

TASMANIAN RACING APPEAL BOARD

Appeal No. 01 of 2020/21

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| Panel: | Kate Brown (Chair) Rodney Lester (Member) | Appellant: | Sam Clotworthy |
| Adviser | Mike Stiles | | |
| Appearances: | Steven Shinn (on behalf of the stewards) Anthony O'Connell on behalf of the appellant) | Rules: | AHRR 168 (1)(g) |
| Heard at: | 1 Civic Square LAUNCESTON TAS | Penalty: | Suspension for 5 race meetings (stay of proceedings granted) |
| Date: | 7 September 2020 | Result: | Suspension for 2 race meetings (wholly suspended provided Mr Clotworthy is not found guilty of an offence under AHRR 168 for a period of 6 months) |

REASONS FOR DECISION

1. Mr Clotworthy was charged with breaching AHRR 168 (1)(g) arising out of an incident on the 16th of August 2020 at the Launceston Pacing Club.
2. AHRR 168 provides:
168. (1) 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) reckless
 - (c) incompetent
 - (d) intimidatory
 - (e) improper
 - (f) foul or
 - (g) likely to endanger person or horse.(2) A person who fails to comply with sub rule (1) is guilty of an offence.
3. He was suspended for 5 race dates. He pleaded not guilty and appealed both conviction and penalty on the basis that his actions were not likely to endanger person or horse. Unfortunately, much of the recording of the Stewards inquiry failed so essentially the appeal proceeded as a rehearing, although the Board had regard to that portion of the transcript that was available.

4. The incident which formed the basis of the alleged breach was described in the Stewards Report as occurring “in the back strait on the final occasion where *Gentlemen Red* broke *Stride* with *Karalta Cruise* and *Ol Titch* before being checked”. At the time the Appellant (on *Gentleman Red*) was in the three wide position and Mr Tim Yole (on *Ol Titch*) was one out one back.
5. The Appellant’s case at the enquiry and at the hearing was that Mr Yole had caused the incident by trying to push up the track to get a run and that the Appellant was just holding his line. Mr Yole’s evidence at the enquiry (he did not give evidence before the Board at the hearing despite the deficiencies in the transcript of the inquiry) was that he had a proper opportunity to move the appellant wide on the track to take a run and after he did that, the appellant drove down the track on to him: “*My horse was travelling real nicely, and Mr Yole then tried to push me up off the track to get a run behind Mr McDonald, and my horse is still travelling nicely on the bit, and all I was just try and hold my line and Mr Yole just didn’t take any action or any care in trying to relent. I wasn’t going to give my position away and he just kept on going and kept on going until my horse severely got checked, and has put me completely out to the race*”. The appellant’s advocate at the hearing described the appellant’s move as just “competitive racing” and noted that the appellant had been told shortly prior to this race meet by the trainer Mr Ben Yole that he need to drive more aggressively.
6. The Steward’s case was that the appellant ought to have ceded the position to Mr Yole who was within his rights to push him out; that there was no horse to his outside and that there would have been no danger to him had he done so. Stewards asserted that the Appellant actively steered down the track to try to get back the ground Mr Yole had taken from him and described the incident as having started with a legal move by Mr Yole, with the inference that the incident was caused by the appellant’s response.
7. The Board was taken through the footage by both parties. The following was particularly noted:
 - At the time the drivers checked Mr Yole’s horse was a full head in front of Mr Clotworthy’s.
 - It is not entirely clear that there was a run there for the taking.
 - Mr Clotworthy does steer down the track, albeit in a manner that appears as much about maintaining his ground rather than regaining ground lost.
 - There is clearly an aggressive exchange between the two drivers.
 - Different angles of vision of the incident give a number of plausible explanations for the interference, however it appears clear that Mr Clotworthy’s actions in attempting to protect his ground substantially contributed to the interference.
8. There is no doubt that it had the potential to cause injury to either person or horse. However to be guilty of an offence under this subsection the act or failure to act must be “likely to endanger”. There is ample legal authority for the meaning of the work “likely”. It means probable rather than possible. The Encyclopaedic Australian Legal Dictionary defines “likely” as:

Having a substantial, real, and not remote chance of causing the result. The word 'likely' should not be construed to mean 'more likely than not' or to assume a specific degree of mathematical probability not conveyed as a matter of ordinary language or the statutory context... It means probable as opposed to possible.

9. The question for the Board was whether the appellant's conduct was serious enough to meet that criteria. There is no doubt that the checking of the two horses and the reshuffling of positions that eventuated from that was dramatic and could have caused harm to either driver, other drivers or horses.
10. In considering that point, the Board accepts that the appellant did actively respond to the attempt by Mr Yole to force him up the track, that is, he did more than simply maintain his line or check his horse. However the Board was not persuaded that his so doing so made the endangerment of person or horse more than a possibility. The appellant was able to check and the main contact was between the wheels of Mr Yole's cart to Mr Clotworthy's horse's front leg.
11. The Board also took into account the contribution of Mr Yole in assessing the degree of the appellant's culpability for the outcome. Mr Yole is a far more experienced driver, and he was aware of the relative inexperience of Mr Clotworthy; indeed he may have had in mind that Mr Clotworthy's record was to give way to such challenges. He may have been taken by surprise by Mr Clotworthy's persistence in the face of his challenge. Conversely, Mr Clotworthy saw a run and attempted to take it. There was a point at which he arguably ought to have realised that Mr Yole had the run and reassessed his position in light of his obligation to drive safely, but the same obligation applies to Mr Yole.
12. The Board considered that the level of culpability attributable to Mr Clotworthy was less than that required by AR 168(1)(g); that is, that he is not guilty of driving in a manner likely to endanger a person or horse. However the *Racing Regulation Act 2004* s.34(5) provides:

(5) If, after hearing an appeal under [section 28A\(1\)](#) against a decision, the TRAB is satisfied that the appellant did not engage in the conduct that prompted the making of the decision but may have engaged in some other conduct that would have justified the respondent making another decision against the appellant, the TRAB may, if it considers it just to do so, make any decision that could have been made by the respondent in relation to the other conduct.
13. That is the course the Board takes in this matter. The conduct of Mr Clotworthy was sufficiently concerning to warrant a charge and the consequences which flow from that, and the Board considers it just in the circumstances substitute a charge of reckless driving pursuant to AHRR 168(b). The Board finds that in failing to concede the run to Mr Yole, after Mr Yole had legitimately moved Mr Clotworthy up the track to a position where he was ahead and better positioned to take it, Mr Clotworthy is guilty of reckless driving.

14. With respect to penalty it is noted that the only evidence relevant to penalty apparently taken into account by stewards at the enquiry as to that was that Mr Clotworthy was relatively inexperienced, and that he had been counselled before the race by Mr Benjamin Yole to not let himself be pushed around on the track. The appellant's advocate submitted during the appeal that Mr Clotworthy had only had 78 drives and had only been driving for some two to three months when the offending occurred. His offence report is consistent with that submission and shows one previous breach of AHRR 168(1) on the 5th of July for which he was fined \$100. The Board takes all that information into account and substitutes a penalty of a 2 meeting suspension wholly suspended provided Mr Clotworthy is not found guilty of an offence under AHRR 168 for a period of 6 months.

15. In all the circumstances, the Board finds the appellant not guilty of the charge in respect of AHRR 168(g) but guilty in respect of a substituted charge under AHRR 168(b), and substitutes a penalty of a 2 meeting suspension, wholly suspended provided he is not found guilty of an offence under AHRR 168 for a period of 6 months from this decision. Having varied the decision of stewards, in accordance with s.34 and the Board orders that 25% of the prescribed deposit is forfeited and that the appellant pay 25% of the transcript costs.