

DC Hastings CRN08020500068, 4 November 2008
District Court, Hastings

Department of Labour v Idea Services Ltd

CRN08020500068
Hearing: 6 – 10 October 2008
Decision: 4 November 2008
Judge Rea

Classifications (2)

[1]	Employment law ”All practicable steps”
[2]	Employment law Offences

Legislation Considered

[Health and Safety in Employment Act 1992 \(NZ\) s 2A, s 6, s 50\(1\)\(a\)](#)

Party Names

Department of Labour (*Informant*), Idea Services Limited (*Defendant*)

Legal Representatives

Ms N L K Szeto and *Mr M Hargreaves* for Informant; *Mr B A Corkill* QC and *Mr P A McBride* for Defendant

Judgment

RESERVED DECISION OF JUDGE G A REA

Judge G A Rea

The Charge

[1]	The Defendant is charged that on or about 19 May 2007 at ... being an employer it failed to take all practicable steps to ensure the safety of its employee namely ... while at work, in that it failed to take all practicable steps to ensure that ... was not exposed to the hazard of Hepatitis B in her place of work contrary to sections 6 and 50(1)(a) of the Health and Safety in Employment Act 1992 (“the Act”).
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Basic Facts

[2]	The Defendant is a duly incorporated company operating as a provider of disability support services to intellectually disabled people. The Defendant is wholly owned by IHC New Zealand Incorporated (“IHC”) and from 28 March 2005 the Defendant assumed the day to day support of intellectually disabled people who were previously cared for by IHC.
[3]	In order for the Defendant to commence operations and to assume the support function, staff previously employed by IHC had their employment transferred to the Defendant on the same terms and conditions with effect from 28 March 2005.
[4]	One of those employees whose employment was transferred from IHC to the Defendant on 28 March 2005 was ... Ms ... had originally started working for IHC in the Manawatu area on 10 May 1999 as a Community Support Worker.

[5]	In November 2004 Ms ... transferred from Manawatu to Hawke's Bay where she continued her employment as a Community Support Worker for IHC. As from 28 March 2005 her employment was taken over by the Defendant but she continued doing the same sort of work she had always done since she commenced with IHC.
[6]	When she first transferred to Hawke's Bay Ms ... was employed to provide support to five intellectually disabled people who were living in a house in Hastings. One of those people was ... who was Hepatitis B positive. There is no dispute that at all times relevant to the prosecution both the Defendant through various managers and Ms ... were very aware of ... 's Hepatitis B status.
[7]	Around April 2006 ... was transferred to her own home with one on one staffing because she was causing problems living with others. ... is a woman in her early 40's who has Downs Syndrome. Her mental age is very low. She is unsteady on her feet and has a tendency to fall over.
[8]	When ... moved into her own home Ms ... was one of the staff employed by the Defendant who was responsible for giving ... 24 hour a day care. Ms ... would stay with ... for 10 sleepovers per fortnight.
[9]	On 21 January 2007 Ms ... was working at ... 's home. At one stage Ms ... was sitting with her feet up on the couch when ... fell. ... accidentally bit her on the foot and drew blood. Ms ... went to her general practitioner on 23 January 2007 as a result of that bite.
[10]	On 19 May 2007 Ms ... was again working with ... They had been for an outing in the car and at or about the time ... was getting out of the car she again fell and again accidentally bit Ms ... this time on the left hand. On this occasion she saw the same general practitioner two days later and was off work for two days as a result.
[11]	Over the following weeks Ms ... became increasingly unwell. It is now accepted that Ms ... contracted Hepatitis B when she was bitten by ... on 19 May 2007. As a result she suffered acute liver and kidney failure and was rushed to hospital. Her condition was such that she needed a liver transplant and that took place on 28 July 2007.

The Law

[12]	<p>In describing the purpose of the Health and Safety in Employment Act 1992 Venning J said at paragraph 9 of his Judgment in <i>Martin Simmons Air Conditioning Services Limited v Department of Labour</i> — High Court Auckland — 30 April 2008 — CRI 2007-404-000249:</p> <p>“The Act adopts a preventative approach to maintaining and promoting health and safety in the work place. Its principal objective is to provide for the prevention of harm. To achieve this object employers are required to promote safety in the work place and both employers and others associated with work places are subject to the duty to take all practicable steps to ensure such safety or to ensure that employees and others in the work place are not harmed.”</p>
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[13]	It is for the prosecution to prove the charge, and each element of the charge beyond reasonable doubt. What the prosecution must prove is:		
	(i)	The Defendant was an employer;	

(ii)	Ms ... was an employee of the Defendant;	
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(iii)	That Ms ... was at work on or about 19 May 2007 at the home of ... ; and	
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(iv)	That the Defendant failed to take all practicable steps to ensure the safety of Ms ... at that time.	
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[14]	There is no dispute that the onus or burden of proving the charge remains on the Informant throughout. The evidential burden does not shift to the Defendant to establish anything. The issue in this case is whether the Informant can prove that the Defendant failed to take all practicable steps to ensure the safety of Ms ...		
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[15]	“All practicable steps” is defined in s 2A of the Act. The definition says:		
	“(1)	In this Act, all practicable steps, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to—	
		(a)	the nature and severity of the harm that may be suffered if the result is not achieved; and

(b)	the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and	
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(c)	the current state of knowledge about harm of that nature; and	
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(d)	the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each of those means; and	
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(e)	the availability and cost of each of those means.	
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(2)	To avoid doubt, a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.]”	
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[16]	<p>As to what “practicable” means, Lord Reid said in Marshall v Gotham Co Limited [1954] All ER 937 at 942:</p> <p>“I think it is enough to say that, if a precaution is practicable it must be taken unless in the whole circumstances that would be unreasonable. And as men’s lives may be at stake it should not lightly be held that to take a practicable precaution is unreasonable.”</p>
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[17]	As has been recognised in many cases (including most recently in the <i>Martin Simmons case</i>) whether “all practicable steps” have been taken will depend on the circumstances and what is “practicable” is a matter of fact and degree in each particular case.
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[18]	As Counsel for both sides recognise the Act does not require an employer to provide complete protection but rather to take all reasonably practicable steps to guard against potential hazards — see Buchanan’s Foundry Limited v Department of Labour [1996] 1 ERNZ 333 at 337 .
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[19]	The <i>Buchanan case</i> is also authority for the proposition that practicability is to be judged on the basis of what was known at the time of the incident being examined and is not “a counsel of hindsight perfection”.
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The Prosecution Case

[20]	During the course of the hearing Mr Corkill was critical that the nature of the basic allegations against the Defendant were changing from time to time, even if some of those changes were quite subtle. I consider the best way to approach this issue is to hold the Informant to the approach taken in final submissions after all the evidence had been given and there had been an opportunity for proper reflection on the state of the case.
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[21]	In her final submissions Ms Szeto highlighted the ways in which she alleged the Defendant had failed to take all practicable steps to ensure the safety of Ms The steps she relied upon were as follows:	
	(i)	The Defendant should have established whether Ms ... was Hepatitis B immune by carrying out screening.

(ii)	When the Defendant discovered that Ms ... was not immune, the Defendant should have:	
	a.	Provided Ms ... with a course of Hepatitis B vaccinations and tested her post-vaccination immune status; and

b.	Prevented Ms ... from carrying out work where she risked contracting Hepatitis B until she was either immune or fully vaccinated against Hepatitis B, and if not immune, fully informed of the process of necessary medical follow up of potential incidents of blood or body fluid exposure; and	
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c.	Provided a robust post-exposure care plan that included immediate access to health professionals with knowledge of the principles of post-exposure management; and	
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d.	Ensured that information on the use of Hepatitis B Immune Globulin (HBIG) as post-exposure prophylaxis was readily available.	
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[22]	Based on this approach Mr Corkill submitted that the Court first needed to consider whether the Informant had proved that Defendant should have established whether Ms ... was Hepatitis B immune by carrying out screening. If there was no obligation to do so or it could not legally or practically be done then that was the end of the case because on the approach taken by the Informant any further consideration only arose if the Defendant found out that Ms ... was not immune. Mr Corkill submitted that it was only if the Court found that there should have been screening that the other propositions advanced by Ms Szeto needed to be addressed.	
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The Steps Taken by the Defendant to Protect the Health and Welfare of Ms ...

[23]	Ms ... was cross-examined extensively about the training and instruction she received during the course of her employment with the Defendant about health and safety issues. In addition there was a significant body of evidence called by Counsel for the Defendant outlining the steps taken by the Defendant to protect the health and welfare of all its employees.	
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[24]	Evidence was given by Ms Richardson who was the Community Services Manager for IHC in Manawatu from 1995 until April 2004. Ms Richardson was the person who interviewed and hired Ms ... in 1999 and was her manager through until April 2004.	
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[25]	Ms Richardson gave evidence of the standard recruiting process that applied to everyone including Ms ... when they applied for a job. Each applicant received on the job training with a senior staff member in a particular facility or facilities. When the job applicant was employed there was a formal induction process as well as formal orientation training. This training was extremely comprehensive and was followed by further introductory training.
[26]	Ms Richardson gave evidence that during these training programmes there was a significant emphasis on health and safety which covered infection control including Hepatitis B and meningitis. Ms Richardson said that she placed particular emphasis in training on Hepatitis B ...
[27]	Ms Richardson gave evidence that she always advised staff during the formal orientation training that they should have a Hepatitis B test from their doctor and if not immune they would need a series of three injections to obtain immunity. There was also discussion about what amount IHC would pay towards the cost of immunisation for Hepatitis B.
[28]	In addition to the formal orientation and introductory training there was informal on the job training at regular staff meetings. Ms Richardson gave evidence that Hepatitis B was a frequent subject of discussion in those meetings over the time Ms ... was employed and there was on going discussion about the course of three injections for immunisation. Ms Richardson can distinctly recall Ms ... instigating a number of these discussions.
[29]	In September 2000 and September 2002 there was formal health and safety training conducted by Ms Richardson which Ms ... attended. Health and safety issues around Hepatitis B were discussed at both of those formal training sessions.
[30]	In January 2004 Ms ... received further training in infection control where again the issues around Hepatitis B were discussed.
[31]	In April 2002 the Hepatitis Foundation offered IHC staff free Hepatitis B screening tests and subsequent vaccinations if required. In the end that scheme did not proceed because of funding issues but Ms Richardson said in evidence that all her staff including Ms ... were well aware of the issues and what was being offered.
[32]	Further evidence about health and safety issues in relation to Hepatitis B and the training provided to cover those issues once Ms ... came to Hawke's Bay was given by Natalie Berry, a Community Services Manager for the Defendant who was for a time Ms ... immediate supervisor.
[33]	The only possible conclusion that I can reach is that during the course of her employment with IHC and with the Defendant Ms ... received regular and comprehensive training and advice about the health and safety issues surrounding Hepatitis B. During the course of Ms ... employment IHC and the Defendant did all that could realistically be expected of them to keep health and safety issues, including those relating to Hepatitis B at the forefront of their operation.
[34]	All employees, Ms ... included, must have been aware of the dangers of Hepatitis B and the steps they could take to prevent contracting the disease, including being screened and immunised at the expense of the Defendant. In addition to immunisation there was a considerable amount of information about the use of barrier protection such as gloves, masks and aprons to prevent infection. The Defendant also made it very clear to all its employees that if there was any incident that could place the health or welfare of an employee at risk that employee was immediately to go to his or her general practitioner and was also required to file an incident report about what had happened.

What Ms ... remembers

[35]	During the course of her evidence Ms ... was sometimes vague about what courses she attended and what instruction she had received in relation to Hepatitis B. She was able to remember some of the courses she had been involved in but had little or no recollection of others even when referred to contemporaneous documents which proved her attendance at a particular course. She was unable to remember some of the staff meetings where Hepatitis B was discussed and on occasions was shown minutes of those meetings that she had endorsed by signature. On one occasion she explained the position by saying that she may have signed the document but had not read it.
[36]	Ms ... gave evidence that she received a single Hepatitis B injection from a doctor in the Manawatu area in 1999 after she started work with IHC. She stated that IHC paid for the injection but that she has been unable to find any records relating to it. She was unable to provide any details about the injection including who the doctor was who administered it.
[37]	It is certainly very clear from the evidence Ms ... gave that she believed throughout her employment with IHC and the Defendant that she had been immunised against Hepatitis B and she made that known to her managers and fellow workers.
[38]	Ms ... claims that she was unaware that there needed to be a course of three injections for immunity and she denies any knowledge of any discussion about that topic during the course of her training or at staff meetings.
[39]	Ms Shanna Seala is another Community Service Worker with the Defendant who worked with ... She gave evidence that in late 2006 as a result of the encouragement and training she had received from the Defendant she considered having Hepatitis B vaccinations herself. Her manager, Natalie Berry, strongly recommended that she should be immunised but said it was up to her. Ms Seala said that soon after one such meeting she spoke with Ms ... at ... s home. She asked Ms ... if the Defendant paid for the injections and Ms ... told her that she was not sure if the Defendant paid for all three injections or only half the cost. Ms ... suggested to Ms Seala that she double check it with Ms Berry.
[40]	Ms Seala went ahead and had the series of injections for Hepatitis B immunity. She can recall a meeting in early 2007 when Ms ... was present and there was discussion about three injections being needed for immunity.
[41]	Ms Szeto was given leave to recall Ms ... on this point. She denied that any such discussions had occurred with Ms Seala and maintained her position that she was unaware that three injections were required.
[42]	I have no hesitation in accepting the evidence of Ms Seala on this point. She had a clear recollection of the discussions with Ms ... and I do not consider it is possible she has made a mistake about those discussions. I am reinforced in that view by evidence given Ms Berry who said that Ms Seala had recounted that conversation with Ms ... to her as well at the time.
[43]	I find that Ms ... must have been aware of the need for a series of three injections for immunisations purposes. That is the only conclusion that can be reached when the evidence of Ms Seala, Ms Richardson, Ms Berry and the contemporary documents are considered. Despite receiving this information Ms ... eems to have still believed that she was Hepatitis B immune.

Ms ... visits to her general practitioner in January and May 2007

[44]	<p>When Ms ... was bitten by ... on 21 January 2007 she went to her general practitioner on 23 January 2007. While the general practitioner did not give evidence his records have been made available. They show that Ms ... presented with an accidental human bite which had broken the skin. The doctor records that Ms ... ' was fully immunised for Hepatitis B but notes "needs Hep B, C and HIV and rpt three and six months." Those words have been interpreted as a requirement for blood tests to screen for Hepatitis B, C and HIV and for that to be repeated in three and six months.</p>
[45]	<p>Blood tests were taken and a laboratory order sent for testing specifically checking for Hepatitis B immunity. The results from the blood test showed that Ms ... was not Hepatitis B immune. From the evidence given by Ms ... she was not informed by her doctor that she did not have immunity to Hepatitis B and no arrangements were made for any of the subsequent blood testing that was mentioned in the medical notes.</p>
[46]	<p>Ms ... was asked whether she raised the issue of the result of the blood tests with her doctor and her answer was:</p> <p style="padding-left: 40px;">"No. They have a big notice to say that they will notify you if there is something wrong."</p>
[47]	<p>Although there is no evidence of Ms ... being screened for Hepatitis B at any other stage during the course of her employment either with IHC or the Defendant she was screened after the first incident with ... in January 2007. That screening showed she was not immune to Hepatitis B but for some reason she was never notified of that lack of immunity and as a result the Defendant did not know of it either.</p>
[48]	<p>Following the incident on 19 May 2007 when she was accidentally bitten on the hand by ... Ms ... again went to the same general practitioner she had seen in January. While Ms ... was not questioned closely about what she told the doctor in May she did say that she advised him she had been bitten by the same person as in January.</p>
[49]	<p>In the doctor's medical notes of 21 May 2007 there is no reference at all to Hepatitis B and nothing to indicate a reference back to the January notes.</p>
[50]	<p>All of the highly qualified medical specialists called by both sides were very critical of Ms ... general practitioner and his lack of action in following up and dealing with her non-immunity to Hepatitis B. Their criticisms must be founded on the medical notes because neither side called the doctor to give evidence and Ms ... was not questioned closely about what happened at any of the doctors visits. I am very conscious that any criticisms of the doctor are made in circumstances where he has not been given the opportunity to address them. However I am required to make a decision based on the evidence before me which in this case includes a unanimous interpretation of the medical notes provided by all the highly qualified doctors who have given evidence.</p>
[51]	<p>Based on that evidence the only possible conclusion that can be reached is that prior to the first incident with ... in January 2007 both Ms ... and through her, the Defendant, believed she was Hepatitis B immune. The blood tests taken on 23 January 2007 proved she had no such immunity but that information was not passed on to Ms ... and neither could the Defendant be aware of it. Ms ... visits to the doctor on 21 and 23 May 2007 show no reference back to the 23 January 2007 visit and the result of the blood tests and as a result any medical action that may have prevented Ms ... being infected with Hepatitis B was not taken.</p>

The Medical Evidence

[52]	Dr Richard Meech, a consultant physician specialising in infectious diseases gave evidence for the prosecution. He believed that a variety of steps could have been taken at different times to prevent Ms ... being infected with Hepatitis B necessitating a liver transplant. He recorded various stages in the course of her employment with IHC or the Defendant where blood screening should have been done which would have identified her lack of immunity. In his view opportunities for screening arose before her employment with IHC, at the time of the transfer of employment from IHC to the Defendant, at the time the first injury was sustained on 21 January 2007 and finally at the time of the second exposure on the 19 th of May 2007.
[53]	Dr Meech was of the view that going to a general practitioner when there was an incident involving potential infection with Hepatitis B was inadequate and there should have been a regime in place whereby the Defendant would arrange for Ms ... to be referred to a specialist in the field.
[54]	Dr Meech was also of the view that the Defendant should have provided Ms ... with greater information about Hepatitis B immune globulin (HBIG). He advised that vaccination with HBIG preferably within 24 hours of an exposure was an essential and important component in the prevention of Hepatitis B infection.
[55]	Dr John Reekie a specialist occupational physician also gave evidence for the prosecution. Dr Reekie also believed that screening should have taken place. He was critical that the Defendant had no real post exposure plan apart from a referral to a general practitioner which in common with Dr Meech he regarded as inadequate. Dr Reekie was of the view that there should be a written referral from the employer to the post-exposure expert to ensure that proper steps were taken. In his opinion the Defendant did not take all practicable steps to protect the health and welfare of Ms ...
[56]	Dr Peter Robinson a specialist in occupational medicine gave evidence for the Defendant. He did not accept the criticism made of the procedures the Defendant had set in place. He pointed out that while screening and immunisation can be made available it cannot in the New Zealand employment context be made mandatory. He did not accept that where incidents of exposure occurred there was a need for reference to anyone other than general practitioner. The tenor of his evidence was that general practitioners in New Zealand are very well trained and at the front line when it comes to diagnosing and arranging treatment for all medical conditions.
[57]	Dr Robinson did not accept the evidence given by Dr Meech that a greater emphasis should have been given to HBIG by the Defendant in its training courses. He pointed out HBIG is under the control of the blood banks in New Zealand and can only be administered on the request of a doctor.
[58]	Dr Robinson gave evidence that in his view the policies and procedures set up the Defendant were entirely appropriate and all practicable steps had been taken to protect the health and welfare of their employees as far as Hepatitis B was concerned.
[59]	Dr Roderick Ellis-Pelger, a specialist infectious diseases physician gave evidence for the Defendant as well. His evidence supported that of Dr Robinson. He believed that reference to a GP initially was appropriate and was the normal expected medical standard in New Zealand.
[60]	As I have stated earlier all four medical witnesses were critical of the perceived failure of the general practitioner to notify Ms ... of her lack of immunity. Dr Robinson put that omission in the “medical misadventure” category.

Conclusions

[61]	<p>On the evidence presented in this case I am completely satisfied that from the commencement of Ms ... employment with IHC in 1999 through until she contracted Hepatitis B while employed by the Defendant in May 2007 there were robust and extensive health and safety training programmes in place. It is not necessary to repeat what I have already said in this regard. There is ample evidence from Ms Richardson and Ms Berry about the strong emphasis on health and safety and their evidence is totally corroborated by the significant amount of contemporary documentation which shows the strong emphasis on safety and health and welfare particularly surrounding Hepatitis B.</p>
[62]	<p>I am satisfied that on many occasions screening tests and inoculations for Hepatitis B were discussed by the staff generally, including Ms ... Also as I have said previously I am completely satisfied that Ms ... knew that screening tests were available, that a course of three injections was required for immunisation and that the Defendant would pay for most if not all of the costs involved.</p>
[63]	<p>I am satisfied as well that the Defendant strongly emphasised to any staff, including Ms ... who were involved in any incident that may have compromised their health that they should immediately attend their own general practitioner for any appropriate medical treatment that may be required. The fact that Ms ... attended her general practitioner after the January 21 incident and did so again on two occasions after the 19 May incident is evidence of the Defendant's procedures being put into operation. While undoubtedly it can be argued that Ms ... would have attended her general practitioner on those occasions in any event that does not detract from the fact that the health and safety policy of the Defendant strongly encouraged attendance on the general practitioner when a staff member's health may have been compromised as a result of employment.</p>
[64]	<p>As I set out in paragraph [21] the Informant has identified the ways in which it claims the Defendant failed to take all practicable steps to ensure the safety of Ms ... and it is now necessary to examine those allegations to determine whether the charge is proved. It is also important to emphasise that the Defendant is facing a specific charge. The allegation against the Defendant is that "on or about 19 May 2007" it failed to take all practicable steps to ensure Ms ... was not exposed to the hazard of Hepatitis B in her place of work.</p>
[65]	<p>It is the central plank of the Informant's case that the Defendant should have established whether Ms ... was Hepatitis B immune by carrying out screening. Obviously that proposition must be put into the context of the facts of this case. Although I am satisfied that Ms ... knew full well that immunisation from Hepatitis B required a course of 3 injections I also find that despite that knowledge she firmly believed she was immune because of the single inoculation she received in 1999 and the Defendant was well aware that Ms ... believed she was immune. I am quite sure that Ms ... firmly believed she was immune because I do not believe she would have played Russian roulette with her own health and</p>
[66]	<p>The Informant's view that the Defendant should have established whether Ms ... was Hepatitis B immune by carrying out screening is based on the evidence of Dr Meech. I have outlined earlier Dr Meech's views that there were a number of occasions where opportunities arose when screening should have been done and he was critical that no screening was done.</p>
[67]	<p>One of the occasions where he believed screening should have been done was after the first bite Ms ... received from ... on 21 January 2007. In his evidence Dr Meech said:</p> <p>"The next opportunity to intervene was at the time of the first injury sustained on 21 January where there was an opportunity to determine Ms ... status as lacking antibody to HBV and covering the immediate exposure with the use of Hepatitis B immune globulin and embarking upon a course of vaccination."</p>

[68]	The difficulty I have with this evidence from Dr Meech is that it does not seem to accord with what actually happened. When Ms ... attended her general practitioner in January blood tests were taken and one of the specific purposes of them as recorded in the medical notes was to screen for Hepatitis B. Following the 21 January injury blood screening for Hepatitis B did take place and her lack of immunity was discovered but not communicated to her or to any one else.
[69]	It could perhaps be argued that the screening that took place in January 2007 was not done at the specific direction or request of the Defendant but simply resulted from Ms ... attending her general practitioner. In my view such an approach would be far too simplistic. It was an integral part of the Defendant's health and safety procedures that immediate attendance on a general practitioner was both strongly recommended and encouraged. Ms ... attendance on the general practitioner in January was an example of the Defendant's health and safety procedures in action and it can hardly be blamed on the Defendant that the results of the blood screening were not communicated to Ms ... or any one else.
[70]	It is axiomatic that if the results of the blood screening had been made available to Ms ... she would have taken the necessary steps to ensure her own immunisation from Hepatitis B and the infection and illness she suffered after being bitten by ... in May and the subsequent liver transplant would not have happened.
[71]	The answer to the Informant's proposition recorded above is that the Defendant's procedures recommending and encouraging Ms ... to attend a general practitioner did result in blood screening being carried out in January 2007 even if the results were not communicated to Ms ...
[72]	The Informant's arguments about carrying out blood screening face other hurdles. There is no evidence before me as to how the Defendant could insist that Ms ... undertake blood screening to determine her Hepatitis B immunity. The only relevant evidence in that regard is that there is no right for an employer to insist on blood tests and that no steps can be taken by the employer adverse to the employee should she refuse to undertake blood tests. In this case Ms ... firmly believed she was immune. Counsel for the Informant has not made it clear to me as to how the Defendant could insist on blood screening tests being carried out to check whether she was right or wrong. The submission makes an assertion that the Defendant should have established whether Ms ... was Hepatitis B immune by carrying out screening without in any way providing evidence to indicate how that could be done.
[73]	It can hardly be a practicable step demanded of an employer to protect the safety of an employee to require a blood test that the employer has no authority to enforce by either insisting that the test be carried out or by restricting or removing employment if there is a refusal by the employee to do so. All that can be done is to strongly recommend such screening and as I have found the Defendant did so on many occasions.
[74]	My findings on this issue are sufficient to determine the result of this prosecution. However, the Informant also postulated that when the Defendant discovered that Ms ... was not immune the Defendant should have provided Ms ... with a course of Hepatitis B vaccinations and tested her post vaccination immune status. The same criticism that I have already made of the Defendant's lack of authority to insist on blood screening applies with even greater force to the issue of vaccination and post vaccination testing. The Defendant provided all of the information to Ms ... She made choices not to be screened until she went to the doctor in January 2007.

[75]	<p>The Informant also alleged that when the Defendant discovered that Ms ... was not immune it should have prevented her from carrying out work where she risked contracting Hepatitis B until she was either immune or fully vaccinated against Hepatitis B and if not immune, fully informed of the process of necessary medical follow up of potential incidents of blood or body fluid exposure. This proposition is put forward by the Informant on the basis that the Defendant could prevent Ms ... from working until she was immune or fully vaccinated which is contrary to the evidence that has been given in the case. Additionally I am satisfied that Ms ... was provided with all of the information she needed about attending her general practitioner and thereafter medical care and judgment as to treatment lay with that general practitioner.</p>
[76]	<p>The Informant also alleged that the Defendant should have provided a robust post-exposure care plan that included immediate access to health professionals with knowledge of the principles of post-exposure management. This was also based on the evidence given by the Informant's medical experts. There was no evidence that in any other area of occupational safety and health that first reference was to specialist health assistance. The front line has always been the general practitioner who if necessary engages the appropriate specialist.</p>
[77]	<p>In his evidence Dr Reekie spoke of providing cards to meat workers highlighting the prospect of leptospirosis. The purpose of those cards, he said, was:</p> <p>“Please check me for leptospirosis which meant that the doctor did this screen to check to see if they have got leptospirosis and at the same time give the antibiotic.”</p>
[78]	<p>The purpose of the card is to alert the “doctor” (the general practitioner) and there was no suggestion in Dr Reekie's evidence that what has been described as the front line of New Zealand medicine needed to be bypassed in those circumstances.</p>
[79]	<p>I accept the evidence of Dr Elli-Pegler when he said:</p> <p>“The feasibility of immediate referral to those with special expertise in the infectious diseases is highly questionable. At a theoretical level what is advocated (immediate access to those people) is a good idea. It is not, however, the way things work in the New Zealand medical system. The infrastructure and systems simply do not exist to allow ready access to an infectious diseases physician for any person who might have been exposed to an infectious disease such as HBV.”</p>
[80]	<p>I accept that in circumstances that arose in this case the standard practice is for reference to a general practitioner rather than a specialist. I accept Dr Ellis-Pegler's evidence that this is the way things are done in New Zealand. The Informant has not provided any evidence to show this falls below the standard of “all practicable steps”.</p>

[81]	<p>Lastly the Informant submits that the Defendant should have ensured that information on the use of the Hepatitis B Immune Globulin (HBIG) as post-exposure prophylaxis was readily available. Once again there was no evidence before me of any other employment situation where it was considered necessary to provide the employee with information about the type of a potential medical treatment that may be necessary depending on diagnosis. It is difficult to understand how an individual worker could be advantaged by having a knowledge of the use and effectiveness of HBIG. Whether HBIG is used in any given case requires a careful and considered medical opinion by a professional properly qualified to make the decision. The Informant did not provide any evidence at all as to how it suggested a lay person's knowledge of HBIG would assist him or her in being properly treated for potential Hepatitis B infection.</p>
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Result

[82]	The charge is dismissed.
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All Citations

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