

**RACING APPEALS
TRIBUNAL
NEW SOUTH WALES**

**TRIBUNAL MR D B ARMATI
ASSESSOR MR W ELLIS**

EX TEMPORE DECISION

WEDNESDAY 30 SEPTEMBER 2020

APPELLANT NEIL DAY

**AUSTRALIAN HARNESS RACING
RULE 163(1)(a)(iii)**

DECISION:

- 1. Appeal upheld**
- 2. Appeal deposit refunded**

1. The appellant, licensed driver Mr Day, appeals against a decision of the stewards of 11 September 2020 to impose upon him a period of suspension of his licence to drive for a period of 14 days to commence on 15 September.

2. The rule under which the stewards proffered a charge was 163(1)(a)(iii), which relevantly states:

“A driver shall not cause or contribute to any interference.”

The stewards particularised that breach as follows:

“ ... in Race 8 today when you drove Philandering Chef, stewards feel you shifted that runner out near the 100 metres. We don't feel that you were forced out by Norm's Courage, driven by Mr White, and as a result there was contact between your runner's sulky wheel and the front legs of Bettathanapokeindeye and that manner was checked and broke as a result.”

3. When confronted with that allegation at the inquiry, the appellant pleaded not guilty and has maintained that plea on this appeal.

4. The evidence has comprised the video images, the transcript of the stewards' inquiry and the evidence of the appellant.

5. At the conclusion of the evidence, the stewards indicated that there was still the opinion formed by them at the inquiry as to a breach in the terms particularised.

6. The participants relevantly are the appellant on Philandering Chef, Mr Scott on Bettathanapokeindeye, Mr White on Norm's Courage and Mr Jones on an unnamed horse. The incident occurred and developed as the horses, and naturally the drivers, came into the home straight. It appears that the home straight from the end of that apex of the final turn to the winning post might be 190 metres on a track of 1071-odd metres.

7. The stewards fairly indicated that they had not observed the incident as such and they subsequently therefore at the inquiry did not have a steward give, at the commencement of the inquiry, an assessment of eye vision of the incident. It is all based upon an assessment of camera angles and the evidence of Mr Scott and Mr Day, the appellant, at the stewards' inquiry, coupled with the additional evidence of the appellant today.

8. Therefore, do the stewards, having formed their opinion from a viewing of the images and having taken the evidence at the inquiry, satisfy the Tribunal today that the opinion they there formed at the inquiry was correct? This is a civil disciplinary matter and it is for the Tribunal to be comfortably satisfied

on the evidence having regard to the gravity of the allegation laid against the appellant and the likely consequences on his livelihood of an adverse finding.

9. The major challenge that the appellant takes to the opinion formed by the stewards turns upon camera angles. Here, as is the usual case, the images comprised lateral images, home straight and back straight. Mr Day gives evidence, which does not appear to be controversial, that the back straight camera that that camera may have been some 160 to 180 metres from the actual incident itself. That is examined because it is the appellant's evidence that the parallel angles that are in dispute by him do not show clearly the position of his horse's legs with that of the wheel of Mr White's gig.

10. To put that in context, the horses will not be named, particularly having regard to the length of one of them, rather the drivers will be used to demonstrate the Tribunal's findings. As the horses came into the home straight, various drivers who are not named need not be included, Mr Jones was leading Mr White and Mr Jones was inside Mr White's line. Mr White was inside, relevantly, the line of Mr Day and Mr Scott was to the outside of Mr Day. An unnamed driver of a horse was outside Mr Scott.

11. It is the appellant's evidence that he determined to take a run and commenced to commit himself to it at speed. To jump ahead from the incident, it is apparent from the speed at which Mr Day's horse ran through to the line from the point of the incident that indeed he was travelling at speed as it came from a position well back to run into a place.

12. The way in which races are run enable a driver to commit himself to a run in the fashion that Mr Day did, but that as a very experienced driver he is to provide a level of expertise and anticipation in respect of what might transpire before him and to ensure that in committing himself he can do so safely.

13. The evidence is not in contest, as the stewards agreed at the inquiry, that as the incident commenced to unfold, Mr Jones moved out and Mr White moved out also, possibly half a cart. At that point, Mr Day, having committed himself at speed, remained of the opinion that he could go through and run safely to the line. At that point he had to his outside Mr Scott.

14. It is the stewards' case that when he committed himself to take that gap there was not a space available to him because of the position of the outside wheel of Mr White and the inside wheel of Mr Scott. The evidence, consistent with the concession made by the stewards at the inquiry, certainly is that Mr Jones moved up the track, Mr White moved up the track. Mr Scott essentially maintained his line. The appellant says he moved up with the movement of Mr White. The effect of that was that his offside wheel

came into contact with the forelegs of Mr Scott's horse and caused it to check and break and take no further effective part in the race. The stewards found and maintain that the appellant was well behind Mr White as he moved up and interfered by moving up.

15. It is difficult to ascertain from the images alone whether Mr Day is correct in his assessment that at the time he moved up that amount to put his offside wheel into the legs of Mr Scott's horse, that in fact his horse's forelegs were level with the wheel of Mr White's gig or was well behind Mr White. It could be correct that the images in fact depict the appellant was well behind Mr White.

16. The Tribunal and the Assessor Mr Ellis have had the benefit of viewing the images of each of the angles on numerous occasions, both at speed and slowly, and have done so on a number of occasions whilst discussing the matter between themselves today. That ability to do so is not available to a driver in the course of a race and incidents unfolding. The ability of the stewards, with the same degree of time taken by the Tribunal and the Assessor today, is not of course that which is usually available at an inquiry and it is quite apparent that the stewards gave the appellant every opportunity, in the company of Mr Scott, it is to be noted, who commented on a number of matters favourable to the appellant at the inquiry, to comment and the stewards very fairly made the concessions to which reference has been made.

17. The Tribunal, as presently constituted, reflected as long ago as the appeal of Lauren Panella, 15 march 2012, as a result of assessing all of the cases available to it at that time, that in assessing matters such as this it is necessary to find that a driver was blameworthy. A split-second decision will often not be accompanied by a finding of blameworthiness. It must be accepted that circumstances will change in a race and it is a question of whether an experienced driver has properly anticipated and reacted to what are quite plainly anticipatable circumstances which would cause that driver to proceed in a different fashion or somehow to react differently to avoid interference or other problems, it being borne in mind that the obligation on the driver in a race is welfare and safety, both of horse and drivers.

18. This was not, as it were, a split-second decision. But the trouble the Tribunal has in separating these two matters is that it is satisfied from its viewing of the evidence that Mr Day had committed himself at speed to the run that he took, that having so committed himself it was open to him at the time he did so to have done it. That whilst it might be said he could anticipate that Mr Jones would move up and therefore Mr White would move up, he was also entitled, in the Tribunal's experience, to expect that they would maintain their line. It is common ground they did not.

19. Having regard to the difficulty of the complete assessment of the images, which the stewards quite fairly reflected upon and have done so in this appeal, the Tribunal is not comfortably satisfied that a viewing of the image alone provides a complete answer to everything that unfolded. The Tribunal is of the opinion that the conclusions drawn by the stewards, the opinion they reached, were very fairly ones which were available to them.

20. However, having considered the totality of the evidence today and having, as described, looked at the images with the Assessor Mr Ellis on numerous occasions and discussed the matter quite at some length, the Tribunal cannot have that level of comfortable satisfaction that the interference is one which carries with it blameworthiness.

21. That is the respondent does not satisfy the Tribunal to the Briginshaw standard that the case for the stewards is the one it should accept.

22. In those circumstances, the appeal is successful.

23. The Tribunal orders the appeal to be upheld.

24. The Tribunal orders the appeal deposit refunded.
