

RACING PENALTIES APPEAL TRIBUNAL

**REASONS FOR DETERMINATION OF MR D MOSSENSON
(CHAIRPERSON)**

APPELLANT: PETER O'NEILL

APPLICATION NO: A30/08/785

PANEL: MR D MOSSENSON (CHAIRPERSON)

DATE OF HEARING: 18 JANUARY 2016

DATE OF DETERMINATION: 24 FEBRUARY 2016

IN THE MATTER OF an appeal by PETER O'NEILL against the determination made by Racing and Wagering Western Australia Stewards of Harness Racing on 9 December 2015 imposing a 28 day suspension for breach of Harness Rule of Racing 163(1)(a).

Mr T F Percy QC represented Mr P O'Neill.

Mr D Borovica represented the Racing and Wagering Western Australia Stewards of Harness Racing.

STEWARDS' INQUIRY

1 Following the running of Race 7 at Narrogin Racecourse on 9 December 2015, the Racing and Wagering Western Australia (**RWWA**) Stewards of Harness Racing conducted an inquiry into a driving incident which occurred a short distance after the starting line. Drivers Peter O'Neill and Dylan Egerton-Green were called to the inquiry.

2 At the outset the Chairman of the inquiry Senior Steward Franklin stated:

"I viewed the race in the stand adjacent to the winning post and as the horses raced past me on the first occasion, Mr O'Neill you drew two on the front line, Mr Egerton-Green you were one on the backline. Mr O'Neill you've obviously started to shift down at that stage shortly after the winning post from one wide line to a position closer on the marker pegs, I felt Mr Egerton-Green was to your inside being drawn on the marker peg line and there appeared to be contact made to you Mr Egerton-Green and your horse has broken gait at that stage. But I felt it was from your shift down the track Mr O'Neill at that stage of the event. That, that is how I viewed the incident ..."

3 Mr Egerton-Green gave evidence that as he came out of the gate *"... driving his horse pretty hard to, to maintain its spot"* ... he thought that *"...there was probably a spot there previous, to, the move, but I've been in there, by the time the shift has been made"*.

4 In response, Mr O'Neill asserted he made no contact with Mr Egerton-Green's horse coming down the track but *"soon as I was in there, he's run up onto me, he was coming fast, but I reckon it was his responsibility to see that I was already there, and I definitely never touched him on the way down"*. Mr O'Neill went on to claim that Mr Egerton-Green should have checked his horse as he had plenty of time to observe that Mr O'Neill was coming down. Mr O'Neill continued to assert that he didn't touch *"him on the way down"* and that *"... there was a gap there"*. Despite the propositions which the Chairman then proceeded to put to him, Mr O'Neill remained adamant throughout that there was both a big gap and that he did not touch the other horse on the way down.

5 As the inquiry progressed, the Chairman stated, *"I guess Mr Egerton-Green was there contact made to you on the way down from Mr O'Neill"*, to which Mr Egerton-Green answered *"Oh, yes. I believe so, maybe unless he thought he was in a position when it was not fully (sic)"*.

6 Steward Bennetts shared the Chairman's opinion that Mr O'Neill was not in fact so placed to shift position as he did. After Mr Bennetts enquired as to the position of the

respective horses he went on to assert that "...you can't be in Mr O'Neill, you can't be in, because Mr, quite clear Mr Egerton-Green's legs are to your inside...". Further to that, Mr Bennetts also stated Mr O'Neill was not in front as Mr Egerton-Green's legs were clearly inside Mr O'Neill's cart. Mr Bennetts proceeded to say that Mr O'Neill's propositions did not make sense because looking at the vision, Mr O'Neill was not "already well and truly in there" despite what he claimed.

7 As the short inquiry progressed Mr O'Neill also claimed that he did follow, and further that he was allowed to follow, the leader and shift down the track. The Chairman responded to this proposition by stating that Mr O'Neill was not in fact allowed to so follow because if he had a runner to his inside, he was going to make contact with that runner, whereas the leader did not have runners to her inside.

8 At the conclusion of that part of the inquiry, Mr O'Neill again reiterated that he did not touch Mr Egerton-Green's horse on the way down.

THE CHARGE

9 Based on the propositions the various participants contributed during the course of the inquiry, the Stewards concluded that they "felt" that Mr O'Neill had a charge to answer under the provisions of Rule dealing with offences relating to matters during the race, namely 163(1)(a). That Rule states:

"(1) A driver shall not:

(a) cause or contribute to any crossing, jostling or interference."

The Rule goes on to specify:

"(5) A driver who, in the opinion of the Stewards fails to comply with any provisions of the Rule is guilty of an offence."

In laying the charge the Stewards informed Mr O'Neill:

"The part of that rule we are talking about is the interference part of that Rule. And the specifics of the charge are that, you being the driver of YOU BET, YOU

BETTOR WATCH ME in Race 7 tonight, allowed your horse to shift inwards when insufficiently clear of Mr Egerton-Green's horse JAX OR BETTER. There's been contact made to that runner and that horse has broken gait and that happened shortly after the start racing into the first turn."

10 By way of response, Mr O'Neill refused to enter a plea. The Stewards properly treated that response as a not guilty plea.

11 The inquiry was adjourned after Mr O'Neill told the Stewards that there was nothing else which he wanted to put forward which the Stewards had not already covered.

THE FINDINGS

12 At the resumption the Chairman stated:

"Thanks drivers, obviously after you pleading no plea Mr O'Neill Stewards had to sustain the charge of a guilty plea. We feel that Mr Egerton-Green was obviously drawn closest to the marker uprights and it was his position and we felt that you shifted down when not clear of him. So the charge is sustained and it will be as such, obviously now we go into the matter of penalty Mr O'Neill. Is there anything you would like us to take into consideration, obviously Mr Egerton-Green coming through, like he's done, was a bit quick for you..."

13 The Stewards went on to conclude that the interference was mid-scale, on the low, mid high. Mr O'Neil then was told *"Obviously the first turn attracts more of a penalty too because people are looking to get their positions shortly after the start"*. As a consequence, a 28-day suspension of Mr O'Neill's licence was imposed. The Stewards refused to give any dispensation for the fact that there was no plea to the charge. They also made no concessions on the basis of Mr O'Neill's previous record, referring to the fact that in 2014 he was charged for causing crossing and imposed a suspension. The explanation given regarding the latter aspect was that there was the need to have some 200-odd drives without any trouble to get any dispensation. The Stewards proceeded to

explain that as Mr O'Neill only drove 30 times a year, he would possibly need two or three years before being entitled to a dispensation.

- 14 At the end of the inquiry, the Chairman of Stewards again used the same word which was criticised by senior counsel and relied on in support of the arguments on behalf of the appellant at the appeal. Mr Franklin stated "... but we **feel** (emphasis added) that, he, it was his position and not yours and that's why there's a charge there Mr O'Neill".

GROUND OF APPEAL

- 15 Despite the fact that Mr O'Neill had already served the whole penalty by the time the appeal came on for hearing, he proceeded to appeal against the decision in the following terms:

"A. CONVICTION

1. *The Stewards erred by failing to specify which onus and standard of proof was adopted by them in arriving at their decision to convict the Appellant.*
2. *The Stewards erred by failing to consider and make findings of fact in respect of each of the essential elements of the charge laid under Rule 63(1)(a) of the Rules, namely:*
 - (a) *whether any interference actually occurred, and*
 - (b) *whether any interference (if proved) was caused or contributed to by the Appellant.*
3. *The Stewards erred by failing to give any or any adequate reasons for their decision to convict the Appellant.*

B. PENALTY

4. *The Stewards erred by imposing a penalty on the basis that:*
 - (a) *interference on the first turn attracts a higher penalty than other interference;*

- (b) *any discount for a good prior record was only available when a driver had in the vicinity of 200 drives, or had not offended for a period of 2 or 3 years;*
- (c) *the personal antecedents and circumstances of the offender were not relevant;*
- (d) *it was not necessary to have regard to the range of penalties generally imposed for offences of a similar type.*

C. ORDERS SOUGHT

- 5. *The conviction and penalty be set aside.*
- 6. *The fee paid on lodgment of the appeal be refunded.”*

ARGUMENT AT THE APPEAL

16 Mr Percy QC argued inter alia:

- 16.1 Mr O'Neill did not know why he was convicted nor what he was convicted of.
- 16.2 The part of the Rule the subject of the charge creates more than one possible offence. The Rule makes punishable either an improper drive which caused interference or the lesser offence of contributing to interference. In laying the charge and purporting to particularise it to enable Mr O'Neill to know what it was he was required to respond to, this distinction was not provided.
- 16.3 This was not a catch all offence of careless driving. It required a finding of interference as a fact and then a finding as to whether it was caused or only contributed to.
- 16.4 The decision was void as there was no finding of interference and no finding as to the precise level or role played by the appellant in relation to it.

- 16.5 There was palpable error in the proceedings which started with a “gut feeling” by the Stewards and continued as nothing more than that throughout.
- 16.6 There was a failure to carry out the fact finding function.
- 17 The transcript clearly reveals, as Mr Borovica argued, that this was a most straight forward and simple driving matter which the Stewards dealt with on an informal basis. The participants in the inquiry all spoke to each other in rather basic and simple terms. No technical or complicated issue needed to be resolved. This line of defence was advanced to explain or justify why the approach of the Stewards lacked the usual precision and clarity that one invariably finds the Stewards go to in laying charges and enunciating outcomes.
- 18 Further, Mr Borovica argued the Stewards were entitled to conclude that Mr O’Neill definitely drove improperly at the relevant stage of the race.

MY FINDINGS

- 19 Clearly the assessment of the positioning of the two drivers and their respective rights of passage which flowed from that were in dispute. The Chairman’s assessment conflicted with that of the appellant. The Chairman’s evaluation was to some extent corroborated by the other driver. In view of the descriptions given of what transpired during the relevant time in the race, namely the reference to Mr O’Neill having allowed the shifting in when he was insufficiently clear and the references to contact being made resulting in breaking of gait, I am satisfied that it was reasonably open to the Stewards to conclude that Mr Egerton-Green’s drive had been adversely affected and that his movement forward had been interfered with.
- 20 Rule 163 addresses three different types of driving offences. The Stewards charged Mr O’Neill in relation to the “interference part”. But the offence in question is not one simply that of interference. Two different levels of such improper driving are specified in the Rule. The Stewards in laying the charge needed to choose one of them.

- 21 Any party called to a Stewards' inquiry, whether it be in respect of a fairly typical straightforward driving offence or a complicated and unusual technical matter involving expert evidence, is entitled to know what is the exact charge in couched terms of the actual words employed in the Rule and precisely on what basis the charge has been laid. Stewards are not however required to lay charges with the same precision as in a court of law. Despite not having the same requirement of specificity as other jurisdictions, when any Rule of Racing is alleged to have been breached by Stewards, irrespective of the informality of the proceedings, the actual breach complained of must be identified clearly. Further, the factual basis for the allegation needs to be specified with sufficient clarity to be unambiguous.
- 22 Where a rule contains more than one possible offence as Rule 163(1) does, then it is incumbent on the Stewards laying the charge to ensure any party who may be adversely affected by an outcome, is clearly informed as to which specific leg of the Rule applies and the factual basis relied on for asserting the breach has occurred. Without those matters having been complied with, an accused is not properly or sufficiently informed of his position. Such a disadvantaged party is denied the basic right of being able to properly know precisely what the accusation is. Consequently, such a person is denied the opportunity to properly defend the matter and to preserve innocence.
- 23 In this case Mr O'Neill was not afforded the appropriate clarity and specifics. It is not altogether surprising that Mr O'Neill adopted the somewhat unusual stance of declaring neutrality when called on to plead to the charge. In response to the charge he neither admitted nor denied propositions put to him by the Stewards as to the alleged offending behaviour. I appreciate the appropriateness of Mr Borovica's argument that this matter was particularly straightforward and all parties were communicating less formally than what occurs in other more complicated and technical inquiries involving more sophisticated evidence. That explanation was advanced to justify the repetitious use of language expressed as a "feeling". However, that cannot excuse the fact that a basic right which any accused person is entitled to enjoy was not afforded to Mr O'Neill on this occasion.

24 Briefly the situation can be summed up by saying that Mr O'Neill was charged imprecisely, resulting in the basis for conviction being both unclear and uncertain. The charge laid against Mr O'Neill did not specify with precision the alleged offence. Mr O'Neill was not informed whether he was accused of causing the incident or of the lesser offence. For that reason, I am satisfied the charge was defective.

25 The reasons for convicting which are quoted earlier are short and not entirely clear. Mr O'Neill was only told that Mr Egerton-Green was drawn closest to the marker uprights, it was his position and that Mr O'Neill shifted down when not sufficiently clear. Further Mr Egerton-Green's movement proved too quick for Mr O'Neill. The reasons fell short of being adequate to justify the conviction.

26 For these reasons I am satisfied Mr O'Neill was left in the compromised situation as Mr Percy described in the course of his submissions. Accordingly, I accept Mr Percy's arguments in relation to grounds 2 and 3.

27 It is not necessary for me to analyse or address at any length the penalty issues. I merely comment that I am not persuaded on the facts and arguments in this case that there is merit in the grounds 4(a) and (b). I am also not persuaded by the argument raised on behalf of the appellant that the proposition put by Mr Borovica regarding the importance and significance of the first turn is incorrect.

28 I uphold the appeal. I am satisfied it is not appropriate to refer the matter back to the Stewards for reconsideration. Consequently I simply quash the conviction.

29 I am prepared to entertain submissions from the Stewards should they oppose refund of the lodgment fee.



DAN MOSSENSON, CHAIRPERSON



