EDITORIAL NOTE: SOME NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED

IN THE DISTRICT COURT
AT QUEENSTOWN

CRI 2015-059-000149
[2017] NZDC 22210

CIVIL AVIATION AUTHORITY
Prosecutor

v

THE HELICOPTER LINE LIMITED
Defendant(s)

Hearing:	19 September 2017
Appearances:	Ms Bishop and Ms de Silva for the prosecution Mr Galloway and Ms Bennett for the defence
Judgment:	4 October 2017

RESERVED JUDGMENT OF CHIEF DISTRICT COURT JUDGE J-M DOOGUE

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[1] The Helicopter Line Limited ("THL") faces three charges under the Health and Safety in Employment Act 1992 ("HSEA"), these being that THL:

a) Being an employer, failed to take all practicable steps to ensure the safety of its employee while at work, contrary to ss 6 and 50(1)(a) (**CRN 0018)**;

b) Being an employer, failed to take all practicable steps to ensure that its employees were adequately trained and / or supervised, contrary to ss 13(a) and (b) and 50(1)(a) **(CRN 0019)**;

c) Being an employer, failed to take all practicable steps to ensure that no action or inaction of any employee while at work harmed any other person contrary to ss 15 and 50(1)(a) **(CRN 0020)**.

Issues for Determination

[2] THL has sought disclosure of redacted portions of an email authored by a Mr Andrew McKay, an aviation examiner/flight operations inspector at the Civil Aviation Authority ("CAA"), and sought an order requiring the CAA to call him as a witness (s 113(3) of the Criminal Procedure Act 2011 ("CPA")).

[3] Both the CAA and THL have applied for amendment of the charging documents (s 133 of the CPA).

Application for disclosure and CAA to call Mr Andy McKay as a witness

[4] As THL's application for disclosure was resolved by the CAA disclosing the email on 15 September, I need not determine THL's application on this point.

[5] I also order by consent that Mr McKay be produced as a prosecution witness on the basis that:

(a) Mr McKay's evidence is relevant, credible and will assist the Court in establishing a fair and full picture of the CAA's case against THL;

(b) if the CAA does not call Mr McKay as a witness it would result in unfairness to THL.

[6] On 19 September 2017 I directed that Mr McKay's brief of evidence is to be filed and served within seven working days of 19 September 2017.

[7] In addition, I directed by consent that another material witness, Ms Cathy Penney, also a CAA aviation examiner, be made available for cross-examination and that her brief be filed and served within five working days of 19 September 2017.

Applications Requesting Amendment of the Charges (s 133 of the CPA)

[8] Both the CAA and THL have applied, pursuant to s 133 of the CPA, to amend the charging documents to include particulars of the practicable steps that the CAA alleges THL failed to take. The details of the amendments sought differ. However, both applications appear directed towards bringing certainty to the CAA's allegations against THL prior to trial.

[9] In their current forms, none of the charging documents specify the practicable steps that the CAA alleges THL failed to take. Up until this point, both the CAA and THL have relied upon the practicable steps specified in the summary of facts ("SOF"). For ease of reference, I set out the relevant portion of the SOF at Appendix A.

[10] THL's application appears prompted by the High Court's decision in *WorkSafe New Zealand v Talley's Group Limited*, in which Faire J indicated that relying on summaries of facts to provide such particulars "is not acceptable practice".[1] Such particulars should be included in a charging document from the outset. To this end, THL has applied to correct deficiencies in the charging documents, by replicating most of the practicable steps in the SOF in each charging document. The exception to this application is the practicable step in para 35(b) of the SOF, which THL contends is not a practicable step.

[11] In response, the CAA has argued that the effect of *Talley's* on this case is that the SOF may be relied upon to provide particulars, given the existing deficiencies in the charging documents. As such, no amendment is needed to include matters from the SOF and it is the CAA's position that THL's application would be better treated as an application for further particulars under s 18 of the CPA. Ostensibly in order to provide such particulars, the CAA filed its own s 133 application setting out more detailed practicable steps that it contends should be included in the charging documents.

[12] I disagree with the CAA's contention that including the existing practicable steps in the charging documents would be a superfluous exercise and beyond s 133's

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1 *WorkSafe New Zealand v Talley's Group Limited* [2017] NZHC 1103 at [59] ("*Talley's*").

scope. The decision in *Talley's* was directed, in part, to the question of whether the prosecution's failure to include necessary particulars in the charging document (as required by s 17(4) of the CPA) could be remedied by s 379 of the CPA. The High Court concluded that there was no prejudice to the defence because it was made aware of the allegations' detail in the summary of facts. This saved the charging documents, but did not ameliorate the prosecution's responsibility to provide particulars. Section 17(4)'s requirement remains. Nothing in *Talley's* appears to prevent the Court from rectifying a charging document's deficiencies by way of s 133 where it is in the interests of justice, rather than saving the charging document by way of s 379.

[13] In this case, the charging documents are deficient and are only saved by the Court's ability to refer to the SOF as if that summary was contained in the charging documents.[2] This power does not have the effect of actually specifying those particulars in the charging document. At present, those particulars are absent. Thus, including the practicable steps in the charging documents remains an amendment open to the Court. In essence, THL and the CAA's applications stand as alternatives as to how the charging documents could be amended to rectify their deficiencies. It is simplest to address THL's application first.

Application by THL for Amendment to Charges 0018 and 0020

[14] In light of the CAA's application to further particularise the existing practicable steps, I consider it unnecessary to determine THL's application. THL's application, in effect, has been overtaken by the CAA's application. However, I will make one pertinent comment.

[15] THL applied to amend the charging documents to include paras 35(a), (c) and (d) of the SOF in the charging documents for the charges ending 0018 and 0020, and to include the alleged practicable steps at paras 35(c) and (d) of the SOF in the charging document for the charge ending 0019. It has argued that the practicable step in

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[2] I note as an aside that in cases such as this, the summary of facts should not be amended other than by way of application to the court or on the court's own motion. Regardless of whether the parties consent, the decision in *Talley's* is clear that the prosecution must bear the restrictions of having summaries of facts treated as if they were particulars; see *WorkSafe New Zealand v Talley's Group Limited* [2017] NZHC 1103 at [61].

paragraph s 35(b) should not be included in the same way because on in its present wording that paragraph does not disclose a practicable step.

[16] I disagree. The steps (a) – (d) listed under para 35 of the SOF are preceded by the words "the following practicable steps should have been taken". While the practicable step is very poorly drafted and is worded in the negative, para 35(b) still alleges THL failed to take an action, namely undertake an adequate centre of gravity assessment and place the passengers appropriately. Paragraph 35(b) still concerns a practicable step. This becomes relevant at [35]–[37] below.

Application by CAA for Amendment of the Charges

[17] Turning now to the CAA's application. The CAA applied to amend each charging document. For the charges ending 0018 and 0020, the CAA has sought to include in both charges the following:

> **Particulars:**
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> "Particulars of practicable steps:
>
> (a) The defendant should have formulated and implemented an adequate weight and balance policy to ensure aircraft were flown within weight and balance limitations, including:
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> (i) Requiring the pilot to ensure that a weight and balance calculation is completed prior to every heli-ski operation;
>
> (ii) Requiring the actual weight of passengers and gear to be obtained and provided to the pilot well in advance of the pilot planning the operation;
>
> (iii) Requiring the pilot to build in planning and preparation time prior to any heli-ski operation in order to complete a weight and balance calculation;
>
> (iv) Providing a calibrated sets of scales at the staging area so that the pilot could perform the weight and balance calculation if necessary;
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> (v) Ensuring the pilot had access to a computer or device that enabled him / her to conduct the calculation and save that information;
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> (vi) Creating a computer program to assess the loading and performance of the aircraft;

(vii) Requiring the second front passenger seat to be removed when conducting heli-ski operations to ensure only the guide and the pilot were in the front of the aircraft; and

(viii) Implementing a documents system for high density loading of helicopters used in heli-skiing, requiring the weighing of passengers and equipment, which is subject to annual review and audit."

[18] The CAA connects this proposed amendment with the existing practicable step in para 35(a) of the SOF. Similarly, in reference to para 35(b) of the SOF, the CAA has sought the following to be substituted in the charges ending 0018 and 0020:

"(b) The defendant should have ensured the aircraft in question was operating within weight and balance limitations, including:

(i) Ensuring that a weight and balance calculation was completed prior to operating;

(ii) Ensuring the pilot had access to and used a computer or device that enabled him / her to conduct the calculation; and

(iii) Providing a calibrated sets of scales at the staging area so that the pilot could perform the calculation if necessary."

[19] For the same charges, in reference to 35(c) of the SOF, the CAA has sought the following to be substituted:

"(c) The defendant should have provided [the helicopter pilot] and other pilots with heli-ski training in accordance with CAR 135.561, CAR 135.553(a) and AC119-3 including:

(i) Ensuring pilots received heli-ski recurrent training prior to each season."

[20] Finally, in reference to 35(d) of the SOF, the CAA has sought the following to be substituted:

"(d) The defendant should have reviewed [the helicopter pilot's] heli-ski procedures or at least ensured that the restrictions that were in place in respect of [the helicopter pilot's] previous assessment in 2012 remained. This could have been achieved by:

(i) The Chief Pilot or Senior Training Pilot conducting a complete review of heli-ski procedures as well as completing a flight with [the helicopter pilot's] to see if there had been an increase in his flying ability in regard to heli-ski operations; and

(ii) Conducting comprehensive heli-ski training at the start of the 2014 season with [the helicopter pilot's] as well as the other ski pilots."

[21] Different amendments are proposed for the charge ending 0019. The CAA has sought to amend that charge to include the following particulars:

Particulars:

"Particulars of practicable steps:

(c) The defendant should have provided [the helicopter pilot's] and other pilots with heli-ski training in accordance with CAR 135.561, CAR 135.553(a) and AC119-3 including:

(i) Ensuring pilots received heli-ski recurrent training prior to each season.

(d) The defendant should have reviewed [the helicopter pilot's] heli-ski procedures or at least ensured that the restrictions that were in place in respect of [the helicopter pilot's] previous assessment in 2012 remained. This could have been achieved by:

(i) The Chief Pilot or Senior Training Pilot conducting a complete review of heli-ski procedures as well as completing a flight with [the helicopter pilot's] to see if there had been an increase in his flying ability in regard to heli-ski operations; and

(ii) Conducting comprehensive heli-ski training at the start of the 2014 season with [the helicopter pilot's] as well as the other ski pilots."

Submissions

[22] As discussed above at [11], the CAA advanced its application on the grounds that its proposed amendments will assist in clarifying the CAA's case to THL's benefit. The CAA has suggested its amendment will ensure there is no uncertainty as to what is alleged.

[23] However, THL objected to the CAA's application on the grounds that:

(a) the CAA is, in fact, seeking to substantially alter the practicable steps set out in the SOF;

(b) the CAA is doing so based on evidence acquired outside of the relevant limitation period; and

(c) the proposed amendments will alter essential allegations of failure which form the basis of the charges, resulting in a reconstructed case for which THL has not prepared.

The Law

[24] All charging documents are required to contain details of the offence with which a defendant is charged and the particulars that "fully and fairly inform the defendant of the substance of the offence".[3] A charging document is not inviolate, however. Section 133 of the CPA is one provision which allows its alteration. This section reads:

> (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.
>
> (3) A Registrar may, in respect of any offence other than a category 4 offence, exercise the power under subsection (1) if the prosecutor and the defendant consent to the amendment.

[25] Broadly, s 133 has similar effect to its predecessors in the Summary Proceedings Act 1958 and the Crimes Act 1961, in that it affords the Court a broad discretion to amend a charge before the Court. This provision enables the Court to amend charges and the particulars required to be specified in a charging document at *any stage* of proceedings prior to verdict.

[26] Section 133 contains no direction as to the considerations that the court must take into account when exercising its power. Unlike its predecessors, there is no express requirement that the Court consider the amendment's effect on the defendant. Nonetheless, in *Talley's* Faire J clarified that:[4]

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3 Criminal Procedure Act 2011, s 17.

4 *WorkSafe New Zealand v Talley's Group Limited* [2017] NZHC 1103 at [61].

> The courts have generally taken a permissive approach to this section and its predecessor, but the ultimate purpose of the discretion is to provide for the interests of justice.

[27] The Court of Appeal decision in *Ministry of Transport v Nicholls*, discussing the now repealed s 43 of the Summary Proceedings Act 1958, provides some helpful guidance on when an amendment may be in "the interests of justice".[5] In that decision, the Court of Appeal commented that amendment during a hearing "may enable justice to be done on the merits of the case while at the same time ensuring that the defendant is not unfairly prejudiced".[6]

[28] In any event, the defendant's interests should be central in any decision involving s 133. Such an approach would be most consistent with ss 24 and 25 of the New Zealand Bill of Rights Act 1990 (NZBORA), which protect the defendant's rights to have adequate time and facilities to prepare a defence, and to have a fair and public hearing in an independent and impartial court.

[29] In *R v Lewis*, the High Court indicated some factors which may relevant to determining whether an amendment will prejudice the defendant. The prosecution applied to amend monetary amounts listed in representative charges under ss 220, 228(b) and s 256(1) of the Crimes Act 1961. The application was determined one month from trial. In determining the application, the High Court concluded that:[7]

> There is no prejudice to the defendant as the trial has not begun, the nature of the charges are not altered and whilst in some cases the quantum is increased, in others the quantum is decreased following the amendment.

[30] When considering whether an amendment will prejudice the defendant, it should be noted that the defendant may have had notice of the prosecution case, even though particulars were not included in the charging document. In *Talley's,* the High Court confirmed that the particulars set out in a summary of facts can be treated as the charge's particulars in certain circumstances.[8] This is not best practice. Faire J described reliance on summaries of facts in this manner to be "inappropriate and

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5 *Ministry of Transport v Nicholls* [1980] 1 NZLR 436 (CA).
6 *Ministry of Transport v Nicholls* [1980] 1 NZLR 436 (CA) at 440.
7 *R v Lewis* [2015] NZHC 642 at [4].
8 *Worksafe New Zealand v Talley's Group Ltd* [2017] NZHC 1103 at [63] and [77].

unsatisfactory".[9] However, His Honour found the charging documents in *Talley's* could be saved by s 379 of the CPA, which provides that:

> **379 Proceedings not to be questioned for want of form**
>
> No charging document… 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 there has been a miscarriage of justice.

[31] Where the summary of facts discloses particulars that otherwise ought to have been contained in the charging document, Faire J considered that the defence would have had sufficient notice of the prosecution case and would not have suffered significant prejudice.[10] This means that the High Court could not be satisfied there had been a miscarriage of justice for s 379's purposes and the charging document need not be dismissed. In reaching this conclusion, His Honour observed that to avoid significant prejudice arising, the prosecution would be bound to the particulars set out in the summary of facts unless a s 133 application was granted to amend that summary of facts.

[32] Based on the CAA and THL's submissions and the law discussed, it is necessary for me to consider the following questions in determining the CAA's application:

(a) Do the CAA's proposed amendments substantively alter the practicable steps?

(b) Are any of the alterations prejudicial to THL?

(c) In totality, is it in the interests of justice that I grant the CAA's application?

[33] I deal with each question under the relevant heading below.

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9 *Worksafe New Zealand v Talley's Group Ltd* [2017] NZHC 1103 at [59].
10 *Worksafe New Zealand v Talley's Group Ltd* [2017] NZHC 1103 at [55].

Do the CAA's proposed amendments substantively alter the practicable steps?

[34] The prosecution has contended I should regard its application merely as an attempt to provide further particulars of the practicable steps. THL disagrees. THL's position is that the CAA's amendment would, in fact, serve to substantially alter the practicable steps upon which the CAA's present case is founded. The extent to which any practicable step is substantially altered will be relevant to the later question of whether THL will suffer prejudice.

[35] Looking to the existing practicable steps, it appears that some sub-paragraphs in para 35 of the SOF contain several allegations of failure. Reflecting the wording in these paragraphs, I consider that the allegations made in the SOF are that the defendant failed to:

(a) Have a policy regarding weight and balance (para 35(a)).

(b) Have the ability to weigh all passengers and their gear prior to the flight (para 35(a)).

(c) Account adequately for weight and centre of gravity/balance issues as required by CAR 135.305, noting in particular the pilot's failure on the day to check the unclothed weights provided by the passengers or add 4kgs to those weights as required by CAR 135.303 (para 35(a)).

(d) Undertake an adequate centre of gravity assessment (para 35(b)).

(e) Place the passengers in appropriate positions in the helicopter (para 35(b)).

(f) Provide additional training in accordance with CAR 135.561 and CAR 135.553(a) and Advisory Circular 119-3 to [the helicopter pilot] when such training was required (para 35(c)).

(g) Retain restrictions that were in place in respect of [the helicopter pilots] previous assessment in 2012 (para 35(d)).

[36] The SOF also contains some details which supplement the practicable steps, explaining them further.

[37] In determining whether the amendments alter the practicable steps, my focus is on whether the amendments change these steps' substance or merely their form. Where a new practicable step can be sufficiently connected to one of the seven alleged failings above, no substantive alteration would be made. Instead, the amendment would alter the practicable step's form or provide further particulars, as the CAA suggests is the case.

[38] I will deal with each new practicable step and its sub-steps under relevant headings.

(a)The defendant should have formulated and implemented an adequate weight and balance policy to ensure aircraft were flown within weight and balance limitations, including:

[39] At the hearing on 19 September, the CAA made clear that its position always has been that THL's weight and balance policy was inadequate for heli-skiing. This is distinct from the plain wording used in para 35(a) of the SOF. There, the claim is that the defendant did not have a policy at all. Paragraph 35(a)'s wording conflicts with the further details in para 17 of the SOF which states that the defendant *did have* "a requirement for pilots to calculate and document the weight and balance of the helicopter for heli-ski operations." Paragraph 18 continues: "It did not have a policy about or the ability to weigh passengers itself."

[40] In this respect, the proposed amendment may do something more than restate an existing practicable step, it appears to correct internal inconsistency between the one alleged failing in para 35(a) and details in the SOF. Nevertheless, the alteration's nature can be considered in respect of all of the allegations in the SOF, and not just the allegations which expressly mentions policy. Relevantly, one of the failings alleged in the same para of the SOF is that THL did not adequately account for weight and centre of gravity/balance issues as required by CAR 135.305.

[41] In the CAA's specification of what should have formed part of THL's policy, the CAA argues such a policy should have required that "a weight and balance

calculation is completed prior to every heli-ski operation" ((a)(i)). CAR 135.305 requires such a calculation by implication. A holder of an air operator certificate would find it difficult to meet the requirements of CAR 135.305 without such a calculation being completed. What this demonstrates is that some aspects listed as going to the adequacy of THL's weight and balance policy can be linked to the question of whether it accounted adequately for weight and centre of gravity/balance issues. In essence, this proposed amendment explains how the CAA considers THL could have accounted adequately for weight and centre of gravity/balance issues.

[42] The other proposed particulars which can be sensibly linked in this way are:

(a) Requiring the pilot to build in planning and preparation time prior to any heli-ski operation in order to complete a weight and balance calculation ((a)(iii)).

(b) Ensuring the pilot had access to a computer or device that enabled him/her to conduct the calculation and save that information ((a)(v)).

(c) Creating computer program to assess the loading and performance of the aircraft ((a)(vi)).

(d) Requiring the second front passenger seat to be removed when conducting heli-ski operations to ensure only the guide and the pilot were in the front of the aircraft (a)(vii)).

[43] Each of these requirements could be regarded as a way THL could have met CAR 135.305 or CAR 135.303.

[44] However, there are three exceptions to this position. The first is the CAA's assertion that THL's policy should have required "the actual weight of passengers and gear to be obtained and provided to the pilot well in advance of the pilot planning the operation" ((a)(ii)). The CAA suggested in oral argument that weighing requirements are different in heli-ski operations. Such a differentiation between heli-ski flights and other flights is apparent in neither the SOF nor CAR 135.303. While the SOF makes

reference at, for example, paras 15, 17 and 34(b) to the fact that the operation in question involved heli-skiing, it is not explicit as to what practical impact this has upon what THL specifically ought to have done in this case.

[45] Both the SOF and CAR 135.303 pose several options for how passenger weight might be ascertained. To refer solely to the passengers' actual weight would narrow the scope of the existing practicable steps, rather than provide additional detail. When placed alongside the fact that nothing in the SOF or CAR refers to when the passenger and baggage weights should be obtained, it is apparent that this amendment moves beyond the substance of the existing particulars.

[46] The second exception is the requirement that the defendant "provide a calibrated sets of scales at the staging area so that the pilot could perform the weight and balance calculation if necessary" ((a)(iv)). Comparing this to the SOF, the listed CAR 135.303 requires at (d)(1) that the actual weight of goods and baggage be known. Scales are necessary to ascertain the actual weight of goods and baggage. The rule does not stipulate where the calculations shall be undertaken so in fairness to THL "at the staging area" is an alteration to the substance of the charge as laid.

[47] The final exception is the CAA assertion that the policy should have implemented a "a documents system for high density loading of helicopters used in heli-skiing, requiring the weighing of passengers and equipment, which is subject to annual review and audit" ((a)(viii)). One of my concerns with this amendment is the same as for discussed at [44]-[45]; it introduces a narrowed requirement of actual weighing of passengers, not otherwise present in the SOF or CAR.

[48] In addition, the requirement of annual review and audit seems too far removed from the SOF. While it would be reasonable to contemplate policies and systems will need to be reviewed from time to time, the imposition of an exact time frame as to that occurring is not a requirement reflected in either the SOF or the relevant CAR. Therefore, the amendment would introduce a new substantive element to the charges as laid.

(b) The defendant should have ensured the aircraft in question was operating within weight and balance limitations, including:

(i) Ensuring that a weight and balance calculation was completed prior to operating;

(ii) Ensuring the pilot had access to and used a computer or device that enabled him / her to conduct the calculation; and

(iii) Providing a calibrated sets of scales at the staging area so that the pilot could perform the calculation if necessary.

[49] As with the matters listed at [42], this amendment reflects obligations in CAR 135.305 and thus the substance of the existing practicable steps. There is one element of specificity that I consider moves beyond this, however. This is the words "at the staging area". Just as the CAR are agnostic as to how passengers' weight measurements are determined, so too are they agnostic as to the location of calibrated sets of scales. Such scales would enable CAR 135.305 to be met, but their placement does not appear to be a detail connectable to any existing formulations of the practicable steps. The requirement that scales be present "at the staging area" is a substantive alteration.

(c) The defendant should have provided [the helicopter pilot] and other pilots with heli-ski training in accordance with CAR 135.561, CAR 135.553(a) and AC119-3 including:

(i) Ensuring pilots received heli-ski recurrent training prior to each season.

[50] The SOF at para 35(c) refers to the fact that [the helicopter pilot] ought to have been provided with additional training and, to the extent that the amendment refers to [the helicopter pilot], it reflects the existing practicable step. This is in contrast to the amendment sought which suggests the defendant ought to have provided [the helicopter pilot] "and other pilots" with heli-ski training. While the reference to other pilots seems at first glance to expand the practicable step, the SOF does include CAR 135.553, CAR 135.561 and AC 119-3, all of which discuss the obligation to provide relevant training to each crew member. The introduction of "other pilots" does not in fact expand the obligations apparent on the SOF.

[51] I turn now to (c)(i). As with (a)(viii), this proposed practicable step introduces specificity as to when and how often the step ought to have occurred. CAR 135.561 references the need for recurrent training specific to the operations in question. The rules do not specify the training intervals though circular AC 119-3 contemplates

training might be triggered by numerous events including those indicative of areas of weakness revealed in routine competency checks. This does not set intervals for training, let alone that such training ought to occur regularly at the outset of each season. Those factors cited as potentially triggering recurrent training may practically lend to training, as a matter of course, occurring at the beginning of each season. But that is not expressly required, nor does commonsense dictate that is the only option available. Therefore, the amendment would introduce a new substantive element to the charges as laid.

(d) The defendant should have reviewed [the helicopter pilot's]**heli-ski procedures or at least ensured that the restrictions that were in place in respect of** [the helicopter pilot's]**previous assessment in 2012 remained. This could have been achieved by:**

(i) The Chief Pilot or Senior Training Pilot conducting a complete review of heli-ski procedures as well as completing a flight with [the helicopter pilot's]**to see if there had been an increase in his flying ability in regard to heli-ski operations; and**

(ii) Conducting comprehensive heli-ski training at the start of the 2014 season with [the helicopter pilot's]**as well as the other ski pilots."**

[52] The SOF at para 35(d) states the restrictions that were in place in respect of [the helicopter pilot's]previous assessment in 2012 should have remained. AC 119-3 refers to recurrent training being triggered by, among other things, areas of weakness being revealed in routine competency checks. These two factors demonstrate that the substance of (d) is reflected in the SOF and AC 119-3. Therefore, (d) does not introduce new substance to the charges as laid.

[53] As for (d)(i) and (d)(ii), these are framed as optional steps by which THL might have fulfilled the proposed practicable step set out at (d). While these additional details are new and add further substance to (d), neither (d)(i) nor (d)(ii) moves beyond the scope of (d). All these sub-steps do is clarify the ways the CAA considers the existing practicable step could have been met. While somewhat superfluous, I do not consider that these alter the substance of the practicable steps.

SUMMARY

[54] In summary, I am not satisfied that I can treat all of the amendments simply as providing more detailed explanation of existing allegations. In respect of (a)(i), (a)(ii),

(a)(iv), (a)(viii), (b)(iii), and (c)(i) the CAA are applying to make substantive changes to the practicable steps.

Are these alterations prejudicial to THL?

[55] I turn to deal with THL's argument that it would be materially prejudiced by the amendments which substantively alter the practicable steps as set out in the SOF. At the outset, I note that no prejudice arises in respect of those steps where there is no substantive alteration. THL is properly treated as having been informed of those particulars from the time they received the charging document and the SOF.[11] This is in contrast to *Bentley v Police*,[12] where in the course of the trial a succinct and precise claim (that the defendant failed to restrain her child in a car seat) morphed into a broadly framed claim (that the defendant failed to drive safely given her level of intoxication and careless use of a motor vehicle). Prejudice arose in that case as the alterations were contrary to the defendant's entitlement to "know from the outset the particulars of the charge she was facing." No such prejudice arises in respect of those steps which do not substantively alter the SOF and CARs. Though now specified in greater detail, the steps are correctly regarded as being constituent parts of the practicable steps outlined in the SOF. The CAA's case likely would have addressed these issues regardless of whether they were particularised as sought or left within the four broader steps.

[56] Turning to the steps which I agree substantively alter the prosecution case, I note THL's submission that the practicable steps in this case are particulars that must be proven by the prosecution as if they are essential ingredients of the charges. THL submits that, as essential ingredients and matters of law, the practicable steps are incapable of amendment.

[57] Little turns on THL's assessment that the practicable steps here are essential ingredients or matters of law. The Courts have in the past held that, in relation to practicable steps, what is practicable is assessed as a matter of fact and degree.[13] That

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11 *Worksafe New Zealand v Talley's Group Ltd* [2017] NZHC 1103 at [55].
12 [2017] NZHC 1440.
13 *Central Cranes Ltd v Department of Labour* [1997] 3 NZLR 694 (CA) at at 701, [1997] ERNZ 520 (CA) at 528; *Department of Labour v Southroads Ltd* [2013] NZHC 1620 at [62].

being said, practicable steps still comprise the substance or essence of the charges, and in cases such as these are intrinsically tied to the elements of the offence. It would be near impossible for the defendants to prepare their defence in the absence of those particulars. As noted by Faire J, the defendants cannot be expected to defend perfection.[14] Consequently, substantive alteration to the particulars attracts the same concerns of prejudice as if they were substantive alterations to the essential ingredients, as the particulars are intrinsically tied to the elements of the offence.

[58] The CAA submits that THL would not be prejudiced were I to exercise my s 133 discretion to allow the amendments sought. It maintains that its expert witnesses' evidence can be regarded as merely providing more specific details or particulars under the existing practicable steps. The CAA notes that THL has been in receipt of the expert reports for over sixteen months and that it had prepared for a trial fixture scheduled for March 2017 in full knowledge of the CAA's case and the expert evidence it was relying on. The CAA further note that THL had briefed its own expert to respond to the CAA's experts' evidence.

[59] As discussed above, I cannot agree with the CAA's submission that all the proposed amendments incorporating expert evidence merely add detail or particulars under the existing practicable steps. Some of the amendments sought substantively alter the practicable steps. Where the effect of those substantive alterations is to change the thrust of the CAA's case to the extent that THL would be required to readjust entirely the defences they have prepared in respect of such steps real risks of prejudice arise.

[60] I now turn to assess those steps which substantively alter the charges as laid and determine the extent to which they change CAA's case. As outlined above at [44]-[45] and [47], (a)(ii) and (a)(viii) substantively alter the substance of the existing particulars in that they narrow what THL was required to do with respect to passenger weight, rather than simply providing further detail as to those requirements. This change completely alters the nature of the allegation, eschewing core alternative

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[14] *Worksafe New Zealand v Talley's Group Ltd* [2017] NZHC 1103 at [55].

components originally contained in the practicable step. The change thereby unduly narrows the prosecution's case.

[61] The other element of (a)(ii) which substantively alters the charges as laid is the stipulation that the weights ought to be been obtained and provided to the pilot "well in advance" of the operation. This goes to questions of when something ought to have occurred. While it is a deviation, it is not so consequential as to become prejudicial. The same applies in respect the components of (a)(viii) dealing with the intervals of review and audit, and of (c)(i) dealing with when training ought to have been provided.

[62] As discussed at [46] and [49], the stipulation as to the location of the scales referred to in (a)(iv) and (b)(iii) substantively alters the charge as laid. However, the same applies to these steps as with the timing components of (a)(ii) and (a)(viii), in that because the changes pertain only to location, they are not so consequential as to become prejudicial.

[63] In summary, the components of (a)(ii) and (a)(viii) addressing actual weight of passengers alter the direction of the prosecution's case such that THL's preparations for trial to date would not accord with the changes, were they made.

[64] In addition to the extent to which the amendment would reconstruct the CAA's case, I also have particular regard to matters of timing. There are three timing considerations which go to the question of prejudice which I will address in turn:

(a) the application to amend was made two and a half years after the charges were initially laid;

(b) the application seeks to incorporate expert evidence obtained outside the limitation period into the charging documents; and

(c) there are two months before the trial is to start.

[65] Dealing first with the timing since the laying of charges, THL had a right, per s 24(a) of NZBORA, to be informed *promptly* and in detail of the nature and cause of the charges against them. THL was originally served with the charging documents and

SOF in March 2015. THL notes they pleaded not guilty at that time on the understanding they had defences available to the charges as particularised in the SOF. The CAA itself has relied upon the SOF to establish those particulars. The CAA maintains the amendments sought do not deviate from the SOF. Now, two and a half years since charges were initially laid, the CAA is in fact seeking amendments that substantively alter the particulars as originally contained in the SOF.

[66] Second, the amendments sought which substantively alter the practicable steps do so in many instances by incorporating expert evidence obtained outside the limitation period for laying charges, being 6 months from the date when the incident to which the offence relates to occurred.[15] THL further submit, at the very least, the time to apply to incorporate expert evidence into the particulars was April 2016 when the report of the CAA's second expert was disclosed. Justice Faire relevantly stated in *Talley's*:[16]

> The existence of s 133 also rebuts Worksafe's argument that illegitimate prejudice cannot arise as a result of a shifting prosecution case. Worksafe submits that prejudice cannot arise because if so the prosecution would be precluded from ever strengthening its case after charging a defendant. Quite clearly the impact a change in the prosecution case will have on the fairness of the trial hugely depends on the circumstances. Altering the elements of the offence alleged proximate to trial may certainly sometimes give rise to prejudice, hence the existence of the discretion under s 133.

[67] I also note his Honour's statement that the limitation period may not be circumvented without a s 133 application.[17] Because the CAA has made a s 133 application the limitation period does not act as an absolute bar to alteration of the charges. However, incorporating expert evidence obtained outside that limitation period may nevertheless be relevant to questions of prejudice.

[68] Third, the CAA submits that there is sufficient time to trial for THL to recast its case, and that consequently there is "no palpable reason" against permitting the amendments.[18] In relation to questions as to the proximity to trial, Justice Duffy in *R v Lewis* noted that:[19]

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15 Health and Safety in Employment Act, s 54B.
16 *Worksafe New Zealand v Talley's Group Ltd* [2017] NZHC 1103 at [62].
17 *Worksafe New Zealand v Talley's Group Ltd* [2017] NZHC 1103 at [74].
18 *R v Martin* CA214/00, 23 November 2008 at [15]-[16].
19 *R v Lewis* [2015] NZHC 642 at [4].

> There is no prejudice to the defendant as the trial has not begun, the nature of the charges are not altered and whilst in some cases the quantum is increased, in others the quantum is decreased following the amendment.

[69] In that case the application was determined a month prior to the trial and the amendments as to quantum merely involved fluctuations in the monetary amounts listed in the representative charges. That is materially different from the applications sought here in respect of steps which do in fact substantively alter the nature of the charges as laid. I therefore distinguish *Lewis*.

[70] Section 24(d) of NZBORA provides for the defendant's right to have adequate time to prepare a defence. It is now just two months until the commencement of the trial proper. This is a technically complex health and safety prosecution. Given these factors there is a risk that were I to allow amendments which substantively alter the extent and effect of the prosecution's case THL would not have sufficient time to recast its case (contrary to the CAA's submission).

[71] None of these factors taken alone, or even in the aggregate, suggest the alterations *must* be regarded as prejudicial. The issue is inevitably whether the defendant is in fact prejudiced by the timing of the change.[20] When considered alongside the extent and effect of the alterations themselves, significant weight must be given to the notion that THL will be prejudiced by certain amendments sought by the CAA.

[72] Having regard to the overarching considerations as to the timing of the amendments sought and the extent and effect of the amendments, I consider that THL would be prejudiced by the introduction of the actual weight components of (a)(ii) and (a)(viii).

In totality, is it in the interests of justice that I grant the CAA's application?

[73] The merits of the changes may be assessed with reference to whether they achieve the incorporation of expert evidence, as the CAA suggests. I regard that to be so. There is benefit in ensuring the charges are framed in a way to properly reflect the

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[20] *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987 at [24] and [33].

evidence to be heard at trial. This has the benefit of clarity, discussed below, and meets the public's interest in having full allegations of offending properly determined at trial, rather than seeing a case stymied by the limits of pleading.

[74] Another overarching consideration is the benefit of clarity. As noted, most of the amendments sought substantively reflect the content of the SOF. The division of the steps merely clarifies the prosecution's case. Narrowing the practicable steps for the sake of specificity can assist with the conduct of the trial. However, I emphasise that the defence did not ask for further particulars at this stage. Further, as noted in *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal*, the appropriateness of the changes for the purposes of clarity:[21]

> does not alter the fact that [some are] a significant change being made at a late stage… The key issue, as it inevitably is in these situations, is whether [the defendant] was prejudiced by the timing of the change…

[75] It follows from the fact that most amendments sought substantively reflect the practicable steps as outlined in the SOF, that THL is treated as having been notified of those particulars upon receipt of the charging documents and SOF in March 2015. However, in respect of the amendments sought which substantively alter the practicable steps as contained in the SOF questions of prosecutorial propriety arise. The CAA seeks to tailor its case to incorporate expert evidence obtained well after the charges were laid and well after the evidence itself was obtained. While the amendments seek to rectify deficiencies in the charging documents, it was in the interests of justice for the CAA, as model litigants, to seek those amendments as soon as was possible. That has not occurred here. However, to be fair to the CAA, *Talley's*, which clarified the position in this regard, was decided only recently.

[76] Balancing the interests of justice as a whole, I am of the view that the prejudice to the defendant caused by the amendments sought cannot be overcome except in respect of those amendments where no prejudice in fact arises – being those amendments which either do not substantively alter the practicable steps in the SOF,

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[21] *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987 at [33].

or those amendments where the substantive alterations are not to an extent or effect as to prejudice the defendant.

[77] To the extent that (a)(ii) and (a)(viii) can be saved by removing words which substantively alter the practicable steps and prejudice the defendant, I will remove those words from the amendments but allow the remainder of the amendment to stand. I do so on the basis that omitting the prejudicial words will also avoid the prejudice to THL and be in the interests of justice.

Decision

[78] Amendments shall be made to the charging documents as set out in Appendix B.

[79] The issue of costs is reserved.

J-M Doogue
Chief District Court Judge

Appendix A

"Failure to take all Practicable Steps

34. The defendant:

(a) failed to take all practicable steps to ensure the safety of its employee, [the helicopter pilot], while at work, in that it failed to take all practicable steps to ensure its employees were not harmed by the crashing of a helicopter;

(b) failed to take all practicable steps to ensure that [the helicopter pilot]was adequately experienced, trained or supervised so as to ensure that his doing the work was not likely to cause harm to the employee or other people, in that it failed to supervise and / or train [the helicopter pilot]in relation to high altitude heli-ski operations in mountainous terrain, including landing at Mt Alta; and

(c) failed to take all practicable steps to ensure that no action or inaction of its employee, [the helicopter pilot], while at work harmed any other person, namely [names of six victims deleted].

35. The following practicable steps should have been taken:

(a) The defendant ought to have had a policy regarding weight and balance and the ability to weigh all passengers and their gear prior to the flight. The defendant company did not adequately account for weight and centre of gravity / balance issues as required by CAR 135.305. The defendant asked passengers for their unclothed weights and the pilot did not check this or add four kg as required by CAR 135.303, so the helicopter was overloaded. No load manifest was completed.

(b) The defendant's centre of gravity assessment was inadequate and the placement of passengers in the helicopter was inappropriate. It is noted that, following the incident, the defendant has now put in place a practice of weighing passengers prior to flying.

(c) [The helicopter pilot's]flying deficiencies were known to the defendant and additional training ought to have been provided in accordance with CAR 135.561, CAR 135.553(a) and AC 119-3. [The helicopter pilot]had not received heli-ski specific training since June 2012 and flew subject to operational limitations.

(d) At the very least, the restrictions that were in place in respect of [the helicopter pilot's] previous assessment in 2012 should have remained."

Appendix B

Charges ending **0018, and 0020**:

Particulars:
Particulars of practicable steps:

(a) The defendant should have formulated and implemented an adequate weight and balance policy to ensure aircraft were flown within weight and balance limitations, including:

(i) Requiring the pilot to ensure that a weight and balance calculation is completed prior to every heli-ski operation;

(ii) Requiring the total weight of passengers in accordance with CAR 135.303(b) and the actual weight of gear to be obtained and provided to the pilot well in advance of the pilot planning the operation;

(iii) Requiring the pilot to build in planning and preparation time prior to any heli-ski operation in order to complete a weight and balance calculation;

(iv) Providing a calibrated set of scales at the staging area so that the pilot could perform the weight and balance calculation if necessary.

(v) Ensuring the pilot had access to a computer or device that enabled him / her to conduct the calculation and save that information;

(vi) Creating a computer program to assess the loading and performance of the aircraft;

(vii) Requiring the second front passenger seat to be removed when conducting heli-ski operations to ensure only the guide and the pilot were in the front of the aircraft; and

(viii) Implementing a documents system for high density loading of helicopters used in heli-skiing, requiring the total weight of passengers in accordance with CAR 135.303(b) and weighing equipment, which is subject to annual review and audit.

(b) The defendant should have ensured the aircraft in question was operating within weight and balance limitations, including:

(i) Ensuring that a weight and balance calculation was completed prior to operating;

(ii) Ensuring the pilot had access to and used a computer or device that enabled him / her to conduct the calculation; and

(iii) Providing a calibrated set of scales at the staging area so that the pilot could perform the calculation if necessary.

(c) The defendant should have provided [the helicopter pilot]and other pilots with heli-ski training in accordance with CAR 135.561, CAR 135.553(a) and AC119-3 including:

(i) Ensuring pilots received heli-ski recurrent training prior to each season.

(d) The defendant should have reviewed [the helicopter pilot's]heli-ski procedures or at least ensured that the restrictions that were in place in respect of [the helicopter pilot's]previous assessment in 2012 remained. This could have been achieved by:

(i) The Chief Pilot or Senior Training Pilot conducting a complete review of heli-ski procedures as well as completing a flight with [the helicopter pilot]to see if there had been an increase in his flying ability in regard to heli-ski operations; and

(ii) Conducting comprehensive heli-ski training at the start of the 2014 season with [the helicopter pilot] as well as the other ski pilots.

Charge ending **0019**:

Particulars:
Particulars of practicable steps:

(c) The defendant should have provided [the helicopter pilot]and other pilots with heli-ski training in accordance with CAR 135.561, CAR 135.553(a) and AC119-3 including:

(i) Ensuring pilots received heli-ski recurrent training prior to each season.

(d) The defendant should have reviewed [the helicopter pilot's]heli-ski procedures or at least ensured that the restrictions that were in place in respect of [the helicopter pilot's]previous assessment in 2012 remained. This could have been achieved by:

(i) The Chief Pilot or Senior Training Pilot conducting a complete review of heli-ski procedures as well as completing a flight with [the helicopter pilot]to see if there had been an increase in his flying ability in regard to heli-ski operations; and

(ii) Conducting comprehensive heli-ski training at the start of the 2014 season with [the helicopter pilot] as well as the other ski pilots.