

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANTS: MR BRADLEY LYNN

MR MICHAEL PARIS

APPLICATION NOS: A30/08/797 & A30/08/788

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR P HOGAN (MEMBER)
MR R NASH (MEMBER)

DATE OF HEARING: 13 JUNE 2017

DATE OF DETERMINATION: 6 JULY 2017

IN THE MATTER OF appeals by Bradley Lynn and Michael Paris against the determinations made by the Racing and Wagering Western Australia Stewards of Harness Racing on 8 March 2017 imposing disqualifications of 15 months for breaches of Rule 193(1) of the Rules of Harness Racing.

Mr S Rafferty appeared for the Appellants.

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

By a unanimous decision of the members of the Tribunal, the appeals against penalty under Rule 193(1) are dismissed.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON



RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

**REASONS FOR DETERMINATION OF MR D MOSSENSON
(CHAIRPERSON)**

APPELLANT:

MR BRADLEY LYNN

MR MICHAEL PARIS

APPLICATION NOS:

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PANEL:

**MR D MOSSENSON (CHAIRPERSON)
MR P HOGAN (MEMBER)
MR R NASH (MEMBER)**

DATE OF HEARING:

13 JUNE 2017

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6 JULY 2017

IN THE MATTER OF appeals by BRADLEY LYNN and MICHAEL PARIS against the determinations made by Racing & Wagering Western Australia ('RWWA') Stewards of Harness Racing on 8 March 2017, imposing disqualification of 15 months for breaches of Rule 193(1) of the RWWA Rules of Harness Racing.

Mr S Rafferty on instructions from Jardine & Associates appeared for Messrs Lynn and Paris.

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

- 1 I do agree with the draft reasons for determination of Mr Hogan which I have had the opportunity to read. I have some brief comments to add as follows.

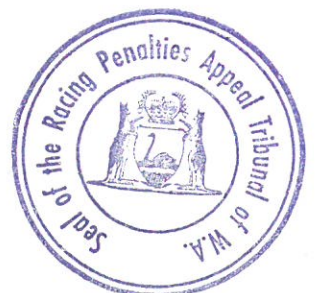
- 2 Rule 193(1) of the RWWA Rules of Harness Racing is designed to prevent a horse from being stomach tubed during the 48 hour period preceding the race in which it has been nominated to run.
- 3 The circumstances in which the appellants stomach tubed TORETTO are particularly serious. These offences do warrant a particularly heavy punishment. The reasons for reaching this conclusion include the following:
 - 3.1 the fact that the incident occurred so close to the time when the horse was due on course prior to its race;
 - 3.2 the location where the tubing occurred, which was on public display in suburban Perth;
 - 3.3 the fact that passersby could see the nature of the activity which was being undertaken;
 - 3.4 the length of time taken to complete the tubing was indifferent to TORETTO's health;
 - 3.5 the amount of time TORETTO had spent in the float and without being provided a drink prior to it being taken to the course to race, again reflecting the fact that the horse's welfare was not being addressed.
- 4 I am conscious of the fact that in determining these penalties the Stewards were required to be guided by the range of penalties imposed for this type of offence. Although the Stewards do enjoy a wide discretion in carrying out their task of determining penalties, if it be established that their decision is clearly so outside the discretionary range applicable as to demonstrate manifest error, then the Tribunal would be justified in interfering and reducing any excess.
- 5 Each case must be determined on its own peculiar facts and circumstances. Unfortunately it is often quite difficult to accurately compare all of the relevant facts and circumstances of the matter under consideration by the Tribunal with decided cases for

the reason that the available information in respect of the relevant determinations is rarely comprehensive or entirely clear.

- 6 In addition to this difficulty, the circumstances in other jurisdictions may well be sufficiently different so as to justify some flexibility and discrepancies in sentencing from state to state. Obviously, the size and nature of the industry in Western Australia is not directly comparable with other jurisdictions. The frequency of particular offences occurring in one state to another will vary from time to time and this too may affect sentencing attitudes. I believe the Stewards are entitled to take these and other factors into account and not just the immediate personal circumstances and mitigating factors when exercising their penalty imposing roles.
- 7 Having weighed up all of these various factors, I am satisfied that, despite both these penalties being on the high side compared to some others, manifest excess has not been demonstrated.
- 8 I am conscious of the fact that both appellants were given the identical sentences. The appellants had different roles and responsibilities in respect of TORETTO. I agree with Mr Rafferty that the role of the trainer who initiated the tubing and who was responsible for TORETTO's welfare in relation to the offence, was more serious than that of Mr Paris who was simply the assistant
- 9 However, bearing in mind the impact on this trainer is far more serious than the impact on Mr Paris, then I see nothing wrong with the conclusion which the Stewards reached to impose equal lengths of disqualification for each offender.
- 10 For these reasons, I too would dismiss this appeal.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON



THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR R NASH (MEMBER)

APPELLANTS:

MR BRADLEY LYNN

MR MICHAEL PARIS

APPLICATION NOS:

A30/08/797 & A30/08/788

PANEL:

MR D MOSSENSON (CHAIRPERSON)

MR P HOGAN (MEMBER)

MR R NASH (MEMBER)

DATE OF HEARING:

13 JUNE 2017

DATE OF DETERMINATION:

6 JULY 2017

IN THE MATTER OF appeals by Bradley Lynn and Michael Paris against the determinations made by the Racing and Wagering Western Australia Stewards of Harness Racing on 8 March 2017 imposing disqualifications of 15 months for breaches of Rule 193(1) of the Rules of Harness Racing.

Mr S Rafferty appeared for the Appellants.

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

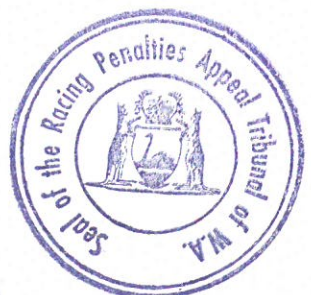
1 I have had the benefit of reading a draft of Member Hogan's reasons for decision with which I substantially agree.

- 2 I wish to add a few further observations of my own.
- 3 In this case, the Appellants through their counsel contend that for the purposes of sentencing there are two categories of breach of Rule 193 (1) of the Rules of Harness Racing, namely:
- a. those involving the stomach tubing of a horse simpliciter; and
 - b. those involving the stomach tubing of a horse with a nefarious intent.
- 4 If this dichotomy exists, it raises an issue as to what is required for the intent to be characterised as nefarious. Is it impropriety or is something even more sinister?
- 5 The dichotomy appears to be based on the Appellants' analysis of the outcome of a number of previous penalty decisions which involved stomach tubing, although we were not taken to any decision where this dichotomy for penalty purposes has been expressly recognised. There is nothing in the Rules of Harness Racing which draws or suggests this dichotomy for the purposes of assessing penalty. Rule 193(1) does not contain any element of intent or purpose.
- 6 The difficulty I have with the dichotomy the Appellants contend for, is that it fails to recognise the gravamen of the offence of stomach tubing a horse within 48 hours of a race. There is no proper purpose to stomach tube a horse within 48 hours of a race and continue to thereafter leave it nominated as a runner. If, for welfare reasons, a horse needs to have administered a stomach tube within 48 hours of a race, the only action a trainer and those involved can take is to immediately notify the Stewards and request the horse be scratched as a runner. Otherwise, the very action bespeaks impropriety.
- 7 Trying to identify or prove a specific "nefarious intent" for the purposes of penalty will often be an unedifying and fruitless pursuit.

- 8 In my view the dichotomy sought to be made for the purposes of determining where on the scale of seriousness a particular stomach tubing offence lies will, in the large majority of cases, lead to inappropriate disparities in penalty outcomes rather than provide a meaningful basis for differentiation.
- 9 The actions of the Appellants in this case were highly improper.
- 10 The manner and circumstances of the offending, the consequential risks posed to the welfare of the horse, and the initial responses when first confronted, justified the Stewards observation that the two Appellants demonstrated an obvious contempt for the rules and also justified the Stewards' rejection of the claims that the stomach tubing was undertaken to hydrate the horse out of a concern for its welfare.
- 11 I accept that the penalty of 15 months' disqualification is towards the upper end of the range when one has regard to the range of penalties imposed in similar cases. However, for the reasons given by Member Hogan, I do not consider the penalty imposed in respect of each Appellant falls outside the proper discretionary range open to the Stewards, having regard to each Appellant's respective circumstances of offending and personal circumstances.
- 12 Accordingly, I agree there has been no error in the exercise of the sentencing discretion.
- 13 I would dismiss both appeals



ROBERT NASH, MEMBER



THE RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANTS: **MR BRADLEY LYNN**
MR MICHAEL PARIS

APPLICATION NOS: **A30/08/797 & A30/08/788**

PANEL: **MR D MOSSENSON (CHAIRPERSON)**
MR P HOGAN (MEMBER)
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Mr S Rafferty appeared for the Appellants.

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

INTRODUCTION

1 These are appeals against penalty.

- 2 The appeals were heard together. The Appellants jointly committed the offence in question, and the penalty imposed on each appellant was the same. There is no difference between the grounds of appeal in each case.
- 3 Each Appellant has different personal circumstances, and the Stewards were mindful of that in imposing what was ultimately the same penalty in each case. Neither Appellant complains on this appeal that he should have received a lesser penalty because of different personal circumstances. In all of these circumstances, the outcome of each appeal should also logically be the same.
- 4 On 8 March 2017, the Racing and Wagering Western Australia Stewards of Harness Racing disqualified each Appellant for 15 months for a breach of Rule 193(1) of the Rules of Harness Racing ("the rules").
- 5 Rule 193(1) is in the following terms:

"A person shall not attempt to stomach tube or stomach tube a horse nominated for a race or event within 48 hours of the commencement of the race or event."

- 6 The particulars of the charge as against Mr Lynn were given by the Stewards at pages 71-72 of the transcript of the inquiry ("T71-T72")

"...the particulars of the charge are that you, Mr B Lynn, as the registered Trainer, did on the 20th January 2017 at approximately 6:15pm, whilst it was in the float, stomach tubed TORETTO which was nominated to race in Race 6 at Gloucester Park that evening."

- 7 The particulars of the charge as against Mr Paris were given by the Stewards at T73 –

"...the particulars of the charge are that you, Mr Paris, being a licensed driver and part owner of the horse in question, did on the 20th January 2017 at approximately 6:15 pm whilst it was in the float stomach tubed TORETTO which was nominated to race in Race 6 at Gloucester Park that evening."

8 Each Appellant pleaded guilty.

THE GROUNDS OF APPEAL

9 The grounds of appeal in each case are the same. The grounds are:

1. The disqualification is too severe

2. The facts statement provided on penalty is inaccurate

10 On the hearing of the appeal, only ground 1 was pursued. It is not said that the Stewards made any error of fact.

BACKGROUND

11 Mr Lynn is a licensed trainer, and Mr Paris is a stablehand/reinsman. They are part owners of the horse Toretto, which was nominated to race in Race 6 at Gloucester Park on Friday 20 January 2017. Earlier on that day, they had been together to Waroona and picked up the horse in a float with a spider on the back. They stopped on the way to Perth at Mr Lynn's stables at Banjup, but the horse did not exit the float. They continued on to Mr Lynn's residence in suburban Perth and parked in the driveway. Mr Lynn and Mr Paris exited the vehicle, and the horse remained on board the float.

12 The vehicle and float were under surveillance by the Stewards.

THE COMMISSION OF THE OFFENCE

13 Senior Investigative Steward Mr Criddle was observing from a distance and using a video camera. He made a report that same day to the General Manager of Racing Integrity. Mr Criddle reported as follows:-

"I parked my vehicle diagonally across the road from the property and I began surveillance.

TORETTO remained on the two horse float the entire time it was parked in the driveway at (Mr Lynn's suburban residence).

At approximately 6.10pm Mr Lynn and Mr Paris attended the float. In their possession, Mr Lynn was holding a plastic tube and Mr Paris was holding a modified plastic green bottle. In my opinion, the green bottle was modified in a way to mimic the functionality of a funnel. A white bucket was placed on the left-hand wheel guard of the horse float. Mr Lynn entered the float through the front left hand door whilst Mr Paris stood close by. After approximately 10 minutes I observed Mr Paris dip the end of the green bottle into a white bucket containing liquid, and then he looked to be attempting to attach the green bottle to the end of the plastic tube. A short time later I observed Mr Paris pour the liquid contents of the white bucket into the green bottle, which was evidently attached to the plastic tube. This process was conducted on three occasions, until the bucket was empty.

At approximately 6.25pm, Mr Paris put the modified green bottle into the empty white bucket and walked away from the float towards the house. Mr Lynn exited the front of the float soon after, with the plastic tube in hand and proceeded to also enter his residential premises.

At approximately 6.50pm Mr Lynn and Mr Paris arrived at Gloucester Park with TORETTO. Mr Lynn's vehicle and float were search(sic) by myself and Senior Steward Mr Grant Franklin, with no items of interest being found.

Mr Lynn was asked to report to the Stewards room at Gloucester Park, and I then made a report to the Stewards regarding my observation of the events that had occurred that evening. The horse was subsequently withdrawn from race 6 by order of the Stewards.

THE AFTERMATH

- 14 Each Appellant was interviewed in the days following 20th January. There was an inquiry on 27 February, and each Appellant pleaded guilty. Letters were delivered to each on 8 March 2017 imposing 15 months disqualification and setting out the reasons for the disqualifications.

MILKSHAKING

- 15 This was not a case of "milkshaking". However, the thought that it might have been was always in the background. It was spoken of during the interview with Mr Paris, at the inquiry on 27 February, and in the reasons for decision on penalty. At Mr Paris' interview on 23 January, he was asked whether he assisted in pouring a white liquid

(T17 23 January). At the inquiry, Dr Medd, the Veterinarian for Racing and Wagering WA, gave evidence. She said that Toretto's TCO2 levels on 20 January were found to be "high normal" (T63). They did not exceed the threshold of 36.0 (the prohibited substance presumption). Mr Lynn gave evidence of what he thought the reasons might have been for the high levels (T41). In their reasons for decision on penalty, at paragraph4, the Stewards said:-

"The tubing of a horse in the confines of a float, with a sulky attached to its rear, in broad day light in suburbia for any person passing by to witness is a flagrant breach of the rules of racing that prohibit the administration of any medications to a horse on race day let alone via stomach tube. It was suggested that random passers-by may not appreciate the significance of what was happening. Such submission is pure speculation and ignores the obvious risk to the image of harness racing and the potential for anyone who has ever heard, or hears about the colloquially termed expression of milkshaking' horses, which is a stigma the industry has fought against for years, to connect this action to that."

THE STEWARDS' FINDINGS

- 16 After reviewing all of the evidence, the Stewards said at paragraph 21 of the reasons for penalty:-

"On the evidence before us, the Stewards cannot make a positive finding that the solution contained alkalinising agents. Neither can such finding be comfortably made on the basis of Inference arising from the array of circumstantial evidence that is before the stewards. Were it available it is likely other charges may have been laid. We therefore make no such finding and approach the task of determining penalty accordingly."

- 17 And further at paragraph 22:-

"Consequently we find ourselves in an all too familiar position of being left with no accepted reason as to why a rule of this nature has been breached and having to determine penalty accordingly".

THE ARGUMENT ON APPEAL

- 18 It was submitted that the ground of appeal (the same in each case) raised the issue of "manifest excess". Out of the four factors material to that ground, only one was advanced. That was that the penalty in this case, the same for each Appellant, was outside the common standards of sentencing for this type of offence. In support of that,

it was submitted that there are 2 types of cases - one where a person has committed a stomach tubing offence simpliciter, and a second more serious category where where a person has committed a stomach tubing offence with some improper purpose. It was submitted that the offending in this case fell into the first category, because there was no improper purpose and that is because there was no conviction for a presenting offence accompanying the tubing offence. Ultimately, it was submitted that 15 months was outside the range for a stomach tubing offence simpliciter.

CONSIDERATION OF THE APPEAL

- 19 The imposition of a penalty is a matter of discretion. If a penalty is outside the range of penalties commonly imposed for offences of its type, that fact itself may demonstrate error so that it can be said that the discretion has miscarried. That is another way of saying that a penalty can be set aside on appeal if it can be demonstrated to be manifestly excessive.
- 20 In their reasons, the Stewards identified a number of cases in relation to Rule 193(1). The Appellants on appeal identified other cases. We were invited to consider all of these in order to determine whether the penalties impose were within a sound discretionary range.
- 21 As a starting point, I do not accept that anything useful can be gained from trying to draw a distinction between cases in which a tubing offence simpliciter has been committed, and one in which "improper purpose" (a further offence of presenting) has been demonstrated. Very commonly, tubing offences are committed as a precursor to presenting offences. The penalties imposed must therefore involve considerations of totality. It would be an impossible task to determine what a penalty might have been if the tubing offence had been committed alone.
- 22 There were a number of other cases referred to which involved the different offence of administering medication on race day. In my view, these are of no assistance because

they do not necessarily involve stomach tubing, which is an offence of particular seriousness over and above that of simply administering medication.

23 The cases in which stomach tubing alone were dealt with include the following:

8/9/2015 G Tanti (NSW Harness) - Attempted to stomach tube a horse on race day
— 3 years disqualification

24/4/2015 R Bell (WA Harness) - Stomach tube the day prior to the race with
alkalinising agents 3 months disqualification

12/3/2015 J McDermott (Vic Harness) - Stomach tube a horse day prior to racing —
Fine \$8,000

31/1/2015 M Neilson (QLD Harness) Stomach tube a horse that was due to
compete that evening - 6 months disqualification

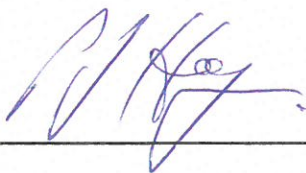
4/11/2014 M Grant (QLD Harness) Stomach tube a horse the day prior to a race —
Fine \$4,000

2017 R Scott (Qld Harness) – Rule 193(1) – 2 offences – Fine \$4,000 on each

3/2016 S Hunter (NSW Harness) – Rule 193(1) – 20 months disqualification

24 It can be seen from the cases referred to above that the penalties in this case, namely
15 months disqualification, were within the range of penalties commonly imposed for
offences of this type. That being so, there has been no error in the exercise of the
sentencing discretion.

25 I would dismiss both appeals.



PATRICK HOGAN, MEMBER

