IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2020-092-002050
[2023] NZDC 8055

WORKSAFE NEW ZEALAND
MAHI HAUMARU AOTEAROA
Prosecutor

v

CULHAM ENGINEERING COMPANY LIMITED
Defendant

Hearing:	20 March 2023
Appearances:	B Finn and Ms Simpson for the Prosecution B Harris for the Defendant
Judgment:	3 May 2023

RESERVED DECISION OF JUDGE R J EARWAKER
(Application to admit disputed evidence)

Introduction

[1] The defendant company (Culham) faces one charge pursuant to ss 36 and 48 of the Health and Safety at Work Act 2015 (HSWA). A Judge Alone Trial, with 7 days allocated, is set down to commence on 29 May 2023.

[2] The prosecution has a filed a Notice of Application, dated 15 December 2022, seeking an order under s 79 of the Criminal Procedure Act 2011 (CPA) and ss 7 and 8

of the Evidence Act 2006 (EA) that certain evidence relating to a prior incident involving the defendant in 2018 (the disputed evidence) is admissible at trial.

[3] The application to admit the disputed evidence is opposed. A pre-trial hearing took place before me on 20 March 2023 at the conclusion of which my decision was reserved.

[4] At a subsequent telephone conference on 16 April 2023, I advised counsel I proposed to admit the evidence and that my reasons would follow.

The charge and the allegations

[5] The charge alleges that on about the 22 February 2019 at East Tamaki, Auckland, Culham breached the "primary duty" of care it owed under s 36 of HSWA, to ensure the safety of workers so far as reasonably practical, while doing work slinging loads on a construction site at East Tamaki, Auckland. [1]

[6] The particulars of the charge details the ways in which it is alleged that Culham failed to meet its duty. These are the "reasonable practical steps" it ought to have taken, namely to:

(a) ensure the hazards and risks associated with the load supports and rigging of steel loads were adequately identified and assessed;

(b) ensure the provision and maintenance of an effective safe system of work in relation to the construction of load supports and rigging of loads;

(c) provide an effective and task-specific load support design that would support the steel loads;

(d) ensure loads supports were safe and effective; and

[1] Loads are basically heavy materials moved during construction or other work. In this case, massive steal beams.

(e) consult, cooperate with, and co-ordinate activities with other PCBU's[2], namely co-defendants Rigweld Engineering Services Limited (Rigweld) and Leigh's Construction Limited (Leighs), in relation to the assembling and rigging steel work at 46 Stonedon Drive, East Tamaki.

[7] The charge was filed after an incident at the site. A detailed 16-page summary of facts was included with the submissions. For the purposes of this application, it is sufficient to summarise that summary of facts.

[8] Fisher and Paykel Healthcare Products Ltd (F&P) were constructing a large commercial building. In 2018 F&P engaged Leighs to complete the bulk of the contracting work on the construction project. Leighs engaged Culham to undertake structural steel work on the construction project. Culham in turn engaged Rigweld to assist with the rigging work and assembling steel trusses.

[9] On 22 February 2019, two workers from Rigweld were working on bolting together four tonne steel beams on the ground, with one of the beams being attached to a chain from an on-site crane. Part of the chain could not be reached by one of the workers who, as a result, asked the other worker (the victim) to hand it to him. The victim did so, in the process moving under the steel beam. The wooden load support supporting the steel beam collapsed. The beam destabilised and fell onto the victim causing serious injuries. The wooden load support had been constructed using timber supplied by Culham. Rigweld constructed the load support structure.

[10] The workers had been erecting the steel guided by a Job Safety Analysis (JSA) produced by Culham. This was intended to assess and mitigate the relevant risks associated with the steel work. The failure of load supports was not identified as a hazard in the JSA or other Culham health and safety documents. The controls the JSA listed did not include ensuring load supports were properly constructed.

[11] For completeness it is noted that both the co-defendants, Rigweld and Leighs, have pleaded guilty to charges under HSWA and are awaiting sentencing pending on the outcome of this trial.

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[2] Persons conducting a business or undertaking, as per s 17 of HSWA.

The Application

[12] The disputed evidence relates to another workplace incident relating to Culham and other PCBU's in Tokoroa/Kinleith on 10 November 2018, some three months before the incident the subject of the current charge. The prosecution seeks to introduce evidence of this prior incident through the formal statement of a Worksafe Inspector, Michelle Kedian and an exhibit (currently listed as exhibit 50) being the Worksafe file concerning this incident. Included in that exhibit is an incident report dated 11 November 2018 jointly prepared by Angela Hodge, Culham's health and safety advisor and Dayna O'Carroll, Maintenir's health and safety advisor (the incident report). A summary of the incident is set out in the prosecutions submissions as follow:

(a) On 10 November 2018 there was an incident at the Oji Fibre Solutions Limited (OJIFS) workshop.

(b) OJIFS is a large company that owns Kinleith Mill south of Tokoroa. OJIFS engages contractors to carry out maintenance of their plant. Culham is one of the contractors who are engaged by OJIFS to carry out such maintenance work.

(c) A large machine called a cross cutter was to be overhauled during maintenance/shutdown works. It had been removed five days earlier and taken to a specific part of the workshop where it was placed on wooden "dunnage".[3] This was done to enable it to be worked on during the week.

(d) The wooden dunnage had been chosen in place of steel trestles. Dunnage had been used many times in the past.

(e) Upon completion of the overhaul of the cross cutter a 200 kg lid was to be placed on it. A crane lifted the lid into place with a view to refit it.

[3] Dunnage is essentially pieces of wood or other material used to support or keep in place a heavy object or "load". Dunnage is a form of load support.

During the process of rolling the lid into place, the cross cutter became unstable and toppled, shifting the weight on the load on the dunnage and causing part of the dunnage to collapse.

(f) This in turn led to one end of the cross cutter dropping 900mm to the floor near to workers. Fortunately, no one was hurt.

(g) Culham's view as to the cause of the incident, as stated through Angela Hodge, a Culham Health and Safety advisor and human resources administrator who appears to have conducted the investigation, was that "*improper placement of dunnage enabled one end to collapse when the cross cutter toppled and shifted the load weight"*.[4]

(h) Culham also identified "contributing actions" as including "improper placement", "failure to secure" and "other", and "contributing conditions" as "no written procedures in place", "inadequate hazard identification and risk assessment" and "other".

(i) In a section in the incident report headed "Description of cause identified", it is stated:[5]

(i) Improper placement of wooden dunnage allowing for it to collapse when cross cutter toppled.

(ii) Failure to secure – use of dunnage prevented the ability to adequately secure cross cutter in place.

(iii) No written procedures in place – work order provided did not adequately document the procedure for the task.

(iv) Inadequate hazard identification and risk assessment – JSA documented for the task did not adequately identify the steps

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4 Angela Hodge's email signoff (page 32 of 34, exhibit 50) indicates she is based in Whangarei, which is where other senior staff from Culham's are based.

5 Page 29 of 34. These are also set out at paragraph 36 of the formal statement of Inspector Kedian.

associated with the task and the risks associated with the replacement of the crosscutter lid.

(v) Improper motivation – workers failed to implement the stop work authority when the steel trestles were unavailable, due to the perceived urgency to get the task completed within designated timeframes.

(vi) Inadequate tools/equipment – the unavailability of steel trestles resulted in the use of wooden dunnage, which prevented the ability to secure the cross cutter into place and prevent any movement.

(j) On 29 November 2018, having been notified of the incident and Culham's report of it, Worksafe issued a directive letter to Culham through Ms Hodge.[6] This:

(i) Indicated that Worksafe had concluded that s 36(1)(a) of the HSWA had been breached, in particular that Culham workers failed to conduct a proper risk assessment and implement sufficient controls when positioning the crosscutter on dunnage during the OJI Fibre Solutions Limited Kinleith site shutdown.

(ii) Required that the issue be rectified by developing and implementing a safe system of work for workers undertaking work for the PCBU and to ensure workers were properly trained in hazard identification and risk management.

[13] The prosecution seek to introduce the evidence of this earlier incident through exhibit 50 and the formal statement of Inspector Michelle Keegan.[7]

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6 Page 33 of 34.

7 The disputed evidence in Inspector Keegan's formal statement is contained at paragraphs 33-38, 65, 84, 85, 87 and 88 of the statements.

[14] As indicated the admission of the evidence is challenged. The defendant opposes the admission of the disputed evidence on the following grounds:

(a) The evidence is not relevant to the events on 22 February 2019 the subject of the charge.

(b) The evidence of the earlier incident is sought to be adduced to unfairly imply that (a) earlier "failures" had occurred and (b) concessions or reflections from the earlier event should be held against the defendant.

(c) The admission of evidence about the earlier event have either no bearing on what needs to be proven, or such little weight that the consequent delays and extra evidence that will be required will unduly or needlessly prolong the trial.

(d) The person who investigated the earlier incident, Ms Hodge's, has now passed away.

(e) The evidence is sought to be admitted pursuant to s 27(1) EA through the incident report prepared by Ms Hodge following her investigation. She is not available for cross examination.

(f) The exclusion of the disputed evidence will have no impact on the prosecution case.

The Law

[15] Section 7 of the EA governs the admissibility of evidence generally and provides as follows:

> **7 Fundamental principle that relevant evidence admissible**
>
> (1) All relevant evidence is admissible in a proceeding except evidence that is—
>
> (a) inadmissible under this Act or any other Act; or
>
> (b) excluded under this Act or any other Act.

(2) Evidence that is not relevant is not admissible in a proceeding.

(3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

[16] The supreme Court, when considering s 7 (3) in *R v Wi* noted at paragraph [8] as follows:[8]

> [8] This is not an exacting test: nor should it be. Any definition of relevance has to accommodate all kinds of evidence and in particular circumstantial evidence, individual pieces of which are often of slender, and sometimes very slender, weight in themselves. The question is whether the evidence has some, that is any, probative tenancy, not whether it has sufficient probative tenancy, evidence either has the necessary tenancy or it does not.

[17] Section 8 of the EA provides as follows:

8 General exclusion

(1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—

(a) have an unfairly prejudicial effect on the proceeding; or

(b) needlessly prolong the proceeding

(2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

[18] Section 27 of the EA provides as follows:

27 Defendants' statements offered by prosecution

(1) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible against that defendant, and is admissible against a co-defendant in the proceeding only if it is admitted under section 22A.

(2) However, evidence offered under subsection (1) is not admissible against that defendant if it is excluded under section 28, 29, or 30.

(3) Subpart 1 (hearsay evidence) except section 22A, subpart 2 (opinion evidence and expert evidence), and section 35 (previous consistent statements rule) do not apply to evidence offered under subsection (1).

[8] *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11, (2009) 24 CRNZ 731, at [8].

[19] Section 3 of HSWA sets out its purposes as follows:

> **3 Purpose**
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> (1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by—
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> (a) protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant; and
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> (b) providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and
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> (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting PCBUs and workers to achieve a healthier and safer working environment; and
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> (d) promoting the provision of advice, information, education, and training in relation to work health and safety; and
>
> (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
>
> (f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and
>
> (g) providing a framework for continuous improvement and progressively higher standards of work health and safety.
>
> (2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.

[20] Culham is charged under s 36 of the HSWA. Section 36(1) and (2) of that Act provides as follows:

> **36 Primary duty of care**
>
> (1) A PCBU must ensure, so far as is reasonably practicable, the health and safety of—

(a) workers who work for the PCBU, while the workers are at work in the business or undertaking; and

(b) workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.

(2) A PCBU must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

[21] Section 22 of HSWA defined "reasonably practicable" the states that:

22 Meaning of reasonably practicable

In this Act, unless the context otherwise requires, reasonably practicable in relation to a duty of a PCBU set out in subpart 2 of Part 2, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—

(a) the likelihood of the hazard or the risk concerned occurring; and

(b) the degree of harm that might result from the hazard or risk; and

(c) what the person concerned knows, or ought reasonably to know, about—

(i) the hazard or risk; and

(ii) ways of eliminating or minimising the risk; and

(d) the availability and suitability of ways to eliminate or minimise the risk; and

(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

[22] As a company has been charged, and due to the nature of the disputed evidence, s 160(2) and (3) of HSWA which deals with attribution is also relevant and provides as follows:

160 State of mind of directors, employees, or agents attributed

…

(2) If, in any civil or criminal proceedings under this Act in respect of any conduct engaged in by a person other than an individual, being conduct in relation to which any provision of this Act or regulations applies, it is necessary to establish the state of mind of the person, it

is sufficient to show that an officer, employee, or agent of the person, acting within the scope of his or her actual or apparent authority, had that state of mind.

(3) In this section, state of mind, in relation to a person, includes the knowledge, intention, opinion, belief, or purpose of the person and the person's reasons for that intention, opinion, belief, or purpose.

[23] Section 161 of the HSWA, also dealing with attribution, provides as follows:

161 Conduct of directors, employees, or agents attributed

(1) Conduct engaged in on behalf of an individual (person A) by any of the following must be treated, for the purposes of this Act, as having been engaged in also by person A:

(a) an employee or agent of person A, acting within the scope of his, her, or its actual or apparent authority:

(b) an employee or agent of person A, acting within the scope of his, her, or its actual or apparent authority:

(2) Conduct engaged in on behalf of a person (other than an individual) by any of the following must be treated, for the purposes of this Act, as having been engaged in also by that person:

(a) an officer, employee, or agent of the person acting within the scope of his, her, or its actual or apparent authority:

(b) any other person at the direction or with the consent or agreement (whether express or implied) of an officer, employee, or agent of the person, given within the scope of the actual or apparent authority of the officer, employee, or agent.

[24] Prosecution seeks to produce the incident report written by Ms Hodge as part of exhibit 50 relying upon the attribution provisions of s 160 and 161 of HSWA. A clear summary of how the rules of attribution for corporate defendants operate is contained in Mazengarbs Employment Law as follows:[9]

> Under [s160] subs (2), HSW Act makes it necessary to establish the state of mind of a person other than an individual (such as a company) for the purpose of any civil or criminal proceedings concerning conduct engaged in by that person, it is sufficient to show that an officer, employee, or agent of the person acting within the scope of his or her actual or apparent authority had that state of mind.

[9] Mazengarbs Employment Law (NZ) HSWA 160.6 and 160.7.

> Under s 16, a "person" is defined as including the Crown, a corporation soul, and the body of persons, whether corporate or unincorporated.
>
> S 160 asks the state of mind of "officers, employees or agents" of a person, including a body corporate or other principle, to be attributed to that person, where necessary for the purpose of any civil or criminal proceedings, so long as the person concerned was acting within the scope of his, her or its actual or apparent authority had that state of mind (subs 2).

[25] There is no dispute that Ms Hodge was an employee of the defendant company and, in preparing the report relating to the earlier incident, she was acting within the scope of her actual authority.

Submissions

[26] The prosecution argues that the disputed evidence relating to the earlier incident is relevant as it has a tendency to prove what the company knew or ought to have known when assessing what was reasonably practical on the East Tamaki Worksite for the purposes of a 22 HSWA. Further, it argues that, as a company operates through institutional knowledge rather than through the knowledge of any one person, it is inevitable that prior events will be "known" to the company or its human agents and actors, and thereby attributed to it through them. That is inherent in ss 22 and 160 of HSWA and the law concerning attribution of criminal liability to corporations. The prosecution argues that, at the very least, such institutional knowledge must be relevant to what the company ought reasonably to have known for the purposes of s 22.

[27] The Prosecution submitted here the knowledge, actual or constructive, is based upon the incident report jointly prepared by Ms Hodge as an employee of the defendant. The incident report clearly sets out what happened in the incident of 10 November 2018 and why it happened. The report was prepared by Ms Hodge as the defendant's health and safety advisor. It was sent to WorkSafe by Ms Hodge on behalf of the defendant company, Culham. The incident report contains considerable details relating to the incident, including photographs, and the causes of the incident. It also includes a remedial action plan as a result of the incident.

[28] As a result of the incident report, WorkSafe sent a directive letter which accepted and adopted what was said in the report.[10]

[29] Ms Hodge's incident report is referred to by Inspector Michelle Kedian in the course of her expert opinion.

[30] The prosecution submits that the incident report is admissible against Culham pursuant to s 27 EA as a statement by the defendant company by virtue of the attribution provisions of s 160 and 161 HSWA, as the statement is not otherwise excluded under any other provisions of the EA.

[31] The prosecution further argues that the disputed evidence is relevant, as Culham should have learnt from the 2018 incident in ways that better enabled it to foresee and mitigate the risk in respect of the East Tamaki project. The reasons put forward by the prosecution to support this submission are summarised as follows:

(a) The JSA that Culham provided for the work was defective. In particular, it failed to adequately identify and control risks relating to rigging loads and loads supports. The controls were generic. The risk of load support (dunnage) collapse was seemingly either overlooked altogether or poorly described and managed.

(b) Culham should have been well aware of the importance of clear planning and risk assessment generally and specifically in relation to the use of load supports and dunnage given the recent incident in

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10 Page 33 of 34. As to what a directive letter is, the following description is taken from WorkSafe enforcement policy online: "*WorkSafe considers this to be an effective way of dealing with minor issues or risks where simple, immediate, or short-term action can be taken by the duty holder to comply. A directive letter or verbal direction provides a formal record that WorkSafe has required a duty holder to manage a risk or prevent future harm. The instruction would need to be clear enough so that the duty holder understands the breach, what action needs to be taken and by when… The letter or verbal direction will be recorded by WorkSafe and may be referred to in the future. For example: if a similar breach occurs in the future (and the duty holder has previously received a directive letter or verbal direction relating to a similar breach) then the duty holder may expect a stronger enforcement response for subsequent incidents":* https://www.worksafe.govt.nz/assets/dmsassets/WKS-17-Reg-function-policy-Enforcement.pdf

Tokora. It failed to learn the lessons that the company itself noted from the incident.

(c) The incident at Tokora should have also alerted Culham to the risks associated with the use of wooden dunnage and the potential superiority of steel trestles when choosing load support materials. The potential problems with wooden dunnage are covered by the second and sixth causes of the earlier incident identified by Culham in the incident report. No such consideration appears to have been given to the issue at the East Tamaki site.

[32] The prosecution argues that the admission of the evidence, which is clearly relevant, will not unduly prolong the trial, particularly given the key parts of the disputed evidence derive from Culham. An employee of Culham prepared and sent WorkSafe the incident report that describes what went wrong and why. It is a statement by or on behalf Culham admissible under s 27 EA. WorkSafe's directive letter largely adopts the conclusions in that form. Accordingly, the prosecution submit that little or no further evidence need be adduced beyond those documents.

[33] The prosecution also submits there is nothing unfairly prejudicial about admitting the disputed evidence. It is effectively an admission by Culham that it made relevant mistakes when dealing with dunnage load supports on an earlier occasion. Any prejudice is legitimate. It is not unfairly so.

[34] The defence's primary submission in opposition, is that the disputed evidence is not relevant and should be excluded on that basis. Mr Harris argues that the earlier incident occurred months before the East Tamaki incident, in another part of the country, involving different workers who were carrying out significantly different tasks. Accordingly, Mr Harris submits the evidence has no material bearing on what was known about or ought to have been known about at the subject construction work site in East Tamaki.

[35] Mr Harris developed that submission by highlighting the differences between the two events. The earlier incident involved a maintenance job at the Kinleith Pulp

and Paper Mill involving a cross-cutter during a mill shutdown. Mr Harris submits that this event has no tendency to prove or disprove anything of consequence in respect of the incident that occurred in East Tamaki three months later during the construction of a large steel warehouse where the defendant company was one of a number of businesses/PCBU's working on site and the relevant tasks at the time of the accident were contracted out to specialist steelworkers.

[36] Mr Harris went on to highlight what he saw the differences to be as follows:

(a) The "work" in question in respect of the East Tamaki site was the construction of a new building out of steel requiring the lifting of steel with cranes into position. In the Kinleith/Tokoroa event, the work was plant shutdown maintenance being carried out inside a paper mill on cutters used in the paper production process.

(b) In the current case the defendant had engaged expert rigging crews to carry out the important steel erection phase of the buildings. In the Tokoroa/Kinleith case the workers were employees of the joint venture "Maintenir" team working with Oji Fibre and there was no aspect of the maintenance jobs that required either the erection of a building or the use of cranes and the load supports for steel. There was no need to build at ground level and lift structures into place.

(c) In the Tokoroa/Kinleith case, the workers appear to have not had any load supports available and they have improvised by propping the cross-cutter onto dunnage from which the cross-cutter has toppled over. It appears from the evidence available that the workers were "unable to locate adequate trestles or trolleys".[11]

[37] Accordingly, Mr Harris says that the two events are quite different. The earlier event represented by the disputed evidence does not have a tendency to prove or disprove anything of consequence the determination of the proceeding.

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[11] Formal statement of Inspector Keidan pg 7,para 34

[38] As to prejudice, Mr Harris submitted that the Courts in the past have exercised caution when assessing the relevance of earlier or subsequent accidents when assessing negligence or failures. As an example, he referred to the High Court of Australia decision in *H.R. Lancey Shipping Co Pty Ltd v Robson* where Dixon J said:[12]

> In actions of negligence evidence is not infrequently tended of the occurrence of other accidents more or less similar. As evidence of this character has a prejudicial tendency, an objection to its admissibility to issue raised on behalf of the defendant and is treated as a matter of important. There is, however, no general or absolute rule that, because evidence involves the disclosure of other accidents in which the defendant has been involved, it should be excluded. Like evidence of other offences upon a criminal trial, it cannot be rejected if it has an actual legal relevancy to the facts in issue. But, owing to its damaging tendency, it should be carefully excluded from the knowledge and consideration of the jury unless its relevance is clear. Where it is necessary to prove that a particular thing, apparatus, structure or practice is a source of danger against which the defendant should have taken precautions, evidence that to the knowledge of the defendant that has caused accidental injuries to other persons in the same way as the plaintiff and in similar circumstances may be relevant. Further… in the present case no relevance was established between the fall of the mask on the latter occasion and any of the possible cause of the breaking of the shekel when the plaintiff was injured. The two things were of a different nature.

[39] Mr Harris accepted that this decision is from the High Court of Australia in relation to evidence before a jury and not a Judge alone trial. However, Mr Harris makes the point that there is a need for caution to avoid the potential for even perceived prejudice in a criminal trial.

[40] Mr Harris then goes on to refer to ways in which evidence of this type may have a prejudicial impact upon a hearing, for example the probative value of the evidence will be overestimated, or undue emphasis placed upon it.

[41] An additional prejudicial aspect noted by Mr Harris was that Ms Hodge, the co-author of the report sought to be admitted as part of exhibit 50, has died since writing the report and will not be available for cross-examination. He notes that the statement is sought to be produced pursuant to s 27 (1) of the Evidence Act and, if the evidence is to be admitted, seeks a clarification on the basis that it is to be admitted.

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12 *H.R. Lancey Shipping Co Pty Ltd* [1938] ALR 429 at 433. (The Argus Law Reports).

[42] Mr Harris concedes that the disputed evidence, if admitted, will not significantly add to the time required for the trial but does point out that additional evidence will be required, particularly in the form of expert evidence to counter the suggestion that the "task" and the "hazard" were effectively the same for both events. However, from his both written and oral submissions it is clear that Mr Harris was not submitting that the disputed evidence, if admitted, will needlessly prolong the proceeding.

Analysis

[43] In considering the admissibility of disputed evidence, it is first necessary to consider s 27 EA, prior to considering the arguments relating to the relevance of the evidence.

[44] It is clear that the incident report signed by Ms Hodge is a statement made in her capacity as Culham's Health and Safety Advisor following an investigation. In that capacity Ms Hodge sent the incident report from her company email to Mr Greg Peters, a WorkSafe inspector. That incident report was accepted and acted upon by Mr Peters, which resulted in the directive letter included in Exhibit 50. Accordingly, there is no challenge to the reliability of the contents of Ms Hodge's report as it was acted upon by WorkSafe. Mr Harris accepts that this compliance letter, being a letter issued by the regulator, is relevant and admissible.

[45] It is clear that, by virtue of the attribution provisions ss 160 and 161 of the HSWA, as Ms Hodge was acting within the scope of her authority, the contents of the report can be attributed to Culham. Therefore, as a statement from a defendant, it is admissible against Culham unless it is otherwise excluded under ss 28, 29 or 30 of EA. There is no suggestion the statement is unreliable (s 28) influenced by oppression (s 29) or improperly obtained (s 30).

[46] Mr Harris did, in written submissions, seek to argue that the statement was inadmissible because it had no link to a conspiracy under s 22A EA. Also, the opinion/expert evidence from the independent expert, Mr Leatherby, makes no mention of the earlier incident.

[47] However, s 22A EA has no relevance to the incident report attributed to Culham because it has not been sought to be admitted against the co-defendants. There is no allegation of conspiracy and the other two defendants have pleaded guilty.

[48] Nor does the fact Mr Leatherby does not refer to the earlier incident in his opinion prevent the incident report being admissible. As Mr Flynn explained in the course of his submissions, Mr Leatherby has not been told about the earlier incident nor been asked to comment on it. As the earlier incident is dealt with in Ms Hodge's incident report and the letter from WorkSafe, there is no requirement for Mr Leatherby to deal with the issue of the earlier incident as part of his evidence. Of course, there is nothing to prevent Mr Leatherby being asked about the earlier incident in the course of his evidence, but that also has no impact on the issue of admissibility of the incident report.

[49] Accordingly, as there are no exclusionary grounds, the incident report will be admissible, subject to the requirements of ss 7 and 8 EA which I now deal with.

[50] What must first be determined is whether the evidence of the 2018 incident is relevant. The threshold for relevance, as already discussed, is relatively low. As noted by the Supreme Court, the question is whether the evidence has some probative tendency.[13]

[51] In my view, despite the differences inherent in the two incidents as emphasised by Mr Harris, the evidence of the earlier incident in 2018 is clearly relevant to the issues to be determined in respect of the incident at East Tamaki. I accept the prosecution's submission that the 2018 incident at Kinleith/Tokoroa should have alerted Culham as to the risks associated with the use of wooden dunnage and the potential superiority of steel trestles when choosing load support materials.

[52] The potential problems with wooden dunnage versus steel trestles was identified in the incident report prepared by Ms Hodge. This should have informed the JSA that Culham provided, in addition to alerting Culham of the importance of the use of appropriate load supports and dunnage. The fact that the papermill incident was

13 *V v R* [2009] NZSC 121.

maintenance conducted under different circumstances to the construction at East Tamaki does not lessen the learnings around wooden dunnage compared to steel trestles when supporting materials.

[53] The knowledge of the risks involved with using wooden dunnage was available to Culham as a result of the earlier incident. That knowledge is relevant to the issue what Culham knew or ought to have known when assessing what was reasonably practicable on the East Tamaki worksite for the purposes of s 22 HSWA. In this context, is important to recognise that the incident report from 2018 not only identifies the cause of the incident, but also sets out a preventative action plan to avoid similar instances with wooden dunnage occurring again.

[54] The difference identified by Mr Harris may affect the weight that the Court will give to the earlier incident, but it does not affect the admissibility of the evidence, as it is relevant.

[55] Having found that the evidence is relevant, it remains to consider the exclusion provisions of s 8 EA. This requires the evidence to be excluded if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceedings or if the evidence will needlessly prolong the proceedings.

[56] In my view, there is no basis to exclude the evidence. While this evidence does fall under s 27 EA, it also bears a key resemblance to hearsay evidence (s 16 EA) in that the statement maker (Ms Hodge) is unable to be cross-examined. The defence submissions emphasise this point, claiming the inability to cross-examine is a strong point in favour of declaring this evidence unfairly prejudicial. However, the mere fact that a witness cannot be cross-examined does not automatically make the evidence under consideration unfairly prejudicial.

[57] In *Anderson v R*, the Court had a discussion around the application of s 8 EA when a witness was unable to be cross-examined.[14]

> [90] In our assessment, the only disadvantage arising from the inability to cross-examine the complainant is the possibility she might recant under cross-

[14] *Anderson v R* [2020] NZCA 106, [2020] 3 NZLR 429, at [90] and [91].

> examination but that we consider a remote and unrealistic possibility. Further, if the existence of that possibility were determinative, it would always rule out ever admitting a hearsay statement from a living but unavailable complainant and that is not the law.
>
> [91] We conclude that in the particular circumstances of this case the defence is still able to achieve everything it would have been able to achieve notwithstanding the admission of the hearsay statements and the absence of the complainant. He is still able to mount an effective defence. The defences are still there. The Crown case can be effectively tested.

[58] Although the incident report is being admitted pursuant to s 27 EA and not under the hearsay provisions, the same reasoning applies. It is not realistic to claim that under cross-examination Ms Hodge would recant any of the contents of the incident report. The report was made following an official investigation by Ms Hodge, as an employee, and the incident report is the official position of Culham as far as WorkSafe is concerned. There is no suggestion that Ms Hodge had any personal ties to the events described in the incident report and there is no reason to consider the report was not written in a competent and professional manner.

[59] Further, there is no suggestion that there is a challenge to the reliability of the incident report prepared by Ms Hodge, nor realistically could issue be taken. The incident report was prepared by Ms Hodge in her official capacity within Culham with the purpose of submitting the report to WorkSafe. It is clear that the statement is reliable.

[60] I accept the prosecution submission that there is nothing unfairly prejudicial about admitting the disputed evidence. The evidence is reliable. It is, effectively, an admission by Culham that it made relevant mistakes when dealing with the wooden load supports on an earlier occasion. Therefore, any prejudice there may be in admitting the evidence is legitimate, but not unfairly so. The evidence of Inspector Keegan in respect of the earlier incident was based upon the incident report prepared by Ms Hodge. As an expert, I accept that Inspector Keegan is able to refer to this evidence and comment upon it.

[61] In ruling the evidence relevant and admissible, I also have taken into account that the disputed evidence will be admitted in a Judge Alone Trial and therefore, what weight the evidence will be given to the evidence is a matter for the trial Judge.

[62] Nor do I consider that the admission of the evidence will needlessly prolong the proceeding. This was in fact conceded by Mr Harris in the course of his oral submissions. The evidence relating to the earlier incident is largely contained in Exhibit 50 and no additional evidence will be required to cover the earlier incident. There will be additional evidence required in the form of comment by experts, on both sides, as to the relevance and applicability of the earlier incident. However, in my view and, as accepted by Mr Harris, such evidence will not add a great deal to the length of the trial and certainly does not fall into the category of unduly prolonging the proceedings.

Conclusion

[63] The application for an order under s 79 of the CPA and ss 7 and 8 of the EA that the disputed evidence is admissible is granted.

[64] Accordingly, I make an order that the following evidence is admissible:

(a) The paragraphs in the formal statement of Inspector Michelle Keegan which refer to the Kinleith/Tokorua incident (paragraphs 33 – 38, 65, 84, 85, 87 and 88).

(b) The document currently referred to as Exhibit 50, which includes the incident report, being the WorkSafe file concerning the 2018 incident.

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Judge R Earwaker
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 03/05/2023