IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2024-404-000039
[2024] NZHC 2824

BETWEEN	EATIM LIMITED Appellant
AND	WORKSAFE NEW ZEALAND Respondent

Hearing: 29 July 2024

Appearances: P N White for Appellant
I M Brookie for Respondent

Judgment: 30 September 2024

JUDGMENT OF ANDREW J

This judgment was delivered by Justice Andrew
on 30 September 2024 at 3.00 pm
pursuant to r 11.5 of the High Court Rules 2016

LF ~~Registrar~~ / Deputy Registrar
Date 30. 9. 24

L.I Fidow
Deputy Registrar
High Court

Introduction

[1] This is an appeal against conviction[1] for a charge under the Health and Safety at Work Act 2015 (the HASWA) for failure to take all practical steps to ensure the safety of an employee.[2]

[2] The appellant, Eatim Ltd (Eatim), grows potatoes and onions in the Pukekohe and Waikato regions. On 17 February 2018, Mr Harchet Singh Gill (Mr Gill), a diligent and rigorously trained employee of Eatim's, died in a paddock being harvested for potatoes. He was fatally crushed in the potato harvester. He had become entrapped in the moving parts of the harvester. He died at the scene.

[3] The charge Eatim faced, included one particular – a failure by Eatim to apply interlocked guarding to part of the recommissioned potato harvester Mr Gill was operating and which caused his death when he became entangled with its inner rollers/conveyors.[3]

[4] The District Court Judge heard evidence from seven witnesses in total, including three expert witnesses. The trial took seven days of court time. Ultimately, the trial Judge agreed with WorkSafe's expert witness, Mr Jack Mains. He is a chartered professional engineer. The Judge accepted Mr Mains' evidence that a trapped key system was the suitable available engineering solution that should have been applied to the harvester and that this approach was mandated by the applicable guidance regarding machine guarding as applied to this particular machine.[4]

[5] This trapped key system is a type of "interlocking" that isolates workers from the hazardous inner conveyor/rollers within the machine. The Judge held that in the absence of that interlocking solution, there was a very real and significant risk of workers being killed or seriously injured when removing the relevant guards to clean the machine while it was still running. Had Eatim employed the trapped key system,

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1 *WorkSafe New Zealand v Eatim New Zealand Ltd* [2023] NZDC 8436.

2 Health and Safety at Work Act 2015, ss 36(1)(a), 48(1)(a) and 2(c).

3 In *Talley's Group Ltd v WorkSafe New Zealand* [2018] NZCA 587, [2019] 2 NZLR 198 at [41], the Court of Appeal held that the particulars are the very "pith and essence" of the charge.

4 The relevant standard is AS/NZS4024: Safety of Machinery and WorkSafe's Best Practice Guidelines – Safe Use of Machinery – May 2014, which substantially mirrors 4024.

Mr Gill would not have been able to access the harvester by removing the guards when the machine was still running. The Judge further held that the trapped key system therefore provided a higher level of protection to workers than the status quo, which relied on standard operating procedures prohibiting the opening of guards while the machine was running.

[6] The sole issue at trial was whether it was reasonably practicable to have installed interlocked guarding on the harvester that ensured the guarding was incapable of removal until the harvester's energy source was isolated and locked in a safe condition.

[7] On appeal, Eatim contends that the determination of that issue by the District Court Judge was wrong; it argues that the Judge failed to apply the correct objective standard and there was insufficient evidence to prove to the criminal standard that interlocking the guards was an available and suitable means to address the risk. In support of the appeal, Eatim seeks to adduce fresh evidence from an expert witness.

[8] WorkSafe opposes both the appeal and the application to adduce fresh evidence. It contends that the evidence is neither fresh nor cogent; it contends that the Court should disallow Eatim's post-trial shopping for another expert to challenge directly relevant expert evidence which was admitted at trial and cross-examined on.

Factual background[5]

[9] Eatim was a small operation that had only four employees; two based in the Pukekohe region and two based in Matamata.[6] Mr Gill had been employed by Eatim since January 2017. Eatim's two directors, Mr Eamon Balle and Mr Tim Balle, were involved in the day-to-day operations of the business.

[10] The potato harvester, a towed Hilder MK3 harvester (the harvester), was owned and operated by Eatim. It was purchased in used condition on an "as is" basis

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5 At trial, much of the factual background was not in dispute. There was an "agreed facts for trial" dated 8 December 2021.

6 Eatim was a PCBU (person conducting a business or undertaking), in terms of s 17 of the Health and Safety at Work Act 2015.

in February the year before. Hilder harvesters were made in Australia. They are well-regarded by commercial potato growers for use in the heavy volcanic soils around Pukekohe. They are sought after and when they become available, they are quickly purchased by growers in the area.

[11] A tractor towed the harvester. The tractor also served as a source of mechanical and hydraulic power for the harvester. The mechanical power came via a power take-off device (PTO) which took power from the tractor's engine and conveyed it, by way of a PTO shaft, to a mechanical input on the harvester. The harvester's own system of gears, shafts and chains then serve to make it function.

[12] It was still possible for the harvester to remain running when the tractor and the harvester were stationary.

[13] In general terms, the harvester functioned by:

(a) lifting potatoes out of the ground (with web elevators at the front of the machine);

(b) the potatoes moved into a cleaning system, which consisted of a network of powered conveyors and rollers under the picking table. The system removed dirt and plant stems ("haulm") from the potatoes;

(c) the potatoes then moved via a conveyor up onto, and across, the picking table;

(d) between two and four workers stood either side of the picking table. They removed potatoes with defects and excess dirt by hand; and

(e) the potatoes were then placed into a bunker near the front of the machine. This is emptied as required.

[14] Extensive work had been done by Eatim to return the harvester to "service ready" condition. This involved significant remedial mechanical work. Guarding was also installed in some previously unguarded areas of the harvester. The guarding was

placed on both sides of the picking table (just beneath the platform where the workers stood). The guards were put in place to prevent access to the powered conveyors and rollers that the freshly dug potatoes were conveyed upon. The four guards were secured in place by anti-luce/drop fasteners. They were not interlocked to the harvester's conveyor system. That meant that the guards could be removed by a worker while the harvester was still operating.

[15] The guards needed to be removed on a regular basis to allow the area to be cleaned of mud, dirt, clumps of potatoes and other foreign objects. This cleaning would need to occur up to 10 – 15 times a day. The same area also needed to be accessed in order to maintain and repair the harvester.

[16] The guarding on the harvester was copied from guarding on a Hilder harvester owned and operated by the Balle brothers, which Eatim considered to be the "best standard".

[17] On 17 February 2018, Mr Gill was responsible for harvesting activity on-site. That responsibility included training and supervising the workers. His role also involved driving the tractor which towed the harvester. Mr Gill provided the safety briefing to the workers.

[18] Mr Gill cleaned the harvester around 8.00 am using a shovel. At 10.00 am when the workers stopped for morning tea, Mr Gill cleaned the harvester again by switching the harvester and tractor off, removing one of the guards and going inside the harvester.

[19] At 12 noon, Mr Gill told the workers to go and have lunch and he stayed with the tractor and harvester. When the workers were about 100 metres away, Mr Gill removed the guard on the harvester and was drawn into the network of rotating rollers of the conveyor system and fatally injured.

[20] On 28 February 2018, the WorkSafe inspector issued Eatim with a prohibition notice for inadequate guarding on the harvester. Since then, the harvester has remained out of service. It still remains out of service today.

The statutory scheme – the Health and Safety at Work Act 2015

[21] Section 3 provides that the main purpose of the Act is to provide for a balanced framework to secure the health and safety of workers in workplaces:

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

[22] Section 3(2) reinforces the importance of worker health and safety by calling for the "highest level of protection" as is reasonably practicable.

> In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.

[23] Section 30 provides:

> **Management of risks**
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> (1) A duty imposed on a person by or under this Act requires the person—
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> (a) to eliminate risks to health and safety, so far as is reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

(2) A person must comply with subsection (1) to the extent to which the person has, or would reasonably be expected to have, the ability to influence and control the matter to which the risks relate.

[24] Section 36 provides:

Primary duty of care

(1) A PCBU must ensure, so far as is reasonably practicable, the health and safety of—

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

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

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

(3) Without limiting subsection (1) or (2), a PCBU must ensure, so far as is reasonably practicable,—

(a) the provision and maintenance of a work environment that is without risks to health and safety; and

(b) the provision and maintenance of safe plant and structures; and

(c) the provision and maintenance of safe systems of work; and

(d) the safe use, handling, and storage of plant, substances, and structures; and

(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and

(f) the provision of any information, training, instruction, or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and

(g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing injury or illness of workers arising from the conduct of the business or undertaking.

(4) Subsection (5) applies if—

(a) a worker occupies accommodation that is owned by, or under the management or control of, a PCBU; and

(b) the occupancy is necessary for the purposes of the worker's employment or engagement by the PCBU because other accommodation is not reasonably available.

(5) The PCBU must, so far as is reasonably practicable, maintain the accommodation so that the worker is not exposed to risks to his or her health and safety arising from the accommodation.

(6) A PCBU who is a self-employed person must ensure, so far as is reasonably practicable, his or her own health and safety while at work.

[25] This Court has held that s 36 is expressed in broad terms and is properly viewed as setting out the Act's foundational duty.[7] The remaining duties in subpart 2 of Part 2 are more specific iterations of that foundational duty and provide guidance for particular instances.

[26] Section 48 of the Act provides:

Offence of failing to comply with duty that exposes individual to risk of death or serious injury or serious illness

(1) A person commits an offence against this section if—

(a) the person has a duty under subpart 2 or 3; and

(b) the person fails to comply with that duty; and

(c) that failure exposes any individual to a risk of death or serious injury or serious illness.

(2) A person who commits an offence against subsection (1) is liable on conviction,—

(a) for an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding $150,000:

(b) for an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding $300,000:

(c) for any other person, to a fine not exceeding $1.5 million.

Reasonably practicable

[27] The phrase "reasonably practicable" is defined in s 22:

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7 *Linfox Logistics (NZ) Ltd v WorkSafe New Zealand* [2018] NZHC 2909 at [52].

Meaning of reasonably practicable

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

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

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

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

(i) the hazard or risk; and

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

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

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

The District Court decision

[28] The Judge held that there were four elements of the charge requiring proof beyond reasonable doubt:[8]

(a) first, Eatim was a PCBU;[9]

(b) second, Eatim had a primary duty in relation to its workers, including Mr Gill;

(c) third, Eatim failed to comply with its duty by not installing interlocked guarding on the harvester, in accordance with the definition of reasonably practicable; and

(d) fourth, Eatim's failure to comply with its duty exposed workers to a risk of death or serious injury.

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8 *WorkSafe New Zealand v Eatim New Zealand Ltd*, above n 1, , at [26].

9 Health and Safety at Work Act 2015, s 17.

[29] In addressing the fourth element, the Judge noted that:[10]

> The risks associated with the moving parts on machines like the harvester were well known. The hazards involved included the powered rollers and [conveyor] belts which operated inside the harvester. They created in-running nip points. Exposure to the in-running nip points risked entrapment in the machine…

[30] The Judge then turned to consider the sole issue of the trial, namely whether it was reasonably practicable for Eatim to have installed interlocking guarding on the harvester. He noted that the primary focus was on Eatim's decision to retrofit the harvester with quick-release or anti-luce guards, which could be removed when the harvester was still running, rather than interlocking (specifically trapped key system) guards.[11]

[31] He framed the key issue in the following way:[12]

> The question to be determined is, was it reasonably practicable for Eatim to have installed the trapped key system on this harvester? Was there, at the relevant time, an available and suitable means to effectively interlock [the] guards to the harvester's energy source, that would still allow it to perform its intended operations? WorkSafe contends that it was reasonably practicable for Eatim to have done so. Eatim contends that it was not reasonably practicable to do so. Moreover, it would have been completely impractical to do so, when considered in the context of harvesting.

[32] In addressing the critical issue of "reasonably practicable", the Judge began his analysis with a discussion of industry standards:[13]

> At first blush, there appeared to be some force in Eatim's submission that no other potato harvesting operation in New Zealand, with perhaps the exception of the Grimme harvester observed by Mr Mains, was using interlocking guarding on its towed harvesters. Was it reasonably practicable then, for Eatim to have employed something that no other New Zealand operation was using?

[33] On the issue of industry standards, the Judge found that there appeared to be a "can't do" attitude within the industry with respect to the adoption of required safety

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10 *WorkSafe New Zealand v Eatim New Zealand Ltd*, above n 1, at [30] (footnote omitted).
11 *WorkSafe New Zealand v Eatim New Zealand Ltd*, above n 1, at [33].
12 *WorkSafe New Zealand v Eatim New Zealand Ltd*, above n 1, at [34].
13 *WorkSafe New Zealand v Eatim New Zealand Ltd*, above n 1, at [97] (footnote omitted).

measures.[14] He then made a number of findings on the shortcomings of industry practice generally.

[34] In relation to the defence argument that the trapped key system will not work because harvesting operations do not have dedicated tractor/harvester pairings, the Judge held that the trapped key system can accommodate multiple tractors.[15] He held, in reliance on Mr Mains' evidence, that even with the additional layer of complexity, the jumper system (involving two or more tractors) was still workable and "vastly improved" over the status quo.[16]

[35] His Honour then addressed the applicable guidelines and the issue of knowledge available at the time. Although there was no specific guidance regarding how to retrofit guarding to this harvester, the Judge accepted Mr Mains' evidence.[17]

[36] The Judge then turned to the issue of the trapped key system as a means of isolating the risk. Here, the Judge addressed the question of suitability and availability of the trapped key solution and found that "[there] was little dispute that the trapped key system could be fitted to the harvester" and that the cost would not be high.[18]

[37] The Judge next addressed the issue of copying another duty holder. He identified key reasons why Eatim "fell into error". This included not consulting with a guarding expert and using a mechanic to copy the retrofitting guarding applied by another operator (the related entity, Balle Brothers).[19]

[38] His Honour concluded that the trapped key system was a cost-effective, available, and suitable means to isolate the risks involved.[20] He found it would not

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14 At [103].
15 At [106].
16 At [106]. A jumper system requires management oversight. It involves the use of a "jumper" plug to be inserted (or sealed) into the tractor ignition circuit in place of the trapped key (which would be used for the tractor attached to the harvester). This would allow tractors to be switched and both to be used.
17 At [108] and [109].
18 At [112].
19 At [115]–[117].
20 At [119].

prevent the machine from performing its intended functions, nor would it drastically increase harvesting time.[21]

[39] In finding the charge proven, his Honour concluded that WorkSafe had proven beyond reasonable doubt that "Eatim failed to comply with its duty, by not installing interlocked guarding on the harvester, in accordance with the definition of reasonably practicable."[22]

The issues

[40] There are three issues for me to determine:

(a) Should I admit the fresh evidence?

(b) Did the Judge correctly apply the objective standard in determining whether it was reasonably practicable to have installed interlocked guarding on the harvester?

(c) Was the Judge in error in finding that the trapped key system was an available and suitable system?

Appeal against conviction

[41] The Court must allow an appeal against conviction if satisfied that, having regard to the evidence, the Judge erred in his assessment of the evidence to such an extent that a miscarriage of justice has occurred.[23] The Supreme Court in *Sena v Police* held:[24]

(a) Appeals under s 232(2)(b) proceed by way of rehearing and the appellate court is required to form its own view on the facts and determine the appeal accordingly;[25]

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21 At [119].
22 At [121].
23 Criminal Procedure Act 2011, s 232(2)(a).
24 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575; see also *Kempson v R* [2023] NZCA 78.
25 *Sena v Police*, above n 24, at [32] (footnote omitted).

(b) If an appellate court comes to a different view than the trial Judge on the evidence, the trial Judge necessarily will have erred and the appeal must be allowed;[26]

(c) The appeal is not to be approached de novo, and it is for the appellant to show that an error has been made.[27]

Analysis and decision

Issue (a) – Fresh evidence

[42] The evidence Eatim seeks to be admitted consists of two affidavits. The first is from Mr Tim Balle. That is largely intended to be an explanatory memorandum to explain how the evidence of the second deponent, Mr Catterson, has been obtained and why this was not available at trial.

[43] Mr Catterson is a machine safety specialist, someone who is certified as a "machinery safety expert".

[44] Mr Balle details the steps that were taken by Eatim by following the guilty finding in the District Court. This involved approaching a number of agents for a solution that Eatim says was not able to be found. This ultimately resulted in an approach to WorkSafe's expert, Mr Mains, for a recommendation of somebody more local (Mr Mains is based in Hawkes Bay) for assistance to come up with a guarding solution that he had given in evidence. Mr Balle says that when Mr Mains' recommendation was made, this resulted in Mr Catterson becoming involved.

[45] Mr Catterson is not an engineer, nor is he a chartered professional engineer. He participated in the standards committee that formulated AS/NZS4024 (4024). He was also involved in the working group that prepared WorkSafe's the best practice guidelines (BPG) Regrinding Safe Use of Machinery and 4024.

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26 *Sena v Police*, above n 24, at [38] (footnote omitted).
27 *Sena v Police*, above n 24, at [38] (footnote omitted).

[46] Mr Catterson works for Pilz New Zealand and he says that Pilz is often approached by engineers for assistance in machine guarding solutions and specifically interlocking.

[47] Mr Catterson says that he examined the Hilder harvester in operation in this case, together with another identical machine that was in operation. He concludes:

> Based on what I have seen, and my engineering knowledge, it is my view that there is no technology currently available that will allow an interlocked guard to be fitted to a harvester like Eatim's and have the harvester still able to operate.

[48] The admission of fresh evidence is to be decided by the application of a sequential series of tests.[28]

[49] The court in *G (CA738/2018) v R* noted that:[29]

> The evidence must be:
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> (i) sufficiently fresh (in that it could not with reasonable diligence have been called at trial);
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> (ii) sufficiently credible; and
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> (iii) cogent in the sense that it might reasonably have led to a different verdict.

[50] The overriding test is whether it is in the interests of justice to admit the evidence. If the Court considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh. In addressing the overriding test of the interests of justice, I note that the public interest in finality of proceedings is relevant to that assessment.[30]

[51] The evidence at issue here is expert evidence. For expert evidence to be admissible, it must be of substantial help to the fact-finder in understanding other evidence or ascertaining any fact that is of consequence to the determination of the proceedings.[31]

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28 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].
29 *G (CA738/2018) v R* [2020] NZCA 375 at [14]–[15], citing *Lundy v R*, above n 28, at [120].
30 *G (CA738/2018) v R*, above n 29, at [14]. See also *R v Bain* [2004] 1 NZLR 638 (CA) at [22].
31 Evidence Act 2006, s 25. See also *G (CA738/2018) v R*, above n 29, at [15].

[52] WorkSafe does not dispute that Mr Catterson's evidence is credible. I agree that it is. The critical issues I must address are whether the evidence is sufficiently fresh and cogent in the sense that it might reasonably have led to a different verdict.

[53] Mr Catterson, a reputable machine guarding expert based in New Zealand, has been available at Pilz for the nearly three years that it took these proceedings to reach trial. In my view, it is difficult to see how he could, or should not, with reasonable diligence have been found by Eatim.

[54] The defence called evidence at trial from its own expert, Mr Nicholas Brendon Frame, a mechanical engineer. He specialises in machinery and plant safety, machinery guarding design, together with guarding fabrication, supply, and installation. He addressed all of the critical issues that Eatim seeks to challenge on appeal. I note that Mr Frame gave advice to Eatim soon after the prohibition notice was issued, that 4024 applied and that interlocking was required.

[55] It is not apparent that somehow Mr Catterson is more qualified to give the contested evidence than Mr Frame. However, even if he is, Eatim has now shown why it could not have been aware of that at the time of trial. I find that the evidence is not fresh.

[56] On the issue of cogency, Eatim submits that the interests of justice heavily "favour" the admission of Mr Catterson's evidence. Eatim says it has been found guilty of failing to take a step that is "not currently possible to do". However, that submission goes well beyond the proposed evidence from Mr Catterson. At best, he is equivocal about whether trapped keys with jumper leads can be applied to this machine.

[57] I find that the evidence that Mr Catterson proposes to give is not cogent for two main reasons:

(a) first, he simply raises points that had previously been raised with Mr Frame at trial and settled by the trial Judge; and

(b) second, because he does not and cannot say that the solution cannot be done.

[58] The critical paragraph in Mr Catterson's affidavit is at [22]:

> I keep in mind that it may be possible to utilise the concepts proposed by Mr Mains to come up with a workable guarding solution on the harvester. However, to do so is likely to take hundreds of engineering time to implement and trial these systems to see whether they provide a workable solution, and to ensure they do not create other safety issues. There is no certainty that a workable solution would be obtained following that work.

[59] It appears that like Mr Frame, the PCBU and other industry participants involved in the trial, Mr Catterson has not attempted the interlocking himself. Furthermore, the comment made at [22] of the affidavit invites scrutiny of his other conclusions and, in particular, that recorded at [30]. At [30], Mr Catterson expresses the view that "The current technology available would not allow the guards to be interlocked and allow the harvester to work as intended". As WorkSafe submits, that is an odd phrasing. If Mr Catterson's evidence is that the interlocking cannot be done, then he should not be qualifying the statement in terms of the operation of the harvester.

[60] There are further problems with Mr Catterson's evidence. At [25] of his affidavit, he states:

> While I accept that the concepts in AS/NZS4024 standard are generally applicable to machines, it would be incorrect to interpret the AS/NZS4024 standard as requiring that an interlocked guarding solution be fitted to a harvester.

[61] The entire trial was of course devoted to WorkSafe's assertion, based on evidence from Mr Mains and supported by Inspector Bunyan, that 4024 and the BPG required interlocking on this part of the harvester. The District Court decision resolved that issue.

[62] Mr Catterson's bald assertion that it does not require "interlocking", lacks cogency. In my view, it is also not substantially helpful in terms of s 25 of the Evidence Act 2006. That is because Mr Catterson does not set out the basis for that conclusion, other than to regard to guarding exceptions that might apply to aspects of mobile

machinery. However, those points were traversed at trial by Mr Frame and dismissed by the trial Judge.

[63] Finally, I find that it is not in the overall interests of justice to admit the evidence of Mr Catterson and Mr Balle. In my view, this case is very similar in principle to *G (CA738/2018) v R*,[32] where the Court of Appeal held that it will not generally allow post-trial shopping for another expert to directly challenge relevant expert evidence, which was admitted at trial and cross-examined upon.[33] Like Dr Harrison in *G (CA738/2018) v R*, Mr Catterson does not demonstrate that Mr Mains was plainly wrong and, in any event, is not capable of altering the outcome of this case.

[64] For all these reasons, I conclude that the fresh evidence should not be admitted on appeal.

Issue (b) – Did the Judge correctly apply the objective standard?

[65] Eatim contends that the District Court Judge failed to apply the correct standard as to what Eatim knew or ought reasonably to have known about the ways to eliminate, isolate or minimise the risk (s 22(c) of the HASWA).

[66] The parties agree (and I concur) that the test to be applied, based on the decision of *Department of Labour v Solid Timber Building Systems New Zealand Ltd*, is as follows:[34]

> What should a reasonably informed PCBU in the position of Eatim have known about ways of eliminating or minimising the risk?

[67] Although decided under prior law, the District Court decision in *WorkSafe New Zealand v Ministry of Social Development*, assists in making the assessment of what was reasonable for a PCBU to have known at the relevant time:[35]

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32 *G (CA738/2018) v R*, above n 29.
33 *G (CA738/2018) v R*, above n 29, at [22].
34 *Department of Labour v Solid Timber Building Systems New Zealand Ltd* HC Rotorua, AP464A/44/2003, 7 November 2003.
35 *WorkSafe New Zealand v Ministry of Social Development* [2016] NZDC 12806, at [91] (footnote omitted).

> The current state of knowledge is to be assessed not on the basis of hindsight, but on the information available prior to 1 September 2014, including expert knowledge. It includes knowledge that was objectively available at the time, whether or not it was subjectively known to the defendant.

[68] The test therefore is to assess on an objective basis what was, at the particular time, reasonably able to be done in relation to ensuring the health and safety of workers taking into account what the PCBU ought reasonably to have known about the ways of eliminating or minimising the risk. That objective assessment can be made with reference to evidence from an appropriate expert. It is not a subjective test that is limited to what the PCBU or even the particular industry was doing or knew about.

[69] Eatim contends that instead of applying the correct objective test, the District Court Judge applied a test of what he considered Eatim "should have been doing". That is a reference to [98] and [105], where his Honour held:[36]

> [98] I am of course reminded that industry norms and industry standards are not the same thing. The standard is not to be judged by what others were doing but what they should have been doing. [The Judge footnotes the District Court decision *Civil Aviation Authority v Alpine Group Ltd* [2022] NZDC 20040 at [84]. …
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> …
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> [105] It is one thing to pay lip service to the importance of safety around dangerous machines. It appeared to be quite another thing to do anything meaningful to isolate the risks involved. The evidence demonstrated to me that the potato harvesting industry, despite utterances to the contrary, has not seriously addressed the problems which led to this prosecution. I agree that industry standards are not to be judged by what others [in the] industry were doing, but what they should have been doing. Eatim's argument, that because no one else in the industry was doing it, it was not reasonably practicable for Eatim to do it, therefore falls away.

[70] Eatim contends that in focusing on what Eatim "should have been doing", the Judge misdirected himself so as to consider the guarding deficiencies in general terms of others in the harvesting industry. Eatim also says that the Judge applied a sentencing principle from the *Alpine Group Ltd* case, rather than the definition of "reasonably practicable" being the test in s 22. Eatim notes that the *Alpine Group* case involved s 151(2)(f) of the HASWA which refers to industry standards, whereas s 22 does not.

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36 *WorkSafe New Zealand v Eatim New Zealand Ltd*, above n 1.

[71] Eatim further argues as follows:

(a) the Judge erroneously applied the industry standard principle to find that Eatim ought to have known of the best practice guidelines in AS/NZS4024;

(b) the Judge should have determined what Eatim ought to have known about ways to eliminate or minimise the specific risk and the specific scenario on the harvester at issue and the industry it operates in. Relevant exhibits in that regard were exhibits I and J that provided guidance on using safe systems of work, which necessarily implies no interlocking of guards;

(c) the only evidence offered by the prosecution on this point were general guidance documents not specifically addressed at the potato-growing industry, and an expert had never seen a harvester in operation; and

(d) in most cases, what has been done to address risk by others in the relevant industry, or what a PCBU is able to do after an incident, will provide the measure of what the PCBU "ought to have reasonably known". The conceptual idea of an expert engineer who has never seen the machine at issue operating does not provide evidence of the correct objective standard of what a PCBU ought to know about how to address risks.

[72] I find that there is no merit to these submissions. In my view, the Judge clearly applied the correct objective test. It is clear from the context of the decision that when his Honour referred to what Eatim "should have known" or "should have been doing", he was applying the objective test of what a reasonably informed PCBU in the position of Eatim should have known about ways of eliminating or minimising the risk (i.e. what a PCBU "ought reasonably to have known"). There is no reasonable basis for inferring that the Judge was applying something other than an objective test – he was not making a subjective moral judgment. He also correctly acknowledged that it is

not a test of hindsight judgment; the relevant time is the point "immediately prior" to the incident.[37]

[73] I further find that the reference by the Judge to the *Alpine Group Ltd* case was not an error; it does not indicate that the Judge applied the wrong test or that he applied any test apart from s 22. The particular paragraph in *Alpine Group Ltd* drawing a distinction between industry norms and industry standards is, in my view, simply a reference back to the same objective test under s 22.

[74] It is also apparent from the following paragraphs of the decision that the Judge correctly applied the objective standard:[38]

> [119] I am in no doubt that the trapped key system was a cost effective, available and suitable means to isolate the risk involved. It would not prevent the machine from performing its intended functions. Nor would it drastically increase harvesting time.
>
> [120] Eatim failed to consider interlocking options, like the trapped key system because it did not obtain advice from a competent person. Mr Antoneivich was not a guarding expert. When it did seek advice from a competent person, the advice was that AS/NZS4024 applied and that the trapped key system was appropriate. This was knowledge that Eatim ought reasonably to have known.

[75] I accept that industry practice is relevant to the application of the objective test and will often be important. However, I reject the contention by Eatim that it is necessarily a predominant factor – even in this case, where the evidence indicated that no-one in the industry was using interlocking guards. As the cases of *Department of Labour v Solid Timber Building Systems New Zealand Ltd*[39] and *Department of Labour v Wastecare Ltd*[40] make clear, industry practice may not be decisive, particularly where it is not keeping pace with the available knowledge or ways to address the given risks. All of the evidence must be considered. As Sir Raymond Evershed MR stated in

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37 *WorkSafe New Zealand v Eatim New Zealand Ltd*, above n 1, at [45].

38 *WorkSafe New Zealand v Eatim New Zealand Ltd*, above n 1, at [119]-[120] (footnotes omitted).

39 *Department of Labour v Solid Timber Building Systems New Zealand Ltd*, above n 34.

40 *Department of Labour v Wastecare Ltd* DC Palmerston North, 23 October 1996, as cited in *WorkSafe New Zealand v Eatim New Zealand Ltd*, above n 1, at at [105]. That case involved practical steps to be applied to mobile rubbish trucks that were not industry standard. In that case, the Court accepted expert evidence as to the availability and suitability of those steps.

Richards v Highway Ironfounders[41], as approved by Baragwanath J in *Department of Labour v Solid Timber Building Systems New Zealand Ltd*:[42]

> … It must be a question of fact and of the weight of all the material evidence in any particular case to assess what was in truth known, or what ought to have been known, by the employers charged at the relevant dates.

[76] In my view, the Judge was entitled on the evidence to conclude that the PCBU (and the wider industry) had not been doing enough to address the risks posed by its machines.

[77] In directly addressing the issue of knowledge available at the time, the Judge accepted Mr Mains' evidence that the applicable guidance for guarding of machinery in New Zealand was AS/NZS4024 and the BPG. He also noted there was no real dispute on that issue during the trial. He recorded Mr Frame's evidence (defence witness) that having viewed the machine, he was in little doubt that AS/NZS4024 applied and that interlocking should be adopted. Mr Frame also confirmed that in his role as a machinery safety engineer, AS/NZS4024 was the document and the standard he used most often.[43] The Judge also noted that Mr Frame himself provided Eatim with information and diagrams on trapped key systems in March 2018.

Issue (c) – Lack of evidence regarding availability and suitability

[78] Eatim contends that there was insufficient evidence of the availability and suitability of the trapped key system (s 22(d)). It argues that the Judge was accordingly wrong in finding that the charge had been proven to the criminal standard. Eatim argues that the Court had to be satisfied beyond reasonable doubt that there existed a solution that could be applied to the harvester and allow it to operate as needed.

[79] Mr White, on behalf of Eatim, noted that the harvester is still in a decommissioned state; it has not been able to be used since the incident. He submits that the evidence at trial establishes that identical harvesters in the state that Eatim's

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41 *Richards v Highway Ironfounders* [1955] 3 All ER 205 at 210.

42 *Department of Labour v Solid Timber Building Systems New Zealand Ltd*, above n 34, at [30], citing *Richards v Highway Ironfounders*, above n 41.

43 *WorkSafe New Zealand v Eatim New Zealand Ltd*, above n 1, at [109].

was prior to the accident, are still being used in that same state. Eatim has been observing this, unable to harvest itself using the same harvester. It has been convicted while its peers are "out there doing exactly what they were doing".

[80] Mr White further submitted that by contrast, the defendant in *Department of Labour v Solid Timber Building Systems New Zealand Ltd*, was able to take steps after the incident so as to effectively guard the machine.[44]

[81] Eatim also contends that WorkSafe's expert witness, Mr Mains, proposed three different solutions for interlocking: a trapped key system, a trapped key system with drive line isolation, and a trapped key system with "jumpers" to enable the harvester to be used with different tractors. Eatim says it was only evidence that the first of these "existed and was available". The submission is then further developed as follows:

(a) There was evidence from the defendant, Eatim, that interlocking was not practical;

(b) Mr Jyatt Master, the defence expert, was not directly challenged on his statement that interlocking could not practically be implemented in a way that allowed Eatim to function effectively;

(c) The District Court Judge erred in his interpretation of Mr Master's evidence to find that a tractor/harvester combination is practicable. This finding was not open on the evidence, as the only people who had any experience with potato harvesting were all resolute in their view that non-pairing was an operational necessity, and Mr Mains had conceded that if non-pairing was an operational necessity, then other engineering solutions would be needed;

(d) There was a total absence of evidence that a jumper-based system was "commercially available"; and

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44 *Department of Labour v Solid Timber Building Systems New Zealand Ltd*, above n 34.

(e) Mr Frame was never challenged on his position that interlocking cannot be done in a practical way.

[82] In assessing these submissions, I make an important preliminary point. Eatim here seeks to challenge factual determinations of the trial Judge which followed seven days of detailed and obviously at times, complex evidence, much of it from experts. As the Court of Appeal noted in *Kempson v R*,[45] (summarising the principles from *Sena v Police*), there are distinct advantages enjoyed by trial Judges in hearing and resolving factual disputes of this kind.

[83] I find that there was sufficient evidence before the District Court regarding the availability and suitability of a trapped key system, whether the harvester was paired with a single tractor or used with multiple tractors. There is no basis for disturbing the Judge's finding that the charge was proven to the criminal standard.

[84] Mr Mains was clear that his preference, and the simplest solution, was to pair a harvester with a single tractor. WorkSafe says that that remains an option today, but that the duty holder, Eatim, refuses to do it. The key advantage for Mr Mains in the paired approach is that it takes the "human element" out of running the system. However, Mr Mains also had a solution for the scenario where a tractor coupled with a harvester may need to change. That system, as discussed above, involves the use of a "jumper" plug to be inserted (or sealed) into the tractor ignition circuit in place of the trapped key (which would be used with the tractor attached to the harvester). However, even with the additional need for management oversight with the jumper system, Mr Mains was of the view that the trapped key system was both workable and a much better solution.

[85] The District Court Judge had the advantage of seeing and hearing directly from Mr Mains. It is clear that his evidence was substantially helpful. I find that there was no error in the Judge's approach in relying on Mr Mains' evidence to find the charge proved.

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45 *Kempson v R*, above n 24.

[86] Where a jumper system is used, duty holders will have to have a system in place to ensure that the jumpers are not left with tractor operators (in much the same way that special tools for fixed guards should not be left with machine operators). Mr Mains called this jumper system a "management issue" that would need to be managed by the PCBU. I note that Mr Master, for the defence, accepted that it was "perfectly manageable" for his organisation to supervise jumper leads.

[87] I further note that Mr Mains was cross-examined extensively on a range of topics, but remained of the view that the trapped key system can (and should) be employed on this machine:

(a) During his road shows he did not see another Hilder machine with a trapped key system, although he did refer to a towed Grimme harvester in Ohakune that had interlocking retrofitted to it. However, this did not affect his opinion;

(b) He had never seen a machine running but was of the view that this is simply not necessary for an expert engineer when it comes to these types of engineering problems. They are straightforward;

(c) As to the availability of the technology, Mr Mains was of the view that a jumper system is "technically feasible" and brings about "increased management responsibility". Later in his evidence, he stated that "the technology is available".

[88] I also note that there was no challenge to Mr Mains' assessment of costs under $10,000 for the trapped key solution, but with some modest increase (of around $1,000) for the jumper system.

[89] The Judge records in his decision, that there was no serious challenge to Mr Mains' evidence from the defence guarding expert, Mr Frame.[46] He agreed that the interlocking suggested by Mr Mains could and ideally should be applied to this machine. There is no basis for disturbing that finding; the notes of evidence, at p484,

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46 *WorkSafe New Zealand v Eatim New Zealand Ltd*, above n 1, at [112].

simply allow for no other conclusion. In my view, it cannot properly be said that Mr Frame's evidence was unchallenged.

[90] As for Mr Master's evidence, I note that he is not a guarding expert. I find that the Judge did not err in interpreting Mr Master's evidence. There is no express reference at [105] to the evidence of Mr Master and at [77] he records of Mr Master that he was not aware of any operation that had a dedicated tractor/harvester combination and that "[it] was not practical to have a dedicated tractor for potato harvesting".[47]

[91] In his oral submissions, Mr White emphasised that this is a unique case; the particular harvester is a unique machine and this is the first-ever case of a conviction being entered for failing to take a step that has never been done on the machine at issue. Eatim relies on the following passage from the decision *WorkSafe New Zealand v Ministry of Social Development*:[48]

> … However, it follows as a matter of logic that if the prosecution cannot establish any effective means of addressing the risk, known to the defendant at the material time, the alleged step is unlikely to be reasonably practicable.

[92] I accept that this case may have unique features. However, the Judge squarely addressed the issue of effective means of addressing the risk and concluded, in reliance on Mr Mains, that the prosecution had met the burden of proof. As WorkSafe submitted, this case highlights the issues that can arise when older plant (here, a 25-year-old machine) with inadequate guarding was returned to service. I note that it was always WorkSafe's case that Eatim, albeit well-intentioned, fell into error by copying the guarding on the Balle brothers' harvester and that it had failed to seek guidance from a suitably qualified person.

[93] I do not accept that WorkSafe has to prove a tangible demonstration of the pleaded solution in every case. It was not required to execute the solution on this particular machine. Mr Mains gave clear evidence that this solution could be achieved and relatively simply and cheaply. As WorkSafe submits, as an expert chartered

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47 *WorkSafe New Zealand v Eatim New Zealand Ltd*, above n 1, at [77].
48 *WorkSafe New Zealand v Ministry of Social Development*, above n 35, at [96].

engineer, he was well able to give that evidence. The District Court Judge was entitled to rely on his evidence.

[94] As counsel for WorkSafe further submitted, commonsense dictates that it is not unusual at all for engineering solutions to be tailor-made to fit machinery, and especially when it is older machinery where there was previously no guarding. As I have found above, the Judge was entitled on the evidence to conclude that the PCBU (and wider industry) had not done enough to educate itself about the available knowledge regarding machine guarding, and the available option of interlocking and trapped keys for this type of machine.

[95] For all these reasons, I also reject the second ground of appeal.

Conclusion and result

[96] In addressing the critical issue under s 22 of the HASWA, the District Court Judge correctly applied the objective test. I also find that he was not in error in concluding that the prosecution had established to the criminal standard that the trapped key solution was an available and suitable solution.

[97] The appeal is dismissed.

Andrew J