**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA316/2017**
**[2018] NZCA 587**

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

**CA335/2017**

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

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| Hearing: | 23 April 2018 |
| Court: | Cooper, Winkelmann and Williams JJ |
| Counsel: | J H M Eaton QC and P C Dawson for Talley's Group Limited<br>I R Murray, M L Wong and E F Jeffs for Worksafe New Zealand |
| Judgment: | 14 December 2018 at 3.00 pm |

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal in CA316/2017 is granted.**

**B The application for leave to appeal in CA335/2017 is granted.**

**C The questions of law are answered as follows:**

**Question:**

**(a) Was the Judge correct to find the non-compliant charging document could be saved by reference to s 379 of the Criminal Procedure Act 2011?**

**Answer:**

**Yes.**

**Question:**

**(b) Was the Judge correct to find that an informant's summary of facts could save a non-compliant charging document under s 379 of the Criminal Procedure Act?**

**Answer:**

**Yes.**

**Question:**

**(c) If s 379 of the Criminal Procedure Act could save the non-compliant charging document, was the Judge correct to find that there could be no miscarriage of justice under s 379 unless the defect caused the significant prejudice?**

**Answer:**

**It is unnecessary to answer this question as we have found there was no miscarriage of justice.**

**Question:**

**(d) Was the Judge correct to find that prosecutorial conduct did not amount to an abuse of process warranting a stay of proceedings?**

**Answer:**

**Yes.**

**Question:**

**(e) Was the Judge correct to conclude that s 17(4) of the Criminal Procedure Act requires 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 to be set out in the charging document?**

**Answer:**

**Yes.**

**D The appeal in CA316/2017 is dismissed.**

**E The appeal in CA335/2017 is dismissed.**

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**REASONS OF THE COURT**

(Given by Williams J)

## Introduction

[1] Te Atatū Hēmi worked at a vegetable processing plant in Fairton near Ashburton. The plant is operated by Talley's Group Limited (Talley's). A bulk bin fell from a forklift and struck Ms Hēmi causing her severe injuries. Talley's was charged by WorkSafe New Zealand (Worksafe) with, contrary to ss 6 and 50(1)(a) of the Health and Safety in Employment Act 1992 (HSEA), failing to take all practicable steps to ensure that Ms Hēmi was, while at work, not exposed to hazards arising out of the operation of the forklift at the plant. Worksafe did not provide particulars in its charging document of the practicable steps it says Talley's failed to take.

[2] The issue in this appeal is whether the lack of particulars of those steps in the charging document invalidated the charge. Judge Maze in the District Court found in favour of Talley's.[1] She considered that the charging document was defective in several respects including its failure to provide particulars of the omitted practicable steps; that those defects could not be remedied pursuant to s 379 of the Criminal Procedure Act 2011 (CPA) by later amendment to the charging document; and that, in any event the prosecution should be stayed because to allow it to proceed would amount to an abuse of process.

[3] On appeal by leave to the High Court, brought by Worksafe, Faire J reversed the District Court.[2] He agreed the charging document was defective (though only in relation to its lack of particulars), but held this defect could be remedied under s 379 of the CPA. The Judge considered further that the prosecution was not an abuse of process and that a stay could not be justified.

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1 *WorkSafe New Zealand Ltd v Talley's Group Ltd* [2016] NZDC 23299 [District Court judgment].

2 *WorkSafe New Zealand v Talley's Group Limited* [2017] NZHC 1103, (2017) 14 NZELR 584 [High Court judgment].

[4] Talley's now seeks leave to appeal to this Court on four questions of law. Worksafe seeks leave to appeal on one question. The leave applications and the substantive appeals were heard together.

## Factual and procedural background

[5] Details of the accident giving rise to Worksafe's investigation were succinctly captured by Faire J as follows:[3]

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

[6] The charging document 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 practicable steps to ensure that she was not exposed to hazards arising out of the operation of a Yale forklift.

[7] Section 6 is contained in Part 2 of the HSEA. The section sets out the relevant obligations of employers in respect of employee safety at work. It provides as follows:

> **6 Employers to ensure safety of employees**
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> 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,

[3] High Court judgment, above n 2, at [6].

organisation, processing, storage, transport, working, or use of things—

(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.

[8] Section 2A defines "all practicable steps" in the following terms:

**2A All practicable steps**

(1) In this Act, **all practicable steps**, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to—

(a) the nature and severity of the harm that may be suffered if the result is not achieved; and

(b) the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and

(c) the current state of knowledge about harm of that nature; and

(d) the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each of those means; and

(e) the availability and cost of each of those means.

(2) To avoid doubt, a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.

[9] Section 50(1)(a) is the related offence provision. It provides:

**50 Other offences**

(1) 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); or

…

[10] Section 54B introduces a time limit for the filing of charging documents in relation to HSEA offences. At the relevant time (that is in 2015) it imposed a six-month time limit in these terms: [4]

> **54B Time limit for filing charging document**
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> (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
>
> (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.

[11] It was accepted that Worksafe inspectors became aware of the incident on or shortly after 22 May 2015 when it occurred. The charging document was filed by Worksafe in the Ashburton District Court on 20 November 2015, that is one day before the expiry of the six-month time limit.

[12] The District Court endorsed the charging document with a CRN number and the date and time of the first appearance hearing, and returned it to Worksafe for service. On 1 December 2015 Worksafe served on Talley's the charging document and a summary of facts. Although the charging document provided no particulars of the practicable steps, the summary of facts did. It identified four practicable steps that were not taken. They comprised the failure:

> (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.
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> (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.

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[4] The six-month time bar was subsequently extended to 12 months in s 146(1)(a) of the Health and Safety at Work Act 2015.

(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.

[13] We understand this list of omitted practicable steps was prepared following a preliminary investigation undertaken by a Worksafe inspector prior to filing of the charging document.

[14] On 11 January 2016, Talley's pleaded not guilty.

[15] On 29 April 2016, Worksafe instructed an independent expert to investigate and provide a further report. The report dated 15 June 2016 was received and disclosed to Talley's shortly thereafter. On 20 June 2016, Worksafe advised the Registrar of the District Court that the summary of facts would be amended in light of additional steps identified in the report.

[16] On 26 August 2016, Worksafe served Talley's with an amended summary of facts (the August summary of facts). It contained the following expanded list of omitted practicable steps:

34. The following practicable steps were available to the Defendant and should have been taken:

(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.

(b) To have implemented detailed and effective procedures to separate forklifts and pedestrians/other workers, including but not limited to:

(i) Delineating all areas where forklifts were operating and classifying these areas as an exclusion zone for all pedestrians;

(ii) Creating a physical barrier to prevent interactions between moving forklifts and pedestrians;

(iii) Ensuring forklift movement was stopped before pedestrians entered the exclusion zone;

(iv) Having a maximum of one forklift and its driver in the Paddle Track area of Coolstore One at a time;

(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 BOl in Coolstore 1.

(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.

[17] On 19 September 2016, Talley's applied to stay the proceeding or dismiss the charge on the basis that the August expansion of the prosecution case amounted to an evasion of the six-month time bar on bringing a charge, so was an abuse of process and that the charge as framed did not comply with the requirement in the CPA that Talley's be fully and fairly informed of the substance of the charge it faced.

**District Court decision**

[18] Judge Maze accepted Talley's argument and dismissed the charge.[5] The Judge identified three defects in the charging document. First, the charge was in relation to events occurring "on or before 22 May 2015". The Judge held that the Court could not have recourse to events occurring before 20 May 2015 as they were time barred.[6] It is common ground that this conclusion was in error as the trigger event in s 54B is not the offending but the date upon which the incident became known or ought reasonably to have been known by an inspector.

[19] Secondly, the Judge found that the 15 omissions referred to in the August summary of facts alleged 15 different offences. Since the charge was not representative, the proceeding breached s 17(1) of the CPA, requiring that each charging document disclose a single offence.[7]

[20] Thirdly, the Judge agreed with Talley's that the charging document itself did not contain sufficient particulars to fully and fairly inform Talley's of the substance of the offence with which it is charged.[8] This meant the charging document did not comply with s 17(4) of the CPA.

[21] The Judge concluded that, while the charging document was not a nullity, the defects were not saved by the effect of s 379 of the CPA which, as we shall see, allows the Court to ignore a defect, omission or want of form unless there has been a miscarriage of justice.[9] The Judge concluded that, in this case the defects would

5 District Court judgment, above n 1, at [61].
6 At [20].
7 At [35].
8 At [35].
9 At [54].

occasion such a miscarriage.[10] The relevant factors were cumulative.[11] In relation to the charging document, they included alleging multiple offences in breach of s 17(4) of the CPA and purporting to charge for conduct outside the six-month time bar.[12] The provision of particulars through the summary of facts was also criticised: the significant change in the scope of the prosecution after the August amendment to the summary of facts occasioned prejudice to the defendant's right to a prompt trial and certainty of the case against it.[13] Furthermore, the Judge was troubled by the fact that the practice of post-plea expansion of the prosecution case through the summary of facts was standard Worksafe procedure.[14] For the same reasons the Judge considered Worksafe had abused the processes of the Court and a stay would have been granted even if the defects could have been remedied pursuant to s 379 of the CPA.[15]

**High Court decision**

[22] Worksafe sought leave to appeal to the High Court. It posed eight questions of law which Faire J reduced to the following:[16]

> (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?

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10 At [54].
11 At [54].
12 At [54(a) and (b)].
13 At [54(d)–(f)].
14 At [54(h)–(k)].
15 At [56].
16 High Court judgment, above n 2, at [28].

[23] The Judge concluded that the offence of failing to take all practicable steps anticipated a single charge which could include many steps.[17] A representative charge was not required.

[24] However, the Judge agreed with the District Court that s 17(4) of the CPA requires each practicable step relied upon to be set out in the charging document as this was necessary to "fully and fairly inform the defendant of the substance of the offence" as required by that subsection.[18]

[25] The Judge then applied s 379 of the CPA to determine whether that defect was fatal. He concluded that it was not.[19] This was because sufficient particulars were provided in the summary of facts served with the charging document on 1 December 2015.[20] Implicit in the Judge's reasoning was that the summary of facts met the s 17(4) standard, even if the charging document did not. While the Judge accepted that the practice of providing particulars in the summary of facts was neither appropriate nor acceptable,[21] Talley's could not point to actual prejudice sufficient to establish a miscarriage of justice as required by s 379 because the company had, from the outset, been fully and fairly informed of the substance of the offence.[22]

[26] The Judge did not however consider that Worksafe could then rely on the expanded list of omissions provided in the August summary of facts.[23] He held that had such an expansion been by way of amendment to the charging document, an application under s 133 of the CPA would have been required.[24] He held that Worksafe should not be able to avoid court oversight by providing particulars outside the charging document.[25]

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17 At [37]–[42].
18 At [47].
19 At [64].
20 At [55].
21 At [59].
22 At [55].
23 At [63].
24 At [63].
25 At [63].

[27] Finally, the Judge concluded that this was not a case where a stay due to prosecutorial abuse of process was warranted.[26] He considered that a stay was an extreme remedy that could not be justified in light of the counterveiling public interest in prosecuting the respondent.[27] Further, Worksafe's standard approach to the preparation of charging documents to HSEA prosecutions, while troubling, was perhaps understandable in light of the fact that the courts had uncritically accepted the practice in the past.[28] But he sounded a note of caution:

> [73] … 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.

**Questions of law**

[28] Talley's seeks leave to appeal on the following four questions of law:

(a) Was the Judge correct to find the non-compliant charging document could be saved by reference to s 379 of the CPA?

(b) Was the Judge correct to find that an informant's summary of facts could save a non-compliant charging document under s 379 of the CPA?

(c) If s 379 of the CPA could save the non-compliant charging document, was the Judge correct to find that there could be no miscarriage of justice under s 379 unless the defect caused significant prejudice?

(d) Was the Judge correct to find that prosecutorial conduct did not amount to an abuse of process warranting a stay of proceedings?

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26 At [73].
27 At [72].
28 At [73].

[29] Worksafe seeks leave to appeal on the following question of law:

(a) 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?

[30] We find it convenient to arrange our analysis under the following headings:

(a) Leave to appeal;

(b) Is the charging document defective due to the omission of relevant particulars?

(c) If yes, does this render it a nullity?

(d) If the charging document is defective but not a nullity, does s 379 of the CPA save it from invalidity?

(e) Should the prosecution be stayed in any event as an abuse of the courts' processes?

**Leave to appeal**

[31] We are satisfied that the issues raised in both appeals concern matters of general or public importance in terms of s 223(3)(a) of the CPA. Those issues relate to the prosecutorial practices of Worksafe both in this particular case and more generally. Leave is granted accordingly to bring both appeals.

**Is the charging document defective due to the omission of relevant particulars?**

[32] Section 16 of the CPA sets out the required content of a charging document. It provides:

> **16 Charging documents**
>
> (1) The charging document must contain 1 charge only.
>
> (2) The charging document must include—

(a) particulars of the defendant; and

(b) particulars of the person commencing the proceeding; and

(c) a statement by the person commencing the proceeding that he or she has good cause to suspect that the defendant has committed the offence specified in the charge; and

(d) particulars of the charge that satisfy the requirements of section 17; and

(e) except if the prosecution is a private prosecution brought by an individual,—

(i) the name of the prosecuting organisation; and

(ii) the particulars of an appropriate contact person in relation to the prosecution; and

(f) any other information required by rules of court.

[33] Section 17 then sets out the required content of the charge itself. Section 17(1) and (4) provide:

**17 Content of Charge**

…

(1) A charge must relate to a single offence.

…

(4) A charge must contain sufficient particulars to fully and fairly inform the defendant of the substance of the offence that it is alleged that the defendant has committed.

…

[34] Three further provisions must be mentioned as necessary context at this point. Section 18 empowers the court to order the prosecution to provide further particulars to ensure a fair trial:

**18 Court may order further particulars**

(1) A court may, if satisfied that it is necessary for a fair trial, order that further particulars of any document, person, thing, or any other matter relevant to setting out the charge against the defendant be provided by the prosecutor.

(2) Nothing in subsection (1) limits the power of a court under section 133.

[35] Section 133 allows the court to amend particulars in a charging document at any time prior to verdict:

> **133 Amendment of charge**
>
> (1) A charge (including any of the particulars required to be specified in a charging document under section 16(2)) may be amended by the court at any stage in a proceeding before the delivery of the verdict or decision of the court.
>
> (2) The amendment may be made on the court's own motion or on the application of the prosecutor or the defendant.

[36] Finally, reference must be made to s 379 which was very much the focus of the decisions in the District Court and High Court. It is designed to save defective charging documents provided there has been no miscarriage:

> **379 Proceedings not to be questioned for want of form**
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> 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.

*Submissions*

[37] Worksafe submitted that the charging document complied with the requirements of s 17(4) of the CPA. It conveyed the "essence or pith" of the charge in that it identified:

> (a) the incident to which the offence related and the date it occurred;
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> (b) the place where the alleged offence occurred;
>
> (c) the nature of the relevant hazard; and
>
> (d) the relevant omission, being a failure to take all practicable steps.

[38] Worksafe submitted that there was no need to set out the actual steps as they are better characterised as details relied upon to establish the charge, rather than necessary particulars.

*Analysis*

[39] The requirement in s 17(4) of the CPA, that particulars in a charging document be sufficient to fully and fairly inform the defendant of the substance of the charge, is of long-standing. It is materially identical to the previous requirement in s 17 of the Summary Proceedings Act 1957. In *Police v Wyatt* McCarthy J explained the required standard in these terms:[29]

> A requirement stated in the general terms of s 17 [of the Summary Proceedings Act] 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.

[40] In this case, as noted, the charging document alleged that Talley's had "failed to take all practicable steps to ensure that … [Ms Hēmi] was not exposed to hazards arising out of the operation of a Yale forklift". The focus of the charge was implicitly s 6(d)(i) of the HSEA, relating to the avoidance of exposure to "hazards arising out of the arrangement, disposal, manipulation, organisation, processing, storage, transport, working, or use of things in [the employee's] place of work." Particulars were provided of the date and place of the incident, the identity of the injured employee and the machine, the operation of which was the immediate cause of Ms Hēmi's injury. But there were no particulars of the practicable avoidance steps Talley's had failed to take.

[41] The practicable steps Worksafe alleges should have been taken are more than the details upon which it relies to prove the charge. Rather, they are its very pith and essence. Given that the charge is one of failing to take all practicable steps to prevent Ms Hēmi from exposure to workplace hazards, those steps formed the substance of the offence. It follows that particularisation of the practicable steps Worksafe charges that Talley's failed to take is necessary to "fully and fairly inform the defendant of

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[29] *Police v Wyatt* [1966] NZLR 1118 (CA) at 1133.

the substance of the offence" alleged to have been committed.[30] The level of detail required may be a matter of debate, but the point is, *some* detail is required. The charging document in this case is defective because it contained no detail at all.

**Is the charging document a nullity?**

*Submissions*

[42] Talley's argued that the failure to include details of the practicable steps that had been omitted, meant the charging document was not just defective, but a nullity. This meant it was incapable of being saved by s 379 of the CPA. It was argued that a distinction must be drawn between formal or procedural irregularities to which s 379 is directed and substantive defects relating to integral and important elements of the relevant offence. The latter are outside the ambit of that section. This it was suggested, is particularly important with offences of omission because the spectrum of possible omissions is inherently wide in contrast to offences of commission.

[43] Talley's placed emphasis on the High Court of Australia's decision in *Kirk v Industrial Court (NSW)*, a case about a workplace accident.[31] The majority found that the prosecution's failure to include particulars of the relevant omissions to provide a safe workplace meant no offences were disclosed and convictions should not have been entered.[32] Talley's argued that, as in the present case, the prosecution in *Kirk* had done no more than repeat the statutory offence formula in the form of particulars. The Court found that, in the context of the particular statute, this had prejudiced the appellant.[33]

*Analysis*

[44] The early English and subsequent Australian cases say, in various ways, that particulars of the essential acts or omissions said to comprise the offence are required for a valid charge.[34] Such requirement was consistently justified by reference to

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30 Criminal Procedure Act 2011, s 17(4).
31 *Kirk v Industrial Court (NSW)* [2010] HCA 1, (2010) 239 CLR 531.
32 At [34].
33 At [38].
34 See for example *Smith v Moody* [1903] 1 KB 56; *Johnson v Miller* (1937) 59 CLR 467; *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508.

the need to properly inform the defendant of the true nature of the charge, or, in the case of the early English authorities, the concern that a charge couched in generalisations would make it too difficult for the decider of fact to identify what the prosecution is required to prove.[35] In the end, both explanations reflected the need to guard against the risk that justice might miscarry.

[45] In New Zealand, such considerations have tended to be dealt with under s 379 of the CPA (or its predecessors),[36] where miscarriage must be established in order to invalidate a defective charge. This means that New Zealand courts have tended to be less strict on the prior question of nullity. A charging document will be a nullity if it fails to disclose an offence,[37] or a defendant,[38] or is so unintelligible that the nature of the offence cannot be ascertained.[39] Such will also be the case where the charge lacks a required statutory consent,[40] or is out of time.[41] To void a charging document therefore, relevant defects must be so radical as to deprive the document of its essential character.[42] Technical or mechanical defects will not suffice,[43] and the courts will be slow to reach such a "drastic conclusion".[44] It follows that even serious defects will be protected by s 379 of the CPA if, despite the impugned defect, the document nonetheless discloses a recognisable charge, a recognisable defendant, (where necessary) is in time and is supported by statutory consents. But if one or more

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35 *Smith v Moody*, above n 34, at 60.

36 Section 379 of the CPA replaced s 204 Summary Proceedings Act 1957. Section 204 provided:

> **204 Proceedings not to be questioned for want of form**
>
> No information, complaint, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding shall be quashed, set aside, or held invalid by any District Court or by any other 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.

The explanatory note to the Summary Proceedings Bill 1957 (87–1) provides that s 204 "re-enacts the existing provisions that proceedings are not to be questioned for want of form, unless the Court is satisfied that there has been a miscarriage of justice." The "existing provisions" referred to were ss 4–6 of the Inferior Courts Procedure Act 1909, ss 79 and 373 of the Justices of the Peace Act 1927 and s 11 of the Summary Jurisdiction Act 1952. We note that none of these provisions refer to "miscarriage of justice". The Supreme Court noted in *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [117] that the reference to "miscarriage of justice" was "entirely new", citing *R v Kestle* [1973] 2 NZLR 606 (CA).

37 *Muirson v Collector of Customs* [1982] 2 NZLR 506 (HC).

38 *Ministry of Transport v The Cash Oat Co of Christchurch Ltd* CA81/83, 20 February 1984.

39 *Police v Walker* [1974] 2 NZLR 418 (SC) at 420.

40 *R v O'Connell* [1981] 2 NZLR 192 (CA), although consent of the relevant approval authority was inferred from the facts in that case.

41 *Hall v Ministry of Transport* [1991] 2 NZLR 53 (CA) at 57.

42 At 58.

43 *Dotcom v Attorney-General*, above n 36, at [129].

44 *Hall v Ministry of Transport*, above n 41, at 57.

of these elements is missing, "there is nothing before the Court capable of rectification".[45] That said, the dividing line between nullity and mere irregularity is not always a bright one. Whether the defect goes to the very heart of a charging document will sometimes be a matter of degree almost always informed by the risk of a miscarriage of justice.[46]

[46] The New Zealand cases have generally accepted that insufficient particulars of a charge will not render it void if there are *some* particulars provided. In *Wiley v R* particulars of an abduction charge did not identify which of the three possible forms of abduction in s 210(1) of the Crimes Act 1961 was alleged.[47] This Court focussed not on nullity but on fairness to the defendant.[48] It considered the transcript of discussions during the trial made it clear that the defence was well aware of the Crown's stance.[49] There was no unfairness, and the conviction was upheld. Similarly a lack of particulars in a murder charge was considered by this Court in *Fungavaka v R* where the charge provided simply that the defendant murdered the victim on 20 August 2013 at Kaitaia.[50] Although the particulars were inappropriately spare, this Court was satisfied that all relevant details were provided in the summary of facts and that was sufficient to prevent a miscarriage.[51] The Supreme Court upheld that finding in a subsequent leave decision.[52] There was no suggestion of nullity.

[47] As Worksafe noted in argument in this case, the preference of the New Zealand courts to take a trial fairness rather than a nullity approach to sufficiency of particulars is consistent with the court's discretion in s 18 of the CPA to require further particulars to ensure a fair trial.

[48] The High Court of Australia's decision in *Kirk*, upon which Talley's appeal relied to a great extent, involved a farming accident in New South Wales. The farm

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45 *Best v Watson* [1979] 2 NZLR 492 (CA) at 494.
46 *Police v Walker*, above n 39, at 420.
47 *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1.
48 At [98].
49 At [98].
50 *Fungavaka v R* [2017] NZCA 195.
51 At [11].
52 *Fungavaka v R* [2017] NZSC 119 at [5].

was owned by Kirk Group Holdings Pty Ltd (Kirk Group) and run by a manager. The manager was killed when an All-Terrain Vehicle he was operating overturned. Mr Kirk was a director of Kirk Group. He had no farming expertise, was in any event, in poor health, and did not participate in the day to day operation of the farm.

[49] Kirk Group was convicted of failing to ensure the health, safety and welfare at work of the manager in contravention of s 15 of the Occupational Health and Safety Act 1983 (NSW) (the Act), and failing to ensure that four fencing contractors (who were fencing on the farm at the time) were not exposed to risk of injury in contravention of s 16 of that Act.

[50] Mr Kirk was convicted of the same offences pursuant to s 50 of the Act. That section deemed each director of the company to have contravened any provision of the Act also contravened by the company, unless the director could satisfy the court that he or she had no influence over the company in relation to the contravention, or if he or she did have influence, all due diligence was used to prevent it. In addition, s 53(a) provided that it was a defence for both Kirk Group and Mr Kirk if they could prove it was not reasonably practicable to comply with the relevant provision.

[51] The particulars of the offence were stated in relatively general terms in the formal document that in New Zealand would have been the charging document. We would note however that the particulars were more detailed than the charging document served on Talley's.[53]

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[53] Particulars of the offence in relation to the death of the manager were as follows:

The particulars of the offence are that the Defendant failed to:

i. provide or maintain systems of work that were safe and without risks to health in relation to the operation of the Polaris All Terrain Vehicle ('ATV');
ii. provide such information, instruction, training and supervision as may be necessary to ensure the health and safety at work of its employees in relation to the operation of the Polaris All Terrain Vehicle ('ATV');
iii. to take such steps as are necessary to make available in connection with the use of any plant (namely the ATV) at the place of work adequate information about the use for which the plant is designed and about any conditions necessary to ensure that, when put to use, the plant is safe and without risks to health;
iv. ensure that the Polaris All Terrain Vehicle ('ATV') was only operated by persons with appropriate training.
v. adequately identify, assess and control risks and hazards in relation to the operation of the ATV on the farm.

In relation to the four contractors, the following particulars were provided:

The particulars of the charge are that the Defendant failed to:

[52] The majority of the Court found that these particulars simply repeated the relevant provisions of ss 15 and 16 of the Act. The Court observed:[54]

> The statement of the offence against s 15(1) did little more than follow the words of that sub-section. The first three particulars provided of the offence simply combined the words of s 15(2)(a), (c) and (f) with a reference to the ATV. Likewise the first particular relating to the s 16(1) offence repeated the words of that sub-section and merely connected them to the operation of the ATV. Of the other two particulars provided to each charge, only that which alleged a failure to ensure that the ATV was operated by persons with appropriate training came close to any measure of specificity.

[53] The Court considered that Mr Kirk and the Kirk Group were entitled to be informed in the formal charging document of the time, place and manner of the defendant's acts or omissions.[55] The charges in this case failed to satisfy the last of those three requirements. The Court said:[56]

> It is also necessary for the prosecutor to identify the measures which should have been taken. If a risk was or is present, the question is — what action on the part of the employer was or is required to address it? The answer to that question is the matter properly the subject of the charge.

[54] The Court found that the New South Wales Industrial Court lacked the jurisdiction to convict Mr Kirk and the Kirk Group for contravention of ss 15 and 16:[57]

> It had no power to do that because no particular act or omission, or set of acts or omissions, was identified at *any* point in the proceedings, up to and including the passing of sentence, as constituting the offences of which Mr Kirk and the Kirk company were convicted and for which they were sentenced.

[55] On its face, the Court's decision appears to stand for the proposition that a failure to provide adequate particulars of relevant omissions to ensure worker safety

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i. ensure that persons not in the employer's employment were not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work in relation to the operation of the Polaris All Terrain Vehicle ('ATV');
ii. ensure that the Polaris All Terrain Vehicle ('ATV') was only operated by persons with appropriate training; and
iii. adequately identify, assess and control risks and hazards in relation to the operation of the ATV on the farm.

54 At [25].
55 At [26], citing *Johnson v Miller*, above n 34, at 486.
56 At [34].
57 At [74] (emphasis in original).

will render a charge a nullity. But this is not the complete picture. The matter proceeded summarily as then required by s 168(1) of the Industrial Relations Act 1996 (NSW). The Supreme Court (Summary Jurisdiction) Act 1967 (the Summary Jurisdiction Act) and the Industrial Relations Commission Rules 1996 (the Rules) controlled the prosecution.[58] Rule 217B(1) of the Rules required proceedings to be commenced by application for an order of the court by way of summons under s 4(1) of the Summary Jurisdiction Act:

> **4 Orders for appearance or apprehension of defendants**
>
> (1) Upon an application being made by any person (in this Act referred to as the ***prosecutor***) in accordance with the rules, a Judge shall make an order:
>
> (a) ordering any person alleged in the application to have committed an offence punishable in the Court in its summary jurisdiction to appear at a time and place specified in the order to answer to the offence charged in the order, or
>
> (b) ordering the apprehension of any such person for the purpose of the person's being brought before a Judge to answer to the offence charged in the order.
>
> …

This application for an order to appear to answer to the offence was the subject of the challenge in *Kirk*.

[56] Section 6(1) of the Summary Jurisdiction Act is the curative provision for any defective order made under s 4(1):

> **6 Defects and variances in process**
>
> (1) No objection shall be taken or allowed to any application referred to in, or to any order or warrant made or issued under, section 4 or 5 by reason of any alleged defect in it in substance or in form or by reason of any variance between it and the evidence adduced at the proceedings for the offence charged in the application or order.
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> …

[57] As can be seen, this provision is of the widest import. It is capable of curing defects in substance as well as form. And it contains none of the limitations present

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58 At [20].

in s 379 of the CPA. It was, however, not deployed by the appellants in *Kirk.* Mr Kirk and the Kirk Group did not apply to quash the defective orders. Rather, they challenged the resulting convictions. That is why the Court noted:[59]

> Because no application was made to quash the orders requiring appearance to answer the charges, it is neither necessary nor appropriate to examine whether those orders were made upon an application made "in accordance with the rules", or to consider whether or how s 6 of the Summary Jurisdiction Act might affect the availability of an order in the nature of certiorari.

[58] For these procedural reasons s 6(1) was not considered by the Court and a finding of nullity was the only means to correct the orders. The decision therefore only stands for the proposition that *absent an applicable curative provision*, a failure to provide adequate particulars of relevant omissions to ensure worker safety will render the charge a nullity. This in turn means that (despite the emphasis placed on the case by Talley's) *Kirk* is not relevant to this case. Here Worksafe has invoked s 379 of the CPA, the applicable curative provision in New Zealand.

[59] A subsequent decision of the New South Wales Court of Appeal in relation to workplace safety appeals suggests our assessment is correct. A brief background explanation is required before turning to those cases.

[60] Since *Kirk*, the Industrial Relations Act (NSW) was amended so that the Summary Jurisdiction Act no longer applied to workplace safety prosecutions. Instead the Criminal Procedure Act 1986 (NSW) applied. That Act contains s 16(2), a curative provision, and s 21 which allows the court to amend defective indictments:

> **16 Certain defects do not affect indictment**
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> …
>
> (2) No objection may be taken, or allowed, to any indictment by which criminal proceedings (including committal proceedings) in the Local Court or for any other offence that is to be dealt with summarily are commenced, or to any warrant issued for the purposes of such proceedings, on the grounds of:
>
> (a) any alleged defect in it in substance or in form, or

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59 At [30].

(b) any variance between it and the evidence adduced at the proceedings for the offence charged in the indictment or warrant.

…

**21 Orders for amendment of indictment, separate trial and postponement of trial**

(1) If of the opinion that an indictment is defective but, having regard to the merits of the case, can be amended without injustice, the court may make such order for the amendment of the indictment as it thinks necessary to meet the circumstances of the case.

…

[61] In *G.P.I (General) Pty Ltd v Industrial Court of New South Wales,* the New South Wales Court of Appeal held that a failure to adequately particularise a charge will not, without more, render it a nullity and that having regard to the provisions of s 16(2) of the Criminal Procedure Act (NSW), defects can be cured by amendment to the charge or subsequent particularisation provided that the charge describes an offence known to law and that the amendment does not cause procedural unfairness to the defendant.[60]

[62] This demonstrates that even after *Kirk*, the approach of the courts in New South Wales to defective charges is in fact broadly similar to that adopted in this country.

[63] Furthermore, even if we have somehow misunderstood the effect of *Kirk,* we consider that the case is contextually distinguishable for the following reasons.

[64] First, s 50 of the Act effectively required Mr Kirk to prove his innocence and s 53 of that Act reversed the onus in relation to matters which would be for Worksafe to prove in New Zealand. The Court in *Kirk* placed considerable emphasis on this aspect of the Act, which, they noted, was unique in workplace safety legislation in Australia:[61]

> The scheme of this legislation stood apart from other legislation of this type in Australia. In other States the employer's obligation, to take measures for

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60 *G.P.I (General) Pty Ltd v Industrial Court of New South Wales* [2011] NSWCA 157 at [32]–[42] per Hodgson JA; and [78]–[80] per Basten JA. See also *Area Concrete Pumping Pty Ltd v Childs (WorkCover)* [2012] NSWCA 208 at [47].

61 At [16].

> the health and safety of employees and others, was limited to the taking of such measures as were practicable. This Court has held that such a provision places the onus upon the prosecution to show that the means which should have been employed to remove or mitigate a risk were practicable. A feature of the legislation here in question is that where an employer is charged with an act or omission which is a contravention of s 15 or s 16, it will be necessary for the employer to establish one of the defences available under s 53 in order to avoid conviction. Where reliance is placed by the employer on s 53(a), it would be necessary for the employer to satisfy the Industrial Court, to the civil standard of proof, that it was not reasonably practicable to take the measure in question. Such a defence can only address particular measures identified as necessary to have been taken in the statement of offence.
>
> (Footnotes omitted.)

[65] Because of the reverse-onus, both the Kirk Group and Mr Kirk were prejudiced by the lack of specificity of the prosecutor, WorkCover's, alleged breaches. The Court considered they would be hampered in discharging the burden of proof placed on them by ss 50 and 53(1)(a) and (b) without first knowing exactly what WorkCover alleged. For example, Mr Kirk (who by the terms of s 50(1) was deemed to have committed the same offence as Kirk Group) would be at a real disadvantage in proving that he had used all due diligence to prevent the breach by Kirk Group if he did not know precisely what the breach was. General claims of unsafe systems, even in respect of specific equipment would not have been sufficient. Materially deficient particulars would be likely to cause a miscarriage in those circumstances.[62]

[66] Second, judgments of the Industrial Court are protected by the privative clause in s 179 of the Industrial Relations Act. The Court was required to find jurisdictional error in order to intervene in any event.

[67] Third, in *Kirk*, Mr Kirk and the Kirk Group had already been convicted and sentenced. The decision does not deal directly with the position where the matter is being considered pre-trial and where defects can be corrected to avoid miscarriage.[63] While there was no issue of a time bar in *Kirk*, there are indications in the judgment that later particularisation (but still prior to verdict) would have been permissible.

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62 Similarly, in *Baiada Poultry Pty Ltd v Gleinster* [2015] VSCA 344 a majority of the Victorian Court of Appeal considered that the principle in *Kirk* should be construed by reference to its statutory context. It pointed out that unlike NSW, the equivalent legislation in Victoria contained no reverse onus provisions.

63 See *G.P.I (General) Pty Ltd v Industral Court of New South Wales*, above n 60, at [50] per Basten JA.

The Court said, "[h]owever, it may be said that the matter should not have proceeded without further particularisation of the acts and omissions said to found the charges."[64]

[68] We conclude that while the charging document was defective because it failed to provide relevant particulars of Talley's omissions, it was not a nullity because there were particulars of time, place and means in the charge. Specifically, the charge referred to the failure to take all practical steps to ensure Ms Hēmi was not exposed to hazards from the operation of the Yale forklift at the site. Though such particular was inappropriately sparse, it was no more so than was the case in *Fungavaka v R*.[65]

**Does s 379 of the CPA save the defective charging document?**

*Submissions*

[69] Talley's argues that s 379 of the CPA does not save this charging document. The following points were made:

(a) Section 379 only applies to technical irregularities and defects in form. It was never intended to save substantive flaws in a charging document.

(b) Worksafe cannot have recourse to the summary of facts served on 1 December 2015 to supplement the defective charging document because it is an informal document without status under the CPA. Further, its preparation is not subject to judicial oversight. Worksafe's ability to amend the summary of facts at will makes it an unstable basis upon which to found a charge and allows Worksafe to circumvent the disciplines of the CPA — particularly s 133.

(c) Reliance on the summary of facts will allow Worksafe to circumvent the important time bar safeguard. The summary of facts was not filed in the District Court at Ashburton and was served on Talley's after the expiry of the six-month limitation period. Even if the charge is not

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64 At [30]. Note also [74] of the judgment where the Court emphasised the prosecutor's failure to provide particulars at "*any*" point in the proceedings (emphasis in original).

65 *Fungavaka v R*, above n 50.

a nullity it cannot be saved by a circumstance (service of the summary of facts) that occurred after the expiry of the time bar.

(d) In any event, to overlook the defect in the charging document would occasion a miscarriage of justice. Talley's has been put to significant unnecessary cost in meeting a case that changed fundamentally eight months after the first summary of facts was served by virtue of an expanded new summary of facts. Further, if Worksafe can provide particulars through its summary of facts, it deprives Talley's of the benefit of the time bar, and that, in itself, is so prejudicial as to amount to a miscarriage of justice. Further, there is also the inherent prejudice in Talley's not knowing with certainty the metes and bounds of the charge it must face.

*Analysis*

[70] We are satisfied that s 379 of the CPA is designed to save the defect in the charging document in this case and Talley's will suffer no miscarriage of justice thereby.

[71] Since we have found the charging document is not a nullity, it cannot be said that s 379 would enable Worksafe to improperly evade the six-month time bar. If a charge is defective but not a nullity, and was filed in time, it will be saved unless ignoring the defect would produce a miscarriage of justice. Cooke P made the same point in *Hall*:[66]

> Mr O'Driscoll said that the commencement of a prosecution out of time would not be within the section. *That must be right, at least if nothing has been done in time which could pass muster as a commencement*; but in such a case it would in any event be a miscarriage of justice to allow the defendant to be prosecuted although entitled to the benefit of a time bar.
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> (Emphasis added.)

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66 *Hall v Ministry of Transport,* above n 41, at 57.

[72] Nor do we consider s 379 of the CPA is designed to save only technical defects or mere irregularities in form. Although that was the view of Elias CJ in *Dotcom*, at least insofar as search warrants are concerned,[67] it was not the view of the majority. To the contrary the majority considered that "even relatively serious defects may receive the protection of s 204 [the predecessor to s 379]".[68]

[73] Further, as the majority noted in *Dotcom*, the assessment of whether justice will miscarry is factual and contextual.[69] All relevant surrounding circumstances may be considered.[70]

[74] In this case, although the charging document served on 1 December 2015 was defective, the particulars provided in the summary of facts that accompanied it gave Talley's sufficient notice of the nature of its alleged failures. The defect was therefore one of form only. That is the particulars were not supplied in the correct form, but they were supplied. It seems to us that s 379 of the CPA is designed for precisely such cases as this.

[75] We accept though that Talley's can argue it will be prejudiced if required to respond to a more complex case than that reflected in the first summary of facts of 1 December 2015. This prejudice (if accepted) is occasioned by the provision of an expanded list of failures in the amended summary of facts of August 2016 which was drafted following the report of the independent expert.

[76] The essence of Talley's complaint in respect of Worksafe's expanded case is that by allowing it to be achieved through an amended summary of facts, Worksafe avoids judicial supervision. Had Worksafe applied under s 133 of the CPA to amend its particulars, instead of simply recasting the summary of facts, the trial court might well have come to the view that such late expansion should not be allowed. But that prejudice (if accepted) can be addressed adequately by means other than invalidating the entire proceeding. Invalidation, in our view, would be a disproportionate response to the prejudice.

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67 *Dotcom v Attorney-General*, above n 36, at [8] and [64].
68 At [129].
69 At [130].
70 At [130].

[77] We find therefore that s 379 of the CPA applies to save the charging document in this case. But the charge will be confined to the particulars set out in the summary of facts served with the charging document on 1 December 2015. We amend the charging document using s 379 to include the summary of facts served with the charging document as particulars of the charge.

[78] If Worksafe wishes to expand those particulars, it must apply under s 133 of the CPA for an order to that effect in the usual way. No doubt the period that has elapsed between expiry of the time limit and Talley's first receiving notice of the substance of such particulars will be a relevant consideration if any such application is made.

**Should the prosecution be stayed as an abuse of process?**

*Submissions*

[79] Quite apart from the application of s 379 of the CPA, Talley's argues that to allow the prosecution to proceed would amount to an abuse of the court's processes. Talley's submits that Worksafe's approach in this case of filing an unparticularised holding charge just before expiry of the time bar and providing particulars later, out of time, is systemic. That is, it is Worksafe's standard charging practice. It is only if a not guilty plea is entered that an independent expert is then instructed to prepare a detailed report. Full particulars are then provided but only by way of amended summary of facts. In this case, they were supplied nine months after the expiry of the time bar. The Court, Talley's submitted, should not abide such systemic and cynical avoidance of statutory protections for defendants.

*Analysis*

[80] The authorities are clear that while the court has the discretion to stay criminal proceedings due to prosecutorial misconduct, this will not be done lightly. A useful summary of the position may be seen in the decision of this Court in *Fox v Attorney-General*.[71] After a careful review of New Zealand, English and Australian authority the full court said this:

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[71] *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [37].

> [37] These principles set a threshold test in relation to the nature of a prosecutor's conduct which warrants a decision to end a prosecution, prior to trial, as an abuse of process. Conduct amounting to abuse of process is not confined to that which will preclude a fair trial. Outside of that category it will, however, be of a kind that is so inconsistent with the purposes of criminal justice that for a Court to proceed with the prosecution on its merits would tarnish the Court's own integrity or offend the Court's sense of justice and propriety. The power of stay is not available for disciplinary purposes nor to reflect a Court's view that a prosecution should not have been brought. The hallmarks of official conduct that warrant a stay will often be bad faith or some improper motive for initiating or continuing to bring a prosecution but may also be simply a change of course by the prosecution having a prejudicial impact on an accused. Finally, to stay a prosecution, and thereby preclude the determination of the charge on its merits, is an extreme step which is to be taken only in the clearest of cases.

[81] In the subsequent Supreme Court decision in *Wilson v R* the majority divided "state misconduct" into the following two categories; first misconduct that will prejudice the fairness of a defendant's trial; and second misconduct that will undermine public confidence in the integrity of the judicial process if a trial is permitted to proceed.[72]

[82] The first category does not arise in this case. We have already concluded in the context of assessing the position with respect to s 379 of the CPA, that there could be no substantive trial unfairness in this case. Talley's received notice of sufficient particulars on 1 December 2015, at the same time as it received the charging document. And, as we have said, the charging document was not a nullity.

[83] The question then is whether provision of necessary particulars by way of summary of facts as a standard charging procedure raises a second category issue. In assessing matters at that level, the majority in *Wilson* provided the following guidance:

> [60] 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

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72 *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705 at [40].

> 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.

[84] While it is a matter of concern that Worksafe has adopted a flawed charging practice, we do not consider it to be so egregious as to undermine public confidence in the integrity of the judicial process. The practice has, it seems, continued unremarked upon by trial courts for some time. Worksafe refers, for example, to the following prosecutions: *WorkSafe New Zealand v Department of Corrections*; *WorkSafe New Zealand v Ministry of Social Development*; *WorkSafe New Zealand v Avon Industries Ltd*; and *WorkSafe New Zealand v Ask Metro Fire Ltd*.[73]

[85] Of course, irregularity cannot be excused because it is commonplace. But it does support Worksafe's contention that it did not realise its charging practice was impermissible. In any event, there is no suggestion of actual bad faith, and Worksafe has now indicated that, the law having been clarified by Faire J (and this Court on appeal), necessary particulars will henceforth be provided, in time, and on the face of the charging document. As is made clear in *Wilson*, the sanction of a stay is primarily aimed at prospective correction in the case of systematic misconduct, and this must particularly be the case where the impugned conduct was in good faith.[74] Relatedly, *Wilson* requires a balancing of the public interest in ensuring charging practices are not unlawful, and that in ensuring that those accused of offences stand trial.[75] In the circumstances of this case and Worksafe's (now former) charging practice, we have no doubt that the balance must fall on the side of bringing those accused of offences to trial.

[86] We find that this is not one of the "clearest of cases" in which the "extreme remedy" of a stay can be justified.[76]

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73 *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 18502; *WorkSafe New Zealand v Ministry of Social Development* [2016] NZDC 12806, (2016) 14 NZELR 318; *WorkSafe New Zealand v Avon Industries Ltd* [2016] NZDC 2173; and *WorkSafe New Zealand v Ask Metro Fire Ltd* [2017] NZDC 4651.

74 *Wilson v R*, above n 72, at [40].

75 At [60].

76 *Wilson v R*, above n 72, at [60].

**Result**

[87] The application for leave to appeal in CA316/2017 is granted.

[88] The application for leave to appeal in CA335/2017 is granted.

[89] The questions of law are answered as follows:

(a) Was the Judge correct to find the non-compliant charging document could be saved by reference to s 379 of the CPA?

Yes.

(b) Was the Judge correct to find that an informant's summary of facts could save a non-compliant charging document under s 379 of the CPA?

Yes.

(c) If s 379 of the CPA could save the non-compliant charging document, was the Judge correct to find that there could be no miscarriage of justice under s 379 unless the defect caused the significant prejudice?

It is unnecessary to answer this question as we have found there was no miscarriage of justice.

(d) Was the Judge correct to find that prosecutorial conduct did not amount to an abuse of process warranting a stay of proceedings?

Yes.

[90] And in relation to Worksafe's appeal in CA335/2017:

(a) 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.

[91] The appeal in CA316/2017 is dismissed.

[92] The appeal in CA335/2017 is dismissed.

Solicitors:
Dawson & Associates Ltd, Nelson for Talley's Group Ltd
Crown Law Office, Wellington for WorkSafe New Zealand