EDITORIAL NOTE: NO SUPRESSION APPLIED.

IN THE DISTRICT COURT
AT BLENHEIM

CIV-2016-006-000096
[2017] NZDC 4430

BETWEEN	NEW ZEALAND FIRE SERVICE COMMISSION First Plaintiff
AND	MARLBOROUGH KAIKOURA RURAL FIRE COMMITTEE (KNOWN AS THE MARLBOROUGH KAIKOURA RURAL FIRE AUTHORITY) Second Plaintiff
AND	MARLBOROUGH LINES LIMITED Defendant

Hearing: 3 March 2017

Appearances: G Rippingale for the Plaintiffs
J L Forrest for the Defendant

Judgment: 27 March 2017

RESERVED JUDGMENT OF JUDGE A A ZOHRAB

Introduction

[1] The plaintiffs, the New Zealand Fire Service Commission ("the Commission") and the Marlborough Kaikoura Rural Fire Authority ("the Fire Authority") claim against the defendant, ("Marlborough Lines"), for the cost of suppressing a fire caused by electrical power lines owned by Marlborough Lines ("the fire").

[2] The fire occurred on 21 December 2013 at Tumbledown Bay Road when the occupier of a property at Flagg Bay felled a pine tree onto power lines owned and operated by Marlborough Lines. Electricity from the broken power lines ignited vegetation. The fire spread, and was subsequently extinguished by the Fire Authority. Those facts are not in dispute.

[3] The Commission and the Fire Authority say that they are entitled under s 43 Forest and Rural Fires Act 1977 ("the Act") to recover the costs of suppressing the fire from Marlborough Lines as a person responsible for causing the fire.

[4] Marlborough Lines have applied for summary judgment on the basis that they did not cause the fire, that the events leading to the fire were extraordinary, and that they otherwise took all available steps to preclude the risk of fire. Accordingly, they submit that the plaintiffs' claim cannot succeed.

[5] The Commission and Authority oppose the application for summary judgment. They submit that there is no dispute that Marlborough Lines' electrical lines physically caused the fire. Further, far from being an extraordinary occurrence, electrical power lines frequently cause fires, including as a result of being damaged by trees and by land owner activities. In those circumstances Marlborough Lines is responsible for causing the fire for the purposes of the Act.

[6] Finally, and without prejudice to its principal argument, the plaintiffs submit that not only does Marlborough Lines not have a clear answer to the plaintiffs' case, but that if there is any doubt about the issue, then this is an intensely factual question which would be best addressed at trial where further evidence would be required.

Cost recovery in the Act

[7] The plaintiffs' claim is brought under s 43 of the Act which provides:

> **43 Recovery from person responsible for fire**
>
> (1) Where any property has wholly or partially been destroyed or damaged by or safeguarded from an outbreak or threat of outbreak of fire, and responsibility for the outbreak is acknowledged by, or is established by action or otherwise as caused by, any person—

(a) the costs of control, restriction, suppression or extinction of the fire may be recovered from that person by the Fire Authority or the New Zealand Fire Service Commission or the eligible landholder or eligible landholders of the forest area affected, as the case may be, incurring those costs pursuant to fire control measures under this Act; and

(b) any loss in, or diminution of, value of that property, and any consequential loss or damage not too remote in law, may be recovered from that person by the owner of the property.

(1A) [Repealed]

(2) The amount of the costs so recoverable may be wholly or partially established by agreement, or by a Rural Fire Mediator, or by proceedings under section 48(4).

(3) This section shall be deemed to be supplementary to and not in substitution for any other rights of recovery that may exist in law or by enactment or otherwise howsoever.

(4) Before imposing any levy under section 46 or section 46A, a Fire Authority shall reasonably endeavour to recover its costs pursuant to this section.

[8] Section 43 of the Act provides a statutory cause of action that permits the Fire Service Commission (in its role as National Rural Fire Authority) and Fire Authorities incurring the costs suppressing a fire, to recover those costs from the person who caused the fire.

[9] It is accepted by both parties that the leading case on s 43 is *Tucker v New Zealand Fire Service Commission*[1].

Summary judgment principles

[10] Rule 12.2(2) District Court Rules 2014 provides:

(2) The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

1 *Tucker v New Zealand Fire Service Commission* [2003] NZAR 270

[11] The principles relating to application for summary judgment by a defendant are set out in *Westpac Banking Corporation v M M Kembla (NZ) Limited*[2]. More particularly, the Court, discussing a predecessor to r 12.2(2) High Court Rules 2016 said:

> [60] Where a claim is untenable on the pleadings as a matter of law, it will not usually be necessary to have recourse to the summary judgment procedure because a defendant can apply to strike out the claim under r 186. Rather r 136(2) permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed. The difference between an application to strike out the claim and summary judgment is that strike-out is usually determined on the pleadings alone whereas summary judgment requires evidence. Summary judgment is a judgment between the parties on the dispute which operates as issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a further properly constituted claim.
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> [61] The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim. Examples, cited in *McGechan on Procedure* at para HR136.09A, are where the wrong party has proceeded or where the claim is clearly met by qualified privilege.
>
> [62] Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear *(Pemberton* v *Chappell* [1987] 1 NZLR 1; (1986) 1 PRNZ 183 (CA)), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.

Factual background

[12] The factual background with respect to the cause of the fire is not in dispute, and can be found in the report attached as Exhibit A to Mr Topp's (Marlborough Lines' operations manager), affidavit of 16 June 2016. Furthermore, Mr Topp has filed two affidavits addressing Marlborough Lines' operations. He focuses particularly on its vegetation department, and the steps it takes to manage the risk of

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[2] *Westpac Banking Corporation v M M Kembla New Zealand Limited* [2001] 2 NZLR 298 (CA) at [58] – [64]

fire and, more particularly, on the steps it takes to manage the risk of fire from trees close to the lines.

[13] The plaintiffs have filed an affidavit from Mr Alexander, a consulting electrical engineer. He agrees with Mr Foley's hypothesis with respect to the cause of the fire. He also provided evidence as to:

(a) How transmission lines cause fires; and

(b) Steps that can be taken to manage the risks of transmission lines causing fire.

[14] On 21 December 2013 witnesses described hearing a chainsaw operating and then a crash of a tree as it struck the ground, and then noticing that power lines were swinging across the gully. Within a relatively short timeframe one of the lines had broken and fallen to the ground.

[15] A fire started, and the plaintiffs responded. The total area of vegetation burnt was six hectares. A number of residential properties were threatened by fire with one house and seven outbuildings destroyed. The costs of extinguishing the fire were $107,000.

[16] Mr Foley, a fire investigator, completed a fire report for the Marlborough Kaikoura Rural Fire Authority. The report's findings are not contested. In relation to the cause of the fire, Mr Foley stated as follows (page 19 of the report):

> At the end of the elimination process I have concluded an approximately 16 year old pine tree was incorrectly felled using a chainsaw causing it to fall across an 11kV power line.

[17] At page 32 of his report, Mr Foley concluded as follows:

> After eliminating all probable causes my investigation has identified a single pine tree that was incorrectly felled, causing it to fall across the 11kV power lines. Mr Peter Collins is the most probable person to have felled the tree. The felled tree grew on the hill side below Mr Collins and Vicky Barnett's house and within their property boundary.

[18] Marlborough Lines operates 3300 kilometres of power lines, and its network is predominantly rural, with 80 percent of the network requiring access by air, boat or four-wheel drive vehicle.

[19] Their network includes the supply of electricity to Flagg Bay which is located in the Port Underwood area of the Marlborough Sounds.

[20] The plaintiffs did not challenge Marlborough Lines' position that it had a close working relationship with the Fire Authority. The defendant and the Fire Authority would liaise closely over high risk periods. On notification from the Fire Authority, Marlborough Lines would modify the circuit breakers in high risk areas. Mr Topp confirmed in his affidavit that at the time of the fire there were three patrollers inspecting the lines.

[21] Further, the network is divided into 30 geographical areas, each of which is inspected every two to three years.

[22] Patrollers identify vegetation within the notice or growth limit zone set out in the regulations, or which might create a risk to the power lines. Once necessary work is identified, landowner consent is obtained before aborists then undertake the work.

[23] Marlborough Lines communicates with landowners by way of newsletter and website, the need for them to be vigilant regarding trees close to the lines.

[24] During the four years prior to the fire, Marlborough Lines carried out various patrols and inspections, including:

(a) Helicopter patrols in 2011 and 2012;

(b) Letters were sent to landowners in 2012;

(c) They responded to various customer enquiries in 2013;

(d) During 2014 to 2015/2016, 66 various work packs were identified, and 54 were completed; and

(e) Mr Page patrolled the assets from September 2011 to mid October 2014 and did not observe any vegetation issues.

[25] The risk posed to power lines by trees is well recognised. The Electricity (Hazards from Trees) Regulations 2003 ("the Regulations") were enacted to protect the security of the supply of electricity and the safety of the public, by –

(a) Prescribing distances from electrical conductors within which trees must not encroach; and

(b) Setting rules about who has responsibility for cutting or trimming trees that encroach on electrical conductors; and

(c) Assigning liability if these rules are breached.

[26] The Regulations set a "growth limit zone" around lines. If a tree encroaches on the growth limit zone, the lines company must issue a cut or trim notice to the owner of the tree (Regulations 8 and 9). On receipt of this notice, the tree owner must cut or trim the tree so that it is no longer encroaching on the growth limit zone.

[27] In the present case, the Regulations imposed a clearance of 7.5 metres on both sides of the 11 kV line in the Flagg Bay area. The Fire Report (page 32) confirms the stump of the tree, which caused the fire, was approximately 10.8 metres from the power lines. This is outside the notice zone provided for in the Regulations. Accordingly, Marlborough Lines had no statutory duty and/or ability to require the particular tree to be cut or trimmed. Moreover, there is no evidence to suggest the tree was old or unhealthy.

Marlborough Lines' submissions

[28] Counsel for Marlborough Lines emphasised that whilst the liability established by s 43 of the Act is strict so as no negligence or want of care is required to be proved, it does not impose an absolute liability.

[29] Counsel for the applicant noted William Young J's observation that the issue of causation presented "exquisite difficulty" for the Courts. After referring to the need to determine causation as a matter of common sense, counsel pointed out the scope for a principled approach and referred to Lord Hoffmann's judgment in the House of Lords decision in *Environment Agency v Empress Car Co (Abertillery) Ltd.*[3]

[30] Counsel for the applicant urged the Court to carefully consider the facts of the *Empress Car* case, and more particularly the fact that the diesel was stored in a tank in the yard, and the yard was protected from spillage by a bund, but this had been overridden by the company which fixed an extension pipe to the outlet of the tank, so as to connect it to a drum standing outside the bund.

[31] The outlet from the tank was governed by a tap, which had no lock, and someone opened the tap and all the diesel in the tank drained into the drum, overflowed into the yard, and passed down the drain into the river.

[32] The company was prosecuted under s 85(1) Water Resources Act 1991 for causing polluting matter to enter controlled water. It defended the prosecution on the basis that it had not caused the pollution as this occurred as a result of the intervention of a third party who turned the tap on.

[33] In *Empress Car,* Lord Hoffmann began with an analysis of the nature of the duty imposed by the regulatory statute. He posed this as a question of statutory interpretation having regard to the policy of the Act in question. He concluded the strict liability imposed was in the interests of protecting water from pollution. This meant that the fact that a deliberate act of a third party caused the pollution did not,

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3 *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22

in itself, mean that the defendant's creation of a situation in which the third party could so act did not also cause the pollution for the purposes of the section.

[34] The issue to be determined in *Empress Car* was whether the defendant was liable for causing the pollution where, on the facts, the deliberate act of a third party had intervened and was arguably the immediate cause of the pollution. Lord Hoffmann concluded at page 34F l2:

> …
>
> The true commonsense distinction is, in my view, between acts and events which, although not necessarily foreseeable in the particular case, are in the generality a normal and familiar fact of life, and acts or events which are abnormal and extraordinary.
>
> …

[35] Counsel for the applicant noted that there were some important matters which distinguish *Empress Car* from the *Tucker* case and more particularly:

(a) The *Empress Car* case involved environmental legislation with the aim of preventing pollution.

(b) The House of Lords noted that the lower Court held that the defendant company should have foreseen the risk of interference with their plant and equipment, and that it failed to take the simple precaution of putting a proper lock and proper bund to prevent escape of diesel, and that was a significant cause of the escape. Accordingly, counsel for the applicant submitted that that was effectively a finding the defendant was either negligent or remiss in its approach to the protection required for the storage of the diesel.

[36] Counsel for the applicant noted that in *Tucker,* William Young J, as Lord Hoffmann had done, considered the purpose of the legislation under which the case was being considered, in this case the Act, and said that it was aimed at the situation where a farmer (or someone else) deliberately lights a fire in a rural area, and was intended to impose an absolute obligation to make sure the fire does not get

out of control (see para [57]). He then went on to consider the responsibility for accidentally lit fires and stated at para [59]:

> It follows from what I have already said that negligence or other breach of legal duty is not a prerequisite to liability under s 43(1). On the other hand, it stands to reason that a plaintiff in a claim based on s 43(1) will be reasonably well placed to prove causation where the outbreak of fire arose in circumstances where the person who caused the outbreak was negligent or otherwise in breach of legal obligation.

[37] William Young J concluded, at para [60], that *Tucker* was rather different when he said that:

> All that Mr Tucker did in this case was drive a properly maintained and properly inspected vehicle down State Highway 1.

[38] William Young J then went on to say that the concatenation of events which produced the fire were unusual in the sense that someone in this situation would not normally expect to start a roadside fire. He placed this in the category of an "extraordinary" event and found Mr Tucker was not liable.

[39] Counsel for the applicant urged the Court to reflect upon the "concluding" words of William Young J at para [66] where he stated as follows:

> On the approach which I have adopted s 43(1) is likely to apply so as to impose liability upon any person who deliberately starts a fire or who causes a fire through negligence or other breach of legal obligation. In cases where a person causes fire accidentally but without negligence (or other breach of legal obligation) causation is likely to be difficult to establish. This seems to me to be consistent with the likely intentions of Parliament when s 43 was enacted.

[40] Counsel for the applicant acknowledged that the *Tucker* analysis of causation has been applied in subsequent cases under s 43 of the Act, and more particularly I was referred to *New Zealand Fire Service Commission v Attfield*[4]. In *Attfield* the Fire Service claimed against both the landowner and the lines company. It alleged that the first defendant (land owner) failed to take reasonable care to prevent the trees from damaging the lines. The trees were 20-30 metres in height, and some were about 80 years old, in poor condition, and growing close to the power lines. The claim against the second defendant (the lines company) alleged negligence, with

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4 *New Zealand Fire Service v Attfield* HC Dunedin CP58/01, 16 June 2003

a number of particulars and breach of duty. The particulars of negligence alleged included that it:

(a) failed to notify the land owners of the risk and to take action to make the trees safe in accordance with its trimming policies; and

(b) failing to take steps under the statutory powers conferred upon it; and

(c) failed to reroute the lines or to place them underground.

[41] The evidence was that the lines company installed the lines close to the trees when they were 20 metres high and in a poorly maintained condition.

[42] The lines company sought to strike out the claim as disclosing no reasonable cause of action. The application failed.

[43] Master Christiansen analysed *Tucker* and *Empress Car*, and determined that the events that caused the fire could be described as ordinary. He placed great weight on the fact that, by its own admission, the lines company had failed to take any steps to protect or safeguard the power lines against damage from the first defendants.

[44] Against that background, Master Christiansen observed that he could see no good ground to claim that a duty of care should not be owed to a Fire Authority to meet the costs of extinguishing a fire caused through negligence.

[45] Counsel for the applicant submitted, therefore, that the facts of the current case are strikingly different to *Attfield*, more particularly given the negligent acts alleged against the lines company. In the present case, no negligence is alleged against Marlborough Lines, nor has any been established, nor are there any allegations of breach of duty on the part of Marlborough Lines.

[46] Adopting William Young J's analysis in *Tucker*, counsel for the applicant submitted that the issue of causation under s 43 should be determined as a matter of fact and degree, and is governed to a large degree by a common sense assessment.

[47] In this case the fire report identifies the cause plainly as the resident's negligent felling of the tree in question, as counsel submitted that this is the common sense conclusion urged by William Young J.

[48] Unlike the *Attfield* case, there is no suggestion of any negligence or breach of any duty by Marlborough Lines. Accordingly, counsel for the applicant submits that this falls within the situation identified by William Young J in *Tucker* as a case where causation will be difficult to establish.

[49] Counsel for the applicant says that this observation reflects the intentions of Parliament when s 43 was enacted. Mr Tucker was not held liable primarily because he was operating a properly registered and maintained vehicle in a proper way. Counsel for the applicant submitted that this contrasts with the conclusion reached in the *Empress Car* case, where the defendant company was held responsible for diesel leaking out of the tap that was opened by someone unknown. However, that was a direct result of the fact that the company had taken steps which allowed the diesel to bypass the protective bund, and by failing to take the simple precaution of using a lock to secure the tap. Given that factual background, the defendant was held to have caused the leak on the basis of its own actions and inactions, and that case could also be distinguished from the present case in that there was a high duty to protect the environment imposed by the particular legislation.

[50] Counsel for the applicant accepted that trees do fall from time to time, especially if they are old or otherwise not maintained, as was the case in *Attfield*. That possibility is recognised by the Regulations which prescribe situations where lines companies can effectively compel land owners to carry out remedial work to prevent trees affecting the lines. However, the Regulations are limited in their application and prescribe a specific distance from the lines to create a zone which can then be maintained.

[51] Marlborough Lines have a comprehensive system in place to maintain the lines and to protect against the risk of trees falling on lines. However, the circumstances of the current situation are different in that the tree in question was outside the regulated zone.

[52] Marlborough Lines could not have compelled the land owner to maintain or remove the tree, or indeed to use an arborist to do so. Furthermore, Marlborough Lines could not anticipate that the land owner might attempt to fell the tree, more particularly given that this was a relatively young tree (16 years), and was otherwise healthy. Indeed, it did not pose a threat to the lines until the resident decided that it was to be felled.

[53] By way of analogy with the *Tucker* case, counsel for Marlborough Lines submitted that the operation and maintenance of the power lines was carried out in an entirely proper and appropriate way, and the actions of the resident could not have been anticipated and guarded against.

[54] Counsel for the applicant submitted that the Act is designed to impose liability on those who are responsible for causing rural fires. Here the cause was a landowner negligently felling a tree. It is not intended to penalise lines companies in the absence of some level of fault or failing. It was submitted that if the plaintiffs' interpretation of the law was correct, then not only was *Tucker* incorrectly decided, that as a matter of logic the New Zealand Transport Agency would also have been liable in the *Tucker* case, given that they were responsible for the roading system. Finally, counsel also submitted that there was a total absence of fault on the part of Marlborough Lines. In this case there was nothing else they could have done, they did everything within their control, and there was nothing else they could have anticipated.

[55] Counsel for the applicant submitted that Mr Yeabsley's evidence was inadmissible as he was essentially trying to answer the ultimate question, which was one of interpretation.

[56] Finally, stripping the defendant's case back to its basics, counsel for the applicant submitted that to hold Marlborough Lines liable would be an unreasonable result, and would fly in the face of the common sense analysis advocated for by William Young J in *Tucker*.

Plaintiff respondents' submissions

[57] In *Tucker*, William Young J held that s 43 imposes liability on a person who causes the outbreak of fire, irrespective of whether that person is otherwise civilly responsible for the fire and its consequences.

[58] In doing so, William Young J considered the difficulty with the construction of s 43 and at [42] concluded that the appropriate construction of s 43 includes the addition of the words inserted into the statute in bold type and which follows:

> **43 Recovery from person responsible for fire**
>
> (1) **Where** any property has wholly or partially been destroyed or damaged by or safeguarded from an outbreak or outbreak of threat of fire, and responsibility for the outbreak is acknowledged by, or **[the outbreak] is established by action or otherwise as caused by, any person –**
>
> (a) **The costs of** control, restriction, **suppression** or extinction **of the fire may be recovered from that person** by the Fire Authority or the New Zealand Fire Service Commission or the eligible landholder or eligible landholders of the forest area affected, as the case may be, incurring those costs pursuant to fire control measures under this Act; and
>
> (b) Any loss in, or diminution of, value of that property, and any consequential loss or damage not too remote in law, may be recovered from that person by the owner of the property.
>
> …
>
> (2) This section shall be deemed to be supplementary to and not in substitution for any other rights of recovery that may exist in law or by enactment or otherwise howsoever.

[59] Accordingly, William Young J concluded that the appropriate construction was that it was the outbreak of the fire that is to be established as caused by any person, not responsibility for the outbreak. His Honour then went on to add at [42](2), "That the legislature was looking at causation <u>in fact</u> rather than <u>responsibility in law.</u>"

[60] William Young J held that for the purposes of s 43 of the Act a person could be regarded as "causing" a fire, and therefore liable under that provision where the person:

(a) deliberately lit the fire, at [57]; or

(b) was negligent or otherwise breached a legal obligation which resulted in a fire, at [59]; or

(c) produced a situation from which the fire resulted, where the concatenation of events leading to the fire is a matter of ordinary occurrence, as opposed to extraordinary (at [61]), and applying the analysis of Lord Hoffmann in *Empress Car*.

[61] The Court of Appeal in *Garnett v Tower Insurance Ltd*[5] referred to *Tucker* and confirmed at para [38] that s 43 is a strict liability provision:

> … by s 43(1) a person who is responsible for causing a fire in a forest or a rural area is strictly liable for costs incurred both in fighting the fire and for damage done to property – that is, without proof of negligence or want of care …

[62] *Tucker* has been applied by the High Court in *Attfield.* In that case the plaintiff pursued a claim under s 43 of the Act against the power line company where a storm had caused tree branches to break a power line, causing a fire.

[63] The claim against the lines company was based on it "owning, operating and maintaining lines", by which it "produced a situation from which the outbreak of fire resulted", and only in the alternative, on accident, emergency, and only in the alternative on acts of negligence and breach of duty.

[64] The power line company unsuccessfully applied to strike out the proceeding. The Court concluded, amongst other things, that:

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5 *Garnett v Tower Insurance Ltd* [2011] NZCA 576

(a) the lines company created a situation by maintaining the lines which caused the fire; and

(b) in that context, the events leading to the fire could be described as "ordinary" in the sense contemplated by *Tucker* and *Empress Car*, and therefore causation could be established under s 43 of the Act.

[65] It was submitted by counsel for the respondent that a person can cause a fire even where the act of a third party could be said to have caused the fire. That proposition is illustrated in the speech of Hoffman LJ in *Empress Car* and which was cited with approval by William Young J in *Tucker*.

[66] *Empress Car* involved a criminal prosecution under a statute which provided that it was an offence if any person:

> Causes … any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters.

[67] Empress maintained a diesel tank in a yard which drained directly into a river. The tank was vandalised by a trespasser who caused the tank to empty into the yard and the diesel to subsequently enter the waterway. The question was whether Empress had "caused" the diesel to enter the river in circumstances where the immediate cause of the discharge was the act of the third party vandal.

[68] The House of Lords concluded that in these circumstances, Empress had caused the pollution. Lord Hoffmann's discussion of the issue at p 32D to p 36C is submitted to be instructive in the circumstances of the present case which also involves a third party actor, i.e. the landowner who felled the tree:

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> While liability under section 81(1) is strict and therefore includes liability for certain deliberate acts of third parties and (by parity of reasoning) natural events, it is not an absolute liability in the sense that all that has to be shown is that the polluting matter escaped from the defendant's land, irrespective of how this happened. It must still be possible to say that the defendant caused the pollution. Take, for example, the lagoons of effluent in *Price v Cromack* [1975] 1 WLR 988. They leaked effluent into the river and I have said that in my view the justices were entitled to hold that the pollution had been caused by the defendant maintaining leaky lagoons. But suppose that they had emptied into the river because a wall had been breached by a bomb planted by terrorists. I think that it would be very difficult to say, as a matter

of common sense, that the defendant had caused the pollution. On what principle therefore will some acts of third parties (or natural events) negative causal connection for the purpose of section 85(1) and others not?

…

In the sense in which the concept of foreseeability is normally used, namely as an ingredient in the tort of negligence, in the form of the question: ought the defendant reasonably to have foreseen what happened, I do not think that it is relevant. Liability under section 85(1) is not based on negligence; it is strict. … And foreseeability is not the criterion for deciding whether a person caused something or not. People often cause things which they could not have foreseen.

The true common sense distinction is, in my view, between acts and events which, although not necessarily foreseeable in the particular case, are in the generality a normal and familiar fact of life, and acts or events which are abnormal and extraordinary. Of course an act or event which is in general terms a normal fact of life may also have been foreseeable in the circumstances of the particular case, but the latter is not necessary for the purposes of liability. There is nothing extraordinary or abnormal about leaky pipes or lagoons as such: these things happen, even if the particular defendant could not reasonably have foreseen that it would happen to him. There is nothing unusual about people putting unlawful substances into the sewerage system and the same, regrettably, is true about ordinary vandalism. So when these things happen, one does not say: that was an extraordinary coincidence, which negatived the causal connection between the original act of accumulating the polluting substance and its escape. In the context of section 95(1), the defendant's accumulation has still caused the pollution. On the other hand, the example I gave of the terrorist attack would be something so unusual that one would not regard the defendant's conduct as having caused the escape at all.

…

(4) If the defendant did something which produced a situation in which the polluting matter could escape but a necessary condition of the actual escape which happened was also the act of a third party or a natural event, the justices should consider whether that act or event should be regarded as a normal fact of life or something extraordinary. If it was in the general run of things a matter of ordinary occurrence, it would not negative the causal effect of the defendant's acts, even if it was not foreseeable that it would happen to that particular defendant or take that particular form. If it can be regarded as something extraordinary, it will be open to the justices to hold that the defendant did not cause the pollution.

…

(5) The distinction between ordinary and extraordinary is one of fact and degree to which the justices must apply their common sense and knowledge of what happens in the area.

[69] In cases such as *Empress Car*, where it can be said that the third party has also caused the impugned result, Lord Hoffmann explains that, "The fact that … one could also say that someone or something else caused the [result in question] is not inconsistent with the defendant having caused it."

[70] While *Tucker* was not concerned with a third party, William Young J noted at [50] that what had happened in that case could be regarded as natural forces and that Lord Hoffmann's speech was equally applicable to third party and natural force intervention.

[71] On the other hand, the plaintiffs' claim in *Attfield* alleged that both the land owner and the power lines company had caused the fire, and were responsible for the fire costs. While the issue did not directly arise, given the context of a strike out application, there was no suggestion that the power lines company could not have caused the fire because of the involvement of the land owner.

[72] The plaintiffs contended that there was little factual disagreement between the parties on the pleadings, given that:

(a) It is accepted that Marlborough Lines owned, operated and maintained the power lines across the property at Tumbledown Bay Road.

(b) That on 21 December a tree in close proximity to the power lines, felled by an occupier of the property, came into contact with the power lines causing a discharge of electricity which caused the outbreak of the fire.

(c) The Authority incurred $107,089.09 in extinguishing the fire, and the Commission paid to the Authority in respect of the fire costs $100,584.62 from the Rural Fighting Fund (subject to an issue as to whether GST is claimable).

[73] The real issue is whether or not the sequence of events that resulted in the power lines causing the fire was an ordinary and not extraordinary consequence of operating power lines in proximity to the trees.

[74] The plaintiffs say that the series of events resulting in the fire, whereby a third party felled a tree onto lines maintained by Marlborough Lines, was not an extraordinary result of Marlborough Lines maintaining the lines in question. Marlborough Lines says the felling of a tree onto lines resulting in fire, was an extraordinary consequence of operating the lines.

[75] The plaintiffs maintain that the pleadings and affidavit evidence established the following:

(a) The propensity of trees to damage power lines – including where tree works are undertaken by property owners/occupiers, was well known to Marlborough Lines who had an explicit written policy and practices in place to try to reduce the likelihood of this offending.

(b) The tree that hit the power lines was very tall (20 metres) and in close proximity to lines (10 metres) such that the tree was (self-evidently) capable of falling on the lines.

(c) Marlborough Lines acknowledges in its Asset Management Plan that Growth Limit Zones, as provided by the Electricity (Hazards from Trees Regulations) "in many cases do not protect the lines from trees or inhibit the risk of fire," and so "seek to obtain greater clearances [between lines and trees] than those provided by the legislation. In order to address tree risks outside of the Growth Limit Zone, Marlborough Lines' "focus has shifted from compliance with the regulations, to avoidance of hazards".

(d) The lines in question, and their proximity to trees, were known to Marlborough Lines as a result of helicopter and site visits, and on each occasion, "No concerns," were identified, despite the proximity

of the tree to the lines and the defendant's stated focus on, "Avoidance of hazards."

(e) The occurrence of trees or branches breaking power lines that then arc and cause an outbreak of fire is not an uncommon cause of fires in New Zealand. The New Zealand Fire Service incident reporting system (ICAD) shows 176 fires in the four years to June 2013 caused by trees/branches coming into contact with lines. Of these, an average of four a year were the result of trees being either felled, or otherwise resulting from work being done on trees.

(f) Marlborough Lines had a policy of monitoring trees and engaging with tree owners in relation to trees near their assets, and acknowledge in their Asset Management Plan that, "Legislation requires line companies to advertise suitable safety information to tree owners as well as contacting tree owners when their trees are close to power lines."

(g) Marlborough Lines acknowledges in its Asset Management Plan that the fire risk posed by the felling of trees exists even in commercial contexts (involving professional arborists and where standards of care are likely higher), and so seeks to maintain greater clearances between trees and lines.

(h) The area where the fire occurred, Marlborough, experiences climactic conditions which increase the risk of fire.

(i) There are steps that Marlborough Lines could have taken to avoid or limit the risk of fire which it chose not to take, including:

(i) moving the lines away from wooded areas or undergrounding the lines;

(ii) utilising fault protection mechanisms to cut power to the line and prevent relivening where there is an increased risk of fire;

(iii) maintaining clearances between vegetation and lines equipment.

[76] There is nothing extraordinary or abnormal about lines causing fires, and the liability of power lines companies for such fires has been considered in a number of contexts, for example:

(a) *Attfield;*

(b) *Quebec Railway, Light, Heat and Power Company v Vandry*[6] where a fire was caused in similar circumstances to *Attfield*. The Privy Council similarly concluded that the cause of the damage was the discharge of electricity, rather than the trees from which the branch broke. The trees that fell in high winds were simply an antecedent prerequisite to the damage;

(c) *New Zealand Timberlands Limited v Tasman Electric Power Board*[7], where the Court found that the carrying of electricity through power lines was a non-natural use of the land for the purpose of a *Rylands v Fletcher* claim; and

(d) *Midwood & Co v Manchester Corporation*[8] where the Court said it was negligent to omit, "To use all reasonably known means," to keep electricity harmless.

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6 *Quebec Railway, Light, Heat and Power Company v Vandry* [1920] AC 622 at 678

7 *New Zealand Timberlands Limited v Tasman Electric Power Board* DC Nelson 1/89, 30 July 1991 at 12

8 *Midwood & Co v Manchester Corporation* [1905] 2 KB 597 at 608

[77] The transmission of electricity, particularly through rural areas, carries inherent risk of fire in the event that electricity is able to escape. Likewise, there is nothing unusual about people felling or maintaining trees on their own property, even where they do not possess the requisite skills to do so safely.

Discussion and decision

[78] To succeed in its summary judgment application, Marlborough Lines is required to satisfy the Court on the balance of probabilities that the plaintiffs' cause of action cannot succeed.

[79] The plaintiffs' cause of action is brought under s 43 of the Act alleging:

(a) The defendant, by operating the power lines, produced a situation in which a fire could occur;

(b) The sequence of events pleaded was an ordinary event, and was not an extraordinary occurrence; and

(c) Therefore the plaintiffs are entitled to recover costs from the defendant as the party who caused or was responsible for the fire.

[80] As observed by William Young J in *Tucker* at para [5], "The statutory scheme [of the Act] is quite complex". Furthermore, with respect to s 43 of the Act he states:

> There can be no doubt that the hand of whoever drafted s 43 faltered badly. It is extremely difficult to say with any confidence just what the section was intended to mean.

[81] Fortunately for this Court, William Young J engaged in a comprehensive analysis, in *Tucker*, of:

(a) The law prior to the commencement of the Act;

(b) Whether s 43 of the Act applies only to cases where a defendant has civil responsibility for a fire; and

(c) The scope for a principled analysis of causation, and as part of his discussion he found the analysis in *Empress Car* relevant to the issues arising in *Tucker*.

[82] Counsel for both the plaintiffs and Marlborough Lines accepted that *Tucker* is both instructive and binding on this Court, but they are divided as to its application to the facts of the present case.

[83] At para [59] in *Tucker,* William Young J confirms that negligence or other breach of legal duty is not a pre-requisite to liability under s 43(1). This is not surprising, given his observation at para [55] that "… s 43 was intended to be supplementary to and not in substitution for the existing legal rules". Put another way, if it was to be restricted to cases where some kind of civil liability was a prerequisite, then s 43 would be superfluous.

[84] William Young J held in *Tucker* at para [61] that a person could be regarded as "causing" a fire, and therefore be liable under s 43(1) if they produced a situation from which the fire resulted, where the concatenation of events leading to the fire is a matter of ordinary occurrence.

[85] Whilst *Tucker* did not concern a third party, William Young J noted at para [50] that what happened in *Tucker* could be regarded as natural forces, but what Lord Hoffman said in *Empress Car* was equally applicable to third party and natural force intervention.

[86] Furthermore, in *Attfield,* although that was a strikeout application, there was an acknowledgement by the Court that the lines company in that case could have been liable, even though the landowner was primarily responsible for the fire.

[87] Accordingly, what is clear from William Young J's analysis in *Tucker,* and from the *Attfield* case, is that a lines company such as Marlborough Lines could arguably be liable under s 43 for a fire caused by the intervention of a third party.

[88] Having said that, there are some cautionary words from William Young J in *Tucker*. Where causation is the issue, a "common sense" approach is required and the approach should be considered within the legal context of the Act.

[89] The present case did not involve a deliberately lit fire, but as William Young J observed, the effect of s 43 is not confined to such cases. However, he again cautions that the fact that it was not deliberately lit is "relevant to consideration of where the causation line should be set".

[90] Moreover, William Young J opines at para [66] that:

> Where a person causes fire accidentally, but without negligence (or other breach of legal obligation), causation is likely to be difficult to establish.

[91] In the present case, the direct cause of the fire was the landowner felling the tree which landed on the power lines.

[92] The propensity of trees to damage power lines is a well-known cause of fire, and is well-known to Marlborough Lines, and they have an explicit policy and practices to reduce the likelihood of this happening.

[93] The New Zealand Fire Service reporting system shows 176 fires in the four years to June 2013 caused by trees/branches coming into contact with power lines. Of these, an average of four a year were the result of trees being felled, or otherwise resulting from work being done on trees.

[94] In the present case, the tree that was felled by the landowner was 20 metres tall, and was within 10 metres of the lines. Whilst the tree was not within a distance that activated the Regulations, Marlborough Lines' Asset Management Plan recognises that the Regulations "in many cases do not protect the lines from trees or inhibit the risk of fire", and so "seek to obtain greater clearances [between lines and trees] than those provided in the legislation". Indeed, in order to address tree risks outside of the Growth Limit Zone, Mr Topp states at para [15] of his affidavit that Marlborough Lines' "focus has shifted from compliance with the regulations, to avoidance of hazards".

[95] However, despite knowledge of the risk that trees present to lines, and an acknowledgement that the Regulations are insufficient, and despite climatic conditions which increase the risk of fires, and despite a proactive approach to "avoidance of hazards", Marlborough Lines failed to identify the particular tree concerned as a potential hazard to the lines. I acknowledge that the evidence suggests it was relatively young and healthy, but its size and proximity alone present as a potential hazard.

[96] The plaintiffs suggest that there are several steps that Marlborough Lines could have taken to avoid, or limit the risks. More particularly, they suggest that they could have moved the lines away from wooded areas, or undergrounded the lines. My instinctive reaction to such a suggestion, is that it would place too higher operational, or financial burden on Marlborough Lines.

[97] The plaintiffs do, however, raise other steps, which arguably are not as onerous. In particular, they suggest that Marlborough Lines could have:

(a) Maintained clearances between vegetation and lines equipment; and

(b) Utilised fault protection mechanisms to cut power to the line and prevent relivening where there is an increased risk of fire.

[98] Counsel for Marlborough Lines submits that there was nothing more that Marlborough Lines could reasonably have done. However, I do not agree with that submission. Given the inherent risk presented by the transmission of electricity, and the obvious risks that trees pose, I would have thought that it was not too onerous to expect Marlborough Lines to identify any tree or vegetation that poses a risk to the lines. In this case, notwithstanding their inspection regime, they failed to identify that there was a 20 metre tall tree, 10 metres from the lines. Their failure to identify such a risk, given the known risk that trees pose, is arguably a fundamental failure on their part.

[99] Counsel for Marlborough Lines makes the valid point that it was a healthy tree and, given the Regulations did not directly apply to the tree, that there was nothing they could have done by way of forcing the owner to take action. Furthermore, it is argued that it was totally unforeseeable that the landowner would fell a perfectly healthy tree. However, if Marlborough Lines had identified the risk, they could have spoken with the landowner and discussed the risks perceived by them, and entered into discussions about what could have been done to reduce, minimise or remove the risk.

[100] If, for example, there had been a failure by the landowner to engage an appropriate expert to top or fell the tree, then one of the options that could have been looked at is whether or not, in that particular area, Marlborough Lines could have utilised fault protection mechanisms to cut power to the line, and prevent relivening where there is an increased risk of fire. Given that this is a summary judgment application, I do not have sufficient information to decide whether or not this is a realistic option.

[101] Standing back and looking at the matter, and taking a common sense assessment, as I must, it is fairly arguable, in my view, that given that these were ordinary events, and given that Marlborough Lines failed to identify and take any steps to deal with the risk presented by the tree, that both the landowner and Marlborough Lines caused the fire, and as such the applicant, Marlborough Lines, has failed to satisfy me on the balance of probabilities that the plaintiffs' cause of action cannot succeed.

[102] For the sake of completeness, I simply note that I did not place any weight on Mr Yeabsley's evidence when determining this application.

[103] I leave the issue of costs for resolution as between the parties. In the event that the parties cannot agree on costs, I invite submissions to be filed within 14 days of the date of this decision.

A A Zohrab
District Court Judge