

# RACING APPEALS TRIBUNAL

**JOSHUA GALLAGHER**  
Appellant

**HARNESS RACING NEW SOUTH WALES**  
Respondent

## DETERMINATION

22 September 2021

### Introduction

1. The Appellant, Joshua Gallagher (**Mr Gallagher**) is a licensed driver with Harness Racing New South Wales (**HRNSW**).
2. On 29 July 2021, Mr Gallagher drove RECKON I'M SMART NZ (**Horse**) in Race 2 at Penrith (**Race**).
3. At a Stewards inquiry conducted shortly after the Race on 29 July 2021, Mr Gallagher was charged with a breach of Australian Harness Racing Rules (**Rules**) 168(1)(a). That rule is relevantly in the following terms:

*“A person shall not, before, during or after a race drive in a manner which is in the opinion of the Stewards:*

*(a) careless*

*(b) ...”*

4. In the transcript of the Steward's Inquiry conducted on 29 July 2021 (**Transcript**), the Steward's particularised the charge as follows:

*“...at the Penrith harness racing meeting conducted on Thursday, 29 July 2021 in Race 2, the Hogs Breath Penrith Pace... racing between the 500 metres and the 400 metres you, Joshua Gallagher, the driver of Reckon I'm Smart have when endeavouring to shift your runner from a 3-wide position down toward a 2-wide position to follow the movement of Clementsorrell, you have permitted Reckon I'm Smart to strike the offside wheel of Clementsorrell and subsequently your gelding has been checked and broke gait and lost valuable ground, and subsequently both Flyin Circles and Ultimate Ad were hampered out of this incident.*

*The stewards are noting in laying the charge that whilst...it's at a critical point of the race and obviously any ground the runner loses at that point of the race is obviously crucial to its finishing chances or finishing position.” (Charge)*

5. Mr Gallagher pleaded guilty to the Charge.
6. Having regard to:
  - (a) the fact that Mr Gallagher pleaded guilty at first opportunity, for which he was afforded the standard 7-day discount in respect of any suspension that may be imposed;
  - (b) Mr Gallagher's driving record, including two suspensions incurred over the preceding 12-month period for driving offences involving interference, for which Mr Gallagher was suspended a total of 18 days (7 days for the first offence and 11 days for the second) and various reprimands; and
  - (c) the fact that Reckon I'm Smart, which was the favourite or close to favourite, lost significant ground and two other horses, Flyin Circles and Ultimate Ad were also hampered by Mr Gallagher's conduct,

Mr Gallagher's licence was suspended by the Stewards for a period of 14 days.

7. On 2 August 2021, Mr Gallagher lodged a Notice of Appeal with the Tribunal against the decision of the Stewards.
8. The appeal is both as to breach and severity of penalty.
9. In his Notice of Appeal, Mr Gallagher sought a stay of the decision of the Stewards. That application was not opposed.
10. On 6 August 2021, the Tribunal ordered that the decision of the Stewards not be carried into effect pending the determination of the appeal or other order on condition that that Mr Gallagher prosecutes the appeal with expedition.
11. On 20 August 2021, Mr Gallagher lodged his grounds of appeal.
12. On 8 September 2021, Mr Gallagher provided the Tribunal with written submissions on the hearing of the appeal.
13. On 20 September 2021, the Stewards provided the Tribunal with written submissions on the hearing of the appeal.
14. 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: *Racing Appeals Tribunal Act, 1983 (NSW) (RATA)*, s 16.

### **Jurisdiction**

15. Pursuant to s 15B(1)(b) of the RATA, any person who is aggrieved by a decision of a steward of HRNSW may, in accordance with the regulations, appeal against the decision to the Tribunal.

16. Regulation 10 of the Racing Appeals Tribunal Regulations (**Regulations**) provides that an appeal under section 15B of the RATA is to be initiated by lodging a written notice of appeal within 7 days of the appellant being notified of the decision appealed against.
17. Mr Gallagher, a person aggrieved by a decision of a steward, brought his appeal on 2 August 2021, that is, within 7 days of being notified of the decision appealed against. The Tribunal accordingly has jurisdiction to hear the appeal. Neither party contended to the contrary.

### **Evidence on the appeal**

18. The evidence on the appeal relied upon by HRNSW comprised:
  - (a) a video of the race taken from a number of angles;
  - (b) the Transcript;
  - (c) oral evidence given by Mr Chris Paul, the Deputy Chairman of Stewards and Chairman of the Steward's Panel which undertook the Inquiry; and
  - (d) the "Offence Report" for Mr Gallagher.
19. Mr Paul gave oral evidence both in chief and under cross-examination which can be summarised as follows:
  - (a) he has been a Harness Racing Steward for 20 years;
  - (b) immediately prior to the incident, Mr Rixon's drive (Clementsorrell) was 3-wide on the track forward of Mr Gallagher. It was maintaining good momentum, did not shift back up the track immediately before the incident. Whilst Mr Rixon's left hand can be seen momentarily adjusting his goggles or helmet, with the whip and both reins in the right hand, Clementsorrell's head was straight at all times until Mr Rixon resumed control of both reins, it did not break gait, lose momentum or change direction. It did not cause or contribute to the incident;
  - (c) immediately prior to the incident, Mr Gallagher had ample room on the outside of the track. He made contact with Mr Rixon's sulky as a consequence of a lack of care and poor judgement;
  - (d) the incident involving driver Ms Rixon in Race 5 at Penrith on 19 August 2021, in which she received a reprimand is distinguishable from Mr Gallagher's case for the following reasons:
    - (i) Ms Rixon was relatively inexperienced (@200 drives) compared to Mr Gallagher (2,000+ drives);
    - (ii) Mr Towers contributed significantly to the incident;
    - (iii) Ms Rixon made some effort to avoid the incident; and
    - (iv) she had a relatively good driving record having only been suspended on one prior occasion in her career.

20. Mr Gallagher was afforded the opportunity to give oral evidence at the hearing but elected not to do so. Instead, he relied upon the evidence given to the Steward's Inquiry as recorded in the Transcript. He also relied upon a video of Race 5 at Penrith on 19 August 2021 in relation to penalty.

### **Hearing of the Appeal**

21. The appeal was heard on 22 September 2021. Mr Morris sought leave to appear for Mr Gallagher who was also present at the hearing. Mr Bentley who appeared for HRNSW did not object to Mr Morris representing Mr Gallagher.
22. To the extent that it may be necessary, the Tribunal grants leave to Mr Gallagher pursuant to Regulation 17(2) to be represented by Mr Morris as his agent
23. Prior to the commencement of the hearing, the Tribunal informed Mr Gallagher that as the appeal was in the nature of a hearing *de novo* and as he disputed both breach and the severity of the suspension imposed by the Stewards, in the event that the Tribunal found the breach to have been established, he would not be entitled to the customary 25% discount in penalty which accompanies an early admission of breach and that, accordingly, in the event of breach being established, the penalty may be greater than that which was initially imposed by the Stewards following their Inquiry at which Mr Gallagher had admitted breach. Having been so informed and provided with an opportunity to consider whether, in these circumstances he wished to pursue his appeal at all or limit it to severity alone, Mr Gallagher opted to proceed with his appeal as lodged.
24. The parties relied upon written submissions and were also afforded an opportunity to and did supplement those submissions orally.
25. The Tribunal sat with Assessor Mr W Ellis who was appointed pursuant to s 8A of the RATA and has provided the Tribunal with expert advice 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 Mr Ellis as assessor although informed by them.
26. 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 (RATA, s 17A).
27. 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.

### **Oral Pronouncement of the Tribunal's Determination**

28. After a short adjournment, the Tribunal informed the parties that the appeal in so far as it relates to breach is dismissed, the appeal as to severity of penalty is upheld with the decision of the Stewards as to penalty varied by setting aside the suspension of 14 days and substituting it with an order that Mr Gallagher be suspended for 7 days with effect from midnight, 23 September 2021 and that one half of the Appeal deposit be refunded to Mr Gallagher. They parties were informed that formal orders would follow with the reasons.

29. These are the written reasons of the Tribunal.

### **The Issues**

30. ARR 168 requires the Stewards to have formed an “opinion” that a person has, relevantly for present purposes, driven in a manner that was “careless”. ARR 168 requires the Stewards to have formed a professional and experienced opinion of the driving in question having regard to the totality of the evidence that was before them (see, for example, *Panella v HRNSW*, 15 March 2012, *Oates v HRNSW*, 3 April 2013 and *Grima v HRNSW*, 14 April 2021).
31. “Careless” is not defined in the ARR. In the absence of such definition, “careless” should be afforded its ordinary English meaning of not taking or showing sufficient attention or thought to avoiding harm or errors. This is consistent with the approach taken by the Tribunal in previous determinations. In *Oates* (3 April 2013), for example, the Tribunal said that to constitute careless driving, “*there has to be something which, objectively judged, is blameworthy. That is, blameworthy in the sense of careless...it is necessary to have regard not only to the evidence of what happened, but to the driving, knowledge and experience of [the] driver...* ”
32. The issues for the Tribunal are whether there was evidence upon which the Stewards were entitled to form an opinion that Mr Gallagher drove in a careless manner in breach of ARR 168, as particularised in the Charge and, if so, the appropriate penalty.

### **Onus and Standard of Proof**

33. The onus of proof lies at all times with HRNSW. As the Charge involved an alleged breach of the ARR, HRNSW must discharge its onus in accordance with the standard set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361–362. As Dixon J observed in *Briginshaw*, “*when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence...It cannot be found as a result of a mere mechanical comparison of probabilities.*” The standard is of “reasonable satisfaction” “*...but reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer.... In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*” (see also, *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449–50)
34. The Tribunal has held on previous occasions that in determining issues relating to the breach of the rules of racing, and in the application of the so-called *Briginshaw* principle, it must be “comfortably satisfied” that the facts support the claims or issues in question (see, for example, *Eberand v Greyhound Racing NSW* (5.9.19); *Aiken & Roche v Harness Racing NSW* (19.3.19); *Gallagher v Harness Racing NSW* (14.9.19) and *Schembri v Harness Racing NSW* (13.12.19)).
35. This approach is also consistent with the standard that is most commonly applied in international sports disciplinary tribunals and in the Court of Arbitration for Sport (Sports Law, Second Edition, 2012., Beloff & Ors, Hart Publishing at p 215).

### **Submissions as to Breach**

36. HRNSW submits that the video evidence discloses the following conduct by Mr Gallagher which it contends was careless and thus breached ARR 168:
- (a) at between 500 metres and 400 metres, Reckon I'm Smart appears to break gait. At that time, Mr Gallagher was in close proximity to Clementsorrell, being driven by Mr Rixon which was forward of Mr Gallagher;
  - (b) Mr Gallagher was 3 deep on the back of Mr Rixon and wanted to come back to the running line and, as a consequence of moving from a 3-wide position down toward a 2-wide position to follow the movement of Clementsorrell, Reckon I'm Smart struck the offside wheel of the sulky of Clementsorrell;
  - (c) as a consequence of the contact with Clementsorrell, Reckon I'm Smart was checked, broke gait and lost valuable ground. Subsequently, both Flyin Circles and Ultimate Ad were hampered by the incident;
  - (d) the sole reason for Reckon I'm Smart striking the offside sulky wheel of Clementsorrell was due to Mr Gallagher's decision to follow Clementsorrell down the track despite not being fully clear of Motu Gatecrasher and, as a result, not being able to fully occupy the position behind Clementsorrell. That action was careless; and
  - (e) Mr Gallagher is an experienced driver. He has been driving since at least 2017, has had in excess of 2,000 drives over his career with 510 drives from 1 January 2021 to the date of the incident alone.
37. In both his written and oral submissions, Mr Gallagher did not dispute that Reckon I'm Smart's legs came into contact with the sulky of Clementsorrell, however, he contended that:
- (a) the point of contact was minor;
  - (b) Clementsorrell came marginally out at the same time as Mr Gallagher was moving from a 3-wide to a 2-wide position;
  - (c) Mr Rixon, did not have full control of his horse. He can be seen raising his left hand towards his helmet with both reins and the whip in his right hand. Mr Rixon's momentary action in adjusting his gear and loss of full control of his horse's direction contributed to the accidental contact;
  - (d) his judgement during the race was that he had sufficient distance prior to the incident to move outside of and clear the sulky wheel of Clementsorrell with which he subsequently engaged; and
  - (e) the Stewards failed to give any consideration to any of these matters in determining breach and penalty.

**Did Mr Gallagher breach ARR 168(1)(a)?**

38. Mr Gallagher gave evidence at the Steward's Inquiry that at between the 500 metres and the 400 metres, he was 3-wide of Mr Rixon's ride Clementsorrell which was forward of Mr Gallagher. As Mr Gallagher attempted to come back into the running line and fall in behind Mr Rixon, he touched Mr Rixon's (offside) wheel causing Reckon I'm Smart to go off stride (TP 2-3).
39. That evidence is consistent with the video footage taken from three separate angles, the back straight, head on and lateral, which the Tribunal has had the benefit of considering several times both in real time and in slow motion. The video footage also discloses that:
- (a) after Reckon I'm Smart struck the offside wheel of Clementsorrell, it checked, broke gait and lost valuable ground;
  - (b) Flyin Circles and Ultimate Ad were impacted by having to slightly change course but neither broke gait or lost momentum nor were their ultimate prospects in the race affected; and
  - (c) whilst Mr Rixon can be seen adjusting his headgear with his left hand whilst his reins and whip were held in this right hand, he at no time loses control of Clementsorrell nor does it break gait, deviate from its run or behave in any other manner that could have contributed to the incident.
40. Mr Gallagher is an experienced driver. He has been driving since at least 2017. Since that time, he has had more than 2,000 drives with 510 drives just in the period from 1 January 2021 to the date of the incident. The Tribunal will accordingly assess him as a driver of substantial knowledge and experience.
41. The Tribunal finds that at between the 500 metres and the 400 metres, Mr Gallagher was racing 3-wide of Mr Rixon's ride Clementsorrell which was forward of Mr Gallagher. In his attempt to shift his runner from a 3-wide position to a 2-wide position to follow the movement of Clementsorrell, Mr Gallagher mis-judged and mis-timed the position of Clementsorrell colliding with its offside wheel and causing Reckon I'm Smart to be checked, break gait and lose valuable ground. Whilst Mr Rixon can be seen adjusting his headgear with his left hand whilst his reins and whip were held in this right hand, there is no evidence that he lost control of Clementsorrell nor does it break gait, deviate from its run or behave in any other manner that could have contributed to the incident.
42. It is an incident which was avoidable with the exercise of the due care expected of a driver with Mr Gallagher's knowledge and the experience.
43. The Tribunal is comfortably satisfied that on the totality of the evidence, the Stewards were entitled to hold the opinion that Mr Gallagher drove in a careless manner in breach of ARR 168(1)(a). The Tribunal accordingly finds that Mr Gallagher has breached ARR 168(1)(a).

**Submissions as to Penalty**

44. As to penalty, HRNSW submitted that:

- (a) the HRNSW Penalty Guidelines (**Penalty Guidelines**) provide that careless driving attracts a starting penalty of 28 days suspension. As Mr Gallagher did not admit breach, he was not entitled to a 25% reduction, or 7 days on this starting penalty;
  - (b) in the last 12 months, Mr Gallagher has been suspended on two occasions for interference. The first such suspension imposed on 17 January 2021 was for a period of 7 days. The second suspension imposed on 8 July 2021 was for a period of 11 days. Mr Gallagher has had no other suspensions in the 12 months prior to this incident. He has been reprimanded on no less than 5 occasions in the period 8 December 2018 to 10 July 2021 for careless driving and has been reprimanded on a further 4 occasions in the same period for causing interference;
  - (c) the Penalty Guidelines indicate that based on having no more than 300 drives in the past 12 months and 2 suspensions, Mr Gallagher would be eligible for a further 7 days' reduction for his record;
  - (d) Reckon I'm Smart was the \$4.70 second favourite in the event. The chances of Reckon I'm Smart were severely impacted by the incident as were, to a lesser extent, those of Flyin Circles and Ultimate Ad; and
  - (e) having considered all of the relevant factors, the Stewards determined to issue a Mr Gallagher with a 14-day suspension of his licence which they maintain is appropriate.
45. Mr Gallagher submitted, by reference to the decisions of the Stewards involving *Trainor* (Race 1, Penrith, 29 July 2021) and *Rixon* (Race 5, Penrith, 19 August 2021) that the 14 days suspension imposed by the Stewards was unreasonable, disproportionate and unfair. As this is a hearing *de novo*, it is for the Tribunal to determine the appropriate penalty in all the circumstances of the case.
46. On occasion, the Tribunal is requested to consider previous determinations of the Stewards or of the Tribunal itself in support of a submission that there should be parity in penalties. As the Tribunal has remarked from time to time, so called parity cases are often "*not of great assistance*" because "...*factual differences occur in relation to pleas of guilty compared to not guilty, priors or lack thereof, the actual facts and circumstances surrounding the breach and the number and type of them...*" (*Simiana v HRNSW*, 5 August 2020; see also *Aiken & Locke v HRNSW*, 15 March 2019, *Atkinson v HRNSW*, 4 October 2019 and *Butt v HRNSW*, 16 March 2020).
47. According to Mr Gallagher, *Trainor* was a case in which the Stewards found Mr Trainor to have driven recklessly for which he was suspended for 28 days. The circumstances which gave rise to the charge were serious as it placed the safety of two horses and their drivers in jeopardy with one of the drivers having to be taken to hospital for surgery. Yet, according to Mr Gallagher, his sanction was half that of Mr Trainor for an incident that was very minor in comparison.
48. Mr Bentley submitted that *Trainer* is distinguishable from Mr Gallagher and does not therefore provide a point of comparison because Mr Trainor was charged with interference (not careless driving), he admitted breach at first opportunity for which he received a 14-day reduction in penalty and he had only one suspension in the 12 months prior to the incident.



49. The Tribunal is of the view that the matter of *Trainor*, provides no assistance to Mr Gallagher as a parity case. It involved a different charge to Mr Gallagher's and very different circumstances. Further, at the time of the incident, Mr Trainor had a better driving record than Mr Gallagher.
50. The Tribunal was shown the video of a race for which Ms Rixon received a reprimand for careless driving. Whilst *Rixon* concerned a finding of careless driving, it was Mr Paul's evidence, which the Tribunal accepts, that the circumstances of that incident are distinguishable from the present because Ms Rixon was relatively inexperienced, Mr Towers contributed significantly to the incident, Ms Rixon made some effort to avoid the incident and, at the time of the incident, she had only one prior suspension. The Tribunal finds that these circumstances distinguish *Rixon* from Mr Gallagher's circumstances and thus provides no assistance by way of parity.
51. As *Trainor* and *Rixon* provide no assistance in determining the appropriate penalty in this case the Tribunal proposes to address the issue of penalty on its own merits.

### **Penalty**

52. The Rules do not prescribe a penalty for breach of ARR 168(1)(a)). Accordingly, the penalties that apply are those enumerated in Part 15 of the Rules and otherwise in the discretion of the Tribunal.
53. In exercising its discretion, the Tribunal will be informed by the Penalty Guidelines. These "...are not tramlines..." but serve "...to give certainty to drivers, regulators, in particular, the stewards, and the industry at large...[T]hey provide that level of understanding, calculation and certainty." (*Blythe v HRNSW*, 7 May 2019 [36])
54. The Penalty Guidelines provide a starting point of 28 days suspension for a breach of ARR 168(1)(a) which can be increased or reduced having regard to the nature of the actual carelessness.
55. Mr Gallagher has had the benefit of reprimands for careless driving on no less than less than 5 occasions in the period 8 December 2018 to 10 July 2021, including 2 reprimands in 2021 alone. He has also been reprimanded on a further 4 occasions in the same period for causing interference. He has served two suspensions in 2021, one of which was for a driving offence. In these circumstances, a further reprimand will not, in the view of the Tribunal, act to sufficiently deter Mr Gallagher from re-offending thus justifying a period of suspension.
56. The nature of the carelessness in this case is not, in the view of the Tribunal, to be assessed at such a level of seriousness as to attract the starting point of a 28-day suspension. The contact between Reckon I'm Smart and Clementsorrell was minor, however, it was sufficient to cause Reckon I'm Smart, a favourite or near favourite to be checked, break gait and lose valuable ground. It also hampered, in a minor way, the progress of Flyin Circles and Ultimate Ad but did not affect the prospects of either of those runners. The industry expects a driver of Mr Gallagher's experience and knowledge to do better. In these circumstances, the starting point for a consideration of penalty should be a suspension of 14 days.
57. As Mr Gallagher pleaded not guilty to the Charge in the Tribunal, he is not entitled to a 25% discount customarily awarded for an early guilty plea. He is, however, in the opinion of the

Tribunal entitled to a 7-day reduction on account of his record, in particular, having regard to the fact that he has had in excess of 510 drives from 1 January 2021 to the date of the incident with only 2 suspensions since 2017 for driving offences.

58. In all the circumstances, the Tribunal considers that a suspension of 7 days is warranted.

**Orders**

59. The appeal in so far as it relates to breach of ARR 168(1)(a) is dismissed.
60. The appeal in so far as it relates to severity of penalty is upheld.
61. The decision of the Stewards, dated 29 July 2021, as to breach of ARR 168(1)(a) is confirmed.
62. The decision of the Stewards, dated 29 July 2021, as to penalty is varied by setting aside the suspension of 14 days and substituting for it an order that Mr Gallagher be suspended for 7 days with effect from 12.00 am (midnight), 24 September 2021.
63. The order made by the Tribunal on 6 August 2021, staying the decision of the Stewards the subject of the appeal be vacated with effect from 11.59 pm, 23 September 2021.
64. One half of the Appeal Deposit be refunded to Mr Gallagher.

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

Assessor: Mr W Ellis