

TASMANIAN RACING APPEAL BOARD

Appeal No 15 of 2015/16 – NICHOLAS BROCKMAN

Panel:	Mr Tom Cox (Chair) Mrs Kate Brown	Appellant:	Mr Nicholas Brockman
Adviser:	Mr David Arnott		
Appearances:	Mr Grant Hodges on behalf of the appellant Mr Adrian Crowther on behalf of the stewards	Rule:	Harness Rule 149(1)
Heard at:	Launceston	Penalty:	Suspension for four race meetings
Date heard:	25 February 2016	Result:	Upheld

REASONS FOR DECISION

1. Mr Brockman was the driver of *Lucky Dave* which raced in race 11, the Sea FM Claimer over 2297 metres at the Devonport Pacing Club on 24 January 2016. Following an inquiry into his drive the stewards found that he had breached AR149(1), which provides:

“A driver shall take all reasonable and permissible measures during the course of a race to ensure that the horse driven by that driver is given full opportunity to win or obtain the best possible pacing in the field.”

2. The appellant pleaded not guilty, was found guilty by stewards of the charge and was suspended for four race dates.

3. He lodged an appeal on 1 February 2016, which although was said to be an appeal against conviction and penalty, the grounds set out (“Not guilty of the offence”) only addressed guilt. The appellant did not make any submissions regarding penalty at the hearing of the appeal.

4. The stewards’ report dated 26 January 2016 sets out the particulars of the offence. It provides, in part:

“Mr Brockman was charged under AHRR 149(1) and the particulars of the charge were that as the driver of LUCKY DAVE NZ after initially resisting that challenge out of the gate and around the first turn he then continued to resist the challenge for too long a distance in an exceptionally fast lead time 48.2 seconds which was 4.3 seconds faster than average and as a result of his speed duel with Mr Hill his horse then gave ground to be beaten 35 metres in 4th place where Stewards state there was a reasonable and permissible opportunity to surrender his position and give his horse some respite to allow it to then finish in the best possible finishing position.”

5. Mr Hodges, on behalf of the appellant, submitted that the stewards in reaching their decision had failed to give sufficient weight to the following factors:

- a. That the appellant was driving the horse in accordance with specific instructions from him, as trainer, and from the owner of the horse that the appellant should take the lead from the start and hold it at all costs. The appellant was also advised by Mr Hodges that *Sky Tower* would “have a look at you but he should back off” bearing in mind recent performances by *Sky Tower* on that track.
- b. Those instructions had been given on the basis that *Lucky Dave NZ* had drawn gate 1, and that the trainer believed there was a strong leader bias on the Devonport track.
- c. The advice concerning *Sky Tower* was premised on a belief that it was in poor form and would, if it challenged, tire and fall back.
- d. The appellant was in the lead with *Sky Tower* to his outside. The appellant was not obliged to give up the lead when challenged. Instead, it was a matter for the driver of *Sky Tower* to determine whether he could take the lead or should desist in his challenge. That did not occur.
- e. The driver of the horse *Sky Tower* maintained the extended challenge; and that fact was supported by the stewards own characterisation of the driver as “the aggressor”.
- f. The trainer of *Sky Tower* had four other runners in the race and Mr Hodges believed that *Sky Tower* was sent out to “set the race up for another runner in the stable”.
- g. The driver of *Sky Tower* was culpable in his drive, as evidenced by the fact that the stewards imposed a ten race meeting penalty for his actions.

6. The Board has considered the race film, along with the transcript of the stewards’ inquiry.

7. The stewards’ report dated 26 January 2016 sets out the actions of the driver of *Sky Tower* as follows:

“...as the driver of SKY TOWER after challenging for the lead out of the gate and being unsuccessful he then persisted with his challenge for a second extended time which meant he had challenged for the lead for nearly 700 meters significantly contributing to the exceptionally fast lead time of 48.2 seconds which was 4.3 seconds faster than average which stewards state was the major contributing factor in SKY TOWER tiring to finish last beaten in excess of 80 meters when there was a reasonable and permissible opportunity to cease his challenge and give his horse some respite and give it full opportunity to then win or finish in the best possible position.”

8. Mr Crowther, on behalf of the stewards argued that the appellant’s drive was culpable as he failed to reassess his race plan at any stage. He submitted that by continuing to hold off *Sky Tower* over such an extended period and at such a fast pace, it was inevitable that the appellant’s horse lost any opportunity it had to achieve the best possible placing in the field. He submitted that it takes two horses to engage in a “duel” and both drivers were culpable, albeit to differing degrees, for ending both horses’ prospects to achieve the best possible place. He also referred to results for the season so far in disputing the alleged “leader bias” on the Devonport track. He submitted that it was more than a momentary error of judgement, and the longer the challenge between the horses continued the more apparent it ought to have been to the appellant that he should have pulled back and taken cover.

9. The scope of Rule 149(1) is well settled. In the decision of *Honan* (NSW Harness Racing Appeals Tribunal, 26 October 1983) Justice Goran stated the following:

“In the first place the rule does not permit the mere substitution of the steward’s view as to how a particular horse should be driven for the view of the driver. Secondly, the rule does not seek to punish a mere error of judgment during a race on the part of the driver...”

The rule attempts to ensure not merely that the horse has a winning chance in a race but that, given its inability to win, it will still do the best it can in the circumstances...

The rule demands that the measures of the driver must be "reasonable and permissible". Obviously it is not expected that a driver would be permitted to interfere with another horse in order to win with his own horse, but his failure to take a permissible measure to win or to secure the best possible place in the field must be a reasonable failure. It is for this reason that I have said that a mere error of judgment is not a breach of the rule because a mere error of judgment may be reasonable in the circumstances....

There are an infinite number of possibilities when this present rule will apply.... In short, however, the unreasonableness of the driver's tactic must be culpable, - that is blameworthy... Each case will turn upon its own merits, but overall if in taking into account all the circumstances the actions of the driver are unreasonable then he may be considered in breach of this particular rule."

10. The appellant's argument was that if all the circumstances were properly taken into account by the stewards, his manner of driving would not be considered unreasonable to the extent that he should be culpable under the rule. We also note that the appellant told the driver of *Sky Tower* that he would not give up the lead in the course of the race and that notice was obviously ignored.

11. The Board accepts that the appellant was in an invidious position. He was driving to instruction, and *Sky Tower* did challenge him as he and the trainer had predicted. He had the inside running and it was he who had the lead. He also had a reasonable basis to believe that *Sky Tower* would fade on account of its lack lustre form. When that did not occur (and it did not because the driver of *Sky Tower* disregarded the appellant's notice to desist in the challenge) the appellant was faced with an extended challenge from a grossly culpable driver to his outside and left with the choice of either giving up the lead or simply waiting for the challenge to abate.

12. The difficulty for the appellant was that had he given up that lead his drive would have been pushed back on the pegs and effectively boxed in by the others drivers. His prospects of obtaining the best possible place, whatever that may have been, in those circumstances can only be a matter for speculation, but we accept that the prospects would not have been glowing on the tight Devonport track. There was also the very real possibility that if he had taken such a course he would have been subjected to even greater criticism with such criticism being attended by allegations of impropriety.

13. It is trite to say that for a breach of this rule it is necessary that the stewards establish something more than a mere error of judgment on the part of the driver. The Board must be comfortably satisfied that the quality of the drive was culpable and deserving of punishment. For the reasons above, it is not appropriate in this case to find the appellant culpable for failing to give up the lead in these circumstances. Ultimately, the situation in which the appellant found himself was created and sustained by the driver of *Sky Tower* who consciously set about maintaining the challenge and did so in clear breach of the rules. While the appellant could have taken a different course, his failure to do so was not culpable and deserving of punishment.

14. The appeal is upheld. The stewards' decision of 26 January 2016 is quashed.

15. The Board orders that the appellant have his deposit returned to him pursuant to Section 34(2) of the *Racing Regulation Act 2004*. The appeal having been successful the Board makes no order as to transcription costs.

DATED: 1 March 2016