

**IN THE DISTRICT COURT
AT TOKOROA**

**CRI-2017-077-000513
[2017] NZDC 20624**

MINISTRY FOR PRIMARY INDUSTRIES
Prosecutor

v

RODNEY GRANT NICOL
Defendant

Hearing: 7 September 2017

Appearances: K Herlihy for the Prosecutor
B McCorkindale for the Defendant

Judgment: 7 September 2017

NOTES OF JUDGE M A MacKENZIE ON SENTENCING

[1] Rodney Nicol, you appear today in relation to one charge laid under the Animal Welfare Act 1999. You have entered a plea of guilty to a charge that being the owner or person in charge of a Friesian cross dairy cow, number 27, that was ill or injured, failed to ensure that the animal received treatment to alleviate unreasonable and unnecessary pain or distress being suffered by the animal and it was practicable to do so.

[2] These are not cases which we see frequently in these Courts. The maximum penalty for this charge is 12 months imprisonment or a fine not exceeding \$50,000. There are limited comparator cases, as you have heard from the submissions made by your counsel, Mr McCorkindale, and the prosecutor, Mr Herlihy.

[3] I start with the facts. As a result of an inspection by an animal welfare inspector in May of last year, cow number 27 was located in a paddock a short distance from the cowshed. It was obvious to the inspector that there was an injury to the cow. Mr McCorkindale advises the Court that the injury was not initially noticed by you due to the location of the injury.

[4] The culpability for you lies in the fact that once you became aware of the injury, which I will detail shortly, you did not engage a vet to consider what steps should be taken in terms of cow 27 for veterinary assistance or to be dealt with in another way. The duration of your neglect of the cow was a period of six months. I call it neglect in a general sense in terms of the specific charge. The period where you failed to ensure that cow 27 received treatment was a period of approximately six months.

[5] In layman's terms, the diagnosis was a chronic injury, either blunt force trauma or a penetrating injury that had resulted in carpal joint infection, septic arthritis and destruction of articular cartilage which would have taken place over some weeks. I prefer to refer to it in layman's terms which are set out in the summary rather than the more specific veterinary medical terms which are detailed in the summary of facts.

[6] Both counsel have referred me to a particular paragraph in the summary and it is important, in my view, to quote that:

“In the opinion of Veterinarian Professor Richard Laven, ‘joint infection is extremely painful 9/10 [on a scale] (my words) and would have been present for a considerable period of time, but reduced as fibrosis develops, but even at the time the cow was euthanised there would have been significant pain (>5/10)’.

Joint infection due to a penetrating wound can be treatable by a veterinarian, provided the problem is identified early enough. If the infection has set in then treatment will either be ineffective or uneconomic, so euthanasia is the best option.”

[7] You were candid, as submitted by Mr McCorkindale, acknowledging you had been aware of the injury since December 2015 but did not engage a veterinarian, instead you continued to graze cow 27 for a period of six months until the intervention of MPI when a decision was made to home-kill the cow. You said that you did not

engage a vet to examine the cow on the basis that there was no obvious sign of pain or distress being exhibited by cow 27 at that particular point in time.

[8] Certainly, as Mr McCorkindale notes, the cow was in good condition at the time the decision was made to home-kill the cow. He describes the scale as being 5.5 to 6, which I can only accept meant that cow 27 was in good condition. There is no doubt that there must have been pain and suffering by cow 27 over that six month period. It would seem that at a particular point in time, it would have been at the extreme end of the scale because 9 out of 10 is the extreme end of the scale, but mitigating to 5 out of 10, which is still described by the expert as significant.

[9] One comparator case counsel have helpfully given me is a case of *MPI v Hall*¹, a sentencing decision of His Honour Judge Connell. Both counsel have invited me to consider that as a useful comparator. Often the MPI cases involving animals are of a much larger scale. I do consider that I can deal with you today, however, rather than adjourning sentencing to call for written submissions.

[10] I accept that a fine can adequately meet the principles and purposes of sentencing in your case which are deterrence, denunciation and accountability. The real question is what the appropriate starting point should be.

[11] Both Mr Herlihy and Mr McCorkindale accept that the starting point is in the vicinity of \$4000. Mr McCorkindale submits that factoring in the fact that you will be required to pay some additional costs that Mr Hall did not, and pointing to some differences or distinguishing factors in your case as compared with *Hall*, an end sentence could be in the vicinity of \$2000 plus the costs of \$822.25 which are not in dispute.

[12] Mr Herlihy submits that your situation is on all fours with Mr Hall's case.

[13] Both counsel have spoken to the similarities or differences with *Hall*. There is no tariff case for offending of this nature. That is because there is always a variety of circumstances. No two cases are the same and your case is a good illustrator of that.

¹ *MPI v Hall* DC Morrinsville CRI-2013-063-002250, 12 June 2013

[14] There are some differences to the *Hall* case. Mr McCorkindale says that the situation in *Hall* is different because, in the *Hall* case, the cow would have suffered considerable pain and distress from the tumour for a period of some three to five months and should have been euthanized long before. The main distinction Mr McCorkindale draws between your case and the *Hall* case is the descending level of pain that cow 27 would have suffered.

[15] I accept that, but with the caveat, that clearly there would still have been a significant degree of pain even if at a scale of 5 out of 10, according to the specialist opinion of Dr Lavin.

[16] There is another difference between your case and *Hall* which is the period of time where you did not seek medical treatment for cow 27 is greater than in the *Hall* case. In your case it is acknowledged to be six months; in the *Hall* case it is something less between three to five months. If it was at the five month end of the spectrum, then it is reasonably similar; if it is at the three month end of the spectrum, then it is, in your case, double the period of time.

[17] It is always difficult to undertake a nuanced analysis in broad brush terms. As I have noted, there are differences, one to your advantage and the other not, in terms of the timeframe.

[18] That compels me to the view that given the two cases are broadly similar in terms of the facts, I will start at \$4000 as the starting point for the fine. There are no aggravating personal factors to uplift that starting point.

[19] I am going to apply discounts for three factors. Two are specific mitigating factors; the third is not so. The third is a matter of proportionality when I stand back. The first mitigating factor is that I am going to give you a credit for remorse and acceptance of responsibility beyond what is inherent in the guilty plea. You have fallen on your sword. You fully accepted responsibility. You are clearly remorseful and remorse, if genuine, is well accepted as a separate credit, so I am going to give you a separate credit of \$400 for that.

[20] I am going to give you the full 25 percent credit for the guilty plea, which is the factor that is always applied after other personal mitigating factors. So that would be a fine of \$2700.

[21] The difference between Mr Hall's case and yours is that there were no other costs sought. There is no dispute that you are responsible for the specialist costs of \$822.25. That is where the question of proportionality comes into play. In my view, it is akin to the health and safety decisions and in those decisions, it is clear that proportionality is a relevant factor in assessing the quantum of a fine, and so that means that I am going to stand back and say in an overall sense, is a fine of \$2700 proportionate when there is going to be an order by me for you to pay \$822.25 in specialist fees. It is not a dollar for dollar reduction, but what I am going to do is that I am going to reduce that fine of \$2700 by \$400 and so there is going to be a fine of \$2300 to reflect proportionality and that is in accordance with the principles of the Sentencing Act 2002 which must apply, because a Judge must, in an overall sense, determine a sentence that is appropriate and proportionate to meet the sentencing needs.

[22] Standing back, you are convicted. You are fined \$2300 and you are also ordered to pay fees in the sum of \$822.25.

M A MacKenzie
District Court Judge