**IN THE HIGH COURT OF NEW ZEALAND**
**TIMARU REGISTRY**

**CRI-2017-476-000001**
**[2017] NZHC 1103**

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| BETWEEN | WORKSAFE NEW ZEALAND<br>Applicant/Appellant |
| AND | TALLEY'S GROUP LIMITED<br>Respondent |

Hearing: 4 May 2017

Appearances: I R Murray and E F Jeffs for Applicant/Appellant
J H M Eaton QC for Respondent

Judgment: 25 May 2017

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**JUDGMENT OF FAIRE J**

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*This judgment was delivered by me on*
*pursuant to Rule 11.5 of the High Court Rules*

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*Registrar/Deputy Registrar*

*Solicitors:* Crown Law Office, Wellington for Applicant/Appellant
*Counsel:* J H M Eaton QC, Christchurch

## The application

[1] The applicant applies for leave to appeal pursuant to s 296 of the Criminal Procedure Act 2011 ("CPA") on questions of law arising from a judgment of Judge Maze. On 6 December 2016 the Judge dismissed a charge against the respondent alleging failure to take all practical steps to ensure the safety of an employee.

## The questions of law

[2] The applicant has submitted eight questions of law, namely:

> **Question 1:** Was the Judge correct to conclude that each practicable step relied upon by the prosecution in terms of an offence under ss 6 and 50 of the Health and Safety in Employment Act 1992 (the HSEA) must form the basis of a separate and specific charge, or (alternatively) must be encompassed in a representative charge, in order to comply with s 17(1) of the Criminal Procedure Act 2011 (the CPA)?
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> **Question 2:** Was the Judge correct to conclude that s 17(4) of the CPA requires each practicable step relied upon by the prosecution in terms of an offence under ss 6 and 50 of the HSEA to be set out in the charging document?
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> **Question 3:** Did the Judge fail to correctly identify the applicable limitation period (under s 54B of the HSEA)?
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> **Question 4:** Did the Judge identify and apply the correct test for determining whether a miscarriage of justice had occurred, in the context of s 379 of the CPA?
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> **Question 5:** In light of s 379 of the CPA, was the Judge's conclusion that the defendant had been prejudiced unsupported by any evidence?
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> **Question 6:** In light of s 379 of the CPA, was the Judge plainly wrong to dismiss the charge against the defendant?
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> **Question 7:** Did the Judge correctly identify and apply the test for a stay of proceedings on the grounds of an abuse of process (prosecutorial misconduct)? In particular:
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> a) Did the Judge fail to give any weight to the public interest in prosecuting the defendant (including the seriousness of the alleged offending and the impact on the complainant)?
>
> b) Was the Judge's conclusion plainly wrong?
>
> **Question 8:** Did the Judge identify and apply the correct test for a stay of proceedings on the grounds of undue delay? In particular, were the Judge's

conclusions about prejudice caused to the defendant unsupported by any evidence and plainly wrong?

[3] Mr Eaton QC for the respondent opposed the grant of leave in relation to questions 3, 5 and 8. He did not oppose leave in respect of the other questions. Mr Eaton did not provide substantive submissions directly relating to the opposition to the grant of leave in relation to Questions 3, 5 and 8. It is not clear to me why granting of leave in respect of Question 3 is opposed. Both sides accepted that the Judge erred on this point. The applicable limitation period in s 54B of the HSEA Act starts from the date that the offending set of circumstances first becomes known (or reasonably ought to have become known) to an inspector. Having noted, however, that the Judge erred on this point, the Judge's comments on the limitation period do not seem to have materially altered her decision.

[4] With respect to Question 5, I have assumed that the opposition is based on the premise that it concerns an assessment of factual evidence. Mr Murray referred me to *Brown v R.*[1] That also is the appropriate response in respect of the second question raised under Question 8. So far as the first question under Question 8 is concerned, I can only assume that the respondent's opposition arose out of a contention that the Judge did not stay the proceedings on the grounds of undue delay, but rather through the inherent power implied by s 379.

[5] In my view, all the questions raise a question of law and therefore justify my ordering leave to appeal. Accordingly, I so order and now proceed to consider the appeal itself.

**The accident**

[6] The accident that gave rise to the applicant's investigation occurred at a vegetable processing plant operated by the respondent in Ashburton on 22 May 2015. It is alleged that an employee was operating a forklift to stack empty bulk bins. While he was doing this, the victim, another employee who was standing a few metres away securing a lid to other bins, was struck when the bins on the forklift

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1 *Brown v R* [2015] NZCA 325, [2015] FRNZ 471 at [16] where the Court of Appeal held that a "factual finding unsupported by any evidence is an error that gives rise to a question of law".

toppled backwards and over the forklift cab. The victim suffered a serious injury and is now a paraplegic confined to a wheelchair.

**The charge**

[7] On 20 November 2015, the applicant filed a charge pursuant to ss 6 and 50(1)(a) of the Health and Safety Employment Act 1992 ("the HSEA"). The charge alleged that:

> On or before 22 May 2015 [at 125 Fairfield Road in Fairton, the respondent] being an employer, failed to take all practical steps to ensure the safety of its employee, namely Te Atatu Hemi, while at work, in that it failed to take all practical steps to ensure that she was not exposed to hazards arising out of the operation of a Yale forklift

[8] The charging document was filed one day before the end of the six-month limitation period prescribed by s 54B of the HSEA on the assumption that the circumstances became known to the inspector on or shortly after the day of the accident.

**The legislative provisions**

[9] Section 6 of the HSEA provides:

> Every employer shall take all practicable steps to ensure the safety of employees while at work; and in particular shall take all practicable steps to—
>
> (a) provide and maintain for employees a safe working environment; and
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> (b) provide and maintain for employees while they are at work facilities for their safety and health; and
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> (c) ensure that plant used by any employee at work is so arranged, designed, made, and maintained that it is safe for the employee to use; and
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> (d) ensure that while at work employees are not exposed to hazards arising out of the arrangement, disposal, manipulation, organisation, processing, storage, transport, working, or use of things—
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> (i) in their place of work; or
>
> (ii) near their place of work and under the employer's control; and

(e) develop procedures for dealing with emergencies that may arise while employees are at work.

[10] Section 50(1)(a) provides:

> Every person commits an offence, and is liable on conviction to a fine not exceeding $250,000, who fails to comply with the requirements of—
>
> (a) a provision of Part 2 other than section 16(3); …

[11] Section 54B of the HSEA provides:

> **54B Time limit for filing charging document**
>
> (1) Despite anything to the contrary in section 25 of the Criminal Procedure Act 2011, the limitation period in respect of an offence against this Act ends on the date that is 6 months after the earlier of—
>
> (a) the date when the incident, situation, or set of circumstances to which the offence relates first became known to an inspector; or
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> (b) the date when the incident, situation, or set of circumstances to which the offence relates should reasonably have become known to an inspector.
>
> (2) This section is subject to sections 54C and 54D.

[12] When s 54B is read in conjunction with s 25 of the Criminal Procedure Act 2011 it is apparent that it is the filing of the charge that is the critical date for the operation of s 54B of the HSEA.

**The first summary of facts**

[13] On 1 December 2015, the charging document and a summary of facts were served on the defendant. The summary of facts made allegations of all practical steps that the defendant was said to have failed to have taken, namely:

(a) To have carried out a detailed and effective hazard assessment for the work being carried out in the "paddle track area" of Coolstore One.

(b) To have implemented detailed and effective procedures to separate the forklifts and pedestrians/other workers.

(c) To have ensured that the forklifts provided for employees to use could safely stack bulk bins five high.

(d) To have ensured that the bulk bins being lifted by forklifts were always supported by the backrest or the forklift mast. This could have been achieved by creating a standard operating procedure that specified how bulk bins were to be stacked, training the employees in the methodology, and auditing employee behaviour to ensure compliance.

**The initial appearances**

[14] The first appearances on the charge were made on 14 December 2015. The matter was adjourned to 11 January 2016. At that time the defendant company pleaded not guilty.

**Disclosure**

[15] On 9 February 2016, the prosecution made full disclosure under ss 12(2) and 13(1) of the Criminal Disclosure Act 2008 of all relevant information held.

[16] Judge Maze recorded subsequent Court steps which were taken. A case review date was set for 25 February 2016, but was adjourned by consent to 24 March 2016. On 30 March, the Registrar directed a case review hearing before a Judge on 2 May 2016.

[17] On 17 March 2016, Luke Cunningham Clere were instructed as counsel for the prosecution. Notification was given to the defendant on 22 March 2016 that the prosecution would be obtaining an independent expert report. The parties filed a joint memorandum and indicated that the case review hearing could be dealt with on the papers. An estimate for a trial of five days was given. Advice was given that the prosecution was finalising which expert witnesses it would call and that other issues that might arise between the parties would be advised to the Court in due course. All of that led to a further case review hearing being fixed for 2 May 2016.

[18] On 2 May, a case review was conducted before Judge Sommerville. The Judge noted that the prosecution would be taking expert advice and that Mr McDougall would be the prosecution expert. On 16 June 2016, the prosecution disclosed to the defence the first section of Mr McDougall's report dated 15 June 2016.

[19] On 21 June 2016, a teleconference before Judge Maze was held. The defendant advised that it needed more time to consider the expert's report. The Judge advised that the witness list was required to be finalised before the matter was given a hearing date. That led the Judge to adjourn the case review until 29 August. On 26 August, the prosecution served the defence with a witness list containing nine witnesses and summaries of evidence for seven of those witnesses, together with a new summary of facts which contained the following alleged failings:

> [34] The following practicable steps were available to the defendant and should have been taken:
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> (a) to have carried out a detailed and effective audit and risk management process in respect of the "paddle track area" of Coolstore One. This would have included identifying the potential for bins to fall from forklifts, bins stacked in storage rows to be knocked and fall during forklift movements, and for bins stored in storage rows to collapse and fall.
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> (b) to have implemented detailed and effective procedures to separate forklifts and pedestrians/other workers, including but not limited to:
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> (i) delineating all areas where forklifts were operating and classifying these areas as an exclusion zone for all pedestrians;
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> (ii) creating a physical barrier to prevent interactions between moving forklifts and pedestrians;
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> (iii) ensuring forklift movement was stopped before pedestrians entered the exclusion zone;
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> (iv) having a maximum of one forklift and its driver in the paddle track area of Coolstore One at a time;
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> (v) prohibiting pedestrians from standing adjacent to forklifts whilst they were stacking bins;

(vi) limiting the height to which empty bins can be stacked to 2 high in areas where pedestrians can be standing adjacent, such as the paddle track area;

(vii) limiting the height to which full bins can be stacked to 4 high in areas where pedestrians can be standing adjacent such as in storage aisle BO1 in Coolstore One.

(c) to have implemented a larger pedestrian exclusion zone through procedural controls in areas where 2 bins are being carried at a time, due to the significantly increased potential for the upper unsupported bin to fall. Procedural controls include but are not limited to:

(i) the pedestrian exclusion zone should have been at least 5 metres in general movement areas.

(ii) the pedestrian exclusion zone should have been at least 8 metres whilst forklifts are stacking bins up to 5 high in cool room storage areas.

(d) to have implemented a physical barrier to prevent bins from falling from adjacent stockpiles and to prevent interactions between pedestrians in the paddle track area with moving forklifts stacking full bins. Alternatively but with lesser effectiveness, to have implemented a pedestrian exclusion area at least equal to the height of stacked full bins in the stockpile metres.

(e) to have delineated the zone on the ground surface in the paddle track area where the limitation to operating only one forklift and its driver at a time applies.

(f) to have ensured that the forklifts provided for employees to use could safely stack bulk bins five high.

(g) to have ensured that the bulk bins being lifted by forklifts were always supported by the backrest or the forklift mast. This could have been achieved by:

(i) requiring that bulk bins were stacked one at a time; and

(ii) creating a Standard Operating Procedure that specified how bulk bins were to be stacked, training the employees in this methodology, and auditing employee behaviour to ensure compliance.

[20] The parties advanced before the District Court different versions of the effect of the second summary of facts. The prosecution claimed it was simply an enlargement or explanation of the first. The defence submitted it represents a change

from four alleged failures to 15, which represented a vastly different and substantially increased series of allegations.

**The defendant's application**

[21] The defendant filed an application which sought an order:

(a) Declaring the charging document a nullity; or

(b) Staying the prosecution because of the prosecution's abuse of process; or

(c) Limiting the scope of the prosecution to that which was originally charged and disclosed.

[22] It is that application which was determined by the Judge and is the subject of the judgment of 6 December 2016.

**The Judge's decision**

[23] The Judge observed that the enlarging of the alleged practical steps in the amended summary of facts was a significant change in the scope of the allegations. The Judge considered each failure to take a practical step constituted a separate breach of ss 6 and 50 of the HSEA and so must give rise to a separate charge, or must be encompassed in a representative charge. The charging document was, in the Judge's view, defective as it combined at first four and then 15 failures under one charge.

[24] The Judge considered that it was wrong for the charge to allege offending occurring "on or before" 22 May 2015 because the six-month limitation period under the HSEA meant that any alleged offending before 20 May 2015 would be time barred.

[25] The Judge also considered the charging document was defective because it did not contain sufficient particulars as required by s 17(4) of the Criminal Procedure Act 2011. Despite these deficiencies, the Judge concluded that the charging

document was not a nullity, because it met the minimum requirement of alleging that a legal entity committed an offence at law.

[26] The next issue considered by the Judge was whether the defects she had identified could be remedied by s 379 of the Criminal Procedure Act. Section 379 provides:

> No charging document, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding may be dismissed, set aside, or held invalid by any court by reason only of any defect, irregularity, omission, or want of form unless the court is satisfied that there has been a miscarriage of justice.

[27] Judge Maze in summary came to a conclusion that a miscarriage of justice had occurred because –

(a) The applicant used the deliberate tactic of expanding the charges through altering the summary of facts to "circumvent the six-month limitation period"; and

(b) This disadvantaged the respondent as they pleaded on the basis of, and for several months prepared their case based on, only a limited number of the allegations ultimately levelled against them. These shifting sands caused them wasted cost and expenses; and

(c) The applicant has developed an undesirable practice of not providing particulars and relying instead on the summary of facts. This enabled it to take advantage of its own breach of s 17(4). In substance it brought new charges outside the limitation period. The Judge considered this conduct a breach of the respondent's right to be able to prepare promptly for the case it had to answer; and

(d) The applicant should not be allowed cynically to rely on s 379 to cure obvious and deliberate defects. The Judge considered the section was designed to remedy defects made by mistake and in good faith.

**Summary of the issues in the substantive appeal**

[28] The appeal is based on eight separate questions of law. However, the issues in my view can be summarised as follows:

(a) Was the Judge correct in finding that the charging document was deficient? In particular:

(i) Does each failure to take a practical step constitute a separate breach of the HSEA, such that separate charges or a representative charge must be brought?

(ii) Do particulars of the failures need to be included in the charging document?

(b) If the Judge was correct in finding the charging document deficient, was the Judge correct in concluding that a miscarriage of justice had occurred so as to make correcting the document under s 379 of the CPA impossible?

[29] The six-month limitation period is relevant to the question of whether a miscarriage of justice occurred. The issue is not contentious between the parties before the Court. The Judge took issue with the wording in the charging document "on or before 22 May 2015" saying that any offending conduct prior to the date of the accident must be statute barred. The parties are agreed, and correctly so, that in this matter the Judge erred. The applicable limitation period in s 54B of the HSEA specifies that the six month period starts from the date the offending set of circumstances first becomes known (or reasonably ought to have become known) to an inspector. The set of circumstances became known to the inspector on or after the day of the accident, but the circumstances themselves involve systematic problems that stretch back further. The limitation period will not exclude those circumstances, as long as they first become known to the inspector on the date of the accident or later.

**The applicant's submissions**

[30] Mr Murray summarised the applicant's case as follows:

(a) Sections 6 and 50 of the HSEA impose a duty on an employer. A failure to take all practical steps can only be the subject of a single charge. It does not involve representative charges.

(b) The Judge's finding that there were inadequate particulars was wrong. However, if that were the case, it could be cured by applying s 379 of the Criminal Procedure Act. The respondent, it was submitted, had not demonstrated prejudice which would justify a finding of a miscarriage of justice which would in turn bar the application of s 379.

(c) The Judge misunderstood the actual limitation period. That misunderstanding led to the unsupportable conclusion that the prosecution had acted inappropriately.

(d) The Judge made findings of fact that were unsupported by evidence and they were a significant aspect of her decision to dismiss the charge.

(e) The Judge erred in relation to her assessment of whether a stay would otherwise be available.

**The respondent's submissions**

[31] The respondent submitted:

(a) The Judge was correct to hold each alleged failing in breach of the duty imposed by ss 6 and 50 of the HSEA should be the subject of a separate charge. Various discrete failings are distinctly identifiable acts of alleged offending.

(b) The charging document did not provide the respondent with sufficient information to know fully what was alleged, in breach of s 17(4) of the CPA. The alleged practicable step not taken is pivotal to the

proving of the charge, so must be incorporated in the charging document.

(c) The Judge correctly decided that s 379 did not apply and the charge should be dismissed. Adoption of a rights based approach to the meaning of a miscarriage of justice under s 379 was appropriate. A finding of a miscarriage of justice is available where prosecution abuse of process has occurred. Regardless, there was significant prejudice to the respondent as a consequence of the prosecution filing a defective charging document and then seeking to expand the case by reference to an amended summary of facts.

(d) If the Judge was wrong to dismiss the charge, a stay of proceedings was appropriate.

**Was the Judge correct in finding that the charging document was deficient?**

*Separate charges*

[32] Question 1 asks whether Judge Maze was wrong in law to conclude that each practicable step the respondent allegedly failed to take must be the subject of a stand-alone offence and therefore a specific charge. The Judge's conclusion means that the prosecution would have been required to file four, seven or 15 separate charges for breach of ss 6 and 50 of the HSEA, for each of the particular steps they alleged Talley's had failed to take.

[33] The defendants rely on s 17(1), which provides:

> A charge must relate to a single offence.

[34] The parties discussed two Supreme Court decisions relevant to the general approach to determining what comprises a single offence for the purpose of a charge. In *Mason v R* the Supreme Court discussed the application of s 329(6) of the Crimes Act, a provision that has since been repealed but similarly specified that every count shall in general apply only to a single transaction. The Supreme Court noted "the difficulty of application of any precise rule to the charging of the many different fact

situations in which acts of offending may occur" and "the need for some flexibility".[2] The Court held:[3]

> The essential requirement… is that, if particular acts of alleged offending can sensibly be charged separately without undesirably lengthening the indictment (overcharging), then that should be done. It is necessary that distinctly identifiable acts of alleged offending by the subject of separate charges where the accused may be prejudiced either at trial or on sentencing if they are combined in a single count. On the one hand, the use of a multiplicity of counts is to be avoided where fewer would suffice for the interests of justice. On the other, overly complex counts may prejudice the defence or make it difficult to frame fair and accurate directions to the jury.

[35] In *R v Qiu*, the Supreme Court held that:[4]

> … it is appropriate and not unusual to charge as a single count a continuing course of conduct which it would be artificial to characterise as separate offences. But it is another thing to charge as a single count repetitive acts which can be distinguished from each other in a meaningful way. In such cases, it is appropriate to have distinguishing counts even if they relate to more than one act of a certain class or character. Separate counts facilitate fairness in the conduct of the trial by focussing attention on matters of fact and law which can and need to be distinguished for the purposes of different counts.

[36] The Judge did not refer to case law when discussing this question, except for *New Zealand v Department of Corrections* which I do not consider to be strictly on point.[5] There are three aspects of this case in light of the authorities that lead me to the view that the Judge was wrong in law to conclude that the steps should have been charged separately.

[37] First, the relevant HSEA provision itself is clear in setting out that the duty of the employer is to take "all practicable steps to ensure the safety of employees while at work". The offence is for failing to comply with that duty; that is for failing to take all reasonable steps.[6] The plain wording of the statute anticipates a single charge as a result of a failure to fulfil that duty.

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2 *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296 at [9].
3 *Mason v R,* above n 2, at [9].
4 *R v Qiu* [2007] NZSC 51, [2008] 1 NZLR 1 at [8].
5 *New Zealand v Department of Corrections* [2016] NZDC 18502.
6 Health and Safety in Employment Act 1992, s 50.

[38] Once an employer fails to take a particular practicable step, they are in breach of the duty to take all practicable steps. If they also fail to take a second step, they are still failing to take all practicable steps. This may be a more serious instance of failing to take all reasonable steps, but it remains a single offence. I agree with the applicant's submission that the failure to take each practicable step cannot sensibly be understood as a stand-alone offence of failing to take *all* reasonable steps.

[39] Secondly, the authorities make it clear that a continuing course of conduct will amount to one charge. I am not of the view that repetitive acts of alleged offending can be distinguished from each other in a meaningful way in this instance. Rather, the alleged offending amounts to a course of conduct that extended across time and related to ongoing omissions rather than particular acts that can be meaningfully separated in time or nature. The accumulation of omissions cumulatively amounts to a breach of the duty. Separation of the course of conduct in charges relating to offending of this type would generally (although perhaps not always) be an artificial separation.

[40] Thirdly, in my view this is an instance in which charges may not be able to be laid separately without undesirably lengthening the indictment. Should it be found that Talley's ought reasonably to have taken all of the steps listed, I would not consider it an appropriate outcome for them to be found guilty of 15 separate charges.

[41] In part these considerations arise due to the fact that the offence charged is a breach of a duty arising from omissions rather than multiple discrete positive acts. A similar issue arises in relation to charges for ill-treatment or neglect likely to cause unnecessary suffering of a child.[7] Like that charge, ss 6 and 50 of the HSEA require an evaluation of evidence to determine whether or not the accused's conduct amounts to breach of duty. The Court of Appeal in *R v Mead* was of the view in respect of s 195 of the Crimes Act that separate charges for separate instances of neglect were not required:[8]

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7 Crimes Act 1961, s 195.

8 *R v Mead* [2002] 1 NZLR 594 at [73]–[74].

> The fact that the evidence may disclose a number of forms or incidents of ill-treatment does not alter this basic principle… The core of the offence lies in the cruelty, not the particular form it may have taken.
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> Crucially, however, the notion that the evidence in cases of cruelty under s 195 will fall into a number of discrete incidents is artificial and divorced from reality… For the most part ill-treatment for the purposes of the section will comprise a course of conduct on the part of the parent or guardian. It will be an accumulation of incidents extending over a period of time. Some incidents will be less serious than others and, standing alone, not necessarily amount to ill-treatment. What the jury is required to do is examine the evidence and be satisfied that the Crown have established beyond reasonable doubt that the course of conduct or accumulation of incidents constitutes wilful ill-treatment… For the purpose of s 195 there is one crime, notwithstanding that there have been a number of incidents extending over a period of time.

[42] I am satisfied for these three reasons that separate charges for each step were not required.

*Particulars*

[43] However, that is not the end of the matter in relation to s 17. Section 17(4) requires that:

> A charge must include sufficient particulars to fully and fairly inform the defendant of the substance of the offence that it is alleged that the defendant has committed.

[44] As Judge Maze pointed out, s 17 aims to provide sufficient information required for a fair trial. Under s 18, a Court may order the prosecutor to provide further particulars of any document, thing or other matter relevant to setting out the charge if that is necessary for a fair trial. This clearly anticipates that the charge should include information necessary for a fair trial. This reflects the fair trial right enshrined in s 24 of the New Zealand Bill of Rights Act 1990, which includes specifically that every person charged with an offence shall be informed promptly and in detail of the nature and cause of the charge.

[45] The charge in this instance contained sufficient specifics to identify the date and the place of the alleged offence, and that it related to a Yale forklift, but provided no details of the offence itself beyond merely restating the statutory offence of

failing to take all reasonable steps. I am in agreement with Judge Maze that further particulars are required in this instance.

[46] The relevant principles were set out in *Police v Wyatt*.[9] That case dealt with the correct interpretation of s 17 of the Summary Proceedings Act, but the principles apply equally to s 17(4):[10]

> A requirement stated in the general terms of s 17 cannot be reduced to a mere list of particulars which is to be common in all charges. Obviously the degree of particularity needed to inform a person adequately of the substance of a charge must vary according to the nature of the offence. I point out that it is the substance, the essence or pith, of the charge which must be revealed by the particulars, not the details relied upon to establish the charge. It will, I think, be readily apparent that in some cases only a few particulars will be necessary to convey the substance. In others, especially where the offence is a complex one… more will be required.

[47] To fully and fairly inform the defendant of the substance of the offence that is alleged, the particulars must include identification of the act or omission that contravenes the statute. This may require less particularisation where the offence alleged consists of an act rather than an omission. The charging document in this instance informed the defendant only that they had allegedly failed to do some act(s), but not which act. The vague wording of the charging document results in an outcome where the defendant is not informed as to what they are required to defend; they must either guess the alleged failings, or attempt to defend perfection. Neither outcome is acceptable. The defendant must be informed of the particular failing so that they are able to prepare their case and identity any defences relevant to each failing.

[48] A similar outcome was reached by the High Court of Australia in *Kirk v Industrial Relations Commission of New South Wales*, cited by Judge Maze. The Court held:[11]

> The common law requires that a defendant is entitled to be told not only of the legal nature of the offence with which he or she is charged, but also of the particular act, matter or thing alleged as the foundation of the charge… In more recent times the rationale of that requirement has been seen as lying

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9 *Police v Wyatt* [1966] NZLR 1118.

10 At 1133.

11 *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1, (2010) 239 CLR 531 at [26] (footnotes omitted).

> in the necessity of informing the court of the identity of the offence with which it is required to deal and in providing the accused with the substance of the charge which he or she is called upon to meet. The common law requirement is that an information, or an application containing a statement of offences, "must at least condescend to identifying the essential factual ingredients of the actual offence".

[49] The steps that Worksafe alleges the defendant has failed to take comprise the substance or essence of the charge. Without that information, it is not clear what the defendant has failed to do. Judge Maze referred to the comment in *Kirk v Industrial Court* that without such particulars the Court would act as an administrative commission of inquiry rather than undertake a judicial function.[12] This reflects the breadth of the acts or omissions which could be encompassed in the vague wording of the charge. This is distinct from the situation in *Police v Wyatt* in which the information specified that the defendant had driven carelessly on a particular road at a particular time. There, the substance of the act which was to be proved against the defendant was clear: that he had driven carelessly. Here, the charge could encompass all manner of acts or omissions by the defendant.

[50] Accordingly I agree with the Judge's conclusions that s 17(4) requires each practicable step relied upon by the prosecution to be set out in the charging document.

**Was the Judge correct in concluding that a miscarriage of justice had occurred so as to make s 379 inapplicable?**

[51] Section 379 is a savings provision that protects proceedings from being dismissed for want of form so long as the deficiency of form does not give rise to a miscarriage of justice. It replicates s 204 of the Summary Proceedings Act 1957 in respect of the CPA.

[52] The leading authority on interpretation of the provision is the Supreme Court decision *Dotcom v Attorney-General*.[13] Judge Maze did not refer to *Dotcom* in her decision, although I note that no argument referring to that case appears to have been advanced before her. The case includes discussion of s 204 of the Summary

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12 At [83].

13 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745.

Proceedings Act 1952, which as the Court pointed out was carried across to s 379 with no relevant change.[14] Relevantly, the Supreme Court held:[15]

> The court's approach should not be a technical or mechanical one, and even relatively serious defects may receive the protection of s 204 [now s 379]. Where a court concludes that the relevant document or process is not a nullity on account of the particular defect(s), the question whether s 204's protective effect is available depends on whether that will involve a miscarriage of justice. That will be determined by whether or not the particular defect has caused significant prejudice to the person affected. In considering whether there is such prejudice, where defects on the face of a search warrant are alleged, the court is entitled to have regard to the context of surrounding circumstances to see whether they alleviate the potential effect of any such deficiencies or whether prejudice remains.

[53] The test clearly requires evidence of actual prejudice against the defendant, rather than a plain breach of rights without consequences. The impact of a defect, irregularity, omission or want of form must be assessed against the circumstances. A contextual approach may require considering the defendant's actions in response to the defect.[16] Thus there may be prejudice in one case but not another, even though the defect in each case is identical.[17] The Supreme Court affirmed the state of affairs described in *Andrews v R* that "the courts have shown a willingness to use s 204 robustly, even in relation to serious defects".[18]

[54] Judge Maze referred to extra-judicial commentary from New Zealand, the UK and Canada before concluding that if a "breach of rights is significant and achieved in breach of statutory requirements in a way which cannot be said to be a mere slip, or an inadvertent error made in the context of what is otherwise a diligent approach, then that must be relevant to unfairness".[19] I am of the view that this aspect of the Judge's assessment was wrong. The breach of rights, no matter whether the result of a mere slip or not, must result in significant prejudice to the defendant to make s 379 inapplicable.

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14 At [128].
15 At [129].
16 *Hall v Ministry of Transport* [1991] 2 NZLR 53 (CA) at 56.
17 *Dotcom v Attorney-General*, above n 13, at [120], citing *Police v Thomas* [1977] 1 NZLR 109 (CA) at 122 per Cooke J.
18 *Andrews v R* [2010] NZCA 467 at [42], cited in *Dotcom v Attorney-General*, above n 13, at [128].
19 At [46].

[55] Having regard to the context of the case, the failure to provide particulars within the charging document plainly did not lead to significant prejudice to the respondent. This is due to the summary of facts that was provided along with that charging document. The consequence of the summary of facts was that Talley's must be taken to have been aware of the omissions alleged from that point, and thus was fairly informed of the allegations. This reduced the seriousness of the defect in the charging document. It also reduced the practical impact, in that the respondent was able to commence preparation of their defence with some focus; they did not have to defend perfection but could deny the allegations set out in the summary of facts as though they were particulars. In this sense the provision of the summary of facts has acted to alleviate the potential impact of the deficiencies in particulars by functioning effectively as particulars.

[56] Katz J reached a similar decision in *Stewart v Police*. While not related to the HSEA, the case similarly involved generic charges which "[v]iewed in isolation [did not] include sufficient information to adequately inform [the defendant] of the charges she was facing".[20] While the informations referred to the relevant section, the date and the person against whom the offence was alleged, they did not refer to the particular act or weapon used, nor could the charges be distinguished from one another.

[57] However, as here, the charging document was accompanied by a summary of facts. Katz J held:[21]

> Accordingly, from a practical perspective, the relevant particulars were provided, albeit not on the face of the informations themselves. In addition, full disclosure was provided by the police prior to trial. Taking all of these matters into account the appellant cannot, in my view, have been under any misapprehension as to the case she was required to meet.

[58] Accordingly, Katz J held that no miscarriage of justice resulted from the deficiencies in particulars, and therefore s 204 applied to save the charging document. I am satisfied that the same logic should apply to the deficient charging document here.

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[20] *Stewart v Police* [2013] NZHC 2846 at [18].
[21] At [25].

[59] This is not to defend the use of the summary of facts in such a way. I am in agreement with Judge Maze that reliance on a summary of facts to provide particulars is not acceptable practice; it is saved in this instance only by s 379. That the problem with the particulars here appears to be Worksafe's general practice is inappropriate and unsatisfactory. I further note my agreement with Judge Maze's observation that the inclusion of the vague and uncertain phrase "including but not limited to" when specifying the steps the defendant allegedly failed to take was unhelpful.

[60] My discussion thus far relates only to the prejudice arising from the initial absence of particulars, ameliorated by the accompanying summary of facts that functioned effectively as particulars. It does not address the alleged prejudice arising from Worksafe's subsequent actions of altering the summary of facts, extending the alleged failings from four to 15. In my view the prejudice alleged by the defence and identified by Judge Maze relates largely to this consequence of the deficient particulars.

[61] Had the particulars been correctly contained in the charging document as required by s 17 of the CPA, rather than included in the accompanying summary of facts, Worksafe would have been required to apply to the Court under s 133 of the CPA in order to amend them. The courts have generally taken a permissive approach to this section and its predecessor, but the ultimate purpose of the discretion is to provide for the interests of justice.[22] If Worksafe had correctly included the particulars, they would have had to satisfy the Court the amendment was appropriate. Worksafe should not be able to avoid this provision due to the deficiencies in their original charging document. If they are to receive the benefit of that portion of the summary of facts being treated as particulars, they must also wear the consequences. This is no higher a burden on them than they would have faced had their charging document been correctly particularised.

[62] The existence of s 133 also rebuts Worksafe's argument that illegitimate prejudice cannot arise as a result of a shifting prosecution case. Worksafe submits

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[22] See, for example, *Campbell v Police* [1990] 3 NZLR 9; see also *Deliu v National Standards Committee* [2014] NZHC 2739 at [35]–[36].

that prejudice cannot arise because if so the prosecution would be precluded from ever strengthening its case after charging a defendant. Quite clearly the impact a change in the prosecution case will have on the fairness of the trial varies hugely depending on the circumstances. Altering the elements of the offence alleged proximate to trial may certainly sometimes give rise to prejudice, hence the existence of the discretion under s 133.

[63] Accordingly, while I do not consider the charging document invalid by dint of s 379, the prosecution is limited to the particulars set out in the summary of facts disclosed to the defendants at the time of that charging document as if they were particulars in a charging document. If the prosecution wishes to enlarge the scope of the omissions alleged against the defendant, it must apply to the District Court under s 133 of the CPA and abide by the Court's decision.

[64] Accordingly, I find that Judge Maze identified and applied the incorrect legal test under s 379. Under the correct test, the charge should not have been dismissed. However, the charge is confined to the details functioning as particulars originally set out in the summary of facts.

**Is a stay of proceedings appropriate?**

[65] In the instance that s 379 saved the charge, the defence applied for a stay of proceedings as a result of prosecutorial abuse of process in the alternative. There are two categories of abuse of process which may render a stay appropriate:[23]

(a) Where the prosecutor's conduct renders a fair trial impossible; or

(b) Where the prosecutor's conduct is of a kind so inconsistent with the purposes of criminal justice that proceeding with the trial would tarnish the court's own integrity or offend the court's sense of justice and propriety.

[66] The power to stay criminal proceedings should not be exercised lightly: [24]

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[23] *F v The District Court at Hamilton* [2015] NZCA 600 at [1].
[24] *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [31].

> The Courts traditionally have been reluctant to interfere with decisions to initiate and continue prosecutions. In part this is because of the high content of judgment and discretion in the decisions that must be reached. But perhaps even more so it also reflects constitutional sensitivities in light of the Court's own function of responsibility for conduct of criminal trials. This reluctance to interfere on the ground that the prosecution is thought to be inappropriate is widely apparent in the common law jurisdictions.

[67] The appellant submits that Judge Maze was of the view that a stay of proceedings was an available outcome as a result of the prejudice arising from delay. That would fall within the first category of abuse of process. The first category is concerned with a 'fair trial', being one which "adequately protects the defendant from a wrongful conviction".[25] The Supreme Court has emphasised that a stay of proceedings under this head does not focus on misconduct by the prosecution, nor on a desire to discipline the prosecution for conduct the Court considers undesirable, but on the impact of the misconduct on the fairness of the trial.[26]

[68] In my view, this case is not one where prosecutorial conduct has made a fair trial impossible. Any prejudice to the defence would be able to be met by additional time. That has certainly been the case thus far. As the appellant points out, no trial date has been set down. There is nothing to indicate that the resulting delay has had consequences for the defence that will prevent a fair trial.

[69] However, I do not agree that Judge Maze considered a stay of proceedings justified under the first limb of the test as a result of delay. Rather, Judge Maze held:[27]

> I conclude that the conduct of this prosecution is so inconsistent with the purposes of criminal justice that to proceed would tarnish the Court's integrity and/or offend the court's sense of justice and propriety, noting in particular the improper way in which separate and new charges are in effect being introduced to in circumvention of the limitation period. Such an approach is unfair to a defendant but more importantly it is a misuse of the legal processes to flout statutory requirements. I am satisfied, extreme though such a measure is, if required to make an order, I should stay the charge.

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25 Andrew L-T Choo *Abuse of Process and Judicial Stays of Criminal Proceedings* (2nd ed, Oxford University Press, Oxford, 2008) at 18.

26 *Wilson v R* [2015] NZSC 189 at [40].

27 At [57].

[70] Of note, Judge Maze was of the view that Worksafe's charging practice in this instance reflected a general pattern of behaviour. That behaviour amounts to Worksafe using "holding charges" to circumvent the limitation period and thus the intention of Parliament. Judge Maze held that Worksafe was "rely[ing] on its own dilatoriness to claim lack of prejudice". This was unacceptable. Should other prosecution agencies do the same thing, the system would grind to a halt. Thus a stay of proceedings was considered appropriate not because of the unfair impact on the trial, but because of the extent to which Worksafe's conduct was so inconsistent with the principles of criminal justice.

[71] I share many of Judge Maze's concerns. However, I am of the view that Judge Maze's reasoning on this point, which was an argument she recognised she did not strictly need to address in light of her earlier conclusions, included two errors of law.[28] The correct approach to stays of proceedings in the second category was discussed in *Wilson v R*. The Supreme Court held:[29]

> To summarise, when considering whether or not to grant a stay in a second category case, the court will have to weigh the public interest in maintaining the integrity of the justice system against the public interest in having those accused of offending stand trial. In weighing those competing public interests, the court will have to consider the particular circumstances of the case. While not exhaustive, factors such as those listed in s 30(3) of the Evidence Act will be relevant, including whether there are any alternative remedies which will be sufficient to dissociate the justice system from the impugned conduct. In some instances, the misconduct by the state agency will be so grave that it will be largely determinative of the outcome, with the result that the balancing process will be attenuated. The court's assessment must be conducted against the background that a stay in a second category case is an extreme remedy which will only be given in the clearest of cases.

[72] I agree with the appellant's submission that the Judge did not take into consideration the public interest in prosecuting the respondent, as clearly required. Secondly, I am of the view that Judge Maze was plainly wrong that a stay of proceedings was warranted given the extremity of the remedy.

[73] The charges against Talley's, if proved, amount to considerable failings, and allegedly resulted in paralysis for one of their employees. The public has a clear interest in the prosecution of workplace failures, especially when they have such

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28 At [56].

29 *Wilson v R,* above n 26, at [60].

grave consequences. Balanced against this factor is the impact of Worksafe's misconduct on the justice system. In my view, while concerning, the prosecutorial behaviour was not as plainly abusive as Judge Maze concluded. As the appellant points out, there are some decisions from the District Court and High Court that may have led to a misunderstanding of the law on Worksafe's part. At this point I am prepared to give Worksafe the benefit of the doubt. However, if this method of charging were to continue, I consider it could well be open to another judge to conclude that ongoing breaches of s 17 sufficiently tarnished the Court's integrity to warrant a stay of proceedings in a future case.

[74] *Wilson v R* also provides that the Court must have regard to any consequences less than a stay that would dissociate the justice system from the impugned conduct. My earlier conclusion that the absence of appropriate particulars cannot be used to circumvent the limitation period without going through the proper process of applying to amend particulars under s 133 of the CPA provides an alternative that limits the impact of the prosecutorial conduct.

**Conclusion**

[75] My answers to the questions posed are therefore as follows:

(a) **Question 1:** Was the Judge correct to conclude that each practicable step relied upon by the prosecution in terms of an offence under ss 6 and 50 of the Health and Safety in Employment Act 1992 (the HSEA) must form the basis of a separate and specific charge, or (alternatively) must be encompassed in a representative charge, in order to comply with s 17(1) of the Criminal Procedure Act 2011 (the CPA)? **No.**

(b) **Question 2:** Was the Judge correct to conclude that s 17(4) of the CPA requires each practicable step relied upon by the prosecution in terms of an offence under ss 6 and 50 of the HSEA to be set out in the charging document? **Yes.**

(c) **Question 3:** Did the Judge fail to correctly identify the applicable limitation period (under s 54B of the HSEA)? **Yes, as the parties agreed.**

(d) **Question 4:** Did the Judge identify and apply the correct test for determining whether a miscarriage of justice had occurred, in the context of s 379 of the CPA? **No.**

(e) **Question 5:** In light of s 379 of the CPA, was the Judge's conclusion that the defendant had been prejudiced unsupported by any evidence? **Given my answer to Question 4 that Judge Maze did not identify and apply the correct test, I do not consider I need to answer this question.**

(f) **Question 6:** In light of s 379 of the CPA, was the Judge plainly wrong to dismiss the charge against the defendant? **Yes.**

(g) **Question 7:** Did the Judge correctly identify and apply the test for a stay of proceedings on the grounds of an abuse of process (prosecutorial misconduct)? **No.**

(h) **Question 8:** Did the Judge identify and apply the correct test for a stay of proceedings on the grounds of undue delay? In particular, were the Judge's conclusions about prejudice caused to the defendant unsupported by any evidence and plainly wrong? **I do not consider that Judge Maze decided the issue of a stay of proceedings on the grounds of undue delay.**

[76] I allow the appeal insofar as the charge should not have been dismissed.

[77] However, that charge will be confined to the allegations of practical steps that the defendant was said to have failed to take laid out in the summary of facts served with the charging document on 1 December 2015 as though those allegations were particulars. The relevant passage is set out at [13] of this judgment. If the

prosecution wishes to amend or extend the particulars they must apply to the Court under s 133 of the CPA. That is a matter for the District Court.

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Faire J