IN THE RACING APPEALS TRIBUNAL

LLEYTON GREEN
Appellant

v

HARNESS RACING NEW SOUTH WALES
Respondent

REASONS FOR DETERMINATION

Date of hearing:	**3 October 2024**
Date of determination:	**21 October 2024**
Appearances:	**Mr M Hammond for the Appellant**
	Mr B Day for the Respondent
In attendance:	**Mr W Ellis, Expert Assessor, appointed pursuant to s 8A(1) of the *Racing Appeals Tribunal Act* 1983.**

ORDERS

1. **The order made on 24 July 2024 granting a stay of the orders made by the Harness Racing Appeals Panel is vacated.**
2. **The appeal is upheld.**
3. **The decision of the Harness Racing Appeals Panel dated 23 July 2024 is set aside.**
4. **The charge against the Appellant alleging an offence against r 163(1)(a)(iii) of the *Australian Harness Racing Rules* is dismissed.**
5. **The appeal deposit is to be refunded.**

INTRODUCTION

1. On 9 July 2024, Lleyton Green (the Appellant) was the driver of *Bertie Jones NZ* (the horse) in Race 9 at a meeting staged at Menangle. At the conclusion of that race, Stewards conducted an Inquiry into the Appellant's conduct in driving the horse, particularly as to the impact of that driving on another horse, *Bettors Hope* (Bettors) which was driven by Jack Callaghan (Callaghan).

2. That Inquiry culminated in the Appellant being charged with an offence of causing interference, contrary to r 163(1)(a)(iii) of the *Australian Harness Racing Rules* (the Rules). The Appellant pleaded not guilty to that offence, but was found guilty by the Stewards[1] who imposed a suspension of 21 days.[2] An appeal to the Harness Racing Appeals Panel (the Panel) against both determinations was dismissed on 23 July 2024.[3] The Panel's reasons were delivered on 30 July 2024.[4]

3. On 24 July 2024, I made an order (by consent) that the decisions of the Panel were not to be carried into effect, pending the resolution of the present appeal which was heard on 3 October 2024.

4. For the purposes of the appeal, the parties prepared a Tribunal Book (TB) containing the relevant evidence. In addition, I was provided with footage of the race in question. Following the conclusion of the hearing, and shortly prior to the publication of this determination, I received further material from both parties going principally to the issue of penalty. In view of the conclusion I have reached, it has not been necessary to consider that additional material. In reaching a decision in the present appeal, I have had the assistance of Mr Bill Ellis, an expert appointed pursuant to s8A(1) of the *Racing Appeals Tribunal Act 1983* (NSW), who was in attendance at the hearing, and with whom I had the benefit of subsequent discussions.

[1] TB 17.
[2] TB 20.
[3] TB 132.
[4] TB 133 and following.

THE RELEVANT PROVISIONS OF THE AUSTRALIAN HARNESS RACING RULES

5. The Respondent alleges that the Appellant committed an offence contrary to r 163(1)(a)(iii) which is in the following terms:

> *A driver shall not –*
>
> *(a) cause or contribute to any*
> *...*
>
> *(iii) interference.*

6. In the course of the hearing of the appeal reference was also made to r 164 which is in the following terms:

> *The Controlling Body may determine the circumstances in which a driver who does not have a clear passage in the course of a race may take action to secure such a passage.*

THE CASE AGAINST THE APPELLANT

7. The charge against the Appellant alleges that he caused (rather than contributed to) interference[5], and is particularised in the following terms[6]:

> *At the Menangle Harness Race Meeting conducted on Tuesday 9 July 2024, in race 9, the Allied Express Pace, the stewards are alleging that at a point near the 300 metres that [the Appellant], the driver of [the horse], directed [his] runner up away from a two-wide line, into a three-wide line, when not clear of Bettors Hope and as a result, [he] placed [his] offside wheel underneath [Bettors], placed that runner in a very awkward position, resulting in [Callaghan] to have to steady his runner at that stage of the race. And then as [the Appellant] got wider on the track and he made some attempt to keep [his] horse down the track, [he] then resumed driving [the horse] and failed to make sufficient effort to prevent [the horse] from shifting further up the track shortly thereafter, resulting in [Bettors] receiving a second check and having to be taken away by its driver, and subsequently [Bettors] raced roughly.*

8. From a procedural point of view, the terms of those particulars are somewhat problematic, for the simple reason that they give rise to an argument that they offend the rule against duplicity. This issue was touched upon, although not fully

[5] TB 12.
[6] TB 12.

argued, in the course of the hearing of the appeal.[7] Giving full weight to the fact that the particulars canvass a series of circumstances which are closely related in time, they are nevertheless at least capable of being interpreted as (impermissibly) alleging the commission of two separate offences within the one charge, namely that the Appellant caused interference by:

(i) directing the horse from a two-wide line to a three-wide line, resulting in the Appellant's off-side wheel being placed underneath Bettors, thus placing Bettors in an awkward position; and

(ii) failing to make sufficient effort to prevent the horse from shifting further, resulting in Bettors being checked and having to be taken away by its driver.

9. Whilst this Tribunal is not a Court, it must act in accordance with principles of natural justice and procedural fairness to both parties. It follows that the rule against duplicity has some role to play in proceedings which come before the Tribunal. That is because the rule is one of elementary fairness which is directed, firstly towards enabling a person in the Appellant's position to know what is actually alleged, and secondly towards ensuring that only one offence is alleged in a single charge.[8] The terms of the particulars in the present case arguably offend the second object of the rule.

10. However, having regard, firstly to what was said at the Stewards' Inquiry, and secondly, in the hearing of the appeal, it is apparent that the gravamen of the case against the centres upon what occurred *after* the wheel on his sulky became clear of the wheel on Callaghan's sulky. In this regard, and firstly in terms of the Inquiry, the Chairman of Stewards said the following when imposing a penalty on the Appellant[9]:

[7] Transcript 21.21 to 21.47.
[8] See for example *Walsh v Tattersall* (1996) 187 CLR 77 at 84.
[9] TB 18.1 – 18.5.

> *From that point on, [the Appellant] failed to make sufficient effort to correct [the horse] and [his] failure to do that led to [Bettors] receiving what [Stewards] would classify as a secondary check, at which point [Bettors] races roughly.....*

11. The reference to *"from that point on"* is a reference to the point from which the two sulky wheels became clear of each other.[10] In other words, the basis on which the charge was apparently determined at the Inquiry, and the basis on which the penalty was imposed, was the allegation in [8](ii) above.

12. A position consistent with that adopted at the Inquiry was taken at the hearing of the appeal by Mr Day when, in reference to what occurred ***after*** the sulky wheels had separated, he said:[11]

> *... It's probably the one point both parties agree, is that* ***this is the point where the interference does occur to [Callaghan]. Obviously, the issue in dispute is how or why.***

13. That position was further confirmed in the following exchange:[12]

> *TRIBUNAL:* *As I read the particulars, you accept that some effort was made. What you say is the effort wasn't sufficient. Where you and Mr Hammond fundamentally differ, is that Mr Hammond says he did all he could. You say, well, he could have done more?*
> *DAY:* *Precisely.* ***That's the small window that the Tribunal has to consider****.*

14. Accordingly, I have proceeded to determine the appeal on the basis that the interference which is said to have been caused by the Appellant, and which is the subject of the charge, arises from the check received by Bettors after the separation of the sulky wheels.

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[10] TB 17.41 – 17.46.
[11] Transcript 9.15 – 10.7.
[12] Transcript 17.35 – 17.45; see also Transcript 20.35; Transcript 28.1 – 28.3.

THE EVIDENCE

15. In the course of the hearing of the appeal, l had the benefit of viewing footage of what occurred, by reference to both a lateral view and a rear-on view. Having done so, I am satisfied of the following facts:

    (i) at the time of the interference, the horses had entered the final 400 metres of the race;[13]

    (ii) the horse commenced to shift outwards (i.e., to the right);[14]

    (iii) the Appellant was entitled to push wider, providing he did so without causing or contributing to any interference;[15]

    (iv) the Appellant's right hand sulky wheel, and Bettors' left hand sulky wheel, became "blended" on the footage, and could not be distinguished;[16]

    (v) the sulky wheels then separated;[17]

    (vi) the Appellant then attempted to direct the horse away from Bettors by pulling on the horse's left rein.[18]

    (vii) the horse drifted wider to the right, causing the interference to Bettors which is the subject of the charge as I have outlined it.

16. Those facts are uncontroversial. They are supported by the footage, as well as by a number of still photographs taken from it which form part of the evidence before me.[19]

17. The fact that interference occurred was expressly conceded by Mr Hammond.[20] Whilst the Respondent accepted that the Appellant made some effort to direct the horse away from Bettors, it is essentially at that point that the respective cases

[13] Transcript 5.37.
[14] Transcript 6.25.
[15] Transcript 6.28 – 6.30; 11.37 – 11.47.
[16] Transcript 7.21 – 7.35
[17] Transcript 9.20.
[18] Transcript 8.21 to 8.44.
[19] TB 160 – 164.
[20] Transcript 12.17.

diverge. The issue for my determination is whether the Appellant could have done more to avoid the inference, and thus whether, in that sense, he *caused it*. It is important to bear in mind that the onus lies on the Respondent to establish that the Appellant's conduct (or perhaps, his lack of conduct) was the cause of the interference. If I am not satisfied of that fact, the offence is not made out.

18. The evidence also includes a statement of Dean McDowell, the trainer of the horse, which includes the following:

> *23. When [the Appellant] returned to the stables after the race he told me words to the effect of 'It [the horse] hung out the whole way around today' and 'the bloody thing wouldn't steer at all in the home straight. I kept pulling it left as hard as I could at wanted to head right'.*
>
> *24. Through my training I have come to learn that if a horse unusually can't be steered, that there is likely a non-urgent but underlying soreness somewhere to the animal.*
> *...*
>
> *28. On 11 July 2024, [Equine Chiropractor Savanna Coles] attended my stables and upon inspection diagnosed underlying soreness to the horse. She treated the horse and provided an 11 July 2024 email report to my wife which is in the appeal materials.*
>
> *29. The injuries described included:*
> *(a) jarring to the (near) fetlock;*
> *(b) pain in the local area of the collateral ligaments of the proximal sesamoids and referring up into the shoulder joint and the sternum. There was tenderness in the Brachiocephalic, Omotransverse, and Pectoral muscles of the nearside shoulder.*

19. Ms Coles' report forms part of the evidence before me.[21]

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant

20. As canvassed in an exchange with Mr Hammond in the course of the hearing, the Appellant's fundamental position can be encapsulated in the following propositions:[22]

[21] TB 94.
[22] Transcript 14.1 – 14.41.

1. As the horses were negotiating the turn, the Appellant pushed out as he was entitled to do.
2. The Appellant then tried to, and did, straighten the horse.
3. The horse veered to the right of its own accord, and for no apparent reason.
4. The conclusion that the horse did so of his own accord is corroborated by the absence of any indication of the Appellant pulling on the right rein, or doing anything else to direct the horse to the right.
5. When the horse veered to the right, the Appellant took immediate remedial action with his left arm by pulling as hard as he could on the left rein, at a frequency of about once per second, on a total of 23 occasions.
6. Despite those concerted efforts, the horse continued to veer to the right.
7. The interference to Bettors then occurred.
8. That interference was not caused by the Appellant, who did all that he reasonably could to avoid it.

21. Mr Hammond submitted, with some emphasis, that the conclusion in [20](8) above was supported by the footage of the race. He submitted, in particular, that the footage demonstrated that the Appellant repeatedly pulled on the left rein in an effort to prevent the horse from running to the right, an action to which the horse did not adequately respond,[23] In this regard, Mr Hammond relied upon the evidence of Mr McDowell, in terms of both his conversation with the Appellant following the race, and the injuries reported by Ms Coles.[24] As to the latter, it was Mr Hammond's submission that the evidence of Ms Coles supported a conclusion that the horse had deviated to the right due to injury.

[23] Written submissions at TB 141 at [30].
[24] TB 141 – 142 at [33] – [38].

22. Bearing in mind the case against the Appellant as I have outlined it, Mr Hammond submitted that the Respondent had failed to point to a single act which the Appellant could reasonably have performed in order to rectify the position that had developed. Put simply, Mr Hammond submitted that I could not be satisfied that the Appellant had caused the interference because there was nothing more he could have done in order to prevent the horse from acting as it did.

Submissions of the Respondent

23. The Respondent's fundamental position can be summarised in the following submissions made orally and in writing by Mr Day:

    1. The Appellant had the onus, as the driver in charge of a horse shifting wider, not to cause interference.[25]
    2. The number of times that the Appellant may have pulled on the left rein was irrelevant.[26]
    3. The Appellant had driven the horse before, and was therefore aware of its inclination to shift out.[27]
    4. The Appellant had made some effort to steer away from Bettors which was initially successful, but that effort was not sufficient.[28]
    5. The crux of the matter was that the effort initially made by the Appellant was not continued, as a consequence of which he caused the interference.[29]

24. Mr Day placed significant emphasis on the uncontested evidence of Appellant's prior experience with the horse, and his consequent knowledge of the horse's habits. In this regard, Mr Day referred me to a decision of this Tribunal in *Grima* which, he submitted, supported the proposition that such prior knowledge and

[25] Transcript 10.15 – 10.18.
[26] Transcript 17.5 – Transcript 17.10.
[27] Transcript 17. 12 – Transcript 17.24; Transcript 24.18 – 24.39.
[28] Transcript 17.24 – Transcript 17.29.
[29] Transcript 17.29 – Transcript 17.32.

experience were matters to be *"factored in"*[30] when determining whether the offence was established. Mr Day further submitted that the evidence regarding the examination of the horse by Ms Coles was of limited weight, given that her examination was performed on 11 July, some 2 days after the horse had raced, in circumstances where the horse was nominated to compete in another race on 10 July 2024.[31]

25. Bearing in mind the express concession that the Appellant had made some effort to avoid the interference, Mr Day submitted that the Appellant's culpability, and thus the essence of his offending, lay in his failure to continue to attempt to straighten the horse after it had initially deviated. Mr Day expressly accepted that if I were to find the offence established, its circumstances reflected the Appellant having displayed something less than a high level of culpability, although he submitted this would not automatically lead to the conclusion that the level of culpability was properly regarded as low.[32]

CONSIDERATION

26. The fact that interference occurred is accepted. The issue is whether the Appellant *caused* that interference. In the circumstances of the present case, that determination must be made within what was conceded by Mr Day to be *"a very small window"*, a circumstance which arises principally from the fact that he concedes that the Appellant took some action to avoid the interference, but asserts that he did not do enough. It follows that on the facts of this case, there is a very fine line between finding the offence established on the one hand, or not established on the other.

27. I turn to the terms of the charge.

[30] Transcript 25.3.
[31] Transcript 25.16 – 27.44; TB 181.
[32]

28. The Appellant is charged with causing interference. To "*cause*" an event is to make that event happen.[33] An event may be caused by a positive act on the one hand, or by an omission to act on the other. The Respondent's case against the Appellant is framed in terms of the latter. Whilst the Respondent concedes that the Appellant took some action to try and avoid the interference, it alleges that such interference was caused by the Appellant omitting to take further action to straighten the horse after it had deviated. It follows that before I am able to find the offence proved, I must be satisfied:

    (i) of that omission; and

    (ii) that the omission was the cause of the interference. in order to find the offence made out.

29. Bearing in mind that analysis of the charge, I turn to consider the evidence and the submissions.

30. I accept the submission of Mr Day that the evidence of Mr McDowell concerning the examination of the horse which was undertaken by Ms Coles is of limited weight. That examination was conducted well after the event, in circumstances where the horse was nominated to compete in another event shortly thereafter. In my view, any suggested injury to the horse at the time of competing in the race has little or no bearing on the issue I am required to determine.

31. However, the evidence of Mr McDowell as to his conversation with the Appellant immediately following the race[34] is of some significance for two reasons.

32. First, the conversation demonstrates that the Appellant, at least from his point of view, did everything he could to keep the horse on track. Needless to say, simply because someone makes an exculpatory assertion does not mean that such assertion will automatically be accepted without scrutiny. However, the

[33] See the definition of the word "cause" in the Cambridge Dictionary.
[34] Set out at [18] above.

statement is nevertheless one to be taken into account. In my view, for the reasons I have set out below, what the Appellant said to Mr McDowell is supported by the objective evidence of the footage.

33. Secondly, the statement was made by the Appellant contemporaneously with the relevant event. It is not a recent invention, created with the benefit of hindsight in an attempt by the Appellant to exculpate himself from liability for what occurred during the race. Needless to say, no one factor is ever conclusive in reaching a determination of the present kind. However, the Appellant's statement goes directly to the issue I am required to resolve, and is deserving of some weight.

34. I had the benefit of viewing the footage on several occasions prior to the hearing of the appeal. I viewed it again during the hearing, in the course of which I was assisted by the respective observations of Mr Hammond, Mr Day and Mr Ellis. I have also undertaken several views of the footage since the hearing of the appeal, for the purposes of making this determination. Having done so, I am satisfied that at the relevant time, the Appellant repeatedly pulled on the left hand rein. That is an action which is entirely (and objectively) consistent with attempting to prevent the horse from drifting to its right. Indeed at one point, the Appellant is seen to be leaning markedly to his left hand side in the sulky, whilst still pulling on the left rein. That constitutes further objective evidence of the efforts the Appellant was taking to steer the horse away from the right, and to the left.

35. In circumstances where the Respondent's case against the Appellant is that what he did was not sufficient, those actions are of obvious significance. On the basis of that evidence I find myself unable to accept the submission that the number of times on which the Appellant pulled on the left rein is irrelevant. It is not necessary for me to determine whether this occurred precisely 23 times (as Mr Hammond submitted), or more or less than that number. The fact that the Appellant is seen to repeatedly pull on the left rein is highly relevant. It tends to weigh in favour of a conclusion that the Appellant was doing all he reasonably could do in the

circumstances with which he was faced, and against a conclusion that he omitted to take sufficient action as the horse deviated.

36. Further in my view, there is a necessity to recognise that driving is not necessarily a counsel of perfection. A driver may be faced with a variety of situations in a race, which call upon the exercise of care, skill and judgment. Whether a particular response by a driver to a set of circumstances with which he or she is faced is appropriate or sufficient, or whether it amounts to some offence against the rules, will fall for determination according to what actually occurred. On the evidence in the present case, the Appellant was faced with handling a horse which had a clear propensity to drift to the right. True it is that the Appellant was aware of that propensity. But that is not conclusive of his guilt. Had the Appellant, with his knowledge of such propensity, allowed the horse to deviate to the right and done absolutely nothing to correct it, and interference resulted, then a conclusion that he had caused such interference might reasonably be open. Indeed, on those facts, such a conclusion might be regarded as irresistible.

37. However on the evidence before me, and after careful consideration, I am not satisfied that such a scenario reflects the circumstances of this case. This is not a situation where, the horse having drifted to the right, the Appellant did nothing to rectify the situation. On the contrary, he repeatedly pulled on the left rein to alter the horse's course. Whilst the horse did not straighten, I am satisfied that the Appellant did what he reasonably could. Bearing in mind the narrow window within which liability must be established in this case, I am not able to conclude that the Appellant failed to properly maintain his obvious effort to direct the horse to the left, such that he caused the interference which resulted.

38. In this regard, it is relevant that at the Stewards' Inquiry the Appellant variously said:[35]

[35] TB 13 – 16.

> *As you can see, I was steering the horse down as much as I could … I'm pulling on the horse's mouth to keep him down the track. There's nothing else I could do. … What else could I possibly have done?*

39. Those statements were entirely consistent with what the Appellant said to Mr McDowell following the race. As I have noted above,[36] the response of the Stewards to those statements was that the Appellant *"failed to make sufficient effort to correct"*. What might have been constituted by a *"sufficient effort",* or what the Appellant could or should have done, was not precisely articulated.

40. In written submissions, the Respondent cited a number of previous determinations of the Tribunal (differently constituted) in support of its case against the Appellant. They included, importantly, a determination in the matter of *Blythe*[37] which has some factual similarities with the present case. Those similarities are reflected in the following passages of the Tribunal's reasons:[38]

> *30 The Appellant had taken steps, prior to those other two drivers passing him, by not less than the two movements of the left rein to straighten his tiring horse. That movement of his left hand corroborates the fact, in any event, that his horse was moving up and he was required to take corrective action. The mischief that the Stewards identified, and which was put to the Tribunal today, was that those efforts were insufficient.*
>
> *31. The Appellant, an experienced licenced driver, aware that his horse was tiring, aware that the possibility of moving up the track could occur, and the fact that it did, required him to make an effort sufficient to ensure that he did not move up and interfere. He took effort but the Tribunal shares the opinion adopted by the Stewards and finds it was an opinion reasonably open to them, that those efforts that he did make were insufficient to prevent the horse moving up, it was the horse moving up that caused Mr Day to move up and that is what subsequently led to the locking of the wheels* (emphasis added).

41. It is evident from the emphasised parts of those passages that in *Blythe*:

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[36] At [10].
[37] 7 May 2019.
[38] At [30] – [31].

(i) it was accepted by the Respondent that the Appellant driver took some steps to avoid the interference;

(ii) the conclusion was reached by the Tribunal that such steps were not sufficient, and the charge was found to be proved.

42. Whilst those factors are obviously similar to those presently under consideration, they do not mandate that the same conclusion be reached. That is so for a number of reasons.

43. First, each case must be determined according to its own facts and circumstances. What may be sufficient action in one case, may be insufficient in another.

44. Secondly, in concluding in *Blythe* that the steps taken by the Appellant driver were insufficient, the Tribunal's determination does not appear to incorporate any exposition of the reasons why this was considered to be so, nor any exposition of what more the Appellant could reasonably have done.

45. Thirdly, even if a conclusion is reached that steps taken by a driver were insufficient to prevent interference occurring, that does not automatically lead to the conclusion that the driver is guilty of an offence contrary to r 163(1)(a)(iii). To the extent that the passages extracted from the decision in *Blythe* above may tend to reflect such a process of reasoning, I find myself unable to agree with it. In a case where it is accepted that a driver took some steps to avoid the interference, but where it is alleged that such steps were insufficient, a finding that the offence of causing interference is established can only be made if:

(i) there are additional steps identified which the driver could reasonably have taken but did not; and

(ii) the conclusion can be reached that the failure to take those steps was the cause of the interference, or in other words, that such failure made the interference happen.

46. The reason that proof of such matters is required in such a case stems from the terms of r 163(1)(a)(iii). It needs to be emphasised that the rule creates an offence of ***causing*** interference. Liability for the offence is not absolute. Put another way, the offence is not established simply by proving the fact of interference, and the fact that the driver took insufficient steps to avoid it. Establishing the offence requires proof that the interference was *caused* by the person charged. That element of causation may be proved by a positive act on the part of the driver on the one hand, and/or an omission on the part of the driver to do something on the other. However, if a conclusion is reached that a driver took every step which was reasonably available to them, but the interference nevertheless occurred, it will be open to conclude that the fact of causation is not made out.

47. That, in my view, reflects the circumstances of the present case. The Appellant did not sit idly by, allowing the horse to veer to the right, and doing nothing to correct it. On the contrary, I am satisfied that he was vigilant in the steps that he took to try and steer the horse to the left, and I am unable to identify any further action that was reasonably open to him.

48. I am therefore not satisfied that the Appellant caused, in the sense I have described it above, the interference which obviously occurred.

49. It follows that the charge is not established, and the appeal must be upheld.

ORDERS

50. For the reasons given I make the following orders:

    1. The order made on 24 July 2024 granting a stay of the orders made by the Harness Racing Appeals Panel is vacated.

    2. The appeal is upheld.

    3. The decision of the Harness Racing Appeals Panel dated 23 July 2024 is set aside.

    4. The charge against the Appellant alleging an offence against r 163(1)(a)(iii) of the *Australian Harness Racing Rules* is dismissed.

5. The appeal deposit is to be refunded.

THE HONOURABLE G J BELLEW SC

21 October 2024