

RACING APPEALS TRIBUNAL

LACHLAN MANZELMANN
Appellant

HARNES RACING NEW SOUTH WALES
Respondent

DETERMINATION

31 July 2019

Introduction

1. The Appellant, Lachlan Manzelmann (**Mr Manzelmann**) is a licensed driver with Harness Racing New South Wales (**HRNSW**).
2. On 21 June 2019, Mr Manzelmann drove GENTLEGIANT NZ (**Horse**) in Race 3 at the Bankstown Harness meeting.
3. Following an inquiry, HRNSW Stewards charged Mr Manzelmann with a breach of Australian Harness Racing Rules (**Rules**) 163(1)(a)(iii). That rule is relevantly in the following terms:

“A driver shall not –
(a) cause or contribute to any
(i)...
(ii)...
(iii) interference....

4. The Stewards particularised the charge as follows¹:

“...Lachie Manzelmann, the driver of Gentle Giant, engaged in Race 3, at the Bankstown Paceway meeting on 21 June 2019 did allow your runner to shift down the track at the first turn when not the required 1 metre clear of the extended front legs of Mr McElhinney’s Drive, Magnum Rose, which was racing to your inside, which was tightened of racing room, and struck the off-side foreleg of Mr Rixon’s

¹ Transcript of Steward’s Inquiry, 21 June 2019, p 12

runner, and as a result of that, Mr McElhinney's runner sustained a flat tyre and was retired from the event." (**Charge**).

5. Mr Manzelmann pleaded not guilty to the Charge.
6. The Stewards found Mr Manzelmann guilty of the Charge and imposed a suspension of 18 days commencing, at Mr Manzelmann's election, from midnight, Sunday 30 June 2019.
7. On 21 June 2019, Mr Manzelmann lodged a Notice of Appeal to the Tribunal against the decision of the HRNSW Stewards. The appeal is both as to guilt and severity of penalty.
8. An appeal to the Tribunal is by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence on which the decision appealed against was made.²

Evidence on the appeal

9. The evidence on the appeal as to breach of the Charge comprised the:
 - (a) transcript of the Stewards' Inquiry of 21 June 2019;
 - (b) a video of the race taken from a number of angles; and
 - (c) oral evidence given by Mr C Bentley, Chairman of the Steward's Panel which undertook the Inquiry and who witnessed the circumstances giving rise to the Charge live from the Steward's Tower.
10. Mr Manzelmann elected not to give any oral evidence at the hearing but instead relied upon the evidence given to the Steward's Inquiry as recorded in the Transcript.
11. The evidence on the appeal as to severity of penalty comprised Mr Manzelmann's offence report.

Hearing of the Appeal

12. The appeal was heard on 31 July 2019. Mr Manzelmann was represented by Mr Hammond, solicitor. Mr Adams appeared for HRNSW. The parties relied upon written submissions which each had provided to the Tribunal in support of Mr Manzelmann's application for a stay. They were also afforded an opportunity to and did supplement those submissions orally.
13. The Tribunal sat with Assessor Mr W Ellis who has provided the Tribunal with expert advice³ and with whom substantial discussions have taken place in respect of the matter. However, it for the Tribunal and for it alone to determine the merits of this appeal unencumbered by any view of the Assessor although informed by them.

² Racing Appeals Tribunal Act, 1983 (NSW), s 16

³ Racing Appeals Tribunal Act, 1983 (NSW), s 8A

14. Upon the hearing of an appeal in respect of harness racing, the Tribunal may, inter alia, dismiss the appeal, confirm the decision appealed against or vary the decision, or make such other order in relation to the disposal of the appeal as the Tribunal thinks fit.⁴
15. At the conclusion of submissions, the Tribunal indicated to the parties that it would pronounce its determination orally after a short adjournment to consider that matter with written reasons to follow. Each of the parties was content with that course.

Oral Pronouncement of the Tribunal's Determination

16. After a short adjournment, the Tribunal informed the parties of its orders, being that the appeal is dismissed, the order made on 28 June 2019 staying the decision of the Stewards the subject of the appeal be vacated and that the Appeal Deposit be forfeited, with the consequence that Mr Manzelmann will be suspended for a period of 18 days commencing at midnight on 1 August 2019.
17. These are the reasons of the Tribunal.

Reasons for Determination

The Evidence

The evidence before the Stewards' Inquiry

18. What follows is a summary of the key evidence that was before the Steward's Inquiry and that is relevant to the determination of the appeal.
19. Mr Manzelmann gave evidence to the Stewards to the effect he was not a full metre clear of the extended front leg of Mr McElhinney's drive, Magnum Rose at the time of the alleged incident but that he had not commenced his movement down to the inside at that time. He claimed that he only did so at the turn once he had cleared Mr McElhinney (Magnum Rose).⁵ He asserted that the video provided support for his contention. He also said that, "*I thought it maybe got a little bit tight, but I didn't think I interfered with any runner sufficiently enough to cause a drama.*"⁶
20. Mr McElhinney gave evidence to the Stewards to the effect that Mr Manzelmann was not sufficiently clear of him when approaching the first turn. He said that the horses that were drawn 3, 4 and 6, all began the race fairly quickly. He had an advantage over Mr Rixon's horse and Mr Manzelmann's horse had an advantage over his but had not crossed him. "*...[A]s we started to get to the point of the turn, it got tight, and I was appealing to Mr Manzelmann to stay out a little bit to give me room, and as a consequence, my inside wheel was struck by Mr Rixon's horse and I sustained a flat tyre...*"⁷
21. Mr Rixon, the driver of Two Ply (NZ) gave evidence that he knew that coming into the first turn "*...we were pretty tight for a bit...*" but that he did not know that he had made contact with Mr McElhinney's wheel. He said, "*... I was hoping to get forward spot and my*

⁴ Racing Appeals Tribunal Act, 1983 (NSW), s 17A

⁵ TP 6.34-41; TP7.2-6

⁶ TP 4.6-8

⁷ TP3.30-34

horse did not quite leave the gate as fast as Mr McElhinney's and Mr Manzelmann's, and we were going real quick into that first turn and obviously I had Mr McElhinney and Mr Manzelmann to the outside me, so I was looking for the spot on MrMcElhinney's back because I thought he would cross the 1. Yeah, I was just coming down into that turn, and I actually did not know I contacted Mr McElhinney's wheel. I knew we were pretty tight for a bit but I didn't know I actually hit it. My horse did not go rough, or it did not make a big bang...''⁸

22. Mr McCarthy, the driver of All About Art, had no recollection of the incident and was unable to provide any assistance to the Stewards.

Additional Evidence before the Tribunal

23. Mr Bentley gave evidence that was essentially consistent with the observations that he made at the Stewards' Inquiry, a position that he also maintained during cross-examination.⁹
24. During cross-examination, Mr Bentley also:
- (a) agreed that a relevant factor to consider both in relation to breach and sanction is whether Mr Manzelmann was steering his horse outwards (or to the right) so as to not cause any pressure to the runners to his inside;
 - (b) accepted that the interference, if any, occurred at or around the 55th second of the video footage to which he was taken;
 - (c) accepted that the video evidence did not show any tightening for room at the 47th, 48th and 50th seconds of the video footage to which he was taken;
 - (d) said that tightening for room commenced at about the 51st or the 52nd second of the video footage;
 - (e) said that at about the 55th second there is evidence that Mr Manzelmann was "pulling off" but by that time the Horse was already in the line of Magnum Rose;
 - (f) accepted that there was likely only a minor brushing of the wheels between Magnum Rose and Two Ply NZ at or around the 55th second mark of the video;
 - (g) did not accept that the positioning of Magnum Rose, Two Ply NZ and All About Art caused or contributed to the interference with which Mr Manzelmann was charged and nor do the circumstances amount to a "racing incident" being one where more than one driver is at fault. In particular, Mr Bentley maintained that Two Ply NZ (Mr Rixon) maintained his line at all times in the approach to the turn and that All About Art (Mr McCarthy) was entitled to be in the position he was at or about the time of the incident. He did not agree with Mr Manzelmann that Mr McCarthy was 65cm from where he should have been.

⁸ TP3.16-24

⁹ TP 2.22-37

The Video Footage

25. The video footage taken from three separate angles, being back straight, head on and lateral shows Mr Manzelmann in barrier 6 wearing a red jacket with a black A, red and black stripes sleeves with a blue helmet and leading the race at the first turn; Mr McElhinney, the driver of Magnum Rose NZ in barrier 4 wearing a pink jacket with a purple Maltese cross, Mr Rixon, the driver of Two Ply NZ in barrier 3 wearing an orange jacket with a black and white checked sash and Mr McCarthy, the driver of All About Art in barrier 2 wearing Royal blue with black horse shoes and striped sleeves.
26. The Tribunal's assessment of the evidence including the video footage is discussed below.

The Submissions as to Breach

Mr Manzelmann

27. Mr Manzelmann submitted that he is not guilty of the charge because:
- (a) a viewing of the video shows Mr Manzelmann's horse's head, on numerous occasions, pointing outwards to the right and that this is a result of Mr Manzelmann steering his horse outwards so as to not cause any pressure to the runners to his inside. He only crosses the Horse to his inside, Magnum Rose, when he is sufficiently clear of it;
 - (b) there is no interference at all from Mr Manzelmann to the horse on his inside driven by Mr McElhinney as particularised. Indeed, it is submitted that there appears to be no interference at all;
 - (c) in the alternative, if there is any interference, it is not caused by Mr Manzelmann. A viewing of the video shows Mr McElhinney looking at Mr Manzelmann from the moment the mobile barrier arm is released. He evidently saw him as a tactical danger for the lead in the race. Mr McElhinney initially slightly shifts his horse upwards up the track in an attempt to baulk the progress of Mr Manzelmann. Mr McElhinney's horse's head then shifts to the left when Mr McElhinney deliberately steers his horse back down the track. Both of these movements were effected independently of Mr Manzelmann;
 - (d) Driver Rixon gave evidence that he didn't even realise that there was any problem at the relevant time. He felt no contact at all. He did not attribute any blame to Mr Manzelmann;
 - (e) Driver McCarthy on the very inside horse had no comment on the cause of the incident; and
 - (f) the incident is either the fault of Mr Manzelman, the fault of Mr McElhinney, or alternatively, it is simply a racing incident with the tight first turn at the Bankstown track.

HRNSW

28. HRNSW submitted that the Stewards rightly formed their opinion that Mr Manzelmann caused the interference suffered by Magnum Rose NZ, causing that runner to contact the

offside foreleg of Two Ply NZ which resulted in a flat nearside tyre causing Magnum Rose NZ to be retired from the event, based on the totality of the evidence available to them, including the evidence of Mr McElhinney, Mr Rixon and Mr McCarthy, the evidence of Mr Manzelmann, the video and the observations and evidence of Mr Bentley.

Did Mr Manzelmann breach Rule 163(1)(a)(iii)?

29. The video evidence discloses the following:
- (a) Mr Manzelmann in barrier 6;
 - (b) as the horses leave the barrier, Mr Manzelmann horse's head is angled outwards to the right in an attempt to avoid pressure to the runners to his inside;
 - (c) as Mr Manzelmann comes into the first turn he begins to put pressure on the runners to the inside and then crosses the horse to his inside, Magnum Rose;
 - (d) Mr Manzelmann's actions causes Mr McElhinney to move to the inside causing Mr Rixon, the driver of Two Ply to ease off slightly;
 - (e) Two Ply NZ maintained its line at all times in its approach to the first turn;
 - (f) In the approach to the first turn, All About Art was not positioned so as to cause any tightening to runners to its inside; and
 - (f) the separation between the rear of Mr Manzelmann's sulky and the extended front legs of Magnum Rose, the horse racing in the next position closer to the inside running line was less than a metre from the start through the first turn and until reaching the next straight. This is consistent with part of the evidence given by Mr Manzelmann to the Stewards although he contended that he had not commenced his movement down to the inside at that time.¹⁰
30. The video evidence does not clearly disclose contact being made between Mr McElhinney's drive, Magnum Rose, and the off-side foreleg of Mr Rixon's but consistent with Mr McElhinney's evidence to the Stewards' Inquiry, it appears to be accepted that there was some contact, as a result of which, Mr McElhinney's runner sustained a flat tyre and was retired from the event. Contact is not, however, a critical element of the charge. The charge is one of "*causing or contributing to any...interference.*" Interference may but does not necessarily involve physical contact. Conduct which has the effect of hampering action may be sufficient to constitute an interference even if such conduct falls short of physical conduct.¹¹
31. The video evidence is consistent with the evidence given by Mr McElhinney to the Stewards' Inquiry¹² and also consistent with the conditions approaching the first turn as described by Mr Rixon in his evidence to the Stewards' Inquiry.¹³

¹⁰ TP 6.34-41; TP7.2-6

¹¹ Macquarie Dictionary, Second Edition

¹² See paragraph 20 of these reasons

¹³ See paragraph 20 of these reasons

32. The Tribunal accordingly finds that Mr Manzelmann has breached Rule 163(1)(a)(iii). Whilst the Tribunal has addressed the issue *de novo*, it is of the view that the finding by the Stewards consequent upon the conduct of its inquiry was therefore reasonably open to them.¹⁴

Submissions as to Penalty

33. As to sanction, Mr Manzelmann submitted, for the reasons that follow, that in the event that a breach is established, a fine would be sufficient or, if there be a suspension, a period of not more than 5 or 6 days would be appropriate:
- (a) he is a professional and up and coming driver and a suspension would have deleterious consequences on his livelihood;
 - (b) the breach is at the lower end of seriousness;
 - (c) there was nothing more than a brushing of the wheels between Magnum Rose and Two Ply NZ;
 - (d) there was no contact with Magnum Rose; and
 - (e) he made genuine attempts to avoid the incident.
34. HRNSW submitted that:
- (a) the HRNSW Penalty Guidelines (14.11.2016) (**Guidelines**) provide that a starting point for interference resulting in a horse being checked, tightened or jostled on the first turn is 28 days;
 - (b) Mr Manzelmann pleaded not guilty and consequently was not entitled to a reduction for a guilty plea of 7 days;
 - (c) a reduction of 10 days was provided by the Stewards when taking into consideration Mr Manzelmann's recent offence record. The Guidelines provide that a driver is entitled to a suspension reduction of 10 days where they have had 300 drives or 12 months since they were last suspended under Rule 163. Mr Manzelmann's record indicates that he was last suspended under the subject rule for a period of 7 days on 7 April 2018. In addition, Mr Manzelmann was fined \$200 for an offence under Rule 168(1)(a) for careless driving on 25 Fairbury 2019;
 - (d) Mr Manzelmann's actions caused a horse to be retired from the race thus denying it, its owners and the wagering community an opportunity of winning or gaining a place; and
 - (e) in the circumstances, a suspension of 18 days is warranted.

¹⁴ Cf *House v The King* (1936) 55 CLR 499

Penalty

35. The Rules do not prescribe a penalty for breach of Rule 163(1)(a)(iii). Accordingly, the penalties that apply are those enumerated in Part 15 of the Rules and otherwise in the discretion of the Tribunal.
36. In exercising its discretion, the Tribunal will be informed by the Guidelines. These “...are not tramlines...” but serve “...to give certainty to drivers, regulators, in particular, the stewards, and the industry at large...” The Tribunal sees no reason in matters such as this to digress from them. “They provide that level of understanding, calculation and certainty.”¹⁵
37. As the Guidelines make plain, such is the objective seriousness of a breach of Rule 163(1)(a)(iii) that a sanction in the nature of a suspension is warranted. There is no provision in the Guidelines for a fine for such an offence as Mr Manzelmann contended.
38. For a breach of Rule 163(1)(a), the Guidelines prescribe a 28 day suspension which can be increased or reduced in each of the circumstances described. HRNSW does not assert that there are any grounds that would justify a heavier penalty. Mr Manzelmann does not qualify for a 7 day reduction for a guilty plea. The penalty can however, be reduced for a good driving record.
39. Mr Manzelmann had, as at the date of the Charge, a reasonably good driving record. His most recent suspension for breach of Rule 163 was on 7 April 2017 when he was suspended for 7 days. It has accordingly been more than 12 months since his suspension under Rule 163 which would ordinarily entitle Mr Manzelmann to a 10 day reduction.
40. The Tribunal agrees with Mr Manzelmann that the breach is at the lower end of seriousness. That justifies the starting point for any sanction in this case at 28 days. It does not, however, provide an additional ground for mitigation of the period of suspension. The fact that there may have been nothing more than, as Mr Manzelmann contended, a brushing of the wheels between Magnum Rose and Two Ply NZ also does not, in the opinion of the Tribunal provide a further mitigating factor. Rather, it is a matter that would, in this case, justify the starting point for any sanction being 28 days.
41. It is not apparent to the Tribunal from the video footage that Mr Manzelmann took any or any effective evasive action. Lastly, the fact that Mr Manzelmann’s livelihood or career may be affected by a suspension is not, in the Tribunal’s opinion, a mitigating factor. It is the unfortunate consequence that befalls any driver who breaches the rules of racing, a fact well-known to Mr Manzelmann given his previous suspension in 2017 for a breach of Rule 163.
42. In all the circumstances, the Tribunal is of the view that a suspension of 18 days is warranted.

Orders

43. The Appeal is dismissed.

¹⁵ Blythe v HRNSW, 7 May 2019 [36]

44. The order made on 28 June 2019 staying the decision of the Stewards the subject of the Appeal be vacated.
45. That Mr Manzelmann be suspended for a period of 18 days commencing from midnight, 1 August 2019.
46. The Appeal Deposit be forfeited.

Mr A.P. Lo Surdo SC
Acting Racing Appeals Tribunal

Assessor: Mr W Ellis