

EDITORIAL NOTE: NO SUPPRESSION APPLIED.

**IN THE DISTRICT COURT
AT TIMARU**

**CRI-2015-076-000277
[2016] NZDC 9689**

NEW ZEALAND POLICE
Prosecutor

v

CHARLES ALFRED DURHAM
Defendant(s)

Hearing: 27 May 2016

Appearances: Mr M Beattie for the Prosecution
Mr J Lovely for the Defendant

Judgment: 1 June 2016

RESERVED JUDGMENT OF JUDGE J E MAZE

[1] Charles Durham faces one charge of assault with a weapon (a wheelchair), threatening to cause grievous bodily harm, and possession of an offensive weapon (a leaf rake) in circumstances which prima facie show intention to use it for an offence of violence.

[2] On 5 March 2015 Deanna Davis, Brent Lane and Judy Wallace went to Mr Durham's home address to deliver a new powered wheelchair organised by the Accident Compensation Corporation (ACC). Mr Durham lost one leg, and severely damaged the other, in a work accident seven years ago. Although efforts were made to save the remaining leg, that was amputated two years later. He was therefore a double amputee for something in the region of four years at the time of the incident. Prior to the accident he had been a ship's engineer. He was alone at home at the time of the incident.

[3] Ms Davis secretly recorded the discussions with Mr Durham that day, and it forms probably the best evidence of most of the events. I am satisfied she resorted to making the secret recording because she had already formed a dislike of Mr Durham, and knew he would become angry. The way in which she spoke to Mr Durham as recorded confirms this. She did not inform Mr Durham, Mr Lane or Ms Wallace she was making the recording.

[4] Mr Durham had informed ACC of his preference for a particular model of powered wheelchair (the 'X8') and he was very annoyed when Ms Davis and the others arrived to deliver a different model (the 'V6'). He did not want the V6, and he did not want them to leave it at his house on 5 March 2015. I am satisfied however that Ms Davis fully intended to leave the V6 with Mr Durham; she had already determined she would not be taking it back despite Mr Durham's protests in very direct and colloquial language. That impasse and the antipathy between Mr Durham and Ms Davis lie at the heart of the events of the day.

[5] In brief Ms Davis described trying repeatedly to persuade Mr Durham of the benefits of the V6 chair, and it was her perception Mr Durham would not listen. He threatened to damage the chair if they left it. Suddenly he told her to go, and then to "fuck off". He said he would hose her down. She followed him when he then drove

down the path to the rear of his home. He then pushed a rubbish bin down the steps at the back of his home. She said he then turned his chair towards her and drove directly at her, with a determined look, saying “I’m going to run you down”. She was turning away to leave when his chair struck her ankle removing her shoe (the allegation for the first charge). She denied this was accidental. He then said “I’ll punch you; I’ll stab you” (the allegation for the second charge), and then picked up a rake and swung it at her (the allegation for the third charge). In fact the recording shows that when he first told her to go and then said “fuck off”, she chastised him and continued to do so as she followed him to the side of his house.

[6] Mr Lane described how they had discussed the V6 chair, but Mr Durham said he was sick of people not listening to him. He told them to “fuck off” and if Ms Davis did not leave he would turn the hose on her. Mr Durham turned and went to the side of his house, and, when they heard a loud banging (the falling red bin), Ms Davis followed Mr Durham and Mr Lane followed Ms Davis. He said Ms Davis was about two feet away from Mr Durham, when Mr Durham turned and drove his chair into her, causing her to fall into his lap (something not supported by Ms Davis). Mr Lane said he was “fairly confident” her hand struck Mr Durham in the chest. Mr Durham then said either he would stab her or he would knife her, and then he began rummaging on a shelf (the wood box). He seized a rake and tried to hit Ms Davis but it struck the fence. The group then left Mr Durham’s property.

[7] Ms Wallace recalled that Mr Durham abused both Ms Davis and Mr Lane while discussing the wheelchair, although the recording does not disclose abuse of Ms Davis until after he had told them to leave, and does not disclose abuse of Mr Lane at all. She said Mr Durham told Ms Davis to ‘fuck off’ and he would hose her down. Ms Davis followed Mr Durham round the side of the house, telling him not to be silly and to grow up. Ms Davis then said they would leave the chair. At the same time as she turned to leave, Mr Durham rammed her leg with his chair. He said he would knife her and he swung the rake at her.

[8] Constable Galbraith attempted to interview Mr Durham who appeared not to take seriously the opportunity to respond to the allegations; in summary Mr Durham said:

- (a) Ms Davis and the others refused to leave when told to do so;
- (b) He denied driving deliberately into her; he said it was accidental;
- (c) He tried to lift the rake but had been unable to get it untangled from the back of the wood bin;
- (d) He did not have a knife at any time.

[9] Mr Durham gave evidence. He is dependent upon a benefit as a result of his injuries. He has never received counselling for the accident and amputations. He said ACC asked him to consider two new wheelchair models, the V6 and the X8. He told ACC he wanted the X8, but he realised, when he saw Ms Davis, Mr Lane and Ms Wallace arriving, that they had the V6, and concluded they had ignored his advice of his needs. They parked it half on the lawn hard to the left of the front path (viewed from the house) and only part of it protruded on to the path. They stood round the new chair discussing what he had wanted and why he did not want the V6, but Ms Davis kept interrupting, telling him why he should accept the V6. He formed the view she was not listening and told her to leave, then to ‘fuck off’. She told him he could not speak to her like that. He told her again to leave and said he would hose her down. He went to the back of his home, where the hose was behind the red bin near the door. She followed him. He realised he could not reach the hose and stopped at the top of the steps (shown in the photographs). At that point he could go no further and could not reach the hose. He shoved the red bin and it went down the steps. He remained facing down the steps, with his left side to the porch by the door. He heard Ms Davis speaking to him but did not realise how close she was then standing behind him. They spoke to each other and he began to turn his chair, and in so doing he struck her with the back of his chair (the back wheels protrude a few inches behind the rear of the seat). As he turned, he heard her say “ow” and then something about that being assault and she would get the police. He maintains that he did strike her with the back wheels of his chair but it was an accident as he did not realise she was standing right behind the chair. He had been facing towards the steps, which formed a barrier to his moving forward, immediately before he began to turn by reversing. He absolutely denied turning to face her, saying he would run her

down and deliberately driving into her. After she said she would ring the police, he told her again to leave, repeating his instructions and flicking his hand at her, to drive her out. He concedes he then said "I'll stab you" but he had no knife and no means of getting one. He described it as a random thought which occurred to him to reinforce his instructions that he wanted them to leave. He reached the gateway by the house and reached for the leaf rake which was between the wall and the wood bin. He tried to pull it out but he was unable to get it free. He did not throw it at Ms Davis. He accepted he had become annoyed, frustrated and angry with his visitors, and he was sick of arguing with them and ACC, but he said, to get them to go, he "put on a show" because he cannot do anything else. He said he did not expect them to take his threat about the knife seriously as a threat to stab anyone. He wanted them to understand he required them to leave. He also demonstrated how the chair he was using on the day in question moves and operates. Importantly, when it starts moving forward it begins slowly, if in the gear he says he always uses, and it makes a very loud clicking noise when engaged to move forward.

[10] The starting point is to determine what is proven to have happened. There is a direct conflict in relation to how Mr Durham struck Ms Davis with his chair, and what he did with the leaf rake.

[11] On the one hand Ms Davis says she had followed him (after he had told her to leave) and she stood beside him (side on to him). She was perhaps 3 metres away from him. He came one and half metres towards her, backing off the wall and turning. She therefore says Mr Durham had already turned his chair when he said he would run her down and he drove towards her deliberately. She had started to turn away from him but he hit her left ankle deliberately.

[12] Mr Lane said Ms Davis followed Mr Durham after he had told them to leave and after the red bin was knocked down the steps. She stood in front of the open part of the porch. He had knocked the bin down the steps then turned his chair to face her. She was two feet from him. She said they were going to call the police and he drove forward hitting her on the left side. Mr Lane then conceded that Mr Durham had already turned his chair by the time Mr Lane could see them. He saw Ms Davis fall against Mr Durham and then she collected her shoe from where it was wedged

under his chair. I note Ms Davis said nothing about the force of the strike knocking her against Mr Durham (and I am satisfied she would have said so had that happened, given her views of Mr Durham), and neither did she say her shoe was wedged under the wheelchair. More importantly, if Ms Davis was indeed standing half way along the open part of the porch, then with Mr Durham's chair at the very top of the steps there would have been almost no space between the two. The photos show it to be a cramped space.

[13] Ms Wallace said Ms Davis said she would leave and leave the wheelchair (the V6) behind, and turned to leave. At the same time Mr Durham drove forward into her leg purposefully. Ms Davis did not lose her balance. Ms Wallace was at no time within the space round the back door. It follows then that Mr Lane and Ms Davis were between Ms Wallace and Mr Durham, at least to some extent, and the gateway is a normal single gate width.

[14] Mr Durham's evidence (and his statement to Constable Galbraith) records that he struck Ms Davis' ankle accidentally as he turned to retreat from the top of the step as he had not realised how closely she stood behind him.

[15] There are obvious inconsistencies between the evidence given by Ms Davis, Mr Lane and Ms Wallace. The crucial question is when Mr Durham turned his chair from the top of the steps. If it was done separately from, and distinctly before, striking Ms Davis' foot, then the facts would lead to an inference of intent, because he would have already been facing her, and must have intended to run into her. If however it is reasonably possible that, as Mr Durham says, he remained facing down the steps while they spoke, and only struck Ms Davis' foot with the rear of his chair as he began to turn, then no such inference is available. Contact would have occurred by accident because Ms Davis was standing closely behind the chair. There was no evidence of injury to her foot. The loss of balance is not supported by Ms Davis herself. Ms Davis and Mr Durham continued to speak to each other and although Ms Davis spoke about going, plainly she did not. I also note from the recording three matters. I can hear no click with the engagement of forward movement of the chair before the "ow". Indeed I cannot hear the chair movement at all until literally immediately before the "ow". Nowhere between the bang of the red

bin on the steps and “ow” does Mr Durham say “I am going to run you down” or anything even like that. And finally, there is no change in the level and clarity of Mr Durham’s voice to support the suggestion he had already turned round and was thereafter facing Ms Davis.

[16] I consider it is reasonably possible that, in the melee, and with subsequent discussion as admitted by Ms Wallace, the eyewitnesses for the prosecution have confused the timing of the forward movement of the chair. There is no doubt, and Mr Durham admits that after he struck Ms Davis’ foot, he displayed no concern for Ms Davis; he merely repeatedly told her to go and moved forward in his chair to enforce the instruction (with no apparent contact then occurring).

[17] In light of all that I am not satisfied it is proven that the prosecution version of events leading to contact between the wheelchair and Ms Davis’ foot is correct; it remains at the very least reasonably possible, if not more likely on the available evidence, that he did not begin to turn until immediately before he struck her foot with the rear wheels. In that case I accept it would be accidental, as they were in a very confined space. I accept he had not realised how close she was. It then follows that one necessary element of that charge, in particular, intent, is not proven to the required standard and that charge must be dismissed.

[18] The next point in issue is the charge of threatening to cause grievous bodily harm. The prosecution must prove beyond reasonable doubt that Mr Durham said the words “ I’ll stab you” (which he admits in evidence), that he intended it be taken seriously by Ms Davis, and that he was not using the threat to protect his property and assist in ejecting Ms Davis and the others from his home address as trespassers. That last element arises because of Mr Durham’s evidence and statement to the effect that he had repeatedly told them to leave, that Ms Davis not only refused to do so, she followed him even further into his property and berated him verbally, and that he wanted them to understand they were obliged to leave. I accept the evidence supports the conclusion the three visitors became trespassers at the very least when Ms Davis followed Mr Durham to the side of the house, and the other two remained on the path, with Mr Lane then joining Ms Davis after the red bin went down the steps. I accept the evidence shows Mr Durham asked Ms Davis if she wanted him to

stab her (the recording and his admission in evidence) and intended that they take them seriously even though he obviously did not have access to a knife. The sole remaining question then is whether his use of the threat was justified or might reasonably possibly have been justified under s 56 Crimes Act 1961.

[19] The prosecution must prove beyond reasonable doubt that Mr Durham did not issue that threat to stab Ms Davis as a reasonable response to reinforce his directions to eject the trespassers from his property. The prosecution accepts this provision is a consideration on the evidence. To exclude justification on the facts in this case, in effect, the prosecution must prove beyond reasonable doubt Mr Durham did not intend to remove the trespassers at the time he uttered the threat, or that he knew that their intrusion at his home had ended, or that his threat was disproportionate and therefore unreasonable for the circumstances as he perceived them to be (*R v Haddon* [2007] NZAR 135). Mr Durham's own evidence was that the visitors had been there for about three-quarters of an hour to deliver a model of chair he had told ACC he did not want. The recording establishes that he told them to leave and in very plain language. He said as an amputee he cannot do anything other than put on a show. "All I have is my voice". He said he was sick of arguing with them and he wanted them to leave. Not only did they ignore his lawful instruction to go, they remained and Ms Davis and, to a lesser extent, Mr Lane, followed Mr Durham further on to his property. I accept Mr Durham's evidence that he uttered the threat because Ms Davis had first refused to leave (by conduct), then intruded further upon his privacy and rights (by following and telling him off), and finally, despite saying she would go, remained and continued to berate him. I find as a fact he did utter the words to reinforce his lawful instruction to the trespassers to leave. Although Ms Davis had said more than once that she would go, she had remained to continue the confrontation. I am satisfied that he perceived that they would not obey his instructions and he needed to reinforce them; it is clear that they had not in fact left when he said it. Finally was it disproportionate viewed from his perspective? Not when viewed in light of the fact he was a double amputee, very obviously had no knives and was outside his home. The threat was plainly absurd, but it was said by Mr Durham with the intention they take seriously his instruction to leave his home. In those circumstances, the threat was a mark of Mr Durham's determination they must leave immediately. His accompanying anger does not

preclude the justification. By refusing to leave his home when told repeatedly to do so, and by remaining to tell him off like a child, Ms Davis was, in effect, telling him he was powerless, and she was in control of the situation. His evidence that “All I have is my voice” was very telling. The threat was made for the permitted purpose, justified and proportionate for the circumstances as Mr Durham understood them.

[20] In those circumstances I accept the prosecution has failed to exclude justification under s 56, when it was available to Mr Durham as an answer to that charge and it too must be dismissed.

[21] Finally that leaves the leaf rake incident, which seems to have occurred after the recording ended. The last words on the recording are those of Ms Davis that she is leaving. For the leaf rake incident the prosecution must prove beyond reasonable doubt Mr Durham was in possession of the leaf rake (which I accept could be an offensive weapon) and that the surrounding circumstances showed he intended to use it for an offence of either causing bodily injury or threatening violence, or causing Ms Davis to fear violence.

[22] Mr Durham says he tried to get the rake out from its position on the wood bin but could not and finally let it go. So he admitted trying to take it out; in light of the threats he had just uttered, he must have intended to try to use it as a weapon (a weapon being anything capable of inflicting bodily injury); no other conclusion is reasonably possible. Ms Wallace saw the handle of the rake and Mr Durham holding it with both hands. She heard it strike the fence. Ms Davis saw him swinging it towards her. Mr Lane says Mr Durham swung the rake at Ms Davis but hit the fence. I am satisfied beyond reasonable doubt that Mr Durham moved the rake handle sufficiently for it to be visible to Ms Davis, Mr Lane and Ms Wallace. It was then still under his control. Accordingly, I am satisfied beyond reasonable doubt Mr Durham was in possession of the rake, it was capable of being used for bodily injury, and he had acted in such a way with it that it showed he intended to use it to commit an offence involving the threat of violence. The prosecution must also prove this was not justified under s 56. I am satisfied that the recording shows clearly that Ms Davis and the others were already departing before the recording ends. The rake incident does not feature at all in the recording. No-one alleges the trespassers were

returning; they were leaving. Therefore the harm against which s 56 was designed to protect had ended and Mr Durham knew it had ended. The threat with the rake was both unnecessary and known to be unnecessary by Mr Durham. If I am wrong in that, it was wholly disproportionate to the extent that any harm remained at that point.

[23] Technically then, the last charge is proven. However the outcome must also reflect the fact there is provocation in that the visitors became trespassers, declined to leave when lawfully told so to do, and Ms Davis then pursued Mr Durham round the side of his house and chided him as if he were a child. Although she then spoke about going she still delayed doing so while she continued to chastise him. It is also a personal mitigating factor that they refused to obey the clear and lawful instructions of a man who was a double amputee, being reminded of his impotence by the deliberate disobedience of his instruction to leave and to leave him alone. He did not need to be told off like a child. I did indicate I would receive submissions on whether a conviction was required in the circumstances should any of the charges be proven. I will receive those submissions at next call. In the mean time this reserved decision can be released and Mr Durham will attend Court on 10 June 2016 at 10 am for consideration of whether to convict and sentence.

J E Maze
District Court Judge

Signed in Timaru on _____ 2016 at _____ am/pm