three months effective midnight the 14th of June 2004 which is next Monday. Now Mr Harvey, this is your fourth charge and come what may of it, I've got to tell you on behalf of the Stewards that for a rider of your ability to be facing a fourth charge of improper riding and I must say to you that if found guilty, if another occurrence occurs where you are in similar circumstances and found guilty of improper riding, serious consideration will be made to the Integrity Assurance Committee as to whether you should be re-licensed. It's unacceptable that any rider face the Stewards for improper riding on four occasions, and indeed, would not be tolerated for any more. So against this decision you have the right of appeal Mr Harvey, which I'm sure you you're aware of. The, the deferment of penalty allows you to ride tomorrow and on Monday. Thank you.'

The grounds of appeal as stated in the Notice of Appeal dated 17 June 2004 are:

- 1 The decision of the Stewards to convict was unsafe and unsatisfactory in all the circumstances.
- 2 The penalty imposed by the Stewards was manifestly excessive in all the circumstances of the case.

The Appeal Hearing

Conviction

Mr Luciani argued the conviction was wrong in that it lacked objectivity, was unfair, unreasonable and contrary to the evidence. Mr Luciani claimed no reasonable or fair minded person could convict. He addressed two relevant aspects, namely intent and accidental circumstances in a tight situation. Further, much was made of the fact that the whip had been deployed in Mr Harvey's left hand.

Mr Luciani was critical of the Stewards' approach to a number of factors which he claimed were highly relevant such as Professor Ackland's findings, the exaggerated left arm action and the riding tactics of Mr Claite.

Despite opposition on behalf of the Stewards, Professor Ackland was allowed to present further evidence. In the course of so doing he produced a new report. Further, the film of the race in question and other races showing Mr Harvey's riding action were shown to the Tribunal.

When all boiled down in effect I was told that the incident only occurred as a result of a simple entanglement of arms which lasted for one to two seconds.

Mr Davies QC responded convincingly to all of the substantive propositions which were put by the other side. In the course of so doing he put into perspective the additional evidence which was described as simply an opinion which could not be substituted for that of the Stewards in the light of the Rule in question and the circumstances of the matter. The fresh evidence took the matter no further as it remained contradicted by the evidence given at the hearing. Senior counsel went through the transcript in detail and highlighted the relevant factual material before the Stewards which justified their finding of guilt.

The propositions on behalf of Mr Harvey were not persuasive. Rather, I agreed with and adopted the approach and reasoning of senior counsel. The decision to convict was clearly open to the Stewards on the totality of the relevant evidence. I was satisfied any body of Stewards acting reasonably on all the material which was before these Stewards could have been satisfied to the relevant degree so as to satisfy all aspects of the offence.

Penalty

Mr Luciani briefly argued the penalty was excessive as the interference was at the lower end of the scale. This was not a case of unbalancing but rather only of checking.

Senior counsel responded by submitting this offence was the most serious of the offences contained in Rule 137. Added to this was the fact that this was the fourth offence of breaching of a rule which addressed dangerous riding practices. Mr Harvey had on a prior occasion already incurred a penalty of three months suspension for a breach of the same rule.

In all of the circumstances of this matter I was satisfied that the penalty imposed was not excessive. The three month penalty was reasonably open to the Stewards.



DAN MOSSENSON, CHAIRPERSON

