11 March 2025

**DECISION**

**HARNESS RACING VICTORIA**

**and**

**JAMES HERBERTSON**

**Date of hearing:** 25 February 2025

**Date of decision:** 25 February 2025

**Panel:** Magistrate Peter Reardon (Deputy Chairperson), Ms Maree Payne and Mr Des Gleeson.

**Appearances:** Ms Kylie Harrison appeared on behalf of the Stewards.

Mr Greg Sugars represented Mr James Herbertson.

**Charge:** Australian Harness Racing Rule (“AHRR”) 170(4)(a) states:

(4) a driver shall not

(a) attempt or allow his foot or leg to come into contact with the hindlegs of the horse he is driving.

**Particulars:** Driver James Herbertson was found guilty of a charge under Rule 170(4)(a) for allowing his right foot to come into contact with the right hind leg of Markleigh Caz in the home straight on the final occasion. In assessing the matter, stewards took into consideration the HRV minimum penalty guidelines, that Mr Herbertson is driving constantly and had not been charged under this rule previously and that there was only one occasion identified that the contact had occurred. Mr Herbertson was fined the sum of $500 of which $250 was suspended for a period of 2 years and will come into effect if he reoffends within that time.

**Plea:** Not Guilty

**DECISION**

1. Mr James Herbertson is a licensed harness racing driver and has appealed the Stewards decision in relation to Race 5 at Charlton on 15 January 2025.
2. At the Stewards inquiry he was found guilty of a charge under Australian Harness Racing Rule (“AHRR”) 170(4)(a) for allowing his right foot to come into contact with the right hind leg of his horse “Markleigh Caz” in the home straight on the final lap.
3. Mr Herbertson pleaded Not Guilty to the charge and after the finding of guilt he was fined $500 of which $250 was suspended for two years.
4. Mr James Herbertson has pleaded Not Guilty to the charge before this Tribunal and is represented by Mr Greg Sugars.
5. Mr James Herbertson was and was at all material times a driver licensed by Harness Racing Victora (“HRV”) and is bound by the AHRRs. On 15 January 2025 at the Charlton Harness Racing meeting, he was the driver of Markleigh Caz in Race 5 over 1,609 metres, his horse finished second in the event.
6. After the race was concluded, the Stewards at Charlton conducted an inquiry and charged James Herbertson with an offence under AHRR 170(4)(a).
7. The particulars of this charge are that Mr Herbertson was the driver of Markleigh Caz in Race 5 at Charlton, on entering the home straight and approximately 70 metres from the finish line he had contacted the right hind leg of Markleigh Caz with his right foot.
8. The Stewards rely on the evidence of video footage and the transcript of the Stewards inquiry as well as submissions made by Ms Harrison on behalf of the Stewards.
9. The Stewards bring the charge against Mr Herbertson and they bear the onus of proof of proving the case to a level of comfortable satisfaction. The onus of proof never shifts to Mr Herbertson and he bears no onus of proof. If the Stewards satisfy this Tribunal to the level of comfortable satisfaction, they have discharged their onus of proof that he is guilty, but if not, he must be found not guilty of the offence.
10. The Stewards in summary rely on the following evidence:
11. Mr Herbertson was the driver of the horse Markleigh Caz in the race and he was familiar with driving this horse in races.
12. Mr Herbertson admitted that Markleigh Caz was a horse without any leg bindings and therefore he was familiar with any peculiarities of the horse and the movements of the horse.
13. He admitted there was some contact with his foot of the right hind leg in the home straight although the point of contact location is disputed and initially Mr Herbertson stated the contact was the horse coming into contact with the sulky not his feet.
14. When contact was made to Markleigh Caz the horse was still in front and competitive and whether the distance from the finishing post was 30, 50 or 70 metres is irrelevant, the horse was in a winning position.
15. Mr Herbertson may have been moving his feet or twisting around in the home straight as distinct from his driving throughout the race but agree his feet remained in the footrest.
16. Mr Herbertson’s foot was low in the sulky footrest and in the home straight was moving towards the horse’s hind legs but there was one contact only and no lifting of the foot.
17. Mr Herbertson as the driver was responsible for setting up the sulky and had driven the horse many times before. Thereby he was aware of his responsibility not to come into contact with the horse’s hind legs with his feet.
18. At the time of contact, Mr Herbertson would have been aware that “Celestial Zodiac” was coming up on his outside endeavouring to overtake Markleigh Caz.
19. Mr Herbertson was responsible for making sure his feet did not come into contact with the horse’s hind leg in the home straight near the finishing post.
20. Any such contact might try to encourage or attempt to improperly persuade the horse to keep going.
21. Therefore, the Tribunal should find that the Stewards have discharged the onus to a comfortable satisfaction find Mr Herbertson guilty of the charge as he improperly allowed his foot to come into contact with the horse’s right hind leg.
22. Mr Sugars on behalf of Mr Herbertson has argued that contact was not 70 metres from the finishing post but about 30 metres from the post and that such contact was accidentally made on a tiring horse.
23. It was only the one contact. If there had been previous contact in this race, then Mr Herbertson would have been aware of his responsibility to be more careful.
24. Mr Herbertson’s foot never moved off the footrest and any contact that was made to a tiring horse.
25. This horse is a leader and does not have any leg binging, if he is tired it may throw its legs about or move awkwardly.
26. The contact was out of Mr Herbertson’s control and that Mr Herbertson never changed his position throughout the race and there being only one contact without fore warning and therefore the verdict should be not guilty.
27. They are the submissions made by both parties in this hearing and each party relies on the video footage and transcript of the inquiry.

**FINDING**

1. The Tribunal has reached a unanimous decision in this case.
2. The Tribunal finds that in the home straight, Mr Herbertson’s foot came into contact with the right hind leg of the horse approaching the finishing post. No advantage needed to be gained for the charge to be proven. It is a strict liability charge. At the time of contact, Mr Herbertson’s foot had changed position, and his foot was lower on the sulky and Mr Herbertson as the driver was responsible for setting up the sulky. He had been the driver of Markleigh Caz many times. At the time of contact, Markleigh Caz was still competitive, and the race was not clear cut and very much in doubt.
3. As already stated, the onus of proof is on the Stewards to prove the case to a level of comfortable satisfaction and that there is no onus of proof on Mr Herbertson.
4. In this case there is no apparent evidence that Mr Herbertson changed his drivers position or moved his feet from the footrest to come into contact with the horse either deliberately or otherwise.
5. After contact he seemed to raise his right foot to instinctively prevent further contact. The contact was isolated event and was not a continual action.
6. There is no evidence to suggest it was done to urge the horse forward even though contact was made close to the finishing line.
7. The Rule was brought in 2022 because the American style sulky was introduced to Australia a decade or more ago whereby the sulky is closer to the horse and the driver is clearly seated closer to the horse.
8. The Rule is there to prevent the urging or persuading the horse to keep going by making contact with the hind legs by feet.
9. However, in this case the Tribunal has a doubt that this was the case in the race and that the Stewards have not reached the level of comfortable satisfaction to prove their case.
10. Accordingly, the appeal is upheld and the charge against Mr Herbertson is dismissed.

Mark Howard

Registrar, Victorian Racing Tribunal