IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CRI-2018-419-000055
[2019] NZHC 1844

BETWEEN	JOSEPH MICHAEL MCDONALD and AGRICOLA ENTERPRISES LTD Appellants
AND	MINISTRY FOR PRIMARY INDUSTRIES Respondent

Hearing: 25 February 2019

Appearances: P Cornegé for Appellants
L Hann for Respondent

Judgment: 1 August 2019

JUDGMENT OF DUFFY J

This judgment is delivered by me on 1 August 2019 at 11.30 am pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Counsel/Solicitors:
P Cornegé, Barrister, Hamilton
McBreens, Hamilton
Crown Solicitor, Hamilton

[1] Agricola Enterprises Ltd ("Agricola") owns a dairy farm and herd. Joseph McDonald is a director of Agricola. Mr McDonald is also the farm manager. Both were charged and convicted of offences under s 12 of the Animal Welfare Act 1999 ("the Act") following a Judge-alone trial in the Te Awamutu District Court before Judge Menzies.[1] They now appeal against those convictions.

Background

[2] Agricola faced two representative charges and Mr McDonald faced four representative charges: two in his capacity as a director of Agricola and two in his capacity as the farm manager.

[3] The charges arose after the Ministry of Primary Industries ("MPI") received a complaint from a member of the public that there were cows with broken tails on Agricola's farm. On 17 January 2017, two Animal Welfare Officers, Jason Corlett and Stefan Halberg visited the farm and conducted a walk around inspection of the cows while they were in paddocks. Because the cows were free to move about the paddocks this prevented any precise quantification of the injuries. However, the Animal Welfare Officers concluded there were an unacceptable number of cows with tail deformities that were consistent with tail breaks, which in their view warranted further investigation.

[4] One week later, on 24 January 2017, Mr Corlett and Mr Halberg returned to the farm with a veterinarian, Dr O'Driscoll to inspect the cows more closely. Agricola's veterinarian, Mr Oertly, was also present for this inspection.

[5] Dr Driscoll examined 516 cows during the afternoon milking. From those she identified a total of 186 cows as having tail injuries, which amounted to 36 per cent of the cows she examined.

[6] Following Dr Driscoll's assessment, Mr McDonald was interviewed by Mr Corlett. In that interview, Mr McDonald stated he had noticed some cows had bends in their tails, but he did not realise there were as many with broken tails as MPI's

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1 *Ministry for Primary Industries v McDonald* [2018] NZDC 16909.

examinations revealed. When asked whether the cause of the breaks was the result of a deliberate act, Mr McDonald stated that he had twisted cows' tails on occasion but stated he did not think he did so with enough force to break the tails.

[7] Throughout the evidence the tail injuries were at times referred to as "broken tails" however these injuries were defined by Dr Richard Laven, an Associate Professor at Massey University, as not necessarily involving a fracture of the vertebrae bones; rather they included breaking of the connections between the vertebrae, breaking the ligaments and the cartilage connections as opposed to the bone itself.[2] This understanding of what a broken tail involved was not challenged by either Agricola or Mr McDonald.

[8] Dr Laven opined that a cow with a broken tail is more sensitive to pain, particularly when the injury is recent. Repeated trauma to this area would only increase the pain and the cow's sensitivity to pain. If left untreated such injuries were likely to heal in a matter of weeks with the cow being more prone to pain in the future, and the tail being less efficacious in controlling flies and signalling. Any reduction in ability to use the tail would be permanent. Dr Laven also opined that the breaking of a tail by bending or twisting it will cause immediate severe pain and distress and if left untreated it could lead to prolonged pain, which could last for months, or prolonged loss of use of the tail. There was no challenge to this aspect of his evidence.

[9] Of the 186 cows identified with broken tails 12 cows were identified as having "new injuries"[3] and the remainder were identified as having "old injuries".[4] The charges against Agricola and Mr McDonald were separated accordingly. In respect of the older injuries, the prosecution was brought in respect of no more than 107 of those cows, the remaining 67 had received injuries that were outside the statutory time frame for bringing a prosecution.

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2 Dr Laven was called as an expert witness by MPI.

3 Injuries that had allegedly been incurred within that milking season, sometime between 1 June 2016 and 24 January 2017.

4 Injuries that had allegedly been incurred between 1 June 2012 and 24 January 2017.

The legal framework of the prosecution

[10] The charges were laid under ss 12(a), 10(a) and (b) and 4(d) of the Act. Section 12(a) makes it an offence to fail to comply, in relation to the animal, with s 10 of the Act. Section 10 provides that the owner of an animal, and every person in charge of that animal, must ensure that the physical and behavioural needs of the animal are met in a manner that is in accordance with both: (a) good practice; and (b) scientific knowledge. Section 4(d) defines the term "physical, health and behavioural needs" in relation to an animal as including "physical handling in a manner which minimises the likelihood of unreasonable or unnecessary pain or distress.

[11] Section 13 (1) makes an offence under s 12 a strict liability offence. Section 13(2) provides a statutory defence to a charge under s 12: namely, that a defendant took all reasonable steps to comply with s 10. However, notice of reliance on this defence must be given.[5]

[12] Section 13(1A) provides that where a relevant code of welfare was in existence at the time of the alleged offence, evidence that a relevant minimum standard was not complied with is rebuttable evidence that the person charged with the offence has failed to comply with or contravened the provision of the Act to which the offence relates. When MPI opened its case, the prosecutor referred to the Dairy Cattle Code of Welfare (the Code) which was then in force.[6] The Code applies to all persons responsible for the welfare of dairy cattle. Part 5.1 of the Code sets out the minimum standard and recommended best practice for behaviour and stock handling and includes the injunction "tails should not be lifted or twisted." Here the prosecutor relied upon s 13(1A) and contended that evidence the minimum standard had not been complied with is rebuttable evidence that that s 10 has not been complied with.

[13] Each charging document relevant to Agricola set out the conduct by which Agricola (as owner) was alleged to have failed to comply with s 10:

> …by failing to ensure that the physical and behavioural needs of the cows were met… in a manner that was in accordance with both good practice and

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5 No such notice was given in this prosecution, nor does it seem to have been relied upon.

6 This Code came into force on 15 December 2016. The earlier Code was not in evidence although there seemed to be common acceptance it was not materially different from the 2016 Code.

> scientific knowledge, specifically by failing to ensure physical handling of the cows in a manner which minimised the likelihood of unreasonable or unnecessary pain or distress.

[14] One charge related to 12 cows with newly broken tails and covered the period between 1 June 2016 and 24 January 2017. The other charge related to 107 cows with older broken tails and covered the period between 1 June 2012 and 24 January 2017. In her report dated 2 July 2018, Dr O'Driscoll explained that the new tail breaks were considered to be new because the injuries had not had enough time to have fully stabilised and heal. She said it takes eight weeks plus, for bone to heal and six months plus, for ligaments to heal. The old tail breaks were injuries which "had had enough time and enough damage done to heal with an obvious palpable bony protrusion, fusion of multiple tail vertebrae, or pathological deviation of the tail". She opined that these injuries would have occurred some eight weeks plus for injuries to the bones and six months plus for injuries to the ligaments, and the damage done was likely to have had a degree of bone damage, not just ligamentous damage. Accordingly, other than the timing of the injury there was nothing to distinguish the new tail breaks from the older tail breaks.

[15] The four charges against Mr McDonald covered the same two groups of injured cows and the same time frames. One set of such charges was brought on the basis that as a director of Agricola he knew or should have known that the offence, with which Agricola was charged, was to be or was being committed and he failed to take all reasonable steps to stop it. The other set of charges alleged the same failings against Mr McDonald in his role as the person in charge of the cows.

[16] Section 164 of the Act sets out the circumstances in which employers and principals will be liable for the offending of employees and agents.

[17] Section 165 of the Act provides that where a body corporate commits an offence under the Act, every director is liable if the director knew of and permitted the offending or, should have known an offence was being committed and failed to take all reasonable steps to prevent or stop it.

[18] Representative charges are permitted by s 20 of the Criminal Procedure Act 2011 (CPA). No one suggested the charges were inappropriately brought as representative charges. Moreover, I am satisfied they are properly within s 20 of the CPA and that the requirements of s 17 of the CPA are satisfied.

District Court Judgment

[19] The Judge found all charges were proven.

[20] There was no dispute that Agricola owned the cows, Mr McDonald was a director of Agricola, and he was the person in charge of the cows at all relevant times. Whilst others carried out some of the day to day functions involving the herd Mr McDonald was personally involved to a significant degree. There was no dispute that: (a) tail breaks were evident in the dairy herd; and (b) those injuries would have caused the cows a level of pain and suffering that contravened s 10 of the Act. Accordingly, those elements of the offences were established. The remaining live issue was whether Agricola and Mr McDonald could be held responsible for one or more of those injuries.

[21] The Judge identified the relevant law. He gave a comprehensive account of the prosecution and defence cases. He correctly identified the focus of the prosecution case as being that the considerable number of cows with broken tails proved the allegations contained within the various charges. The defence case was that the prosecution evidence relating to those tail breaks did not prove the charges beyond reasonable doubt. The defence drew no distinction between the alleged criminal responsibility of either defendant.

[22] The Judge focussed on the prosecution evidence of two witnesses, Dr O'Driscoll and Dr Laven who were both qualified veterinarians. The evidence of those persons satisfied him that a proportion of the tail breaks were not the result of accidental harm. Dr O'Driscoll had identified 186 cows with broken tails from a herd of 516. There was no direct evidence those injuries were inflicted by human agency. However, the number of broken tails, which came to 36 per cent of this herd were more than double the number that might usually be found in a dairy herd. Both Dr O'Driscoll and Dr Laven opined that this number of tail breaks could not be

explained by other possibilities such as cows hurting themselves or human intervention in urgent or desperate circumstances where a cow's tail was broken to avoid another greater harm befalling the cow. Their opinion evidence was supported by a Canadian study which concluded that the expected number of tail breaks in a dairy herd was around 15 per cent.

[23] There was some discussion in the evidence of Dr Laven and Dr O'Driscoll about whether the cows may have broken their tails by pushing back against a zigzag rail that lay behind their rear end in the bails where they stood in the milking shed. They both rejected this as a possible explanation for the tail breaks. First, because it did not fit with the cows' physiology, which meant the tail was not being pressed between two hard surfaces as would be required to break it. Secondly, because some of the breaks where located in a part of the tail that would not be touched by the zigzag bar. The Judge accepted their evidence and further rejected the notion the cows were injuring their tails by pushing back against the zigzag rails on the ground the tail breaks were in different parts of the tail.[7]

[24] Both when interviewed on site, under caution by Officer Corlett, and in his evidence Mr McDonald accepted the number of tail breaks was high. In the interview by Officer Corlett Mr McDonald denied breaking the cows' tails, but he did admit that he would *twist* cows' tails to get the cows to move, although he also said the force he used would not have broken them. In his evidence Mr McDonald retracted this admission and said he *lifted* the tails to cause the cows to move. He attributed his use of the word "twist" to being confused during the interview. However, the Judge found this evidence unconvincing and was satisfied that Mr McDonald was trying to downplay the effect of his statement to Officer Corlett.[8]

[25] The Judge also found that Mr McDonald had confirmed in his evidence that he was actively involved on a day-to-day basis with handling the cows, which led the Judge to find that Mr McDonald had the opportunity to handle the cows on a regular basis and to observe staff doing so.[9]

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7 *Ministry for Primary Industries v McDonald*, above n 1, at [89].
8 At [94]-[97].
9 At [93].

[26] The defence called Greg Lindsay, a veterinarian, who had also examined the herd on a different occasion. He had a higher total number for the herd (642) and he calculated that the cows with identified tail breaks (which he identified as 124 cows) represented 19.3 per cent of the herd. However, Mr Lindsay had not inspected all of those 642 cows. Moreover, he accepted under cross-examination that his calculations relied on untested and unproven assumptions about some of those cows, which led the Judge to find that Mr Lindsay's calculations could not be relied upon.[10]

[27] The Judge concluded that 36 per cent of cows with broken tails and the location of those injuries on the tails could not be explained by naturally occurring events such as cows injuring themselves. By an inferential process of elimination, he also concluded that he could be sure a proportion of the 36 per cent cows with broken tails must have suffered those injuries as a result of stock handling. He acknowledged that it was impossible to determine what proportion of this 36 per cent was attributable to that behaviour but found that it was unnecessary to do so.[11] He was satisfied that tail jacking leading to tail breaks had occurred and this was sufficient to support the charges.

[28] The Judge also found that Mr McDonald, both personally and in his role as a director of Agricola, had either participated in or condoned tail jacking and by doing so he had failed to ensure the cows were physically handled in a manner that minimised the likelihood of unreasonable or unnecessary pain or distress.[12] Accordingly, convictions were entered on all charges against both Agricola and Mr McDonald.[13]

[29] Whilst the prosecution had outlined the circumstances under the relevant legislation when the onus of proof would shift to a defendant the Judge did not base his decisions on a shift in onus. Instead he approached the charges on the basis it was

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10 *Ministry for Primary Industries v McDonald*, above n 1, at [70] and [88].

11 At [98].

12 This finding satisfied the additional element of the charge against Mr McDonald as a director of Agricola. Section 165 of the Animal Welfare Act 1999 required proof that Mr McDonald knew, or should have known, that the offence under s 12 was being committed and failed to take all reasonable steps to prevent or stop it.

13 *Ministry for Primary Industries v McDonald*, above n 1, at [98].

for the prosecution to prove the elements of the charges and his judgment shows he was sure it had done so.[14]

Approach on appeal

[30] The appeal is brought pursuant to s 232 of the Criminal Procedure Act 2011. Section 232(2) relevantly provides that the Court must allow the appeal if it is satisfied that, in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred,[15] or that a miscarriage of justice has occurred for any reason.[16] A "miscarriage of justice" is defined in s 232(4) as:

> …any error, irregularity, or occurrence in or in relation to or affecting the trial that—
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> (a) has created a real risk that the outcome of the trial was affected; or
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> (b) has resulted in an unfair trial or a trial that was a nullity.

[31] A "real risk" that the outcome of the trial was affected will arise if there is a reasonable possibility that a not guilty (or a more favourable) verdict might have been delivered if nothing had gone wrong.[17] Irregularities which "plainly could not, either singly or collectively, have affected the result of the trial" are not miscarriages of justice and the appellate court must disregard them.[18]

[32] The Supreme Court in *Sena v New Zealand Police* has recently confirmed that when this Court hear appeals from the District Court it does so by way of rehearing and in accordance with the principles expressed in *Austin Nichols & Co Inc v Stichting Lodestar.*[19] Accordingly, whilst it is for an appellant to show the trial judge has made an error, an appellant is entitled to this Court's determination on whether the trial judge was right or wrong substantively on the outcome.

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14 *R v Wanhalla* [2007] 2 NZLR 573 (CA) at 588.
15 Criminal Procedure Act 2011, s 232(2)(b).
16 Section 232(2)(c).
17 *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730 at [110]; *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [27].
18 *Matenga v R* [2009] NZSC 18, [2009] 3 NZLR 145 at [30]; *Wiley v R*, above n 17, at [28].
19 See *Sena v New Zealand Police* [2019] NZSC 55 at [32].

[33] When there is a challenge to the factual findings of the trial judge, if this Court "comes to a different view on the evidence the trial Judge necessarily will have erred, and the appeal must be allowed".[20] On the other hand, this Court must take into account the advantages the trial Judge enjoyed when it comes to assessing a witness's evidence. Accordingly, when credibility findings based on contested oral evidence are challenged this Court will exercise customary caution before interfering with those findings. As the Supreme Court explained:[21]

> …appellate judges dealing with a case on the basis of a written record of what happened at trial and the submissions of counsel are unlikely to be as well placed as a trial judge to determine contested questions of fact based on contested oral evidence. For instance, what a witness means may be conveyed, at least in part, by gesture or intonation something which will not be apparent on the written record. More generally, the appellate process in which appellate judges are taken, sometimes rather selectively, to aspects of the evidence on which counsel rely does not replicate the advantages of a trial judge which we have just described.

Grounds of appeal

[34] Agricola and Mr McDonald submit that the Judge wrongly found the charges established because:

(a) there was no direct evidence that the cows' tails had been broken through mishandling. Instead, the case for the respondent relied entirely on expert evidence. That expert evidence was equivocal as to the cause of the tail breaks;

(b) the Judge reversed the onus, requiring the appellant to explain the incidence of tail breaks on the herd;

(c) the Judge failed to rule on the admissibility of evidence which had been objected to; and then wrongly relied on that evidence;

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20 *Sena v New Zealand Police*, above n 19, at [38].
21 At [40].

(d) the Judge failed to distinguish between 67 cows with allegedly damaged tails (in respect of which no charge had been laid), 107 with alleged "old breaks" and 12 with alleged "fresh breaks".

Did the Judge's reliance on the expert evidence amount to an error that resulted in a miscarriage of justice?

[35] There was no direct evidence to prove the cows with broken tails were mishandled by either Mr McDonald or other employees of Agricola. The appellants submit that the Judge could not be sure, simply from the opinion evidence of Dr Laven and Dr O'Driscoll, that the tail breaks were the result of mishandling. I reject this argument. There was ample evidence before the Judge to support the argument the tail breaks were caused by mishandling.

[36] Proof of the prosecution case did not depend on direct evidence of mishandling at the time when tail breaks occurred. There is no reason why the Judge could not base his findings on a combination of circumstantial and opinion evidence.

[37] Here there was direct evidence that a proportion of cows had broken tails. On the day Dr O'Driscoll examined the dairy herd there were 516 cows in the milking shed. Mr McDonald said in evidence that Agricola milked a herd of approximately 520 to 550 cows. Accordingly, the 516 cows seen by Dr O'Driscoll represented a sample of the dairy herd that was randomly selected, insofar as they were not chosen by MPI but just happened to form the herd that was being milked on the day MPI arrived to inspect the cows for tail breaks. Of that herd 36 per cent had broken tails, and some of them had more than one break in the tail

[38] Under cross-examination Dr O'Driscoll accepted she had not examined all the dairy herd in that five per cent of the herd were not in the milking shed on the day she carried out her assessment[22]. She opined that once the additional five per cent were allowed for and assuming they all had unbroken tails this would reduce the percentage of cows with broken tails to 31 per cent. However, I do not propose to consider the

[22] Twenty-seven cows were absent from the milking herd on the day Dr O'Driscoll performed her assessment, which amounted to five per cent of Agricola's dairy herd. In his evidence Mr McDonald said these 27 cows had been dried off after having been mated, which accounts for their absence.

injuries on the basis they were present in no more than 31 per cent of the herd. I consider the better approach is to rely on the 36 per cent with injuries which Dr O'Driscoll identified from her assessment. This is a known percentage and represents the milking herd for that day. The outstanding five percent that were not present that day have a negligible effect on the percentage of cows with broken tails as 31 per cent is still just over double the accepted number. Moreover, this figure is unreliable insofar as it comprises an allowance for additional cows that have not been assessed and, therefore, it cannot be known if some of them also had injured tails.

[39] Something had to cause the tail breaks. If the presence of 36 per cent of cows in a milking herd with tail breaks was a normal feature of dairy farming one would expect to see this percentage of tail breaks in other herds. But that is not so. There is no evidence to suggest that this percentage of tail breaks is within an acceptable range.

[40] The evidence in general was to the effect that the cows were otherwise in good health, they appeared to be well fed and the milking shed was a regular type of design. So, there were no other features about these cows that would distinguish them from other dairy herds. Accordingly, one would logically expect these cows to resemble those cows on other dairy farms. However, they did not.

[41] The expert witnesses for MPI all essentially opined that 36 per cent of the cows in a herd having tail breaks is not something that can be explained by accidents. Their evidence was very clear on this point.

[42] The personal experience of Dr Laven was that this was an unusually high number of breaks. He identified that a level of 36 per cent of stock with tail breaks was "significantly beyond a level that might otherwise be explained by accidental causes".[23] He has worked as a veterinarian in other countries as well as New Zealand. From his experience in the United Kingdom tail breaks would be found in about five per cent of a dairy herd. He referred to a Canadian study which found an average of 15 per cent tail breaks in a dairy herd. This was in circumstances where the method of confining a cow for milking was more restrictive than in New Zealand and therefore

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23 *Ministry for Primary Industries v McDonald*, above n 1, at [87].

perhaps more likely to lead to self-injury. A good summation of his evidence was given when he said:

> What I do know is that farms that I have been involved with that have had high levels of broken tails they generally have been – so far I have not seen one where there was anything else causing the broken tails other than by force or manipulation.

[43] Dr O'Driscoll also opined that for 36 per cent of cows in a herd to have tail breaks was unusually high. Dr O'Driscoll, in concluding that these injuries were caused by mishandling, noted that while the occasional tail injury can result from accidents "the number and location of injuries…rule this out as a major factor".[24]

[44] One explanation that was offered for the high number of cows with broken tails was related to the cows causing breakages by backing up to the rear zigzag shaped railing in the milking shed. Agricola used a herringbone milking shed which works by cows "rowing up" side by side between a breast rail at the front and a zigzag rail at the rear. Under cross-examination Dr Laven was asked whether, if a cow were to back up to this metal railing, it would be possible for her to do so with such force that she would injure/break her tail. Dr Laven rejected this proposition because when a cow pushes against this metal railing this action causes her tail to push against her body, namely the udder or the escutcheon (where the udder meets the back of the cow), which is soft, so no force is applied to the tail.[25] Dr Laven said the tail would need to be pressed between two hard surfaces before an injury like a broken tail was sustained. When further questioned as to whether a cow's tail could be injured by getting caught or wrapped around a railing and being pushed back, Dr Laven stated it would be "extremely unlikely".

[45] When the possibility of the tail injuries occurring as a result of cows backing up against the zigzag rear railing during milking was put to Dr O'Driscoll in cross-examination, she said this would be "very unlikely" for similar reasons as Dr Laven gave: namely, that the tail would hit the bar and sink into the escutcheon, which would protect the tail from injury. She also said that to her knowledge these rear railings, which are common in New Zealand milking sheds, have never been identified as a

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24 *Ministry for Primary Industries v McDonald*, above n 1, at [38].
25 At [29].

structural problem, which makes it unlikely for them to result in injuries of the magnitude which she identified.[26]

[46] When questioned about the possibility of the cows injuring their tails by backing into the rear rail, Mr Lindsay described Agricola's milking shed as "quite a nice herring bone shed. I wouldn't see why that would be an issue".

[47] Thus, the evidence does not support the notion of cows breaking their tails in the milking shed by backing into the zigzag rail.

[48] No defence expert suggested 36 per cent of the herd having broken tails was an acceptable figure. Mr Lindsay, the defence expert, had reached a lower percentage of 19.3 per cent but in circumstances where under cross-examination he accepted he had not "tail scored" cows and had made assumptions:[27]

> Q Your calculation where you've arrived at 19.3 includes some assumptions that can't be proved doesn't it?
>
> A Unless you go back and tail score them now.
>
> Q Yeah. So at the time you did it relied on an assumption that hadn't been tested or proved. Is that correct?
>
> A Yeah
>
> Q So the figure of 19.3% that you've arrived at can't be relied on either can it?
>
> A Without tail scoring the whole herd that number is, yeah is requiring some assumption, yep.

[49] In view of the untested and unproved assumptions on which Mr Lindsay's evidence was founded it is not surprising its impact on the Judge was negligible. It is hard to see how else evidence of this quality might be viewed.

[50] There is another aspect of Mr Lindsay's evidence on which the Judge did not comment, but which also casts Mr Lindsay's evidence in a poor light. He said Agricola had a total herd of 642 which was incorrect. Mr McDonald confirmed the total herd

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26 *Ministry for Primary Industries v McDonald*, above n 1, at [38].
27 See [70].

was no more than 570.[28] He thought Mr Lindsay may have relied on out of date records which included cows that had left Agricola's farm. Mr McDonald's evidence shows that Mr Lindsay had not correctly identified the total size of the herd. This meant Mr Lindsay had used an inflated number from which to calculate the percentage of injured tails which he arrived at. Also, he clearly had not inspected all the animals he included in his calculation, which he readily acknowledged under cross-examination, he was in no position to say how many had broken tails. These errors impacted on the figure of 19.3 per cent tail breaks which he concluded were present. The presentation of this type of evidence falls well below the standard to be expected from professional persons giving evidence in a criminal prosecution.

[51] There was no dispute at trial that tail breaks were evident[29] and that the percentage of cows with tail breaks (36 per cent) was high.[30] Mr McDonald himself said in evidence that he could not explain the high incidence of tail breakage.[31]

[52] Mr McDonald was interviewed by Officer Corlett after the cows were assessed. During this interview, Mr McDonald disclosed that he had "twisted" cows tails on occasion, but not to the extent that he believed this twisting had broken a cow's tail. In his evidence at trial, however, Mr McDonald attempted to retract this earlier admission, stating that he should have used the term "lifting" (in fact referring to cow jacking) rather than "twisting". He maintained that he was unsettled in the interview and had used the wrong term. At trial Mr McDonald denied injuring the cows' tails or seeing staff do so:

> Q. Do you have any idea how your cows' tails were damaged?
>
> A. Apart from Mr Lindsay has indicated as a possibility, no, we, no I do not.
>
> Q. Have you ever damaged the cows' tails?
>
> A. No I have not.
>
> Q. Have you ever seen your staff damage your cows' tails?
>
> A. No.

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28 *Ministry for Primary Industries v McDonald*, above n 1, at [53].
29 At [9] and [48].
30 At [64].
31 At [64].

[53] However, there was no criticism of the circumstances of the interview by the defence. The Judge was entitled to accept that the interview represented the more accurate position. Also, it was open to the Judge to conclude that Mr McDonald's evidence was an attempt to "downplay the comments made in interview".[32] The incriminating implications of what Mr McDonald had said in the interview would have become more apparent at trial. This is especially so based on the expert evidence available to the Judge that, based on the positioning of the breaks and the high percentage of broken tails, the tail breaks were the result of forceful manipulation, as opposed to accidents or misadventures.

[54] The Judge had the benefit of hearing and seeing the evidence from the witnesses at first hand. He was entitled to reject Mr McDonald's evidence and to prefer the account Mr McDonald gave in the interview with Officer Corlett. The Judge was also entitled to reject Mr Lindsay's evidence.

[55] On the other hand, the Judge was entitled to accept the evidence of Dr Laven and Dr O'Driscoll. Indeed, it is difficult to see how he could reasonably have concluded otherwise. This evidence, which was offered by two independent veterinarians, is compelling and logical.

[56] Moreover, evidence from a table Mr Lindsay had prepared showed a spike in the number of tail injuries suffered by Agricola's cows between the ages of two and three years, which coincided with them entering their first year of milking. Under cross-examination Mr McDonald acknowledged this increase in injury occurred after those animals were being subjected to more physical handling than when they were grazing off site. Agricola's veterinarian, David Oertly, accepted this as well when he was cross-examined. Mr Lindsay had scored 122 two-year old heifers of which he identified 3.6 per cent as having broken tails. Mr Oertly had scored those animals as nine per cent with tail breaks, however, his assessment of them had stopped part way through and he relied on information from someone else to complete this exercise. The two-year old animals had been grazed off site and had not been through a milking. Whereas the table showed that for three-year old cows, who had been through their

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[32] *Ministry for Primary Industries v McDonald*, above n 1, at [96].

first year of milking on Agricola's farm, the percentage of tail breaks for this group increased to 18.5 per cent. There is some uncertainty about whether the tail breaks for the two-year old group came to 3.6 per cent or nine per cent but either way, these percentages are well below the 18.5 per cent figure for the three-year old cows. This evidence, from defence witnesses, provides additional confirmation that a proportion of the tail injuries on Agricola's farm must be due to stock mishandling by persons at Agricola rather than something else.

[57] I am satisfied that the evidence on which MPI relied was sufficient evidence to reach a safe and logical inference to the requisite legal standard that the cause of a proportion of the injuries was through stock mishandling, rather than through the alternative causes of accidents, misadventure or the need to act urgently to save a cow from harm.

[58] In the absence of eye-witness evidence, it will almost always be impossible to conclude with certainty as to what was the cause of the tail breaks. However, there was certainly sufficient evidence to prove beyond reasonable doubt that some of the tail breaks must have been caused by human agency through mishandling of the cows because for 36 per cent of the herd to have broken tails was too high for all those breaks to have occurred accidentally.[33] Given the representative nature of the charges that was all that MPI needed to prove in relation to the charges against Agricola. Regarding the charges against Mr McDonald his own evidence was that he was usually present in the milking shed and he was the person managing the dairy farm. In which case in his role as manager and as a director of Agricola, he was in the position both to handle and observe others handling the cows on a day-to-day basis. With such a high percentage of cows having broken tails it can properly be inferred beyond reasonable doubt that he either knew or should have known what was happening to the cows and he failed to take all reasonable steps to stop this mishandling.

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[33] The same reasoning is equally applicable if the percentage is reduced to 33 per cent to take into account the possibility 16 out of the 186 cows may have injured their tails while off site: see discussion at [63] herein.

Did the Judge reverse the onus of proof so as to amount to an error that resulted in a miscarriage of justice? – or conflate both of these?

[59] The appellants submit that the Judge reversed the onus of proof by requiring the appellants to provide an explanation as to whether the tail breaks were the result of stock handling. Specifically, that it was wrong for the Judge to require the appellants to provide and explain how the tail breaks were not caused by mishandling. Further, under this heading, the appellants submit that the Judge failed to refer to one of the explanations proffered by the defence — that some proportion of the cows had arrived on the property with damaged tails. However, in this regard no evidence was adduced by Agricola or Mr McDonald to this effect. I reject both submissions.

[60] As to the first submission, Judge Menzies stated from the outset in his judgment:[34]

> [7] MPI having brought this prosecution, carries the onus of establishing the charges to the required standard of beyond reasonable doubt. That onus remains on MPI throughout the prosecution.

Thus, the Judge was cognisant of the onus of proof as he traversed the evidence.

[61] The Judge noted that the "picture presented by the evidence… is the percentage of broken tails at 36 [per cent] of the herd was unacceptably high and called for explanation".[35] This did not however correspond to meaning the Judge required the appellants to provide an explanation. The Judge was merely echoing the evidence of the experts which he had accepted.[36] It logically followed from his acceptance of the experts' evidence that the percentage of tail breaks was well out of the ordinary and something that could not be explained by accidental occurrence. Mr McDonald had admitted to twisting the cows' tails. Whilst he did not accept he had twisted them to the point of causing breaks and he attempted to withdrawn from the admission of twisting in his evidence it was open to the Judge having seen and heard Mr McDonald's evidence to conclude that the twisting did happen, and that it must have happened with more force than Mr McDonald would admit. Once there was the admission of twisting tails this coupled with the expert evidence was enough in my

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34 *Ministry for Primary Industries v McDonald*, above n 1.
35 At [89].
36 At [80] and [89].

view to constitute proof beyond reasonable doubt that at least one or more of the tail breaks was the result of human mishandling of the cows. I can see no basis for a contrary conclusion. The Judge's reference to the absence of other explanations was not a reversal of the onus of proof, but simply a recognition that there was no other evidence that might explain how the tail breaks had occurred. It was not for him to speculate on other possible explanations. Accordingly, the conclusions the Judge reached were legitimate and his reasoning did not amount to a reversal of the onus of proof.

[62] Regarding the second submission this is something of a red herring. Mr Oertly, the veterinarian who provides services for Agricola's stock, gave evidence of examining the tails of heifers, who had been on grazing on another property. On 30 May 2017 Mr Oertly examined some of those heifers when they had returned to Agricola's land and he found that nine per cent of the heifers he examined had tail breaks. He says that those tail breaks must have occurred before the heifers returned to Agricola's farm. This does not take the matter very far at all. First, these heifers were not on Agricola's land when Dr O'Driscoll carried out her assessment. Secondly, a nine per cent tail break rate is well within the accepted occurrence of tail breaks which is around 15 per cent. It cannot be inferred that because in May 2017 a herd of heifers grazed off site had around nine per cent tail breaks that therefore all of the cows in the 36 per cent Dr O'Driscoll found to have tail breaks suffered those while grazed off site. In addition, Mr Oertly acknowledged he did not assess all of these heifers which means his percentage may be partly based on assumption. A later assessment of the same group of heifers, by Mr Lindsay, arrived at a lower figure with him finding only 3.6 per cent had tail breaks.

[63] During cross-examination of Dr Laven, the defence suggested to him that regarding 16 cows, assessed by Dr O'Driscoll, who were first year milkers and who had been grazed off-site as heifers, he could not say whether they arrived on site with damaged tails.[37] While Dr Laven accepted this was so, there does not appear to be any evidence to establish whether any of those 16 first year milkers actually had tail

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[37] The question the defence asked Dr Laven did not qualify whether Dr O'Driscoll's assessment identified these cows as having broken tails, nor was this matter elaborated on during the appeal hearing.

injuries. So Dr Laven's concession does not take matters very far. Moreover, if those 16 cows are assumed to have suffered tail breaks while grazing off site and are therefore removed from the 186 cows that Dr O'Driscoll identified as having broken tails, this merely reduces the percentage of cows with those injuries from 36 to 33 per cent, which is still more than double the accepted figure.

[64] In conclusion, there is simply no evidence to suggest any, let alone all, of the 36 per cent cows with broken tails were grazed off site in circumstances where they suffered those breaks off site. And even when allowance is made for the 16 first year milkers mentioned above their effect on the number of injuries is negligible, and so does not detract overall from the obvious conclusion that a proportion of the tail breaks were the result of the mishandling by Agricola and Mr McDonald.

Did the Judge's failure to rule on the admissibility of evidence amount to an error that resulted in a miscarriage of justice?

[65] Agricola and Mr McDonald submitted the Judge failed to rule on an objection as to the admissibility of evidence led by Dr Lavern, and wrongly relied on that evidence in reaching his decision. The evidence outlined unpublished research undertaken by Dr Mark Jeremy of the Department of Mechanical Engineering at the University of Canterbury (the Canterbury study) which identified the "mean torque" required to break a cow's tail at its mid-point. The torque was said to be the same as the torque required to lift a bottle containing two litres of water at the end of a 0.7 metre long stick. Dr Laven said this degree of force is unlikely to be applied accidentally.

[66] Agricola and Mr McDonald maintain this evidence is plainly inadmissible as it is hearsay and outside the body of knowledge of Dr Laven.

[67] The objection to the evidence arose during cross-examination of Dr Laven. Dr Laven was directed to explain how he was aware of the study, how the study related to his own expertise, and what involvement, if any, he had with any authors of that study. Dr Laven stated that he has experience with respect to the level of force required to break cows' tails. He further stated that he met with the people who conducted the torque study, traversed their methodology and research, and reached the conclusion

that their study was accurate with reference to his own experience. Dr Laven stated that he has been working with the co-ordinators of the study to peer-review the study in preparation for publication.

[68] The Judge refers to Dr Laven's evidence on the Canterbury study in the section of the judgment which outlines the prosecution case.[38] Nowhere in the discussion section of the judgment where the Judge expresses his reasons for finding the charges proved does the Judge specifically refer to the Canterbury study. Both Dr Laven and Dr O'Driscoll independently confirmed from their own experience that a considerable degree of force would be required to break a cow's tail. At [18] the Judge refers to the evidence of these witnesses and places particular emphasis on the evidence of Dr O'Driscoll, which was not on reliant on the Canterbury study.[39] Thus, it seems to me that the Canterbury study did not form part of his decision. Moreover, I consider there was sufficient evidence apart from the Canterbury study on which the Judge could rely to make his findings. Accordingly, I am not satisfied the Judge has relied upon the study, in which case his omission to deal with the evidence objection to the admissibility of this study will have had no material effect on him finding the charges proven.

[69] In my view the Canterbury study can be disregarded. The short point is that here there was more than double the accepted upper limit of tail breaks. There was no suggestion that unknown persons had come on to the property and committed these acts. There were more breaks than could reasonably be expected to occur from the application of accidental force or self-injury. Dr Laven had referred to evidence regarding beef cattle in paddocks and the smaller number of tail breaks they suffered. There was no evidence there is a difference between the tails of beef cows and dairy cows such that the latter have tails that are more likely to suffer breaks accidentally. Moreover, the evidence Mr Oertly gave regarding the dairy heifers with nine per cent tail breaks that were grazed off site also shows that cows in paddocks are not likely to suffer the level of accidental breaks that would lead to 36 per cent of a herd having broken tails. Accordingly, there is enough evidence to satisfy me beyond reasonable

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38 *Ministry for Primary Industries v McDonald*, above n 1, at [25].
39 At [18].

doubt of the guilt of Agricola and Mr McDonald on the charges they faced, without having recourse to the Canterbury study.

[70] It follows that the Judge's omission to specifically deal with the objection to this evidence does not amount to a miscarriage of justice.

Failed to distinguish between cows?

[71] Agricola and Mr McDonald submit that the Judge failed to distinguish between the three categories of cows when determining the charges. Those categories are the 12 cows with recent injuries, the 107 cows with old injuries and the 67 cows who had suffered injuries outside the statutory time frame.

[72] The Judge was cognisant of the different categories of cows in determining the charges. From the outset, the Judge had regard to the different categories of cows, distinguished by their old and new injuries, when outlining the charges faced by the appellants:

> [3] One of the charges (CRN 0019) alleges the offence was committed between 1 June 2016 and 24 January 2017 in respect of new injuries identified in the tails of no more than 12 cows at the time the dairy herd was inspected on 24 January 2017 at Ohaupo.
>
> [4] The second charge… alleges the same offence committed between 1 June 2012 and 24 January 2017 in respect of no more than 107 cows being those identified as having older injuries at the time of the inspection on 24 January 2017.
>
> [5] The defendant Agricola… faces two identical charges under s 12(a) of the Act in respect of the same dates, location and cows as the owner of the dairy cattle.

[73] The 186 cows that Dr O'Driscoll found with broken tails on the day she carried out her assessment formed part of the herd that was milked that day. I consider the Judge was entitled to take into account the 67 cows with injuries outside the statutory period as this fact cannot detract from the fact those cows had also suffered tail breaks. Whilst those breaks could not be the subject of a charge they could nonetheless provide evidence of the number of cows with broken tails in the herd that day. The recognition of those cows and their injuries was relevant evidence to establish the percentage of

cows with broken tails for the purpose of assessing whether the number of breaks were more than could reasonably be explained by accidental occurrences.

[74] Another way of looking at the evidence of the 67 cows is to view their injuries as propensity evidence which goes to show a propensity on this dairy farm to mishandle stock. Propensity evidence is defined in s 40 of the Evidence Act 2006 (EVA) as including evidence that tends to show a person's propensity to act in a particular way, being evidence of acts, omissions or events or circumstances with which a person is alleged to have been involved.

[75] The 67 cows provide probative evidence in relation to an issue in dispute in the Judge alone trial: namely, were one or more of the number of tail breaks the result of accidental injury or stock mishandling by Agricola employees/agents/contractors or Mr McDonald himself.

[76] Considering the admission of the evidence of the 67 cows' injuries in terms of the usual propensity analysis under s 43 of the EVA is not easy as the section does not readily lend itself to an analysis involving animal subjects. However, in terms of a s 43 analysis the presence of 67 cows with aged tail breaks in a group of 186 cows, the balance of which have more recent tail breaks, suggests a degree of frequency with which those injuries are occurring.[40] There is some connection in time between the cows with broken tails on which the charges are based and the 67 cows as they all form part of a current milking herd.[41] There is strong similarity between the nature of the injuries of the cows with broken tails on which the charges are based and the injuries of the 67 cows.[42] The injuries that support the charges and the injuries of the 67 cows are both unusual in the sense it is out of the ordinary to find so many cows with broken tails in a dairy herd.[43] The other aspects of s 43(3) are not applicable here. The evidence relevant to the 67 cows' injuries has greater probative weight than it does prejudicial effect. Here the fact finder was a Judge and was therefore less likely to be emotionally influenced in an unfairly prejudicial way by the propensity evidence than a jury might be. On the other hand the propensity evidence was highly probative to

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40 Evidence Act 2006, s 43(3)(a).
41 Section 43(3)(b).
42 Section 43(3)(c).
43 Section 43(3)(f).

proof of the overall number of cows in the herd with broken tails, which provided circumstantial evidence to support the inference that one or more of the injuries supporting the charges had occurred through mishandling of the dairy herd. Thus, this evidence meets the threshold for admission under s 43(4) of the EVA.

[77] I accept the injuries of the 67 cows were statute barred and, therefore, they will not be subject to a requirement for proof beyond reasonable doubt. However, there is little if any difference to the use of this propensity evidence and the admission of prior acquittal evidence, which has also not withstood scrutiny beyond reasonable doubt. The admission of prior acquittal evidence as propensity evidence is allowed if the prior acquittal evidence has a probative value in relation to an issue in dispute which outweighs the risk it might have an unfairly prejudicial effect on the defendant.[44] Accordingly, I do not consider the Judge's inclusion of the 67 cows in his assessment of the evidence against Agricola and Mr McDonald was an error.

[78] Nor do I consider it material that the Judge assessed all the injuries without distinguishing between the 12 cows with new tail breaks and the 107 cows with older tail breaks.

[79] There were adequate grounds to separate the cows with old injuries from the cows with new injuries. Dr O'Driscoll gave evidence as such:

> A: … If the tail was connected it would, … bend on a curve as a tail normally does because all the bones are connected. It shouldn't just bend and then bend at an angle. That indicates ligament damage. It's very clear to a vet, yep.
>
> Q: And in terms of your classifications with old injuries and new injuries what would that tail that's shown in the video present as?
>
> A: Because it still has free movement and it hasn't fused that would be classified as a new injury

[80] She further clarified in cross-examination:

> Q: Well, if you've identified a break, that break is not going to disappear in six months' time, is it?
>
> A: Breaks remodel, so especially anything that I considered a new break or just simply a ligamentous break, they won't necessarily look the same in six

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[44] See discussion in *R v K (SC 10/2019)* [2019] NZSC 46.

> months' time. I would agree that most of the breaks that I saw, especially those very obvious zigzags will look the same and that's – I mean we had a high level of agreement but I would be suspicious that especially some of the ligamentous breaks would be difficult to diagnose after they've healed
>
> Q: But that would only apply in relation to fresh breaks?
>
> A: Which I think six of the … 120 …. that he looked at were considered fresh breaks.

[81] Accordingly, the evidence at trial established that a portion of the injuries were rightly classified as recent, sufficient to maintain the charges for the time period 1 June 2016 to 24 January 2017.

[82] The presence of three categories of tail breaks (new, old and those outside the statutory time frame for prosecuting) evidences a continuing course of conduct. Whilst the charges against both Agricola and Mr McDonald were separated into two sets, being new and old injuries, the elements of the offences in relation to each set of charges for each defendant remained the same.[45] The same defence, that the injuries were the result of accidents, was also applied in respect of each set of charges against each defendant. The Judge was, therefore, entitled to apply the same reasoning to each set of charges. Moreover, I am sure, from the evidence available, that at least one of the new tail breaks must have been the result of stock mishandling.

Conclusion

[83] It follows that none of the grounds of appeal have been established. There is nothing to show a miscarriage of justice has occurred. The appeal against conviction is dismissed in relation to all the charges.

Duffy J

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[45] This is with exception of the charges against the appellant in his capacity as the director of Agricola, which required an additional element pursuant to s 165 of the Act as to whether the appellant knew or should have known that the offence was being committed and failed to take all reasonable steps to prevent or stop it.