IN THE DISTRICT COURT
AT WAITAKERE

I TE KŌTI-Ā-ROHE
KI WAITĀKERE

CRI-2017-090-005615
[2019] NZDC 9728

WORKSAFE NEW ZEALAND
Prosecutor

v

BRADFORD JOHN DIBBLE
Defendant

Hearing: 21 May 2019

Appearances: S Symon for the Prosecutor
D Neutze for the Defendant

Judgment: 21 May 2019

NOTES OF JUDGE J JELAS ON SENTENCING

---

[1] Mr Dibble, you are aged 58 and this is the first time you have appeared in a criminal Court. You are supported through this process today by your wife.

[2] You appear for sentencing on two charges. They are:

(a) One charge under ss 36(1)(a), 48(1) and (2)(a) Health and Safety at Work Act 2015. That offence carriers a maximum penalty of $300,000 fine.

(b) One charge under s 163C Electricity Act 1992 and reg 17 Electricity (Safety) Regulations 2010. That offence carries a maximum penalty of two years' imprisonment and fine not exceeding $100,000.

[3] The substance of the charge under the Health and Safety at Work Act is that Mr Dibble, failed to ensure as far as reasonably practicable the health and safety of Mr Garner who was assisting him with tree cutting near electrical lines. As a result, he exposed Mr Garner to the risk of death and serious injury. Mr Garner suffered serious injury.

[4] The Electricity Act charge is based on Mr Dibble taking actions knowing that those acts were reasonably likely to cause serious harm and he failed to prevent so far as reasonably practicable the serious harm that did result. That relates to the work undertaken near electrical lines where safe working distance and other best practises were not adhered to. As a result, Mr Garner suffered serious injury.

[5] The WorkSafe prosecution was commenced in December 2017. Mr Dibble, on the morning of the trial, following late negotiations, pleaded guilty to both charges in November 2018. Sentencing today proceeds based on an agreed caption summary dated 21 May 2019. For completeness that summary will be attached to the sentencing notes as annexure A.

[6] Mr Dibble's prosecution arises from his employment of the victim, Mr Garner, to undertake tree-trimming work. Mr Garner had undertaken casual work for Mr Dibble since 2014. At the time, Mr Garner was completing a carpentry apprenticeship. The property where the work was being undertaken was owned by a family trust. Mr Dibble was a trustee of that trust and undertook the management and maintenance work at that property.

[7] On the property, at the front, were two large ash trees. Multiple powerlines at multiple heights ran along the front of the property.

[8] In December 2015, branches from both trees were approximately 0.5 metres away from the powerlines. The lines are owned and managed by Vector. In late December 2015, Vector sent the first of two cut and trim notices to Mr Dibble. The notices required the trees to be trimmed to clear the top two lines by 3.5 metres. The letter specified a date for the tree-trimming to be completed by. The letter also set out offences that could be committed if the notice was not complied with.

Importantly, for today's purposes, the notice also recorded a warning of the dangers of working close to electrical lines. The warning included in the notice is as follows:

> [12] Due to the danger associated with working near electricity, only arborists that are trained and approved can undertake tree trimming work near our network lines. For your safety, you are not permitted to trim a tree which has any growth within four metres of a power line.

[9] Included with the notice was a list of qualified arborists that could undertake the work. The notice was not complied with.

[10] A second cut and trim notice was sent to Mr Dibble on 22 August 2016. The second notice largely repeated the contents of the first notice. As before, it included a warning about the dangers associated with the required work and the need for a qualified arborist to undertake the work. It also, as before, included the contact information for qualified arborists. That included information for the arborist company Treescape.

[11] After receiving the second notice, Mr Dibble made contact with Treescape who provided a quote. After receiving the quote, Mr Dibble did not make further contact with Treescape or any other arborist.

[12] On 26 October 2016, Mr Dibble asked Mr Garner's assistance to help him trim the Ash trees at the property. Mr Dibble's intent was to remove lower branches overhanging the carpark areas before employing Treescape to trim the higher branches. Mr Dibble's submits he decided to undertake that work to respond to neighbour's complaints about the trees overhanging carpark areas.

[13] The summary of facts that is attached sets out the work that was undertaken prior to the accident. Initially a hand saw was used, along with a metal ladder. Mr Dibble aided Mr Garner who was carrying out most of the tree-trimming. While those earlier aspects of work did not directly contribute to the incident that occurred, it should be noted that from the outset the workplan for the tree-trimming work being undertaken was flawed.

[14] While there was some discussion between Mr Dibble and Mr Garner about the work to be undertaken, Mr Dibble did not refer to any documentation or best practices, or guidelines about working at height when undertaking tree-trimming or working near electrical lines. There is no record of any hazard assessment been undertaken.

[15] The metal ladder that was used to give height to Mr Garner, who was carrying out the majority of the trimming work, was marked with a warning. That warning was, "This product conducts electricity." A metal ladder was not suitable for *any* work near electricity. Relevant industry documents clearly state that wooden or non-conductive ladders should only be used. Ordinary metal ladders should be avoided.

[16] Other factors that indicate the workplan was flawed from the outset include Mr Garner was not wearing a helmet of any kind or any form of head protection. This was particularly relevant given he was working at height, up a ladder. Nor was Mr Garner wearing any insulated gloves which would provide protection from electricity. At the time he was wearing ordinary gardening gloves. Finally, although there was use of a harness, the rope harness that was employed was inadequate and it was only used for part of the work. The harness does not appear to have been used at the time of the incident.

[17] As already noted, the majority of the trimming work undertaken prior to the incident was carried out with a hand saw. When the work was coming to an end, a neighbour approached Mr Dibble and offered a long arm cordless Ryobi pole saw. The Ryobi saw was approximately 1.97 metres long. It had the ability to be extended to 2.9 metres. However, there is no evidence that it was extended during its use. Although Mr Dibble initially hesitated in using the Ryobi saw, he eventually agreed to use it and passed it to Mr Garner. Mr Dibble did not stop to assess how the introduction of the Ryobi saw impacted on the workplan or the hazards involved.

[18] At the time Mr Dibble handed the Ryobi saw to Mr Garner, Mr Garner was up the tree on the metal ladder. Mr Garner immediately began to use it and even made the comment that he wished he had it earlier as it was quick and easy to use. No directions were given by Mr Dibble about which branches should be cut with the saw. It is accepted at this point Mr Dibble moved away from the tree that Mr Garner

was working in to undertake other tasks. Mr Garner continued to trim the tree that he had been working on prior to being handed the saw. He moved to the roadside of the tree.

[19] Mr Garner has stated that the incident occurred at the time he was attempting to cut the last branch for the day. That last branch fell onto powerlines. Mr Garner called out to Mr Dibble asking what he should do. Before Mr Dibble was able to respond, Mr Garner received an electric shock that was conducted through the branch of the tree, through the ladder and into his right arm. The electric shock caused Mr Garner to fall from the ladder to the ground. As a result, he sustained several injuries. There is no suggestion whatsoever that the accident occurred because of any defect with the powerlines.

[20] The resulting investigation undertaken by WorkSafe which Mr Dibble co-operated fully with, which is a point I will return to, identified the inadequacies in the equipment and the personal protective gear being used at the time of the accident. Some of those I have already referred to. Additional factors identified include that the Ryobi saw was not suitable for work near overhead powerlines. The manual for the saw, which is available online, expressly states, "Do not use the machine in any position that causes any part of it to come within 10 metres of overhead electrical lines". Using the Ryobi saw was not an appropriate tool under any circumstances. Even an appropriate qualified arborist would never use this tool to undertake work in these circumstances. A further factor is that Mr Garner was not wearing the required protection for working with chainsaws.

[21] The summary of facts sets out the multiple industry standards and guidelines for this type of work. None of these were consulted by Mr Dibble and the majority of which were not adhered to. By way of example, the approved code of practice for safety and health in tree work published by the Department of Labour includes, amongst other things, a warning of the potential for accidents and serious injury where tree maintenance work is undertaken around powerlines. The risk of accident and injury is described as very high. Further, there is reference to a need to observe minimum safe approach distance for any workers trimming trees near powerlines.

Purposes and principles of sentencing

[22] Turning to the appropriate purposes and principles of sentencing, both counsel have made submissions, and both largely agree. The sentencing process needs to hold Mr Dibble accountable for the harm done to Mr Garner and to denounce and deter conduct of this type by anyone else in the future. The effects of the accident upon the victim also need to be considered. As WorkSafe has rightly emphasised, the purposes of prosecutions under the Health and Safety at Work Act must reflect the Act's intentions of securing the health and safety for workers and workplaces. 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 as is reasonably practicable.

[23] For the prosecution under the Electricity Act, regard should be had to the purposes of that Act and the fact that Mr Dibble was not regulated for, or legally allowed to work with or even near electricity.

[24] Mr Neutze, on behalf of Mr Dibble, has emphasised the need for the least restrictive outcome to be imposed and the offers by Mr Dibble in various ways to make amends for the harm resulting to Mr Garner.

Approach to sentencing

[25] In respect of the approach to sentencing, no issue is taken between counsel in terms of the relevant authorities. Reliance on the *Stumpmaster v WorkSafe New Zealand* case and its approach is referred to by both counsel in their submissions.[1] The four-step process set out in *Stumpmaster* by the full Court of the High Court is as follows:[2]

(a) Assess the amount of reparation.

(b) Fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors.

[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.
[2] At [3] and [35].

(c) Determine whether further orders under sections 152 to 158 of the Act are required.

(d) Make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps.

[26] WorkSafe acknowledges that the maximum penalty relates to the offence under the Electricity Act but submits a totality approach needs to be considered in respect of both prosecutions.

Electricity Act prosecution

[27] Turning first to the charge under the Electricity Act, which carries a maximum penalty of two years' imprisonment, WorkSafe submit the relevant starting point sentence for the charge is one of imprisonment given this is not a systematic failure by an organisation but omissions and failures that can be directly attributed to an individual, Mr Dibble. It is acknowledged that imprisonment should not be the end point and a period of community work would adequately meet the purposes and principles of sentencing once all factors are considered.

[28] Mr Neutze responsibly accepts that community work is an outcome within the range but submits the level of community work noted by WorkSafe in their submissions is manifestly excessive.

[29] WorkSafe submit that the aggravating factors in this case, which makes a starting point sentence of imprisonment appropriate, includes the following: Mr Dibble was aware of the risk associated with working close to electricity. He was informed of those risks in the two different cut and trim notices sent to him by Vector. It can be inferred from those letters that he knew there was a requirement to be trained and approved to carry out the specialist tree work. However, he allowed this work to be carried out by himself and Mr Garner. His qualifications fell well short of industry standards as did Mr Garner's.

[30] Further, there were limited steps taken to mitigate the significant risk that were posed and there seemed to be a failure to appreciate what reasonable steps ought to

have been undertaken to ensure compliance with health and safety legislation and industry standards.

[31] WorkSafe submit that the inference that can be drawn from the summary of facts is that this work was undertaken in an endeavour by Mr Dibble to reduce the financial cost of trimming of trees. A quote had been received from Treescape for the relevant work. Instead of responding to that quote and employing Treescape, Mr Dibble engaged Mr Garner to undertake work albeit only for the initial lower branches. It is accepted that Treescape were always going to be employed for the work relating to higher branches.

[32] Mr Neutze submits the inference of "saving money" is not available on the facts. The work undertaken was done in response to a complaint by a tenant relating to trees overhanging carpark areas and the nuisance that was causing tenants. It was always Mr Dibble's intention to employ Treescape for most of the work.

[33] While I consider there was a cost saving factor calculated in employing Mr Garner, I do not consider that much hangs on this factor. The prosecution relates to the decision to undertake the work, whatever the motivation, and the failures to have appropriate safeguards in place.

[34] A further factor WorkSafe submit makes a start point of imprisonment appropriate is the extreme dangerousness of undertaking any work near powerlines. While thankfully no death resulted in this case, severe injuries were sustained by Mr Garner.

[35] I accept a starting point of imprisonment is available to the Court. I conclude that the scope would be in the range of 12 months' imprisonment. However, I also accept that once the various mitigating factors are considered, which I will refer to shortly, and other punitive aspects of the sentencing outcome are considered, that a modest level of community work is the appropriate response in respect of the Electricity Act prosecution.

Health and Safety at Work Act

Reparation

[36] Two statements from the victim have been prepared, one dated October 2018 and an updating report of February 2019. It is clear from both reports that the effects of the incident upon Mr Garner have been far-reaching, well beyond the physical effects of the injuries he sustained. This included a broken right scapula, broken right index finger, electric shock and resulting complications. He describes being a fit and healthy individual prior to the incident, someone who regularly attended the gym, would run, swim and socialise with others. He also described his mental health and wellbeing before the accident. He perceived himself as being mentally well and sound, with no anxieties or other concerns relating to his mental health.

[37] The incident has had an impact on both his physical wellbeing and his mental wellbeing. After a short stay in hospital, he had a period of approximately two months before he was able to return to work. A significant amount of physical rehabilitation was required. Since the incident, he has been diagnosed with post-traumatic distress disorder. He has been under the care of a neuro-psychologist. He finds himself lacking patience and being easily irritated. The possible fatal consequences that could have arisen from the incident is difficult for him to ignore and everyday tasks around the use of electricity is causing him to pause.

[38] In the October 2018 statement, he records still not having full use of his right arm, with movement being limited. This has impacted on his carpentry apprenticeship. No further information has been provided as to whether he has now made a full physical recovery. I proceed on the basis that the physical recovery has been protracted over a considerable period of time.

[39] The statement touches upon the initial loss of wages he suffered although it must be noted that Mr Dibble met that difference between what his employer was paying him and his entitlement under ACC, even though Mr Dibble was not his employer for the carpentry apprenticeship. Overall, it is obvious that the effects of the

offending, particularly on Mr Garner's mental wellbeing, are ongoing and that is directly related to the level of risk associated with the incident.

[40] WorkSafe seeks a starting point reparation payment to Mr Garner in the vicinity of $30,000. In addition, $73 reimbursement for medical expenses is also sought. Mr Dibble accepts reparation is warranted but submits the starting point range is more in the vicinity of $20,000. All parties acknowledge that the sum Mr Dibble has already paid to Mr Garner of $4200, being the top up of his ACC payment, should be deducted from any reparation start point.

[41] Factors I have taken into account in determining the level of reparation include the risk of possible death, or more severe injury to Mr Garner, and work around live powerlines, particularly at a height which, in my view, carries obvious risk with it. And while those ultimate risk have not eventuated, they certainly continue to plague Mr Garner and cause him ongoing stress and anxiety. Mr Garner did suffer severe injuries which have taken some time for him to recovery. The impact on his mental wellbeing has been ongoing and he is still receiving professional assistance.

[42] I consider the appropriate start point level for the reparation to be in the range of $25,000. A deduction is made to acknowledge the payment Mr Dibble has already made to the victim. The total reparation that will be finally ordered will be $20,000.

Health and Safety at Work Act prosecution

This offence is a fineable only offence. Counsel agree the bands identified by Judge Sinclair in *WorkSafe New Zealand v McRae* apply.[3] They are as follows:[4]

(a) For low culpability, fines of up to $50,000;

(b) For medium culpability, $50,000 to $120,000;

(c) For high culpability, $120,000 to $200,000; and

[3] *WorkSafe New Zealand v McRae* [2019] NZDC 22096.
[4] At 5.

(d) For very high culpability, more than $200,000.

[43] Mr Neutze submits that Mr Dibble's culpability falls between the low and medium culpability range. Fines within those two culpability bands spread from $50,000 up to $120,000. Mr Neutze submits a starting point fine in the range of $50,000 is appropriate.

[44] WorkSafe submit an assessment of Mr Dibble's culpability would place him in the medium to high culpability range which has fines varying from $50,000 up to $200,000. WorkSafe submit a starting point fine of $100,000 is appropriate.

[45] In order to determine the appropriate start-point fine level, it is necessary to assess Mr Dibble's culpability in respect of this offence. An initial factor is Mr Dibble's knowledge of Mr Garner. Mr Dibble had employed Mr Garner since 2014 on a casual basis. This arose out of a job advertisement Mr Dibble placed on student job search, initially for painting work. The role evolved over time and Mr Garner was casually employed by Mr Dibble to undertake gardening work which included trimming of gardens and hedges (but not trees), general painting and other handyman type work.

[46] Neither Mr Garner nor Mr Dibble had any prior experience of working around live electrical lines or tree-trimming. I infer Mr Garner's lack of relevant prior work experience was known to Mr Dibble given his regular employment of Mr Garner and his personal knowledge of him. Given that background, I consider Mr Dibble was aware that Mr Garner lacked the necessary expertise to undertake the work he was asked to do on the day of the incident.

[47] A second factor is that Mr Dibble was solely responsible for directing Mr Garner to undertake the tree work.

[48] A further factor is that Mr Dibble must have been aware of the inherent dangers. They were clearly specified on the cut and trim notices and, in any event, the dangers of working near electrical lines is common knowledge.

[49] A further factor is that Mr Dibble had obtained a quote from an appropriate qualified arborist but elected not to employ them for all the work. Mr Dibble had access to qualified arborists but elected not to employ them.

[50] My assessment of the facts of this case is Mr Dibble made an ill-informed decision to employ Mr Garner to undertake tree work near power lines, without any attempts to adequately identify the hazards and risks, consider an appropriate work plan, stop and reassess the work plan that had been discussed (although inadequate), when the work changed (with the introduction of the power saw), ignored the fact that Mr Garner was not trained or competent to undertake the work and disregarded the fact that he himself was not a trained or competent supervisor for that work. Further, he failed to ensure that there was adequate equipment utilised and personal protective equipment used by Mr Garner.

[51] Mr Neutze has emphasised that the decision to use the power tool and cut branches higher in the two trees was a spontaneous decision that arose out of the neighbour's offer to use the Ryobi saw. While I accept the workplan changed during the course of the work undertaken, I cannot ignore the fact that, from the outset, the parties were all inexperienced, there was a lack of preparation, no qualifications and lack of equipment used, and protective gear supplied. The work that day was flawed from the outset.

[52] I consider that Mr Dibble's culpability in respect of the offending falls between the medium and high culpability range and I adopt a starting point of a fine of $100,000.

[53] I accept, as Mr Neutze has emphasised in his written submissions and the materials attached to them and in the oral submissions made to me today, that there are a number of mitigating factors that need to be given weight and credit which would result in the start point fine of $100,000 being reduced. Those mitigating factors include Mr Dibble's full co-operation with the WorkSafe investigation that followed the incident. These investigations are time consuming and difficult for WorkSafe. Co-operation is vital for these investigations to be effective and completed in a timely manner. Co-operation by Mr Dibble should be given credit.

[54] Mr Dibble and his wife both attended a restorative justice conference with Mr Garner on 14 December 2018. I have read the conference report. I accept all parties found the conference confronting. The reality of the effects of the incident upon Mr Garner were all too apparent to Mr Dibble and his wife. It is clear to all those involved that the WorkSafe prosecution process has also taken a toll on all parties. There were offers by Mr Dibble and his wife to make amends, and I note the report ends with the following quote from Mr Garner, which is as follows, "Even though it was really hard coming here I am glad I did it."

[55] While the updating victim impact statement would tend to suggest that Mr Garner's expectations of that conference were not fully met and, having time to reflect, is critical of some of the statements and offers made by Mr Dibble and his wife, I accept it was never their intent to minimise the harm that Mr Garner has suffered, nor to blame him in any way for the incident that occurred. Their intentions when meeting with Mr Garner were good and in an endeavour to try and rebuild the relationship they had had with Mr Garner prior to the accident.

[56] I accept there has been a demonstration of remorse over and above what is inherent in the guilty plea. That is reflected in the attendance at the restorative justice conference and money paid ($4,200) to Mr Garner by Mr Dibble being the shortfall between Mr Garner's ACC entitlement and wage prior to the incident.

[57] I also acknowledge that Mr Dibble has never been before the Courts before. There is certainly no suggestion that he has failed to adhere to best practice or health and safety practices in the past. Prior to this incident, his safety record was good.

[58] Further, I note he has taken steps to ensure his safety practices in the future are compliant. He has undertaken a Site Safe course and joined the HazardCo group for managing site safety. He now ensures the contractors he employs uses those systems when appropriate.

[59] Apart from this incident, Mr Dibble, throughout his adult life, has been a positive contributing member in the community. I have read the letters and references that have been supplied to the Court. While being successful in his personal life,

Mr Dibble has endeavoured to give back to the community in many ways. They include providing people with an opportunity to get back into the workforce after release from prison. I have read the letter from Mr Vaharaha who, upon his release, was fortunate to work for Mr Dibble. I consider this a significant contribution to the community. It is very difficult for people with criminal records to gain the trust of employers. The assistance extended to Mr Vaharaha and others is to be acknowledged.

[60] Putting aside the issue of the guilty plea, I accept the factors that I have referred to of prior good work history and safety records, an otherwise good character, expressions of remorse evident over and above the guilty plea and his co-operation with the WorkSafe investigation; credit for those factors totalling 20 percent is warranted. That would reduce the start point sentence of the fine to one of $80,000.

[61] The remaining mitigating factor is the guilty plea. I accept WorkSafe's submission that the guilty plea came late, just prior to trial and after extensive preparations have been undertaken by the WorkSafe prosecution team. WorkSafe submit that in those circumstances credit should be limited to the 10 percent range.[5] WorkSafe have confirmed that Mr Garner was a prosecution witness and, if the trial had proceeded, he would have been required to give evidence. While I accept the guilty plea came late and savings to WorkSafe were limited, the benefits of avoiding a victim giving evidence cannot be underestimated. Most research shows that the most harrowing part of a victim making a complaint to authorities is reliving the incident when giving evidence in Court.

[62] In those circumstances, I consider guilty plea credit in the range of 15 percent is warranted, bringing down the fine to one of $65,000.

[63] At this point, all counsel have reminded me of the need to reflect on the totality principle bearing in mind that reparation has been ordered in the sum of $20,000. I have reflected on whether the end fine of $65,000 should be further adjusted (downwards) having regard to the totality principle. However, I consider that the starting points I have adopted have been at the lower end of the range available to me and I consider this a case of serious breaches of the health and safety legislation where

[5] The trial was scheduled to last three to five days.

the workplace risk were patently obvious. In my view, no totality adjustment is required. The total financial cost of $85,000 in my view is warranted. No totality adjustment will be made.

Ancillary orders: prosecution costs

[64] A further final factor to consider is whether an order under s 152 of the Health and Safety at Work Act is required. Mr Neutze accepts an order in respect of prosecution costs is available to the Court but submits the amount sought is not warranted and, in any event, no evidence has been provided of the level of costs incurred by WorkSafe. He seeks an order, if one is made, in the nominal range of $1000 to $2000.

[65] Mr Symon submits that, while no evidence of invoices to WorkSafe have been provided, they are available if the amount claimed is seriously questioned. The amount stated in WorkSafe submissions of 5 February 2019 were the costs at that time. Since then, there has been the second hearing today and the further prosecution attendances that has produced the recent joint memorandum and a revised summary of facts. From my knowledge of legal costs, the amount noted in WorkSafe's earlier submissions do not seem to be outside the range.

[66] I further note that from the *Stumpmaster v WorkSafe New Zealand* decision that orders of this nature are common place.[6]

[67] In accordance with the application made by WorkSafe, I make an order under s 152 of the Health and Safety at Work Act and an order for costs in the sum of $21,476 are granted.

[68] In summary then, the outcomes in respect of the two charges are as follows:

[69] Under the Electricity Act, a nominal amount of community work is imposed. The amount has been kept at the lower end of the range because I consider there has always been a punitive element in terms of the level of fine and reparation that has

[6] *Stumpmaster v WorkSafe New Zealand,* above n 1, at [107].

been imposed, and I also accept WorkSafe process has been taxing and had a punitive effect on Mr Dibble. Community work of 60 hours is imposed.

[70] On the remaining prosecution under the Health and Safety at Work Act, as already noted, reparation in the sum of $20,000 is ordered, as is an additional $73.00 for medical expenses. In addition, a fine of $65,000 is imposed along with ancillary orders relating to prosecution cost in the sum of $21,476.

_____
Judge J Jelas
District Court Judge

Date of authentication: 27/05/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.