

**IN THE DISTRICT COURT  
AT HASTINGS**

**I TE KŌTI-Ā-ROHE  
KI HERETAUNGA**

**CRI-2021-020-002571  
[2022] NZDC 3831**

**WORKSAFE NEW ZEALAND LIMITED**  
Informant

v

**PROGRESSIVE MEATS LIMITED**  
Defendant

Hearing: 5, 6, 7, 8 and 9 December 2022

Appearances: T G Bain and K Opetaiia for the Informant  
B R Harris for the Defendant

Date of Decision: 2 March 2023

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**RESERVED DECISION OF JUDGE G A REA**

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[1] The Defendant is a meat processing business which operates in Hastings. It is charged that on or about 15 October 2020 at Hastings, it being a PCBU having a duty to ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU, including Alesana Baker, while the workers were at work in the business or undertaking, namely at its meat processing site, did fail to comply with that duty, and that failure exposed workers, including Alesana Baker, to a risk of death or serious injury arising from the use of a plant, namely a brisket cutter.

[2] Alesana Baker successfully applied for a job with the defendant on 11 September 2020. At the time he was 17 years of age and he had just finished high

school. He started work in what is described as the “offal room” and in the “casings” area, both of which were on the bottom floor of the meat processing plant.

[3] About two weeks after he commenced work, he started doing some work on the top floor which was the lamb slaughter floor. His first job on the slaughter floor was working on the “hooks” which involved making sure that the lamb carcasses were properly attached to the chain so that they could be properly processed.

[4] It would seem that Mr Baker did not consistently work on the top floor but was moved from time to time between floors both during and between work shifts.

[5] On the slaughter floor he was to be trained using the brisket cutter. A brisket cutter is like a very large pair of shears that is used to cut the brisket of a lamb carcass during the course of processing. It cuts through the bone and flesh of the lamb carcass to open up the chest cavity.

[6] Quite obviously a brisket cutter is a potentially very dangerous piece of equipment. The blades are long, sharp and obviously strong and powerful. There can be no argument that in the wrong circumstances serious injury or death could follow from an accident with a brisket cutter and no issue was taken with that during the course of the hearing.

[7] While using the brisket cutter, on 15 October 2020, Mr Baker suffered injury to his right hand. There was partial amputation of his thumb, index finger, middle finger and ring finger on his right hand. He was admitted to Hawke’s Bay Hospital but then transferred to the plastic surgery department at Waikato Hospital in Hamilton. On 16 October 2020, a plastic surgeon successfully repaired the tendons, nerves and arteries supplying the index, middle and ring fingers, but what was described as the “non-viable right thumb tip” was amputated.

[8] Mr Baker continued to receive nursing and rehabilitative assistance back in Hawke’s Bay and understandably has some ongoing issues as a result of the accident. There is no dispute that the injuries Mr Baker received must be regarded as serious.

[9] As a result of this accident a Charging Document was laid against the Defendant by the Informant for a breach of the Health and Safety at Work Act 2015 (“HSWA”). That charge alleged as follows:

**“Date of Offence\*:** On or about 15 October 2020

**Offence location\*:** At Hastings

**Offence description\*:** being a PCBU having a duty to ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU, including Alesana Baker, while the workers were at work in the business or undertaking, namely at its meat processing site, did fail to comply with that duty, and that failure exposed workers, including Alesana Baker, to a risk of death or serious injury arising from the use of a plant, namely a brisket cutter.

**Particulars:**

It was reasonably practicable for Progressive Meats Limited to have:

- Provided and maintained adequate systems and processes to ensure that hazards arising from plant were identified, and managed immediately and appropriately;
- Ensured the brisket cutter was safe to use, namely that the two-handed controls could not be bypassed; and
- Ensured adequate instruction, monitoring, and supervision of workers, for the purpose of ensuring ongoing compliance with safe use and handling.

**Legislative reference\*:** Health and Safety at Work Act 2015, ss48(1) and (2)(c), and 36(1)(a).”

[10] The Informant alleges that the Defendant exposed its workers, including Mr Baker, to a risk of death or serious injury by failing to comply with various duties under HSWA. It alleges that the breach of these duties had serious health and safety consequences for Mr Baker.

[11] While the charge is expressed in a general way covering all workers, the focus at the trial was on what happened to Mr Baker and the circumstances surrounding his

employment rather than a wider enquiry in relation to other workers. Therefore, it is intended to concentrate on Mr Baker as the relevant worker for the purposes of the prosecution.

[12] As noted in the Charging Document, the Informant has set out under three separate bullet points what it says are “reasonably practicable” ways that the Defendant could have reduced or eliminated the risk when using a brisket cutter. Those particulars are:

- Provided and maintained adequate systems and processes to ensure that hazards arising from plant were identified, and managed immediately and appropriately;
- Ensured the brisket cutter was safe to use, namely that the two-handed controls could not be bypassed; and
- Ensured adequate instruction, monitoring, and supervision of workers, for the purpose of ensuring ongoing compliance with safe use and handling

[13] It is not necessary for the Informant to prove that all of the particulars were reasonably practicable ways of preventing death or serious injury. It is sufficient if they are able to prove one of them.

[14] The particulars supplied in the Charging Document as to what the Informant alleges are reasonably practicable steps for the Defendant to take are extremely important and provide the foundation to the charge. In *Talleys Group Ltd v WorkSafe New Zealand*, the Court of Appeal held that the particulars are the very “pith and essence” of the charge.<sup>1</sup> As a result, it is my obligation to determine the charge based on what is alleged against the Defendant in those particulars and not to stray outside them.

[15] What is “reasonably practicable” is defined in s 22 of the HSWA.

## **22 Meaning of reasonably practicable**

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

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<sup>1</sup> *Talleys Group Limited v WorkSafe New Zealand* [2019] 2 NZLR 198 at [41].

- (a) the likelihood of the hazard or the risk concerned occurring; and
- (b) the degree of harm that might result from the hazard or risk; and
- (c) what the person concerned knows, or ought reasonably to know, about—
  - (i) the hazard or risk; and
  - (ii) ways of eliminating or minimising the risk; and
- (d) the availability and suitability of ways to eliminate or minimise the risk; and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

[16] It is now necessary to examine each of the particulars that the Informant says was reasonably practicable to have in place at the time of this incident and the Informant's assertion that in not doing so the Defendant is in breach of its obligations under the legislation and therefore guilty of the charge. Because of the view that I take of this case, having heard all of the evidence and considered the submissions made by counsel, I believe it is best to consider the last of the particulars first.

*Was it reasonably practicable for the Defendant to ensure there was adequate instruction, monitoring and supervision of workers, for the purpose of ensuring ongoing compliance with safe use and handling?*

[17] This will only be considered in relation to Mr Baker, not in relation to the instruction, monitoring and supervision of any other workers as I received no evidence about that.

[18] In my view, the main focus here is on the training that Mr Baker received on how to use the brisket cutter. The brisket cutter is designed to be operated using both hands. It is not necessary to go into technical detail as to how the brisket is operated. It is sufficient to say that it is designed in such a way that both hands should be used when the blade is activated and the cut is made to the brisket.

[19] Mr James Mitchell was the leading hand on the lamb slaughter floor at the time. He gave evidence that he could not remember who trained Mr Baker on the brisket cutter. He said he could remember taking him out there to the job, but he did not recall who it was who actually showed and/or instructed Mr Baker on how to use the brisket cutter.

[20] In his evidence Mr Baker said that he was trained by a co-worker called "Arama". He said that Arama started his employment with the Defendant on the same day as he did but that Arama started work immediately on the lamb slaughter floor while Mr Baker started in the offal room.

[21] Mr Baker said that his "training" on the brisket cutter with Arama lasted about four hours. Mr Baker said he was not shown any documentation before he started using the brisket cutter. He said that initially Arama showed him how to use the brisket cutter using both hands but then Arama switched to using one hand when he operated the brisket cutter. Mr Baker was able to see what Arama had done and was then able to operate the brisket cutter one-handed himself.

[22] Mr Baker said that he did not get any instruction on using the brisket cutter from Mr Mitchell or from anyone else other than Arama. That evidence seems to be supported by what Mr Mitchell himself said. Mr Mitchell believed he was not the one who instructed Mr Baker on how to use the brisket cutter and although he knew Mr Baker was to be trained in its use, he was not able to say who it was that undertook the training.

[23] The Defendant's documentation around Mr Baker's training also does not stipulate who was actually training him.

[24] On Mr Baker's recollection it was only a couple of days after he received training from Arama that the accident occurred. He said that he was operating the brisket cutter using his left hand only and was using his right hand to reach across and pull carcasses towards him so that he could cut their briskets. It was while he was doing that that the blades of the brisket cutter activated and caused the injuries to him that I have already outlined.

[25] During the course of his evidence Mr Baker was shown a video, prepared by the prosecution expert, Jack Mains, on how the two-handed safety feature could be bypassed and the brisket cutter operated one-handedly. It is not necessary to go into the technical details of that because Mr Baker confirmed that what was shown in the video was how he had been shown to bypass the two-handed safety requirements.

[26] As will become clear in a later part of this decision, Mr Baker's supervisors and the senior management and ownership of the company all gave evidence that they were not aware of the brisket cutter being used one-handedly and until this accident did not believe it could be used one-handedly.

[27] In his submission, Mr Harris pointed out that from time to time Mr Baker seemed confused when giving his evidence and that some of his answers were inconsistent. Mr Baker accepted that he had no recollection at all of what happened after the accident and his first memories were of waking up at Waikato Hospital. Mr Harris also pointed out that some of the signed documentation around training may indicate that Mr Baker could be wrong or misinterpreted the situation.

[28] Despite the criticisms that can be made of Mr Baker's evidence, I have no doubt at all that what he says about his "training" on the brisket cutter is accurate. He was adamant that he was shown how to use the brisket cutter by Arama and that it was Arama that showed him how to use it one-handed.

[29] I consider that his evidence is supported in two key ways. Mr Mitchell took him up to the job when he was to be trained on the brisket cutter, but he did not undertake the training himself. In his evidence he said that it was possible that an employee who had already been trained in the brisket cutter could be used to train a new employee in its use. It is known that at the time there was an employee called Arama who was working in that general area. In addition, Mr Baker said he got his injuries while using the brisket cutter one-handed and the nature of his injuries and how they were caused provides overwhelming support for that. Either Mr Baker must have figured out on his own how to bypass the safety system and use the brisket cutter one-handed or someone showed him how to do it.

[30] In evidence Mr Baker said that he observed others using the brisket cutter one-handed as well. None of the other witnesses ever saw that. Whether the brisket cutter was used one-handed on other past occasions by other people does not have to be explored in this decision. Those in authority on the slaughter board said they had never seen anyone operating the brisket cutter one-handed. I have no reason to reject their evidence on that point. But the fact remains clearly Mr Baker was using it one-handed, at least at the time he suffered his injury, and based on his evidence which I accept Arama must have used it one-handed during the course of “training” Mr Baker. That is how he learned to do it.

[31] Based on the evidence given by Mr Baker about his training I accept that the only conclusion that can be drawn is that Arama was delegated by someone in authority on the slaughter floor to train Mr Baker in the use of the brisket cutter and that training was completely inadequate and, indeed, positively dangerous. I accept Mr Baker’s evidence that he was not told by Arama that the brisket cutter must be used with both hands and that Arama showed him what amounted to a “shortcut” in using the brisket cutter one-handed.

[32] In his submissions, Mr Harris complained that it was very late in the piece before he became aware of the potential prominence of Arama in this case. I do not consider his criticisms in that regard have any validity. In the end Mr Harris did not directly challenge Mr Baker about the accuracy of the evidence he gave about Arama. It was not suggested to Mr Baker that he was mistaken about that or wrong about that or making it up.

[33] There was a theme in the prosecution submissions that quite apart from training there was inadequate monitoring or supervision of workers to make sure that the brisket cutter was not being used one-handed. As I have said, all of those in authority on the slaughter floor gave evidence they had never seen the brisket cutter used one-handedly and were not aware that it could be. While it is easy enough to say that if such a practice was going on the supervisors should have seen it, there is nothing in any of the evidence to suggest that any of them did and I accept their evidence that they were unaware of the practice.



[34] On the evidence that I accept from Mr Baker the training he got in the use of the brisket cutter could only be described as “dangerous”. The Defendant delegated the training of Mr Baker on this piece of equipment to somebody who clearly should not have been given that role and Mr Baker was not properly supervised at the time he undertook the training. Unfortunately, Arama trained Mr Baker to do exactly what resulted in his injuries some two weeks later.

[35] When dealing with potentially dangerous equipment like a brisket cutter it must always be reasonably practicable for proper training to be given and the safety aspects explained otherwise there is no point in giving any training at all.

[36] No matter how comprehensive the training may have been in other areas it was completely inadequate in this case. On that basis that particular, and the charge, is proved beyond reasonable doubt.

[37] While my findings on the third particular determine the outcome of the charge, I consider it is important to deal with the other two particulars as well. They can be dealt with together. In essence, the Informant asserts that the brisket cutter, being a potentially dangerous piece of equipment, should have been given far more scrutiny from a safety point of view on a regular basis and that it was reasonably practicable for the brisket cutter to be independently safety-checked by an expert from time to time, and that such safety checks should include tests by the expert to see whether the two-handed safety system could be defeated and the brisket cutter operated one-handedly.

[38] In response, the Defendant says that at the time of the accident it was doing absolutely everything that could be expected of it in terms of safety procedures and maintenance and what is now suggested by the Informant as being reasonably practicable is simply a hindsight reaction to Mr Baker’s accident.

[39] In *Buchanan’s Foundry Limited v Department of Labour*, John Hansen J gave an early explanation of what “reasonably practicable” meant. He said as follows:<sup>2</sup>

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<sup>2</sup> *Buchanan’s Foundry Limited v Department of Labour* [1996] 3 NZLR 113 at 116, line 5.

It is clear what the Act requires is that an employer takes all reasonably practicable steps to guard against potential hazards, rather than a certain, complete protection against all potential hazards.

[40] In 2016, Collins J in *Waimea Sawmillers Limited v WorkSafe New Zealand*, said:<sup>3</sup>

[36] The Act does not require an employer to ensure complete protection of an employee. Rather the Act imposes an obligation on an employer to take all reasonably practicable steps to guard against potential hazards. Whether a practicable step has been taken cannot be determined with the benefit of hindsight or in what was known after the event. The relevant point in determining what is practicable is a point in time immediately prior to the incident.

[41] I heard the evidence of many witnesses in this case. There were witnesses who either worked, or had worked, on the slaughter floor for the Defendant. There were supervisors from that killing floor. There was senior management including the owner of the company and there were engineers and experts as well as a representative of the manufacturer of this type of brisket cutter. None of them, with the exception of Mr Neal, an engineer, were aware that the brisket cutter could be operated one-handedly and had never heard of that happening in the work context. In addition, none of them were aware of any similar accident at any time anywhere else. The uncontradicted evidence was that over the years tens of millions of cuts had been made with this type of brisket cutter without incident.

[42] The position for the Informant is that all that past history is irrelevant. It is the Informant's submission that if a properly qualified expert had been engaged to check the safety features of this equipment and had been tasked to try and defeat the safety provisions, then the Defendant would have discovered that the brisket cutter could have been used one-handed and the necessary modifications could have been made to the equipment to prevent that from happening in the future and thereby provide further protection for anyone using the brisket cutter.

[43] The Informant's position is almost exclusively based on the evidence given by Mr Jack Mains, a highly experienced engineer, who was called as the Prosecution Expert. In short, Mr Mains gave evidence that when dangerous equipment is

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<sup>3</sup> *Waimea Sawmillers Limited v WorkSafe New Zealand* [2016] NZHC 915 at [36].

purchased from a supplier the assertions made about its safety features should not necessarily be accepted at face value and should be independently verified by an appropriate expert before the equipment is put into use and throughout the time it is used. Mr Mains made the point that from time to time the safety features in equipment do not necessarily live up to the promises of the manufacturer. He said that it is important that there should be ongoing safety checks throughout the period the equipment is used.

[44] Mr Mains considered that it was incumbent on an employer like the Defendant to use an expert to assess the equipment and that there was always a need to check whether safety mechanisms could be bypassed or avoided because it was human nature to do that if it meant the job could be done more easily or more quickly.

[45] On a review of his evidence, it does not seem that Mr Mains was asked, nor did he tell me, how regularly such safety checks should be done in relation to equipment like the brisket cutter. Mr Mains gave no examples to me of where the sort of regime he envisaged was operating in the meat industry or any similar industry anywhere in the country at the time or now.

[46] While Mr Harris did not put it this way, the effect of his submissions were that Mr Mains was simply working backwards from the accident to Mr Baker and looking for ways to prevent a future accident that were not in operation at the time and are not in operation now. In other words, that he has succumbed to hindsight.

[47] Mr Mains did accept that in many cases the regime he envisaged would be an onerous one, but he considered it appropriate in cases like this.

[48] During the course of the case, I received a good deal of information about the safety procedures that the Defendant had in place. Before each shift, a person in authority on the slaughter floor has to check the equipment and make sure that it is safe to use. There is an emphasis on proper maintenance which assists with safety and I am quite satisfied that, apart from the training of Mr Baker, the Defendant had robust safety systems in place. Apart from not having the system in place that was advocated by Mr Mains, there was no other attack by the Informant on the safety measures put in place by the Defendant.

[49] For about 40 years a company called Wassco, owned by Mr Neal, did the engineering and maintenance for the Defendant. From time to time Wassco was required to do engineering work on a brisket cutter. Mr Neal told me that when dealing with equipment like a brisket cutter safety was also paramount for his own staff. As a result, the safety systems on the cutter would be checked prior to any work being done. Sometimes Mr Neal became aware that a cutter could be operated by one hand but generally that was because of the failure of a spring or some other mechanical defect that he was required to correct. Until the accident he was unaware that a properly maintained and operated brisket cutter could be operated one-handedly.

[50] As a result of the accident the Defendant obtained another model of the brisket cutter and under testing by Mr Neal and his colleagues, it was discovered that it was possible to use that with one hand in certain circumstances as well. That was corrected by a further safety feature being added to the cutter.

[51] Mr Neal was unaware of whether the Defendant was notified that in certain circumstances the brisket cutter could be operated one-handedly. I took it from his evidence that he only believed that to be the case when there was a breakage, or for some other reason, the brisket cutter needed to be repaired before it could be returned to service.

[52] At the end of the evidence, I re-called Peter Wilms, who was the officer in charge of the Prosecution. I wanted to know whether WorkSafe had contacted other users of this particular brisket cutter to warn them of the potential safety difficulties particularly bearing in mind the evidence of Mr Mains that the sort of testing that he suggested was essential for safety and a reasonably practicable step in ensuring it.

[53] Mr Wilms advised that he had sent an Improvement Notice to the manufacturer of the brisket cutter, but he had not been in touch with any of the meat processing representative organisations to advise them of the dangers of this piece of equipment.

[54] Mr Wilms said the onus was always on the individual PCBU and that he did not consider the resources of WorkSafe were sufficient to provide that information. I found it unusual that in support of this prosecution, the Informant would rely on what Mr Mains said as representing a reasonably practicable approach to safety, yet not

advise others in the industry that that would be the standard applied by the Informant going forward. There was no evidence that any other meat processor at the time was operating in the way suggested by Mr Mains.,

[55] At [24] of his submissions in reply, Mr Bain addressed this issue. He said that whether WorkSafe could have done more after the incident to remove the brisket cutter from circulation, says nothing about what Progressive could have done prior to the incident. He submitted the evidence on this point was not relevant. He said it does not tend to prove or disprove anything that is of consequence to the determination of the proceeding.

[56] I take a different view. It is the Informant that is putting forward what Mr Mains says as something that is reasonably practicable. The Informant is relying on Mr Mains' views to successfully prosecute the Defendant under the first two particulars but there is no evidence that the Informant passed on to others in the industry what they now assert was "reasonably practicable" as far as this Defendant is concerned. .

[57] While there is a reference in the Defendant's records in 2016 about one-handed use of the brisket cutter, I am not satisfied on the evidence that that is necessarily accurately recorded. As I have said previously, I accept the evidence of all of the witnesses who told me that they were unaware that the brisket cutter could be operated with one hand and in fact did not believe that it could be.

[58] As a result, until the accident to Mr Baker there was nothing to indicate to those in authority that the safety mechanism could be overridden. Once that defect was discovered significant efforts were made to ensure that problem could not occur again.

[59] On the evidence there was nothing that could have alerted the Defendant to the safety defect in the brisket cutter. Under s 22(c), that is one of the matters that is relevant in assessing what is reasonably practicable.

[60] Based on the circumstances at the time of the accident the Informant has failed to prove beyond reasonable doubt that the procedures advocated by Mr Mains were,

at that time, or now, reasonably practicable and on that basis the first two particulars in the charge cannot succeed.

[61] Counsel are to confer and liaise with the criminal court manager in Hastings for a date for sentence to be organised. Counsel will be able to appear by AVL or any other electronic means if he or she wishes to do so.

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Judge G A Rea

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: ...02/03/2023