

**RACING APPEALS  
TRIBUNAL  
NEW SOUTH WALES**

**TRIBUNAL MR DB ARMATI  
ASSESSOR MR W ELLIS**

**EX TEMPORE DECISION**

**THURSDAY 14 FEBRUARY 2019**

**APPELLANT JOSH GALLAGHER**

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

**DECISION:**

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

1. Licensed B Grade driver Mr Josh Gallagher has appealed against the decision of the stewards of 27 January 2019 to impose upon him a period of suspension of his right to drive for 14 days for a breach of Rule 163(1)(a)(iii). That rule states: “A driver shall not cause or contribute to any crossing; jostling”, and part (iii), relied upon, is “interference”.

The particulars are that:

“... in Race 6 at Junee tonight on 27 January, turning off the back straight on the final occasion you’ve allowed your runner to shift down the track when not sufficiently clear of Mr Maggs’s runner, which was racing to your inside, causing his horse to go down the track and check Mr Day’s horse, which was racing to Mr Maggs’s inside, which resulted in Call Me Hector, driven by Mr Maggs, and A Sweet Success, driven by Mr Day, to be both checked and gallop. This occurred coming off the back straight on the final occasion.”

2. When confronted with that allegation, the appellant pleaded not guilty to the stewards. He has maintained the denial of the breach of the rule before this appeal. There is also an appeal on severity.
3. The appellant has not appeared at the hearing because he has fallen quite unwell. Licensed driver Mr Morris has represented him today.
4. The evidence has comprised the transcript and video images before the stewards, together with oral evidence of the Chairman of Stewards on the night, Mr Frost.
5. This is an opinion of the stewards case and, as the Tribunal has said for some time, when fresh evidence is given, it is necessary for the respondent to satisfy the Tribunal that the opinion of the stewards is maintained and was reasonably available to them. The opinion has been expressed by two stewards, firstly, at the stewards’ inquiry by Mr Jasprizza, and in evidence today by the Chairman of Stewards on the night, Mr Frost.
6. Dealing with Mr Frost, he is a steward of 33 years’ experience and has, on his estimate, been involved with some 1600 to 2000 meetings. He has been the Chairman at Junee for some five years and has attended, therefore, some 40 meetings at Junee over that period. No challenge is taken to his experience or his ability to form the opinion that he has and the Tribunal accepts that with his knowledge and experience, which is substantial, that the opinion was one which he was able to express.
7. The question is whether those opinions formed by Mr Jasprizza and obviously by the panel of stewards on the night, which comprised both Mr Frost and Mr Jasprizza, which when coupled with the evidence available to the Tribunal today, satisfies the Tribunal to the Briginshaw standard, that is,

by a level of comfortable satisfaction, that the breach of the rule has occurred in the terms particularised.

8. The key evidence before the stewards, and to some extent supplemented on appeal, relates to three horses and, as said, to some extent, some observations were given in respect of other horses in the race. The key horses, however, do not need to be named. The Tribunal proposes to deal with them by referring to their drivers as that is a more practical way to deal with this particular case.

9. The three drivers in question are the appellant, Mr Gallagher; Mr Day and Mr Maggs. The horses coming into the back straight the first time had the horse of Mr Gallagher some five wide; Mr Maggs's, some four wide and Mr Day, some three wide. The issue is that as they approached the final turn, the stewards formed an opinion that Mr Gallagher shifted down the track and that in doing so he caused undue pressure on Mr Maggs, which also occasioned undue pressure on Mr Day, such that he caused each of the horses of Mr Day and Mr Maggs to gallop.

10. The stewards' inquiry commenced with Mr Jasprizza, who was the steward in the tower with an immediate view of the horses coming down the back straight, and then the incident occurring immediately in front of his stewards' tower. He was in a position to observe it, although it must be said it was from a side-on angle rather than a head-on angle. Incidentally, Mr Frost conceded that he did not see the incident during the running of the race but as a result of the report to him by Mr Jasprizza, he convened the inquiry, he formed the opinion – that is, Mr Frost – as a result of the evidence given at the inquiry and in relation to the evidence that he gave today confirmed his opinion that the breach as particularised is established.

11. Mr Jasprizza, having given evidence at the inquiry to the effect of placing the horses in the position as just described, says this:

“As they got to the turn, I believe Mr Gallagher's horse has applied pressure to Mr Maggs's horse, he was being placed in restricted room and has then moved down the track and he put Mr Day's horse in restricted room and both those runners had been checked and broke”.

12. The issue for determination is whether Mr Gallagher, in crossing from a five-wide to a three-wide position from the back straight until into the turn over a distance of some 80 metres in five seconds, has effected a drive in a fashion which caused interference, the unnecessary imposition of pressure on Mr Maggs. As expressed now, Mr Frost is of that opinion.

13. There is no doubt that Mr Gallagher shifted from a five-wide to a three-wide position and in doing so crossed the lines of both Mr Maggs and Mr

Day. The issue, therefore, becomes narrowed down to the question that as each of Mr Day and Mr Maggs's horses each were checked and broken, whether that was occasioned wholly or, as necessary, partially by the line taken by Mr Gallagher as he moved down.

14. Firstly, Mr Gallagher, on the DVD image, does not look to his left at all. Secondly, when confronted by the stewards with the allegations at the inquiry, he said: "I don't know anything about the incident, sir." He, therefore, was not in a position to comment in respect of what Mr Maggs and Mr Day, supported by the observations of Mr Jasprizza and Mr Frost, have expressed as to have occurred. At best, Mr Gallagher was able to view the images on the video screens, as played before the stewards. He was not, for reasons express, able to do so to this Tribunal.

15. As has been said, there is no issue he moved down. He said that, however, he said at all times he was clear when he did so. To express him, he was asked the question: "You were clear when you crossed down in front of Mr Maggs, were you?" Answer: "I believe so." And, indeed, later on he said: "I don't even know why youse have me in here."

16. The issue becomes whether, on the observations of Mr Frost and Mr Jasprizza, coupled with what Mr Maggs and Mr Day had to say, the opinion formed by Mr Frost and Mr Jasprizza, and reinforced by Mr Frost, remains a reasonable conclusion. Neither Mr Maggs nor Mr Day, as is the usual course on these appeals, has given evidence to the Tribunal. The Tribunal is left with its observations of the DVD and their observations of it and what they said in answer to questions at the inquiry.

17. At all times Mr Maggs has maintained that he was just trying to hold his position. There is no doubt that, as he said, there was tightening. There is no doubt, in the Tribunal's opinion, consistent with what Mr Maggs has said, that there was tightening from both sides. Mr Maggs – and it is common ground – conceded that there was no contact from the outside. That is, that Mr Gallagher's horse, Mr Gallagher's sulky wheel, made no contact with Mr Maggs's horse or sulky wheel. Thus Mr Gallagher was able to say to the inquiry when initially confronted with the allegations he did not know what they were talking about. Because it essentially happened behind him.

18. Mr Maggs repeated on numerous occasions he was just trying to hold his position in a straight line, and the DVD confirms that, as well as suffering pressure from both sides. It got, as he described it, "tight racing". And, critically, he said in the transcript: "I couldn't actually blame one or the other, but it was tight on the inside and the outside."

19. Mr Day said that he was attempting to take a position, legitimately available to him, it must be said, by trying to follow another runner through and, as he said, "I just ran out of room." He said he was hitting the corner at speed, "the gap was closing quick as I was more or less getting into the

corner.” That then is consistent with what Mr Maggs has said, that the racing became tight.

20. Mr Maggs said he did not shift down the track at any stage but was just trying to hold a straight line under pressure. At best, the appellant conceded he shifted 20 to 10 centimetres, to quote his evidence, but did concede that throughout the totality of the drive he did move down from a five-wide to a three-wide position.

21. Critically, Mr Day told the stewards that when they got to the corner he was hitting the wheel of Mr Maggs. There is no doubt that Mr Maggs and Mr Day and the horses’ equipment came into contact. And also critically, consistent with what the DVD shows, Mr Day said to the stewards in answer to this question: “Do you believe your horse has shifted up the track at that stage, Mr Day?” Answer: “Yeah. I was following number 4 through.” And later: “I thought I had significant room there to keep going through.” And later: “I’ve started to restrain because it was starting to get awful tight.” And Mr Gallagher said at the point where Mr Day is said to have started to restrain: “I’m clear right there, sir.”

22. Mr Frost, having given his evidence and viewing the DVD as he did so, said that there was a shift by Mr Gallagher, which again is not in dispute, and that he observed that Mr Maggs had caused his horse’s head to be turned in and that at that point Mr Gallagher had come into Mr Maggs’s racing line. There is no doubt that Mr Gallagher came into the racing line. The question is whether he was sufficiently clear when he got into that racing line that he has not in fact occasioned the checking and galloping which occurred to his inside.

23. There is no doubt that there was tight racing. There is no doubt that the three drivers were all engaged at speed going into the corner and that they were seeking to drive on certain lines: Mr Day coming up, Mr Maggs going straight and Mr Gallagher going down.

24. The opinion of Mr Frost, as was expressed at the beginning, must be given substantial weight. It is the opinion of a highly experienced steward and Chairman of Stewards. It is supported by the opinion of Mr Jasprizza, as he expressed in his evidence, and each of the two stewards in the opinion they formed at the inquiry and now maintained by Mr Frost on this appeal.

25. The issue then is, simply distilled, can the Tribunal be comfortably satisfied that the checking and galloping was caused by pressure occasioned by Mr Gallagher in crossing from the five-wide to the three-wide position?

26. The Tribunal, assisted by Assessor Mr Ellis, and having itself viewed the DVDs on numerous occasions, and in particular in association with Mr Ellis, is not comfortably satisfied that immediately prior to the checking and galloping Mr Gallagher's wheels or Mr Gallagher's horse were sufficiently close to the horse and wheels of the sulky of Mr Maggs that it can be said that it occasioned of itself the tightening. Tightening itself is an incident of racing. It is a question of whether that occasioned interference by reason of the driving of the appellant.

27. The Tribunal is more comfortable in determining that this tightening was also attributable to Mr Day, although it must be said Mr Day is not before this Tribunal and has not given evidence. By his concession, he moved up. And in doing so, it was he that came into contact with Mr Maggs's horse or equipment and that that of itself occasioned the checking and galloping and that there was not a contribution by way of interference in the driving of Mr Gallagher.

28. The Tribunal determines that the opinion of the stewards was not reasonably available to them

29. Mr Gallagher's appeal is upheld.

30. The Tribunal orders the appeal deposit refunded.

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