

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

**APPELLANT:**                      **DAVID O'HEARE**

**APPLICATION NO:**              **A30/08/625**

**PANEL:**                              **MR D MOSSENSON (CHAIRPERSON)**

**DATE OF HEARING:**              **21 DECEMBER 2004**

**DATE OF DETERMINATION:**      **21 DECEMBER 2004**

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IN THE MATTER OF an appeal by David O'Heare against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 8 November 2004 imposing a \$500 fine for breach of Rule 83(a) of the Australian Rules of Racing.

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Ms R Hatherley was granted leave to appear for the appellant.

Mr B W Lewis appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

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**Background**

This is an appeal against conviction which I heard and determined on 21 December 2004. I dismissed the appeal and now publish my reasons.

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Following the running of Race 6 at Ascot Racecourse on 4 November 2004 the Stewards opened an inquiry into an incident that occurred at and after passing the winning post. Mr Lewis, Chief Steward Thoroughbreds, and Mr Delaney, Chief Steward Provincial Thoroughbreds, were both positioned in the main tower at the winning post and within earshot of the incident.

Called to the inquiry were:

David O'Heare	Licensed Jockey
Brad Parnham	Licensed Apprentice Jockey
Neville Parnham	Licensed Trainer

At the outset, the Chairman of the Inquiry, Mr Lewis, stated:

*'Mr O'Heare come in, take a seat. Look I've asked Apprentice Brad Parnham to stay with his Master and Father Neville Parnham. There's quite a serious incident that I believe happened on the line and just passing the line in race, race six today when you rode LILAC HILL and Brad Parnham rode the winner. I believe I heard you swear quite badly and it was f...ing little c..., that's what I heard. I believe it came from you and was directed to Brad Parnham. Maybe it was that incident that the Stewards are inquiring into, the earlier part of the race, but did you say that Mr O'Heare.'* (Transcript ('T') page 1).

The following conversation then unfolded:

<i>O'HEARE</i>	<i>Well I said something, I don't know what I can't recall what I said</i>
<i>...</i>	
<i>O'HEARE</i>	<i>I said something there and I wasn't happy.</i>
<i>CHAIRMAN</i>	<i>You weren't happy, alright. Well Mr Delaney did you hear any comment?</i>
<i>DELANEY</i>	<i>I agree with what you said Mr Chairman, it was definitely swearing and it was in those words.</i>
<i>CHAIRMAN</i>	<i>Mm. Alright and I don't know who it was Mr O'Heare but someone below us, someone below Mr Delaney and I said "Did you hear that", now that was just an oncourse patron who was</i> <i>...</i>
<i>O'HEARE</i>	<i>Well there's always someone isn't there.</i>
<i>CHAIRMAN</i>	<i>Well someone heard it and Mr Delaney and I heard something...</i>
<i>O'HEARE</i>	<i>Bullshit.</i>
<i>CHAIRMAN</i>	<i>Pardon?</i>
<i>O'HEARE</i>	<i>That's bullshit.</i>
<i>CHAIRMAN</i>	<i>It's not, it's not bullshit alright.'</i> (T1 - 2)

And further at T2:

<i>O'HEARE</i>	<i>No, I don't know what I said. I said something, look I've said, I've apologised to Brad in the Jocks Room.'</i>
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Apprentice Parnham told the inquiry that he didn't actually hear what was said because of the wind.

At T4 Mr O'Heare said:

*'It was what, it was earlier that cost me the race. And I explained to Brad what happened and I apologised to him for swearing at him. You know that's how you know adults you know do it isn't it.'*

Mr O'Heare was charged with a breach of Australian Rule of Racing 83(a) which states:

*'Every jockey or apprentice may be punished –*

*(a) If he misconducts himself in any way.'*

The specifics of the charge were:

*'Now you're charged with misconduct under that rule, the misconduct being in that near the winning post in race six when riding LILAC HILL you used foul language towards Apprentice Brad Parnham rider of STAR TUDOR.'*

Mr O'Heare pleaded not guilty. In his defence, Mr O'Heare maintained that the Stewards had no evidence to support the charge and that there is no law against swearing. Despite that the Chairman in announcing a guilty finding stated:

*'Look despite what Apprentice Parnham said there was a comment made. You had cause to apologise to Parnham after the race. I'm extremely confident of what I heard, as is Mr Delaney. Because of that we do find you guilty.'*

The following exchange then took place when the penalty was announced:

**'CHAIRMAN**      *Your record's not good, you've had a few lately and they're the ones I refer to. Back in June was \$200 that was Mr Hoppington's horse and then 29<sup>th</sup> September using inappropriate language passing the winning post.*

**O'HEARE**        *How much was that?*

**CHAIRMAN**      *That was \$250. \$250 September \$200 in June. Look it's getting close to a suspension, because we just can't tolerate it, alright, you'll just have to stop. We hear swearing a bit around, around the course and you know that's not right. We know you're excited and you're, you're agitated and your (sic) keen to win, we know all that*

...

*But you can't, you can't just swear all the time you know.*

**O'HEARE**        *Oh righto.*

**CHAIRMAN**      *Alright.*

O'HEARE *No worries.*

CHAIRMAN *Look its \$500 ...*

O'HEARE *No worries.*

CHAIRMAN *... that's our decision but that's the last time we're fining you.*

O'HEARE *Yeah no worries.*

CHAIRMAN *Should you swear again in those circumstances we're looking at a suspension and that could range from anything from a month up so, you know that's ...*

O'HEARE *Blokes nearly fall out there.*

CHAIRMAN *Sorry.*

O'HEARE *Blokes nearly fall out there and they don't get time and here's me you think I swear and I'm up for a suspension.*

CHAIRMAN *Yes.*

O'HEARE *Well that's ridiculous.*

CHAIRMAN *Mm.*

O'HEARE *Blokes don't make the weight four or five times and don't get suspended and here's me I swear and you gonna say I'm gonna get suspended next time.*

CHAIRMAN *You're a senior rider and ...*

O'HEARE *That's just ridiculous.*

CHAIRMAN *... Brad Parnham take a lead off you David so ...*

O'HEARE *That is ridiculous.*

CHAIRMAN *Alright well look ...*

O'HEARE *For youse to say that I can get suspended next time for swearing.*

CHAIRMAN *Yes we see it seriously enough to ...*

O'HEARE *Yeah.*

CHAIRMAN *... consider that.*

O'HEARE *No worries.*

CHAIRMAN *Alright you can appeal.*



O'HEARE            *Yeah I will appeal don't worry.*

CHAIRMAN        *Okay.*

O'HEARE            *You haven't got a leg to stand on.'* (T11 - 12)

Mr O'Heare did duly appeal. His ground of appeal is:

*'Given the circumstances and context of the incident it did not warrant a charge of misconduct.'*

### **Reasons**

Ms Hatherley confirmed that the ground of appeal was against the conviction only. I was told in substance the ground addressed the inappropriateness of the charge as the behaviour did not amount to misconduct. In support it was argued that:

- the words used by Mr O'Heare were not directed at anyone
- the person closest did not hear it
- Mr O'Heare was very frustrated at the time due to his weight struggle
- for the matter to amount to misconduct it required there to be swearing or an insult that was directed to someone who took offence as a result
- there was no dispute as to the words employed
- swearing is condoned in Australian Rules Football.

In response it was submitted by the Stewards:

- that the words were audible, there being very little background noise
- both Stewards had heard what was said, as well as a patron
- the language was directed to the other rider and not just enunciated at large
- the standards of behaviour in racing can be distinguished from other sports
- it is entirely inappropriate for one rider to speak to another in the way Mr O'Heare spoke to Apprentice Parnham.

The transcript of the Stewards' inquiry reveals the Stewards did not go into much detail regarding Mr O'Heare's record. It was described as '*not good*' and two earlier convictions for inappropriate language were referred to. These convictions were in June and September 2004. On seeking elaboration of the record I was told that Mr O'Heare had been fined on five previous occasions for a breach of the same rule. These fines were imposed for inappropriate language both over the telephone, after passing the winning post and on returning to the scales.

I was not persuaded by the propositions presented in support of the appeal. The sport of racing calls for different standards of behaviour than what may occasionally be condoned in

physical contact sports such as football. I adopt the reasons given in support by the Stewards. The charge in my opinion was clearly warranted. The behaviour did amount to misconduct which breached Australian Racing Rule 83(a).

*Dan Mossenson*

DAN MOSSENSON, CHAIRPERSON

