

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS]

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**ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES),
OCCUPATION(S) OR IDENTIFYING PARTICULARS OF
WITNESS/VICTIM/CONNECTED PERSON(S) PURSUANT TO S 202
CRIMINAL PROCEDURE ACT 2011. SEE**

<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html>

**IN THE DISTRICT COURT
AT MANUKAU**

**I TE KŌTI-Ā-ROHE
KI MANUKAU**

**CRI-2021-092-004289
[2022] NZDC 14786**

WORKSAFE NEW ZEALAND
Prosecutor

v

HON SANG CHEUK
Defendant

Hearing: 27 July 2022

Appearances: V Veikune and A Simpson for the Prosecutor
C S Fredric for the Defendant

Judgment: 27 July 2022

NOTES OF JUDGE J FORREST ON SENTENCING

[1] Mr Cheuk, you appear before me today for sentence having pleaded guilty to one charge of breaching the Health and Safety at Work Act 2015. The charge was laid following the death of [name deleted – the victim] on 15 June 2020 after he fell from the roof of a property he was working at. Your company subcontracted with [the victim]’s company to carry out painting work at the property.

[2] The charge that you face is:

Being an officer of DMJ Painters Limited in liquidation and having a duty to exercise due diligence to ensure that company complied with its duty to ensure so far as is reasonably practicable, the health and safety of workers whose activities in carrying out work were influenced or directed by the PCBU, while the workers were carrying out the work, did fail to comply with that duty, and that failure exposed other persons, including [the victim], to a risk of death or serious injury.

[3] The particulars of failing to take those reasonable steps are:

- (a) Firstly, to ensure that DMJ Painters Limited had available for use and did use appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the business or undertaking, namely an adequate risk assessment and appropriate controls for working at heights.
- (b) Secondly, to verify the provision and use of resources and processes described in relation to that first particular.

Victim impact statement

[4] Before I outline the facts, which gave rise to the charge, I would like to acknowledge the presence of [the victim's wife and his son]. I thank them for the victim impact statement that has been provided. That was signed by you both but is written by [the victim's son].

[5] I want to highlight some matters in that. [The victim's son] was only 16 when his father passed away. [The victim's son] describes his father as the cornerstone of their family, and he states that no one could ever replace him. [The victim's son] described his father as well mannered, smart, optimistic and hardworking. He says that those traits meant that he was a good husband, father, and a good worker. [The victim's son] described that following his father's death the overnight change in your

lives was absolute shock: That when you returned home that night the home felt so empty. [The victim's son] says this was the first for the both of you and it took you a long time to get used to the empty presence. The main provider had disappeared leaving you with almost nothing to live off, and [the victim's son] had to continue attending school despite everything that had just happened. [The victim's son] says that no sum of money can replace the man that was his father, his mother's husband, and a great colleague. Finally, [the victim's son] says that his father's passing caused a huge amount of grief to you all and that he would do anything to get him back.

[6] [Victim's son], thank you for providing us with that insight both to who your father was and also to the impact that this has had on you and your mother. I know it is difficult to listen to those words but they have been heard by the Court. As you have noted, [victim's son], no amount of money will replace your father, and it is unlikely that anything I say today will go a long way towards providing you with the finality that you may want.

[7] I also wish to acknowledge, Mr Cheuk, that your wife is here today, and you have provided evidence as to the impact that this accident has had on you and her. Of course, that cannot be compared to the grief of the victim's family, but it is a relevant factor.

Relevant facts

[8] I am now going to address what occurred on the day that the accident occurred and then I am going to address the legal matters that I must consider in sentencing you, Mr Cheuk.

[9] Mr Cheuk, you were the sole director and one of two shareholders of DMJ Painters Limited. That company is now in liquidation. DMJ was in the business of providing painting services specialising in residential homes.

[10] In about May of 2020, the owner of a property in Bucklands Beach contacted you and requested a quote for painting the roof of his home. The home was a single storey property with a tiled roof which had a pitch of less than 25 degrees. At that

time, you had a business arrangement with [business A]. [The victim] was the sole director and shareholder of that company. You arranged for [the victim] and his company to do painting at the site.

[11] On 15 June 2020, at around 9 to 9.30 am [the victim] arrived at the site with a second man who was assisting him. They began to set up and undertake paint work at the site. [The victim] had taken with him equipment including a spray-painting machine which you had provided and a ladder. At about 10 am, you arrived at the site. You took more ladders, a long plank, and a safety harness which you gave to [the victim]. You told him to wear it but did not follow up or check that he was wearing it. It transpires that [the victim] did not use the safety harness.

[12] At around 2 pm, [the victim] fell from the roof onto the concrete patio area (a fall of 3.18 metres). He then further fell a further 0.46 metres onto the patio area. Emergency services arrived shortly after. [The victim] was taken to hospital in an ambulance, but he died later that night at around 9.00 pm following surgery. The post mortem report states that the cause of death was a laceration puncture of the thoracic aorta and a fractured rib as a result of blunt trauma to the chest through the fall.

[13] When you were interviewed by WorkSafe, you said that you had previously seen [the victim] using a harness at previous jobs. However, you did not establish whether [the victim] had any relevant qualifications regarding working at heights, or the setup, or use of a restraint system involving the use of a harness.

[14] The purposes and the principles of the Sentencing Act 2002 includes the purposes of the Health and Safety at Work Act 2015 (“the Act”). Section 151(2) of the Act provides that regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of harm as is reasonably practicable.

[15] The Act sets out sentencing factors which include:

- (a) The risk of death and whether that could reasonably have been expected to have occur;
- (b) The safety record of the defendant;
- (c) The degree of departure from prevailing standards in the industry; and,
- (d) Importantly, for reasons I will come to later, your financial capacity or ability to pay any fine.

[16] *Stumpmaster v WorkSafe New Zealand* is a High Court decision which confirms that there are four steps in the sentencing process.¹ First the amount of reparation to be paid to the victim or victims. Second, the amount of fine, having regard to the guideline bands and to any aggravating or mitigating factors. Third, whether there are any further orders under the Act are required. Fourth, to make an overall assessment as to the proportionality and appropriateness in imposing the sanctions under the first three steps.

Worksafe's position on reparation

[17] WorkSafe submit that an appropriate amount of reparation is \$150,000 payable \$130,000 to [the victim's wife] and \$20,000 to [the victim's son] (less \$46,450.40 you have paid, and which includes funeral related expenses). That reduces the amount you would pay to [the victim's wife] to \$83,549.50.

[18] In addition, WorkSafe have filed accounting evidence by Mr Jay Shaw of Grant Thornton that identifies consequential losses of \$38,640 to [the victim's wife] and \$8,446.00 to [the victim's son].

Defendant's position on reparation

[19] The consequential losses (in terms of the quantum) are accepted by you. However, your lawyer submits that emotional harm reparation should be set at the sum

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

of approximately \$50,000 (in the vicinity of \$50,000 (less \$46,450.40 you have paid), and that I should make an order in recognition of consequential losses of a further \$30,000.

[20] I am told Mr Cheuk, that you have available \$30,000 and that that would be available in respect of those consequential losses.

[21] During submissions the issue of what would be appropriate for an individual (as opposed to a company) to pay was canvassed. Your lawyer submitted that the amount of reparation should be less for an individual in the same way as the fines against an individual are less than for companies. That position was not accepted by WorkSafe and I have not been referred to any case law which adopts that approach.

[22] Your lawyer did refer me to *WorkSafe New Zealand v Prestige Adventure Limited*. In that case an individual was one of two defendants, the other defendant being a company. The individual was ordered to pay a total sum of \$100,000 emotional harm reparation in respect of two deceased victims.² However, Judge Maze was clear that if funds were available, she would have ordered a total sum of \$130,000 in respect of each victim, noting that the personal capacity of the defendant to pay reparation was the final determinant. Judge Maze noted that fixing impossible reparation figures is prevented by law and can impact adversely on the distress of victims.

Defendant's financial position

[23] Before giving my decision on reparation, I need to first consider the financial information that is available regarding your ability to pay reparation and/or a fine. Mr Shaw has provided an affidavit dated 1 July 2022 which assesses your financial position and your financial capacity to pay a fine. At paragraph 10 of his affidavit, Mr Shaw outlines the information that he has relied on. His affidavit also refers to the absence of certain information which includes detail of your earnings except for the 2020 financial year, Inland Revenue returns to confirm taxable earnings for 2022 and 2023, and accounts in relation to a company that was formed by your son, DHL Limited.

² *Prestige Adventure Limited* [2021] NZDC 23484 29 November 2021.

[24] Mr Shaw's view is that you can pay a lump sum amount of \$26,254 and I have already noted that you are able to pay a lump sum of \$30,000.

[25] You have provided affidavit evidence relating to your income. That states that until March 2021, you earned \$1,459 per week net. Since then, you have worked only part-time and earned approximately \$400 per week doing ad hoc painting work. Your affidavit also refers to the loss of contract work you had painting for a retirement village.

[26] The concern that I have is that in relation to DHL Limited I am left with more questions than answers. It was a company set up by your family to undertake painting work. The source of income to the company is not clear, just as it is not clear who carried out the work. The company provided income to your wife.

[27] Notwithstanding those questions that I am left with, I believe it is in the interests of everyone involved to proceed on the information that is available, and I accept that your income has been minimal as detailed in your affidavit.

[28] It is submitted that the main reason for your reduced income is your mental health and your inability to carry out full-time work or to undertake work which involves working at heights. You have provided evidence confirming that are prescribed antidepressant medication and medication to help you sleep. You say that there was no mental health history prior to this incident. You have also provided evidence that your wife is prescribed antidepressant and anti-anxiety medication.

[29] I am concerned that there is a lack of any other supporting information regarding your mental health issues. There is no report from a psychologist or counsellor which identifies the background, when symptoms commenced, the prescribing history or the effect of the medication. That information would have been helpful.

[30] Having this proceeding hanging over your head for a lengthy time would likely have exacerbated any mental health issues and that ought to dissipate following sentencing.

Reparation

[31] Considering the information available regarding your financial position I am going to order that you pay reparation to [the victim's wife] (which includes the sums already paid to date) totalling \$85,000. In addition, I am going to order that you pay [the victim's son] a further \$15,000. That brings the total emotional reparation (and I am including consequential losses in that that simply because of your inability to pay any more) to \$100,000.

[32] In coming to those figures, I take account that you have paid almost \$50,000 to date and have a further \$30,000 available to pay. I also take account of your ability to pay the balance of reparation of over the next five years. That is based on the information provided by Mr Shaw and taking account of your future income earning potential.

[33] I can indicate that if it was not for your financial position I would have ordered the total sum of emotional reparation of \$130,000 with \$110,000 to [the victim's wife] and \$20,000 to [the victim's son]. I would also have made orders for consequential losses as sought. While the \$100,000 I have ordered is more than you are currently able to pay, it is substantially less than what I would otherwise have ordered be paid.

Fine

[34] I turn next to the issue of an appropriate fine. I am not going to impose any fine because of your inability to pay and because I have prioritised any payments be towards reparation rather than towards a fine as I am required to do.

[35] However, I am required to give a view on the appropriate quantum of a fine. Because it is something of a notional exercise, I will indicate what I would have ordered as a fine briefly.

[36] I accept WorkSafe's submissions that the responsibility to ensure the work was carried out safely was yours. You were the primary contractor and subcontracted this work to [the victim]'s company. That quoted for the work and accepted that

scaffolding would not be in place. You did not carry out any formal assessment, or any assessment whatsoever, of the risks, or make any plan to address those risks, except giving [the victim] the harness. You did not ensure that [the victim] used the harness.

[37] I accept WorkSafe's submission that the *Shore Living* case is the closest of those referred to by me by WorkSafe and by your lawyer.³ In the *Shore Living* case the starting point was \$120,000 being on the cusp of the medium to high band of culpability. In the present case, however, I would reduce that to \$100,000. That is taking into account the fact that you and [the victim] were both principals of very small businesses, that you were both experienced painters and that you both were or ought to have been aware of relevant standards in terms of working at heights. I would then have made a total deduction of 50 per cent which is made up of:

- (a) 25 per cent in relation to your early guilty plea;
- (b) 5 per cent in relation to reparation;
- (c) 10 per cent for good character;
- (d) 5 per cent because of your co-operation with WorkSafe; and,
- (e) 5 per cent in respect of your remorse which I accept is very genuine.

[38] That would have reduced any fine from a starting point of \$100,000 to \$50,000.

Name Suppression

[39] Mr Cheuk, you have asked that I grant final name suppression. The Criminal Procedure Act 2011 provides I may make an order suppressing your name only if I am satisfied publication would be likely to result in "extreme hardship". I have already addressed the evidence that I have been provided in relation to your and your wife's health issues.

³ *Worksafe New Zealand v Shore Living* [2021] NZDC 13214.

[40] There is inadequate medical information to support an application for name suppression. Again, as a minimum, I would expect a report from a health professional and that would need to address specifically, the impact of publication on you or on your wife.

[41] I certainly do not wish my next comment to in any way minimise mental health issues, but to the contrary, it is very normal for members of the community to struggle at times in their life, to be on medication for depression or anxiety or to have sleep issues. In fact, we know that a high proportion of the community will face mental health issues at some stage in their life. I do not dispute in the slightest that there have been mental health consequences for you and your wife, but the information that I have before me simply does not address the impact of publication and I am, therefore, not satisfied that publication would likely result in extreme hardship.

[42] I am prepared to make an order suppressing the name of the deceased and his family. I am prepared to release the summary of facts if WorkSafe wish to do that with any media release as there is a clear public interest in preventing accidents of this nature from occurring.

[43] Mr Cheuk, it is genuinely my hope that this is something you can move on from and I wish you the best in doing that.

Judge JL Forrest

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 15/08/2022