

BEFORE THE MNZ BOARD

BETWEEN

GUY MEREWETHER in his capacity as an
MNZ Steward
Complainant

AND

NOEL CURR
Respondent

Hearing: 21 January 2008 (by telephone conference)

Board: S Perry, N Boyd, A Cressey, D Morris

Decision: 16 May 2008

DECISION OF THE MNZ BOARD

Result:

- A. Dismissed**
- B. Upheld, 6 months suspension of membership, cumulative**
- C. Upheld, 1 year suspension of membership, cumulative**
- D. Costs \$1,500**

Introduction

[1] Noel Curr (“Noel”) appears before the MNZ Board to answer allegations that he breached the MNZ Code of Conduct in that he:

- (a) Assaulted an MNZ Steward;

- (b) Encouraged and/or instructed his son, Tim Curr, to ignore the directions of an MNZ Steward to stop and retire from a race; and
 - (c) Threatened the Board of MNZ that if Tim's competition licence was not immediately reinstated, the video of the assault incident which the Board provided to him pursuant to its natural justice/procedural fairness obligations would be placed on the website "You Tube".
- [2] Paragraphs (i), (ii), (vi),(xi) and (xii) of the MNZ Code of Conduct are all relevant.
- [3] The first two allegations arise out of an incident that occurred in race 3 of the 250 class at round 4 of the NZ Motocross National Championships held in New Plymouth on 18 November 2007. The third allegation arises from an email Noel sent to the Board, and a subsequent text message sent to Board member, Neil Boyd, regarding the temporary suspension of Tim's competition licence while Tim's part in the incidents were being investigated.

The Facts

- [4] The following are the facts as the Board finds them to be:
- [5] Noel's son, Tim Curr, ("Tim") was competing in the 250 class of the NZ Motocross National Championship. In race 3 of round 4 at New Plymouth, four or so riders (including Tim) crashed shortly after the first corner off the start. A number of spectators, including the Event Steward, Guy Merewether ("the Steward"), and Tim's father, Noel Curr, went to assist the downed riders and help clear the pile up. Tim lifted his bike up, remounted, and went to kick start it so as to ride off and continue racing. When doing so, his bike was on top of another rider's (Hayden Clark), bike. Tim made no effort to push his bike clear, but

instead remounted and tried to restart his engine while still on top of Hayden Clark's bike.

- [6] The Steward grabbed hold of the rear fender of Tim's bike. Before the Board, Noel claimed that the Steward grabbed Tim by the body armour and attempted to pull him off his bike, but the Steward denied this and explained that he was merely trying to push Tim's bike off Clark's bike so as to prevent any damage (particularly to Clarke's radiator) occurring as Tim restarted and rode off. The Board prefers the Steward's evidence on this point. It has interviewed a number of witnesses to the incident, and they have confirmed that the Steward's version of events, and not Noel's, is correct.
- [7] The Steward claimed that while he was holding onto the rear fender of Tims bike, Tim's father Noel Curr yelled at him to let go, then Tim, who was seated on his bike, swung his right leg and deliberately assaulted him by kicking him.
- 89] Tim explained in his disciplinary hearing that the kick was accidental in that he had lost his balance and accidentally kicked the Steward as he swung his right leg over the rear fender to dismount. He also told the Board that he was unaware that the Steward was standing directly behind his bike holding his rear fender.
- [9] The Board had the opportunity of viewing film footage of the incident (including in slow motion) shot by the television company hired to film the event. It showed Tim becoming unbalanced as he tried to restart his bike, and swinging his right leg backwards over his rear fender to dismount and regain balance. At no time does he turn and look at the Steward. The Board therefore accepted Tim's explanation that the kick was accidental and that he was unaware that the Steward was standing directly behind him holding his rear fender. It earlier dismissed a charge against Tim that he had assaulted an MNZ steward.

- [10] The Steward however believed that the kick was deliberate. He is not alone in his belief. Other witnesses the Board spoke to, notably Alan Henderson and Clive Cooper-Smith, were also of that view. The Board accepts that the Steward's view that Tim's kick was deliberate was genuinely held at the time. This is important as it is the catalyst for events that followed.
- [11] The film footage shows that after being kicked, the Steward moved forward towards Tim and appeared to lift his knee. Noel claimed before the Board that the Steward had retaliated to Tim's accidental kick by trying to knee Tim in his 'private parts'. The Steward denied this. He said that until he had reviewed the video footage, he was unaware that he had raised his knee, he does not know why he did so (there is a suggestion that he may have been stepping over the handlebars of Clarke's bike), but in any event his knee did not make contact with Tim as he was standing too far away to do so.
- [12] Other witnesses have told the Board that they did not see the Steward try and knee Tim. The Board is conscious that the film footage is from only one angle and the Steward's action in lifting his knee may be less sinister if viewed from a different angle, including the angles on which the other witnesses were standing. It is not necessary for the Board to make any finding on this point as Noel accepts that, thereafter, he assaulted the Steward. However, he claims that he was justified in doing so. He relies on section 48 of the Crimes Act 1961 (Defence of Another) which, as we will shortly explain, requires a subjective, and not an objective, test.
- [13] Rightly or wrongly, Noel considered the Steward's actions in stepping forward and raising his knee as an aggressive act towards Tim. He therefore intervened by stepping forward and backhanding the Steward in the throat area with his forearm. The force used was sufficient to knock the Steward off balance and back a meter or so.

- [14] In the meantime, Tim pushed his bike clear of Hayden Clark's bike. He remounted, started his bike, and went to ride off to continue racing. Believing that he had been deliberately assaulted, the Steward then told Tim, before he rode off, that he was disqualified from the race. Both Tim and Noel claimed that what the Steward said was, "*Your fucken out*" or words to that effect. As we said in Tim's case, the Board considers that nothing turns on the actual words used. Rather the important point is that Tim and Noel both admitted to the Board that they understood at that time that the Steward was disqualifying Tim from the race.
- [15] Tim did not retire from the race as directed. Instead he ignored the Steward's direction and rode off and continued racing. The Steward walked back along the track towards the start area and tried to locate a black flag to signal to Tim that he was disqualified. He was unable to immediately locate one, so he mounted a black laptop computer bag on a flagpole, and signaled to Tim when he next passed the section of track where he (the Steward) was standing. Tim did not immediately stop and retire as directed, but instead continued racing.
- [16] Witnesses Angela McLeod and Clive Cooper-Smith have told the Board that when the Steward was black flagging Tim, Noel was stationed directly opposite the Steward on the other side of the track yelling at him. Noel then walked over to the Steward and in Angela McLeod's words "*was right up in Guy's face*", presumably challenging him about black flagging Tim.
- [17] Tim did not stop but instead continued racing. In doing so, he charged at the Steward at speed on his bike. In explanation to the Board, Tim claimed that he was not required to stop and retire because it was not a proper black flag, but instead was a black lap top bag on the end of a flagpole. However, he admitted that he understood at the time that the black laptop bag was supposed to represent a black flag and that the Steward was indicating that he was disqualified, and directing him to stop and retire from the race.

- [18] On the next lap, the Steward again signaled to Tim that he was disqualified. This time, he used a pit board with “#7 *Black Flagged*” written on it in felt pen. This was in accordance with rule 6-19 of the 2007 Manual of Motorcycle Sport. Again, Tim did not stop and retire from the race, but instead continued racing. In doing so, he again charged at the Steward at speed on his bike narrowly missing him. This occurred on the next lap as well.
- [19] In the meantime, Noel walked back to where others were pit boarding. He wrote on his own pit board “*Don’t Stop*” and held it out to Tim each time he passed. Noel claimed that he had done so because, having crashed and being at the back of the field, Tim was inclined to give up and retire. Noel therefore wrote “*Don’t Stop*” to encourage Tim not to give up, but to instead keep racing.
- [20] Noel also claimed that he only held up his pit board with “*Don’t Stop*” on it for one lap only, that he was stationed quite a distance, and on the other side of the track, from where the Steward was trying to disqualify Tim, and that he was totally oblivious to anything the Steward was doing behind him. He therefore contended that he did not encourage and/or instructed Tim to ignore the directions of an MNZ Steward to stop and retire from a race as his “*Don’t Stop*” message had no connection whatsoever to what the Steward was trying to get Tim to do.
- [21] The Board rejects Noel’s contention and regards it as completely untruthful. As we have already pointed out, Noel was yelling abuse at the Steward from directly across the track when the Steward originally tried to black flag Tim. He then crossed the track and got right up in the Steward’s face about it.
- [22] Witnesses, Alan Henderson, Clive Cooper-Smith, Angela McLeod and Sharon Cox all told the Board that Noel then walked back to where others were pit boarding and held out his own pit board with “*Don’t Stop*” written on it. Whilst doing this, Noel was stationed almost directly across the track and a few meters

forward of where the Steward was standing trying to disqualify Tim. There is therefore no doubt whatsoever in the Board's mind that Noel was fully aware of what the Steward was trying to do, and that his "*Don't Stop*" message was designed to encourage or instruct Tim to ignore the Steward's directions.

[23] In addition, Clive Cooper-Smith told the Board that he specifically went over and told Noel that "*his boy's behavior was totally unacceptable and that he should pull his boy off the track*" to which Noel replied, "*We have done nothing wrong*" and "*We have had him before and we will have him again*". Clive Cooper-Smith said that he understood the latter comment to be a reference to some previous incident between the Currs and the Steward, Guy Merewether.

[24] After receiving a complaint and report about the incident from the Steward and others, the Board commenced a disciplinary investigation. It temporarily suspended Tim's competition licence under rule 7-3-5 of the MoMCS pending the outcome. Tim wished to ride at round 1 of the New Zealand Supercross Championship and at the New Zealand Grand Prix but could not do so because his licence was temporarily suspended. Noel therefore sent an email to the Board that if it did not immediately reinstate Tim's competition licence so that he could compete at these events, he (Noel) would post a video clip of the assault incident that the Board had sent him as part of its natural justice/procedural fairness obligations on the website "You Tube".

[25] When the Board did not meet his demand, Noel sent a text message to Board member, Neil Boyd, which read "*... let me know by 9pm or You Tube*".

The Assault Allegation

[26] As previously mentioned, Noel admits that he assaulted the Steward in that he delivered a backhand making contact with the Steward's throat area. However,

he claims that he was justified in doing so under s.48 of the Crimes Act in that he was acting in defence of Tim. Section 48 provides:

“Self-defence and defence of another

Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.”

[27] There are 3 component parts to this defence:

1. Was the force used in defence of another?
2. What were the circumstances as Noel believed them to be?
3. Was the force used reasonable in the circumstances as Noel believed them to be?

[28] As we explained earlier, the 2nd ingredient requires a subjective test –what did Noel believe the circumstances to be at the time? Rightly or wrongly, Noel believed that the Steward was about to assault Tim. The Steward had stepped forward and, as the film footage shows, had raised his knee. The Steward was clearly agitated about being kicked by Tim which he believed was deliberate. When the Board asked the Steward whether he considered it possible that Noel could have reasonably interpreted his actions as an aggressive act towards Tim, the Steward accepted that, in retrospect, he may well have. Accordingly, the Board finds that the first two components of the defence are made out.

[29] Turning to the 3rd component –whether the force was reasonable – the Board notes that what occurred was not a simple shove to push the Steward away, but instead was a backhand blow to the Steward’s throat which was delivered with sufficient force to knock the Steward off balance and back a meter or so. In assessing whether that the force was reasonable, it must be remembered that Noel’s action was a spontaneous reaction to what he perceived as immediately unfolding before him. The Board has some concerns about whether or not the force used was excessive, but considers the call to be so borderline that Noel

should be given the benefit of the doubt. The allegation of assaulting an MNZ Steward is therefore dismissed.

Encouraging/Instructing Tim to Ignore Steward

- [30] As previously mentioned, the Board does not accept Noel's explanation that he was oblivious to the Steward's efforts to disqualify Tim, and that his "*Don't Stop*" message had no connection whatsoever to what the Steward was trying to direct Tim to do. The second allegation – that Noel encouraged and/or instructed his son, Tim, to ignore the directions of an MNZ Steward to stop and retire from a race – is therefore upheld.
- [31] In terms of penalty, Tim's membership was suspended for 1 year for ignoring the Steward's direction. The Board considers that, as the rider, Tim was the principle offender and the one that had the prime responsibility for complying with the Steward's directions. Noel's part in the incident was a lesser one but was obviously still influential in what occurred. The effect of what Noel and Tim did to the Steward should not be understated. They wound the Steward up to such an extent that he totally 'lost it' and began behaving irrationally even picking up a rock to throw at Tim when he next came around. Fortunately, others intervened and sent him away to cool off which, to the Steward's credit, he sensibly did.
- [32] In the circumstances, the Board considers that a 6 month suspension of membership is appropriate. This is substantially less than the 1 year that Tim received as the principle offender. The offence is aggravated by the fact that, at the time, Noel was serving a 3 year suspension of membership imposed for other misconduct. Although the Sports Tribunal subsequently reduced Noel's period of suspension to 9 months, Noel was within this 9 month suspension period at the time this incident occurred. He has also showed no remorse for his actions and, during the investigation, treated the Board with complete arrogance and

disrespect. At one point, he even answered a Board member's question by asking if the Board member was "*simple in the head*".

[33] Although in his final submissions, Noel has stated "*Should you deem it fit, I am quite happy to apologize to the host club for my actions forced upon my by your officials actions*" it is not for the Board to direct Noel to apologise. An important aspect of an apology is sincerity, and directing a member to apologise lacks sincerity. If Noel was truly sorry and remorseful for his actions he would have apologised to those involved by now. To date, he has not.

[34] The Board also notes that Noel was formerly a Steward himself, so he ought to have appreciated the important and difficult role that a Steward performs. In short, he should have known better than to treat Guy Merewether as he did. What if a member did the same to him as a steward? How would he react?

Threatening the Board

[35] Turning to the third allegation – that Noel had threatened the Board of MNZ that if Tim's competition licence was not immediately reinstated, the video of the assault incident which the Board provided to him pursuant to its natural justice/procedural fairness obligations would be placed on the website "You Tube – the Board upholds this allegation. In doing so, it rejects Noel's explanation that he was entitled to post the video on "You Tube" because journalists had written articles about the incident and his and Tim's behavior, and that he was therefore entitled to tell the public his side of the story. Of course, this explanation does not explain why the publication of the video on "You Tube" was coupled with a demand or threat that this could be avoided if the Board immediately reinstated Tim's competition licence.

[36] The Board regards Noel's actions in this regard as a deliberate attempt to bully and intimidate it into complying with his demand. The Board regards this matter

as very serious as such action corrupts the integrity of the disciplinary process. If a person was to try and threaten or intimidate a Court, or even the Sports Tribunal, in that way, their behavior is likely to be met with a stern response.

[37] In the circumstances, the Board considers that a 1 year suspension of membership is appropriate.

Suspension

[38] In his final submissions, Noel has asserted that the Board is unable to discipline him as he was not a member at the time of the offence, nor is he a member now. As the Board understands it, this argument stems from the earlier Sports Tribunal's decision which reduced his suspension period from 3 years to 9 months, but did not reinstate his stewardship. Instead, the Tribunal reserved leave for either party to apply to have the stewardship issue determined at a latter date if required.

[39] Under the MNZ constitution, Noel held his membership by virtue of him being a steward. Accordingly, his membership and stewardship are one and the same thing. The net result of the Sports Tribunal's decision appears to be (and the Board agrees with Noel's submissions on this point) that Noel was not reinstated as a steward so is therefore not reinstated as a member. His suspension has now been completed so there is no impediment to him applying to MNZ to become a member under a different category of membership (ie: not the steward's category). However, to date, he has not done so.

[40] The Board wishes to make it clear that, given Noel's history of misconduct, it does not consider him a fit and proper person to hold the office of steward or any other position which exercises executive functions. Accordingly, it will not be reinstating Noel's stewardship unless ordered to do so by the Sports Tribunal.

[41] As regards the suspension now imposed, Noel is suspended from holding, or applying for, membership of MNZ for a period of 1 year and six months from the date of this decision. In other words, the two suspension terms are cumulative and not concurrent. This is because the two allegations are different in kind to one another. We also do not consider that the totality of the two suspensions to be wholly out of proportion to the gravity of the overall offending.

Costs

[42] MNZ has been put to considerable time and expense in investigating these matters. This has been compounded by the need to check out Noel's explanations which were ultimately found to be untrue. The Board therefore considers that an award of costs is appropriate and directs Noel to pay \$1,500 under rule 7-2-12 of the 2007 Manual of Motorcycle Sport.