IN THE DISTRICT COURT
AT TAUMARUNUI

I TE KŌTI-Ā-ROHE
KI TAUMARUNUI

CRI-2024-068-000016
[2024] NZDC 32003

WORKSAFE NEW ZEALAND
Prosecutor

v

N.P. & M.A. COOGAN PARTNERSHIP
Defendant

Hearing:	18 December 2024
Appearances:	A Everett for the Prosecutor J Gurnick for the Defendant
Judgment:	18 December 2024

NOTES OF JUDGE J KREBS ON SENTENCING

---

[1] Over the summer of 2022 and 2023 Sean Clear travelled from his native Ireland to Australia before taking up farm work in this country on a temporary work visa.

[2] On 17 February 2023 he was working as a labourer for the Coogan Partnership, making silage at Taurewa Station in the central North Island.

[3] Several days earlier Cyclone Gabrielle had struck the country and significant rainfall had made the property on which they were working boggy in places. A tractor which they were using with a mower unit attached had become bogged near a stream on the property. It could not be freed using its own power. The partnership's representative at the property decided that the best way to free the stranded tractor was to first remove the mowing unit using the extendable arm of an excavator and then to

use the excavator to tow the tractor out of the boggy area. The mower unit was uncoupled, chains were attached to it and then attached to the arm of the excavator. The worker who operated the excavator asked Mr Clear to hold onto the mowing unit to steady it as he raised the excavator arm, lifting the unit away from the tractor. The excavator operator did not notice overhead powerlines. As the excavator arm was raised it connected with the overhead powerlines which carried electricity at 33,000 volts. The electricity passed through the arm of the excavator, the chain and the mower and then through Mr Clear, electrocuting him instantly.

[4] WorkSafe has brought charges against the business of the Coogan Partnership, alleging that Mr Clear's death was caused as a result of the partnership failing to take proper care to ensure his safety. Specifically, it alleges that the partnership did not complete an adequate risk assessment, including the identifying of the hazard presented by the overhead powerlines and that it did not ensure a safe method to retrieve the bogged tractor given the presence of those overhead powerlines.

[5] The defendant partnership sought a sentence indication. I gave that indication in October 2023, but only after resolving a preliminary issue as to whether the partnership itself, as opposed to the individual partners, could be prosecuted. I decided that it could.

[6] The partnership accepted the sentence indication and pleaded guilty to the charge. For consistency, I now repeat the material matters from my sentence indication into the record for sentencing purposes.

[7] Following a WorkSafe investigation into the incident the following facts were established:

(a) The overhead powerlines where the incident occurred were a little over seven metres above the ground.

(b) The defendant's use of the excavator beneath the lines breached the minimum safe distance for the operation of mobile equipment beneath

powerlines and the defendant had not applied for a close approach permit.

(c) The defendant had safety processes in place for the usual work it undertook involving use of dangerous mowing equipment and also held regular but informal meetings to identify hazards. However, the defendant did not identify the hazard presented by the overhead powerlines when planning the recovery of the mowing equipment.

(d) The excavator which was involved in the incident had a label in a prominent position on the right-hand side of the operator cab. On the right-hand side of the label a warning was displayed as follows. It said:

> Danger. Serious injury or death can result from contact with electric lines. Never move any part of the unit or mow closer than four metres or 12 feet, plus twice the line insulator length, to any electric lines.

To reinforce the warning there was a diagram showing a stylised digger with its boom touching powerlines and the person holding onto the digger receiving an electric shock. The operator manual for the excavator also warns of the risk.

(e) The defendant owns and operates a different make and model of excavator which was not at the property at the time. The manual for that machinery also contains a warning about operating that excavator near powerlines.

[8] So serious are the risks associated with operating machinery close to electricity and overhead powerlines, but a number of regulations and guides are in force. They include:

(a) The Electric and Safety Regulations 2010.

(b) The New Zealand Electrical Code of Practice for Electrical Safe Distances (NZECP 34:2001).

(c) WorkSafe guidelines which set out how to manage those risks.

[9] Much of the guidance in this material is the codification of common sense with a common theme being first to identify the presence of the risk and then to take simple steps to avoid operating machinery close to the source of the electricity and minimising the number of people who come close to the risk zone.

[10] WorkSafe argue that:

(a) The defendant was obliged to ensure as far as was reasonably practical the health and safety of workers who worked for the partnership while they were at work and including the victim. That obligation is of course unarguable.

(b) WorkSafe says the defendant failed to comply with its duty, thereby exposing the victim to a risk of death or serious injury.

(c) Thirdly and specifically, WorkSafe says the defendant failed to complete an adequate risk assessment for the recovery of the tractor and mower, including identifying the hazard of overhead powerlines.

(d) Further, the defendant failed to ensure a safe method to recover the tractor and mower was followed, including ensuring no machinery, people, or equipment came within the minimum approach sign of overhead powerlines.

[11] The maximum penalty, given the defendant is an incorporation, is $1.5 million.

[12] Ten victim impact statements have been filed and I have read them all. In addition, the statements of Mr Clear's parents and his sister were read in court by a representative of the prosecution agency.

[13] The emotion expressed in those statements was raw and real. It is clear that Mr Clear was a fine young man with a promising future ahead of him. He was loved by all, and his premature death has left a deep sense of loss in all who knew him.

[14] The victims speak of their initial disbelief at what had occurred, and several are pained by what they see as the tragedy of simple steps not being taken at the time the mower was being moved that could have averted the accident. For instance, having a third person observe from a distance to make sure that nothing untoward occurred would have been a simple step and one which almost certainly would have alerted the excavator operator to the risk that the machine's arm was moving close to the powerlines.

[15] I note that the Coogan Partnership has no previous convictions for health and safety breaches. The parties agree that the discount from the starting point for sentence of five per cent is appropriate to recognise that fact.

[16] I turn now to the sentencing process itself and set out how I approach the assessment in sentencing. First, I must assess a starting point. The now well-accepted guideline case of *Stumpmaster v WorkSafe New Zealand* requires the sentencing court to address four steps in sentencing a defendant for offences against this legislation.[1] The four steps are as follows:

(a) I must consider and assess the amount of any reparation to be imposed.

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

(c) I must determine whether a further order such as a payment of costs should be made.

(d) I must step back and make an assessment of overall proportionality and appropriateness of orders that I would otherwise make under the first three steps.

[17] First, reparation. No ACC top-up or consequence of loss payments are sought in this case. Therefore, the only issue to be considered in step 1 is that of emotional

[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

harm. In *Big Tuff Pallets Ltd v Department of Labour* the High Court said at paragraph [19]:[2]

> [19] Fixing an award for emotional harm is an intuitive exercise. Its quantification defies finite calculation. The judicial objective is to strike a figure which is just in all circumstances and which, in this context, compensates the actual harm arising from the offence in the form of anguish, distress and mental suffering.

[18] Counsel for the prosecution helpfully provided a table which reflects orders for reparation. A common amount appears to be $130,000 ordered for wife and children, although it must be repeated that no amount of money will ever replace Mr Clear. Any such order can only ever be a token acknowledgement of the grief and suffering suffered by Mr Clear's family members and friends. Mr Clear had no dependants, but I agree with the parties that a significant award is appropriate.

[19] Recognising the fact that the partnership has already outlaid nearly $30,000 in funding the travel of co-workers to Mr Clear's native Ireland to attend a memorial service, in my view an award of emotional harm reparation in the sum of $100,000 is appropriate.

[20] The next step is to fix the amount of the fine. As is common with guideline sentencing decisions the full bench of the High Court in *Stumpmaster* indicated a range of bands of culpability and levels of fine which might be set as starting points in each banner. Those are as follows:

(a) For offences involving low culpability, a starting point of up to $250,000 should be considered.

(b) For medium culpability, $250,000 to $600,000.

(c) For high culpability, $600 to $1 million.

(d) For very high culpability, more than $1 million.

---

[2] *Big Tuff Pallets Ltd v Depart of Labour* (2009) 7 NZELR 322 (HC).

[21] I take into account the following factors when setting the starting point:

(a) The defendant failed to take the simple step of performing an adequate risk assessment for the recovery of the tractor and mower. It seems that the presence of overhead powerlines was either not noticed or completely ignored when the plan was made to retrieve the bogged-down equipment, therefore no consideration was given to ensuring a safe method to recover the tractor and mower and no steps were taken to ensure items or people did not come within the minimum approach distance of the overhead powerlines. This culpability factor is present to a high degree.

(b) The defendant's conduct departed significantly from industry guidelines. Regulations and codes of conduct were available and should have been complied with. Furthermore, the warning label within the cab of the excavator was itself a clear warning for the operator to be alert and careful of overhead powerlines. The degree of departure from industry guidelines was significant. The hazard itself was there to be seen, photographs showing the scene with the stranded mowing equipment and digger in situ clearly show the powerlines passing directly overhead.

(c) Reasonably practical actions to avoid risk were available and without cost. As observed by Mr Clear's mother in the victim impact statement, another worker who was present at site could simply have been asked to stand nearby and ensure that the excavator's arm did not come close to the powerlines. Furthermore, it is unclear whether it was in fact essential at all that Mr Clear hold the mower as it was being lifted.

[22] Many of the cases to which I have been referred by counsel involve breaches with similar consequence arising from electrical shock or electrocution in circumstances not dissimilar from the present. This case did not involve the use of scaffolding and its contact with electrical lines in built-up or industrial areas where the risk was more apparent.

[23] Here the prosecution responsibly acknowledge that the risk presented by the powerlines was not one which formed part of the defendant's regular work. The defendant's regular work involved cutting silage and hay and the risk associated with such work were the generic risks associated with operating farm machinery and, in particular, cutting equipment. The defendant had a satisfactory health and safety system in place to accommodate those risks.

[24] The prosecution argues that a starting point in the middle of the medium category considered in *Stumpmaster* would be appropriate, being a starting point fine of $450,000.

[25] The defence highlight the fact that the overhead powerlines were at their least visible given the time of day being 1.30 pm which meant that the sun was virtually directly overhead and making it difficult to see the powerlines. Defence argue that for those mitigating reasons a starting point of no more than $250,000 is warranted.

[26] Having found that a number of the culpability factors were present to a high degree, I agree with the prosecution's submission that the starting point for a fine here should be $450,000. The powerlines were there to be seen, as were the poles supporting them. These should have alerted the Coogan Partnership representatives to the presence of the overhead powerlines. The warning in place on the excavator was a further reminder of the need to be cautious in these circumstances. The simple fact of the matter is that the partnership did not pay any regard to the risks and therefore did not put in place a plan to mitigate them. Simple steps such as a shortening of the chain between the excavator arm and the mower unit and/or having a worker supervising and able to point out the hazards could easily have been employed. They were not. Starting point therefore for the fine is $450,000.

[27] There are no personal aggravating features that require an uplift.

[28] I therefore turn to the mitigating factors. Prosecution and defence agree that a range of mitigating factors that are present here. I too agree that they are appropriate. The defendant partnership is entitled to the following:

(a) A five per cent deduction for the full co-operation with the investigation.

(b) A further five per cent reduction for the defendant's working history, as evidenced by an absence of previous health and safety convictions.

(c) A further reduction of five per cent to recognise the significant remorse felt and demonstrated by the defendant. In this regard I make reference in particular to the significant finance and contribution referred to above for travel costs for those who wished to attend Mr Clear's memorial in Ireland.

(d) A further acknowledgement of that reparation, the tune of five per cent.

(e) A discount for guilty plea of 25 per cent.

[29] Those discounts total 45 percent, amounting to a deduction of $202,500 from the starting point of $450,000. The adjusted level of fine is $247,500.

[30] In terms of step 3 I make an order for the costs of WorkSafe in the sum of $7,590.70 by agreement.

[31] The final step I must take is a proportionality assessment. This necessarily includes consideration of the ability of the partnership to meet the financial penalty in the reparation amounts referred to. I have received affidavits from Anne Topham on behalf of the partnership and John Shaw on behalf of the prosecuting agency. These affidavits consider in-depth the financial position of the partnership by reference to their accounts. I do not intend to go into detail at all as to these matters other than to recognise that on behalf of the prosecuting agency Mr Shaw, the expert, acknowledges that Ms Topham's opinion that the partnership would struggle to meet anything more

than a $25,000 fine over five years cannot reasonably be challenged by him. This is in addition to the reparation order which I have already indicated.

[32] When I step back and look at the proportionality factors and the extent to which a $25,000 fine would impact the company, I am satisfied that such an order would be appropriate to hold the partnership to account and to recognise and deter the breach both at an independent level and more generally. Such a fine would be meaningful for the partnership but would not result in catastrophic financial consequences resulting in the insolvency of the partnership and its business.

[33] I make this order recognising that the emotional harm order that I have indicated is higher than that proposed. Nonetheless in my view the following orders are required:

(a) Reparation in the sum of $100,000 to be paid through the Ministry of Justice collectively to the parents and sister of Mr Clear. I record advice from counsel that the division of the payment of $100,000 as between those three parties will be arranged on receipt. I am not required to make any further directions.

(b) A fine to be paid in the sum of $25,000 by instalments over five years following today's sentencing.

(c) The costs of the prosecutor in the sum of $7,590.70.

[34] The final point I need to make is that the conviction which is attendant on the guilty pleas formally entered today is against the partnership. The charge which is faced here is one which can only be brought against an incorporation, not against individuals; the jeopardy for an individual under this legislation is different to the jeopardy for an incorporation. Convictions are not to be entered against Mr and Mrs Coogan personally. The conviction must and may only be recorded against the partnership. Mr Everett is advised that there is some administrative difficulty in making this record because of the way in which the computer records are

set up. That is not something in which that should result in a conviction being entered against Mr and Mrs Coogan personally regardless and I wish to make that point clear.

_____
Judge J Krebs
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 29/01/2025