IN THE DISTRICT COURT
AT MANUKAU

CRI-2014-092-006693
[2015] NZDC 10056

WORKSAFE NEW ZEALAND
Prosecutor

v

TREESCAPE LIMITED
Defendant

Hearing:	25 March 2015
Appearances:	Ms Moffat for the Prosecution Mr Nicholson for the Defendant
Judgment:	26 June 2015

RESERVED DECISION OF JUDGE C S BLACKIE AS TO PENALTY

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[1] The defendant, Treescape Ltd, has pleaded guilty to a charge that on or about 16 December 2013, it, being an employer, failed to take all practical steps to ensure the safety of its employee, namely Mitchell Joynt, whilst at work, in that it failed to take all practical steps to ensure that he was not exposed to hazards arising out of working with a wood chipper machine. The charge was brought under ss 6 and 50(1)(a) of the Health and Safety in Employment Act 1992 and renders the defendant liable to a penalty by way of fine not exceeding $250,000.

[2] The summary of facts, as presented to the Court upon the entry of a guilty plea by the defendant, was extremely brief. It simply stated that Michell Joynt had been employed by Treescape as an arborist since March 2013, ie nine months prior to the accident. The defendant company carries on business as an arborist and is involved in the felling and clearing of trees. As part of its equipment, it utilises

chipper machines to dispose of tree debris created as a result of its work. The machine in question consisted of a metal chute leading to in-feed rollers for the purpose of directing tree debris towards rotating cutting (clipper) blades. The distance between the outermost edge of the in-feed chute and the in-feed rollers was 850mm.

[3] On 16 December 2013, Mr Joynt was working as part of the Treescape crew, removing a roadside tree that was near power lines. He was the ground worker in charge of operating the wood chipper. At approximately 3.45 pm, he noticed several small branches that had not been picked up by the in-feed rollers. He used his right foot to kick the branches into the rollers. At the same time, his left foot skidded on some loose gravel, causing him to lose balance and for his right foot to be pulled in by the in-feed rollers towards the rotating chipper blades. He was unable to grab the control bar of the chipper to stop the rollers and, as a result, his right foot was pulled into the chipper. He suffered serious harm to his right leg, that had to be amputated below the knee joint.

[4] On the basis of that simplified version of the facts, I am required to consider the appropriate sentence. Unlike many cases brought before the Court involving breaches of the Health and Safety in Employment Act, the Court has been provided with no technical data in relation to the chipper machine (not even a photograph, until it was specifically asked for), no particulars as to where the machine was set up or situated, how come the operator was able to slip in loose gravel or precise particulars of the relevant safety Standard. No details were given as to the in-built safety mechanisms of the machine and/or as to why it was that the operator was unable to reach the control bar and thereby stop the machine before serious harm eventuated.

[5] In hindsight, the Court would have been assisted by a report from an expert within the industry, explaining how these machines come to be imported into New Zealand, apparently from the United States, where they are said to be compliant with United States' Standards OSHA 29CRF 1910.212 and 190.2666 and also the approved Code of Practice for Safety and Health in Arboriculture. Such an expert may have been able to draw comparisons between the safety standards accepted at

the point of manufacture, the safety requirements for the importation of such machines into New Zealand and the safety standards now expected in Australia, under Australian Standard AS4024, upon which, in this instance, the prosecution basically rests its case.

[6] Prosecutions under the Health and Safety in Employment Act are of considerable significance in respect of workplace safety and general public interest. The penalties that can be imposed are substantial. In my view, it beholds the prosecution to ensure that the Court is fully appraised of all relevant factors relating to the incident that is the subject of the proceedings. This is particularly important when the Court is required to approach sentencing in the area of health and safety by following the criteria stipulated in *Department of Labour v Hanham & Philp Contractors Ltd*, HC Christchurch, CRI-2008-409-000002, 18 December 2008. In this case, I consider that the prosecution has fallen short.

[7] Adopting the approach of *Department of Labour v Hanham & Philp*, sentencing for this type of offending requires consideration of s 50 of the Health and Safety in Employment Act, as well as the provisions of the Sentencing Act.

[8] The sentencing process involves three main steps:

(a) Assessing the amount of reparation.
(b) Fixing the amount of a fine.
(c) Making an overall assessment of the proportionality and appropriateness of the total imposition of reparation and fine.

[9] Given that reparation and fines serve discreet statutory purposes, both should ordinarily be imposed. This is, however, subject to the fact that when there is a lack of financial capacity, restricting ability to pay both, the payment of reparation takes priority.

[10] In fixing the amount of reparation, the Court must consider the statutory framework and take into account any offer of amends and the financial capacity of the offender. In fixing a fine, the Court adopts methodology established in *R v Taueki*, requiring fixing the starting point on the basis of the culpability of the

offending and then adjusting the starting point upwards or downwards for aggravating or mitigating circumstances relating to the offender.

[11] As a guide, the full Court in *Deparment of Labour v Hanham* suggested that starting points should generally be fixed according to the culpability of the offender as follows:

(a)	Low culpability	a fine up to $50,000.
(b)	Medium culpability	a fine between $50,000 and $100,000
(c)	High culpability	a fine between $100,000 and $175,000

Prosecution Submissions - Reparations

[12] On behalf of the prosecution, Ms Moffat submitted that with regard to ss 7 and 8 of the Sentencing Act, together with cases involving health and safety, there is a need to prioritise accountability, responsibility and deterrence, to consider for the interests of the victim and to provide reparation for harm done by the offending.

[13] Dealing with the quantum of reparations, Ms Moffat referred to the victim as having suffered serious, life-changing harm. He was only 18 at the time of the accident. The loss of his leg required surgery, treatment for ongoing infections, physiotherapy and learning to walk again. He was unable to work for a period of six months, can no longer play rugby and other sports and has suffered a general loss of confidence. It was submitted that a reparation order in the range of $30,000 to $50,000 would be consistent with previous cases. Given the victim's age and life-changing harm, the upper end of the range would be more appropriate.

[14] It was acknowledged by the prosecution that no top-up under s 32(5) of the Sentencing Act would be required, as the victim had received full wages while away from work.

Defence Submissions – Reparations

[15] For the defendant, Mr Nicholson submitted that an appropriate award by way of reparation should be in the vicinity of $30,000. He accepted that an award of reparation should be made to reflect the physical and emotional impact the accident has had and continues to have on Mr Joynt. He pointed out, however, that Treescape

had added to the ACC payments to Mr Joynt, so that he received 100% of his wages. No reparations were needed to reflect economic loss.

[16] Whereas Treescape acknowledged that Mr Joynt had suffered emotional harm, it was, nevertheless, submitted that as far as possible the Court should strive for consistency in assessing reparations when similar circumstances arrive and there needs to be a degree of proportionality between reparation awards for different injuries when emotional harm is necessarily different.

[17] A number of cases were referred to by counsel for both parties, so as to give some indication of where an appropriate award for reparation might lie. Examples are as follows:

(a) ***Worksafe New Zealand v Hunter Laminates Nelson Ltd***
DC Nelson CRI-2014-042-000957 (1 October 2014)

At the time of sentencing, there was continued uncertainty about whether the victim would ever walk again unassisted. The victim expressed considerable anxiety about his future prospects. The Court considered $35,000 an appropriate award for reparations in those circumstances.

For Treescape, it was submitted that the physical and emotional harm suffered by the victim in *Hunter Laminates* was significantly more than that suffered by Mr Joynt, as he is young, has recovered swiftly and is back working in the same role as before. He has not suffered financially and does not have the added stress of having to provide for his family. The award of $35,000 supports Treescape's submission, setting the fee in this case as $30,000.

(b) ***Worksafe New Zealand v ABB Maintenance Service Ltd***
DC Rotorua CRI-2014-077-000255 (6 October 2014)

In that case, the victim was crushed by a roller and required amputation of his right leg below the knee. The Court considered the significant impact on the victim's life as a result of the accident and referred to the extensive recovery period due to the multiple surgeries and skin grafts required to rebuild the 52-year-old's leg stump so that the wound would heal in a manner to allow for the use of a prosthetic. The complications meant that the victim was still in a wheelchair more than a year after the accident. The victim described the negative psychological impact the injury had had on him, particularly in

discovering on an ongoing basis the things that he could no longer do. $50,000 was awarded by reparation.

For the purposes of this case, Treescape submits that the emotional harm suffered by Mr Joynt is considerably less. He is described as a fit person, who has not suffered physical and emotional trauma in respect of an extensive and complicated recovery. He was back at work within five months of the accident.

(c) ***Department of Labour v Carter Holt Harvey Ltd***
DC Whangarei CRI-2012-043-000601 (6 July 2012)

The victim's leg was amputated above the knee. In considering an award for reparation, the Court noted that the victim suffered, and continued to suffer, serious physical pain and severe emotional harm as a consequence. The sum of $50,000 was awarded.

For Treescape, the submission is made that the amputation above the knee was more serious and, therefore, deserving a higher award by way of reparation. Amputations above the knee involve added complications, particularly fitting a prosthetic where there is no longer a knee joint. There is likely to be a greater emotional impact and, compared to the case of Mr Joynt, a reduced ability to "bounce back" from injury.

(d) ***Department of Labour v Brian Crawford Contracting Ltd***
DC New Plymouth – CRI-2012-043-000601 (6 July 2012)

The victim received severe cuts, injury to his left leg and the amputation of his right leg. With reference to the accident, the victim stated "whatever I wished to do seemed to be a mission". Again, $50,000 was awarded. By contrast, Treescape submits that the emotional impact was significantly greater than that reported by Mr Joynt.

[18] To support its contention that a reparation award of $30,000 would be appropriate for Mr Joynt, counsel for Treescape made reference to further cases, including:

(a) ***Worksafe New Zealand v Carter Logging***
DC Thames 10 CRI-2014-075-000366, 13 September 2014

The victim was hit by an excavator doing fleeting work in the same area. The excavator drove over the victim's right foot and ankle, causing severe crushing injuries, resulting in the amputation of the right leg below the knee. The victim impact statement showed that

the victim suffered from depression and that his relationship with his partner had been adversely affected by his injury. Adding further to the emotional impact on the victim was the fact that he was about to become a father in the near future and was deeply concerned that he would not be able to properly fulfil that role. The Court awarded $30,000.

(b) ***Department of Labour v Juro Corporation Ltd***
DC Dunedin, CRI-2012-012- 3684, 12 March 2013.

The victim suffered serious injury to his lower leg after it had been dragged into a cutter-head. The leg had been amputated below the knee. The victim impact statement showed that the accident severely affected the victim's life and he was unable, or struggled, to do things able-bodied people took for granted. The Court noted that the past cases showed that an order for reparation for emotional harm in the vicinity of $30,000 was the usual. However, reparations of $40,000 were awarded due to the victim's special circumstances.

Treescape submits that this award reflects the more serious injuries the victim suffered, the Court having observed that a figure in the vicinity of $30,000 would have been more usual.

(c) ***Department of Labour v A1 Contractors Ltd***
DC Napier, CRI-2010-041-002975, 11 April 2011.

While working as a tree-feller and cross-cutter, the victim was struck on the leg. He suffered a crushing injury, which required amputation below the knee. Subsequent infection required further amputation above the knee. The Court noted the formerly active man, who particularly enjoyed the outdoors, had had his life "turned on its head". The reparation award was $30,000.

(d) ***Department of Labour v Storm Logging Ltd***
DC Whakatane, CRI-2007-087-943, 17 October 2007.

The victim had his leg crushed between the main lift ram of an excavator and the boom. The injury meant that he initially required amputation of his leg below the knee. However, later, further surgery resulted in amputation above the knee. The victim described the loss of his leg as "the most devastating thing that had ever happened". The Court noted that the accident had taken a huge emotional, physical and financial toll on the victim. Reparation was set at $34,000.

Discussion – Reparations

[19] The difficulty of fixing a figure in respect of reparations is referred to in *Ministry of Business, Innovation and Employment v Goodman Fielders New Zealand Ltd*, DC Palmerston North, CRI-2013-054-001534:

> "[15] There are difficulties with setting an appropriate and exacting figure for largely unquantifiable harm. There are difficulties, too, in that should a stoic person, who suffers less emotional harm, be paid less than others?
>
> "[16] The best I can do in fairly assessing reparation is to look at the extent of the level of injury and associate impact and make a comparison between other cases.

[20] Similarly in *Worksafe New Zealand v ABB Maintenance Services Ltd*, DC Rotorua, CRI-2014-077-000055, 6 October 2014, Judge Weir discussed the description drawn from *Big Tuff Palettes Ltd v Department of Labour* (2009) 7 NZELR 322 (HC) as to the type of analysis in considering reparation:

> [15] ... Harrison J observed that fixing an award for emotional harm is an intuitive exercise, as quantification defies finite calculation. The judicial objective is to strike a figure which is just in all the circumstances and which, in this context, compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering. The nature of the injury is or may be relevant to the extent that it causes physical or mental suffering or incapacity, whether short or long term.

[21] For a young man who has had an undoubtedly life-changing accident, Mr Joynt has a remarkably positive outlook.

[22] When looking at the comparative cases, I am drawn to a reparations order closer to that submitted by the defence. Treescape have ensured that there has been no financial loss to Mr Joynt, they have kept his job open and he was able to return to his job in the same capacity as before. Further, they have offered continued support, both to him and his family.

[23] When compared to a number of the cases referred to by both prosecution and defence, it is clear that Mr Joynt did not face the same degree of uncertainty in respect of his financial and rehabilitation prospects and in this regard, he may be considered comparatively lucky.

[24] In *Hunter Laminates*, at the time of sentencing, the victim was facing uncertainty as to the degree of functionality he would retain in his lower left leg and, also, had understandable anxiety about his future prospects. An award of reparations in the sum of $35,000 was ordered. In *Brian Crawford Contracting Ltd*, the victim experienced psychological and emotional difficulties greater than that experienced by Mr Joynt. The Court made an order for reparations of $50,000. Similarly, in *Carter Holt Harvey Ltd*, an award of $50,000 was made. In that case, the company ensured that the victim's job would be kept open for him. There has been amputation above the knee and the victim was suffering from post-traumatic stress disorder and the depression, resulting in ongoing physiotherapy and psychotherapy. Likewise in *ABB Maintenance Services Ltd*, the Court made an order of $50,000 when the victim had his leg amputated below the knee. He faced a number of complications with the rebuild of his stump, which meant he was subject to multiple surgeries and was still in a wheelchair over a year after the accident. His victim impact statement noted the profound negative psychological impact the accident had on him. At the lower end of the scale, as adopted by counsel for Treescape, the *Carter Logging Ltd* award was $30,000 for a 29-year-old who was about to become a father and in *A1 Contractors* it was also $30,000, where the leg was amputated below the knee but, as a result of subsequent infection, had to be amputated above the knee. There was a high degree of emotional harm.

[25] As already noted, Mr Joynt has been fortunate not to have suffered the level of physical and emotional difficulty that other workers have encountered with similar types of injury. Whereas his case can be distinguished from those that have justified higher awards, I nevertheless consider that he should be entitled to more than what seems to be the "base rate" for below the knee amputation, that is awards of $30,000.

[26] Mr Joynt was only 18 years of age and had his whole life ahead of him. Throughout all those future years his life will be affected as a result of the accident that occurred on 16 December 2013. The restrictions to his mobility are permanent.

[27] I consider that there should be a modest increase above the "base rate", taking into account that during his most active years, ie his twenties and thirties, his

movement will be more restricted than would otherwise have been the case. Accordingly, I consider the appropriate award for reparations to be $35,000.

Imposition of a Fine

[28] Whereas a payment of reparations is regarded as compensatory, the imposition of a fine is the punitive element in respect of charges under the Health and Safety in Employment Act. It involves fixing the starting point on the basis of the culpability of the offending, then adjusting the starting point upwards or downwards for aggravating or mitigating circumstances relating to offender.

[29] For Worksafe, it was submitted that, given the realised and potential harm, the obviousness of the hazard and the departure from industry standards, the starting point should be a fine in the vicinity of $90,000. Counsel referred to:

(a) ***Identification of Operative Acts or Omissions***

The practical step was to comply with Australian Standard 4024 – extend the length of the chipper chute.

(b) ***Degree of Departure from Industry Standards, the Current State of Knowledge About the Nature and Severity of the Harm***

The need to guard moving parts of machinery is an obviously well-known risk. The relevant standard is the Australian Standard 4024 – Safety of Machinery. This represents the current state of knowledge and should be referred to by duty holders as the benchmark. The chute length did not comply with the Standard. The approved Code of Practice in Aboriculture (November 2012) states that the in-feed hopper should be of sufficient height and length so as to prevent workers from contacting the blades or knives during operation.

Counsel submitted that there was a clear and significant departure from industry standards.

(c) ***Obviousness of the Hazard***

The defendant is an industry leader with significant expertise and experience. Rotating chipper blades are inherently dangerous and present an obvious and significant hazard when they are within the reach of workers' limbs.

(d) ***The Availability, Cost and Effectiveness of the Means to Avoid the Hazard***

The hazard could have been effectively avoided if the chipper chute was extended. Given the resources of the defendant company, it was therefore submitted that the cost was well within its means.

[30] A number of cases were referred to by *Worksafe*, including cases earlier mentioned in respect of reparation:

(a) ***Department of Labour v Hunter Laminates***

The victim's legs were crushed by a falling beam being moved by a forklift. Both were broken. The hazard had been identified but adequate controls were not in place. The victim entered the exclusion zone. The starting point for the fine was $105,000, reduced to $63,000 (20% reduction for steps taken to assist the victim and family, 25% for guilty plea).

(b) ***Department of Labour v Brian Crawford Contracting Ltd***

The worker's left leg was severely cut by exposure to blades of a sawmill machine. Starting point for the fine was $100,000, reduced to $60,000 (20% for mitigating steps taken by the defendant, 25% for guilty plea).

(c) ***Department of Labour v Carter Holt Harvey***

The worker was injured when a 20 tonne loader collided with a small pivot-steer front end loader. There was limited visibility. Radio contact between the two vehicles was not provided. It was not a situation of no protective measures. The starting point for the fine was $75,000, reduced to $44,000 (5% uplift for previous convictions, 25% discount for guilty plea, 15% discount for assistance offered to the victim and family, 5% discount for co-operation with the Department and 5% discount for post-accident remedial action).

(d) ***Worksafe v ABB Maintenance Services Ltd***

The worker's leg was crushed by a large beam that had been unbolted, but this had not been communicated to a worker. The starting point of the fine was $60,000, reduced to $31,500 (30% discount for mitigating factors, such as remorse and reparation, co-operation with Worksafe, company's extensive safety processes and remedial steps and 25% discount for guilty plea).

(e) ***MBE v Betteridge Engineering Ltd***

Two trusses were being lifted, using a badly worn webbing strop. This broke, trusses fell, crushing the victim's left foot. Starting point of the fine was $90,000, reduced to $50,625 (25% reduction for mitigating factors and 25% reduction for early guilty plea).

(f) ***Department of Labour v Juro Corporation***

The victim was operating a post peeling machine. He tried to kick waste material out of the area he worked in when his bootlace became caught in a roller and his leg was dragged into the cutter head. His leg was amputated below the knee. The starting point was a fine of $80,000, reduced to $52,550 ($10,000 reduction for remorse, 25% reduction for guilty plea).

[31] The defendant has one prior health and safety incident, in February 2002. The prosecution accepts that this is historical and was a factually different type of offence. Nevertheless, the prosecution submits that the Court may consider an uplift from the starting point for general deterrence.

[32] As to mitigating factors, the prosecution accepts that discount for a guilty plea of up to 25% is available to the defendant. It also accepts that there should be a discount between 10% - 15% for recognising an order for reparation.

[33] On account of Treescape being a major player in the industry, no discount should be considered for financial circumstances.

Defence Submissions on the Setting of Fine

[34] Treescape submitted that its culpability lay at the lower end of the medium band and that the starting point should be a fine no more than $60,000.

(a) ***Deterrence***

For Treescape, it was submitted that this was not a case where particular denunciation or deterrence was necessary. There was no wilful disregard for safety by the company. Indeed, it had a comprehensive health and safety system in place. There was a guard fixed to the chipper to control the hazard of contact with the chipper's in-feed rollers and blades, which was compliant with United States

Standards OSHA 29CRF 1910.212 and 1910.2666, the approved Code of Practice for Safety and Health in Arboriculture.

(b) ***Nature & Seriousness of the Risk of Harm and Actual Harm Caused***

It is accepted there was the potential for serious harm and that Mr Joynt did suffer serious harm. However, it is submitted that the risk of harm occurring was relatively low, given the comprehensive safety policies and procedures and comprehensive training Mr Joynt had received.

(c) ***Obviousness of the Hazard***

Treescape accepted that the potential hazard of contact with the in-feed rollers and blades of the chipper was an obvious one, but submitted that it had followed the appropriate protocols in identifying the hazard. It was further submitted that the chipper in-feed chute was 850mm and compliant with the American Standards and the operation manual supplied by the manufacturer. The risks could not be completely eliminated, only reasonably minimised. Since the accident, Treescape had made a number of physical changes to its chippers to protect operators from the risk posed by the in-feed rollers and blades. It also reviewed and amended its health and safety system to ensure an accident like this does not occur again in the future.

(d) ***Mr Joynt's Degree of Exposure to the Hazard***

Mr Joynt's exposure to the hazard was low on account of:

(i) Prudent steps were taken to ensure all employees were aware of the company's comprehensive health and safety procedures and provided with specific equipment-based training to minimise the risk of exposure to hazards.

(ii) Mr Joynt had received both comprehensive external training prior to commencing work with Treescape and internal training to ensure he was competent to safely operate equipment such as wood chippers.

(iii) Controls were implemented that were consistent with ACOP.

(iv) The chipper in-feed rollers and blades were guarded with an in-feed chute, having a length of 850mm, compliant with American Standards and the operation manual supplied by the manufacturer.

(v) Health and safety issues and concerns were addressed at monthly safety meetings, which Treescape employees were required to attend.

(e) ***Degree of Departure from Prevailing Industry Standards***

It was submitted that this is the most important element in assessing culpability. Whereas Treescape acknowledges that Australian Standard AS4024 ("AS4024") was a relevant Standard for guarding machinery, including the chipper, at the time of the accident, its application was, nevertheless, far from clear as far as New Zealand users were concerned.

Defence Evidence

[35] In his comprehensive affidavit in support of his company's submissions in mitigation of a sentence, the Chief Executive of Treescape, Edward Chignell, referred to the NZ Arboriculture ACOP as being the primary guide for safety in his industry and was used by Treescape as the minimum standard for safety in respect of the company's operations and equipment.

[36] In relation to chipper safety, in December 2013, the New Zealand Aboriculture ACOP required Treescape to:

> "Comply with the manufacturer's instructions. All chipper and grinder equipment shall be equipped and maintained with all manufacturer's safety devices, instructions, warnings and safeguards. Arborists and other workers shall follow instructions provided by manufacturers".

[37] According to defence evidence in Mr Chignell's affidavit, the chipper in this case was manufactured by Brandit, in America, in 1998 and was imported to New Zealand by Treescape in March 2000. It is a "power fed", no bar chipper which is mounted on a tandem trailer. It consists of an in-feed chute, feed control bar, chipper blade disc, blade disc cover, discharge chute, clutch and diesel engine. It was designed with an in-feed chute length of 850mm (as measured by the distance between the in-feed rollers and the edge of the in-feed chute). This was compliant with relevant New Zealand safety standards at the time, which were actually the United States Standards OSHA 29CFR 1910.212 and 1910.2666 (the American Standards).

[38] The machine was supplied by Brandit with an operating manual. As directed by Brandit, warnings were placed on it to alert operators of any potentially dangerous operating conditions. This included a sticker which strictly prohibits operators from reaching into the in-feed chute with their hands/arms/feet/legs. In accordance with NZ Ariboculture ACOP, Treescape used instructions and information provided by the manufacturer when preparing the chipper SOP.

[39] Further, according to Mr Chignell, the NZ Ariboculture ACOP also stated:

> "Rotary drum or disc chippers not equipped with a mechanical in-feed system shall be equipped with an in-feed hopper of sufficient height and length so as to prevent workers from contacting the blades or knives during operations".

The same wording appeared in the American Standards, with which the chipper was compliant at the time it was imported (and was still compliant at the time of Mr Joynt's accident). Therefore, Treescape believed that the chipper was manufactured and used in a manner that was consistent with the NZ Ariboculture ACOP.

[40] On 16 December 2013, according to Mr Chignell, Treescape was not aware of the Australian Standard AS 4024 in relation to machine guarding. With the benefit of hindsight, this was unfortunate. His company, like many other businesses in the ariboculture industry, relied on an ensured compliance with NZ Ariboculture ACOP as the primary legal standard for safety in industry, as well as the American Standards. NZ Ariboculture ACOP did not refer to AS 4024 as a Standard that Treescape needed to adopt or comply with in relation to safety of the chipper. Further, NZ Ariboculture ACOP did not specify any minimum in-feed chute length. By contrast, AS 4024 requires an in-feed length of 1500mm to provide guarding on a machine like the chipper.

[41] Treescape accepts that the guidelines for the safe use of machinery published by Worksafe in May 2014 has now established AS 4024 as the current state of knowledge for safety of machinery in New Zealand. Treescape has worked with a specialist guarding expert to consider and understand the consequences of the revised standards to its business.

[42] Returning, however, to 16 December 2013, according to Mr Chignell it was far from clear as to whether AS 4024 was the primary standard for Treescape for the following further reasons:

(a) The current guidelines for the safe use of machinery were not published at that stage, and were only publicly available in draft form for consultation. The company had not become aware of them, as there was no publicity about any proposed change in the ariboculture industry.

(b) The documentation on machine guarding produced by the Ministry of Business, Innovation and Employment (MBIE), which was well publicised and in force at the time, namely the Guidelines for Guarding Principles and General Safety of Machinery 1995 and Safety and Safe Use of Machinery – An Introduction (November 2012) and Ergonomics of Machine Guarding Guide (June 2013), included only cursory references to AS 4024 and did not suggest compliance with the Standard as a mandatory requirement.

[43] While there was guarding fitted to the chipper at the time of the accident, as a control for the hazard of contact with the chipper's blades and in-feed rollers in accordance with the manufacturer's specifications, Treescape nevertheless accept in hindsight that it would have been prudent to extend the chute length to 1500mm, as required by AS 4024. They believed that their failure to extend the chipper chute from 850mm to 1500mm at that time was understandable, for the reasons above, but not altogether excusable. The company, therefore, acknowledges its "error" by pleading guilty to the charge.

Available Means to Mitigating Risk

[44] Since Mr Joynt's accident, Treescape has spent $89,000 in improving safety of its chippers.

Fine - Discussion

[45] The prosecution submitted a starting point of $90,000 as appropriate and Treescape submitted a starting point of no more than $60,000. Both starting points fall within the medium culpability band of *Hanham v Philp Contractors Ltd.*

[46] The imposition of a fine in addition to reparation will generally be required to address the separate statutory purposes of denunciation, deterrence (both general and specific) and holding the offender accountable for the harm done.

[47] One of the biggest difficulties in determining the starting point of the fine in this case is the issue of how clear it was that the relevant Standard at the time was AS 4024, requiring the chute to be 1500mm. Although Treescape agreed that this was a relevant standard in existence for guarding machinery, they nevertheless submitted that, at the time of the accident, it was far from clear that it was the Standard that they were required to follow. Treescape are prepared now to accept that it was not altogether excusable that they had not followed the Australian Standard but, nevertheless, it was understandable and, therefore, their culpability is lower. There may have been a need for greater vigilance.

[48] I find as compelling the submissions of counsel for the defendant and also the comprehensive affidavit of Mr Chignell, pointing out the multiple reasons for there being confusion as to the applicability of the desired Standard. The evidence was unchallenged and, in light of the submissions, I accept that there should be a reduction as far as the culpability of Treescape is concerned below that submitted as a starting point by prosecution. This is not a case of an intentional or clear departure from the industry Standard – rather, it is more of an inadvertent departure. I accept the argument that there was confusion, there was not a blatant breach.

[49] As to the other factors that are relevant in assessing culpability, both parties acknowledge that the realised harm was serious.

[50] Both parties acknowledge the obviousness of the hazard, with Treescape having the hazard identified and that appropriate protocols were put in place.

[51] As to the cost to mitigate the risk, Treescape has spent $89,000 improving the safety of their chippers.

[52] In my view, the culpability of Treescape is less than that in *Brian Crawford Contractors Ltd*, where there was a starting point of $100,000 for a case that involved the exposed blades of a sawmill and a company that allowed an unsafe practice of jump-starting the saw mill. Indeed, the culpability is less than in *Juro Corporation Ltd*, where a starting point of $80,000 was adopted, given that Treescape had identified the hazard, had ensured that there was training in place and had taken steps to minimise the risks to the workers. Like *Carter Holt Harvey Ltd*, this is not a situation of no protected measures. In that case, the starting point of $75,000 was adopted.

[53] In *Goodman Fielder New Zealand Ltd*, a starting point of $60,000 was adopted where a company failed to guard a machine. There are a number of similarities to that case. Although the risk was obvious, there was no general failing of safety management, nor disregard for the welfare of employees. I consider a similar starting point would be appropriate with regard to Treescape. Likewise, in *Textile Creations Ltd*, the Court held that although the modification of the machine would have prevented the accident, the company did not have a poor safety culture or poor approach to risk management. A starting point of $50,000 was adopted.

[54] For Treescape, the appropriate starting point when assessing a fine, is the sum of $60,000. Although it might be said that a slightly higher starting point might have been justified on account of the seriousness of the injury suffered by Mr Joynt, I am nevertheless persuaded by the submissions and evidence of the defence that the actual safety standards that applied as at 16 December 2013 were far from clear. In bringing this prosecution, Worksafe relied entirely on compliance with the Australian Standard for guarding machinery, namely to extend the chipper chute to 1500mm. There was nothing more. Earlier in this judgment, I referred to the information made available to the Court by the prosecution in the summary of facts as scant. If prosecutors intend to seek of the Court that penalties at the higher end of the scales be imposed, then it is incumbent upon them to provide sufficient facts in support.

[55] Having set a starting point of $60,000, I do not consider it appropriate to apply any uplift for the company's previous conviction in 2002. Despite the unfortunate event of December 2013, I am impressed by the company's commitment to health and safety, its health and safety policy, its identification of hazards and management systems, its health and safety audits and its staff induction and training. Also, despite the offence in 2002, the company, being involved as it is in hazardous operations, has a good safety record.

[56] Following the guilty plea, the parties were referred to Restorative Justice. The report from the Restorative Justice Facilitator records:

> "Edward Chignell expresses his sincerest apology and sympathy on behalf of Treescape Limited. He shares that since the accident in December 2013, Treescape Limited has assisted with providing financial and moral support for Mitchell, as he is viewed by the company as a valuable employee. He continues to express that he personally will seek further assistance when requested by the victim Mitchell, as they believe this was a very unfortunate incident and, as his employer, we will continue to support Mitchell throughout his journey to recovery and employment here with Treescape Limited.
>
> "We are informed by Mitchell that he was very happy with the ongoing support he received by Edward and Treescape Limited. Mitchell shares that he was off work for over five months and was paid his full wages for the entire period and also received assistance by ACC. Mitchell advised that there was a certain degree of responsibility from both himself and his employer and believes it was an accident and that he, too, is at fault. Mitchell concludes by stating that Treescape Limited and Edward Chignell have been nothing less than supportive and accommodating throughout the process of his rehabilitation and present employment situation at Treescape Limited".

Remorse is, therefore, a mitigating factor.

[57] There are a number of other discounts available to the defendant from the starting point. They should be addressed in accordance with *Ballard v Department of Labour* (2010) 7 NZELR 301 (HC) The Court held that separate discounts should be given for each mitigating factor present in the circumstances of the case. Accordingly, in this case, the ultimate fine is calculated as follows:

(a)	Starting point	$60,000
(b)	15% discount for reparations	$ 9,000
(c)	10% discount for co-operation with prosecutor	$ 6,000
(d)	5% discount for remorse	$ 3,000
(e)	5% discount for remedial actions	$ 3,000
(f)	10% discount for safety record	$ 6,000
	Sub-total	$33,000
(g)	25% discount for guilty plea	$ 8,250
	Total fine	$24,750

[58] Turning finally to Step 3 required by *Department of Labour v Hanham & Philp Contractors Ltd*, that is making an overall assessment of proportionality and appropriateness of the total imposition of reparation and fine, I consider that no further adjustment is required in this case.

Conclusion

[59] Accordingly, I direct:

(a) Treescape pay the sum of $35,000 by way of reparations.

(b) That it pay the sum of $24,750 fine.

C S Blackie
District Court Judge