

**ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES),
OCCUPATION(S) OR IDENTIFYING PARTICULARS OF
DECEASED/VICTIM(S)/CONNECTED PERSON(S) PURSUANT TO S 202
CRIMINAL PROCEDURE ACT 2011. REFER PARAGRAPH [23] AND SEE
<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html>**

**IN THE DISTRICT COURT
AT INVERCARGILL**

**I TE KŌTI-Ā-ROHE
KI WAIHŌPAI**

**CRI-2018-025-000356
[2022] NZDC 20656**

WORKSAFE NEW ZEALAND

v

**TRANSPORT SERVICES SOUTHLAND LIMITED
HERBERTS TRANSPORT LIMITED**

Hearing: 20 October 2022

Appearances: B Finn for the Prosecutor WorkSafe New Zealand
J W Cowan for the Defendants

Judgment: 20 October 2022

NOTES OF JUDGE N A WALSH ON SENTENCING

[1] McLellan Freight Limited (McLellan), Transport Services Southland Limited (TSSL) and Herberts Transport Limited (Herberts) were charged under ss 36(1)(a), 48(1) and 48(2)(c) of the Health and Safety at Work Act 2015 (the HWSA) following the death of an employee (who I shall refer to as “the deceased” throughout this sentencing) on 23 February 2017 at Bluff. McLellan was also charged under ss 34(1) and 34(2)(b).

[2] McLellan had a contract with ADM New Zealand Ltd (ADM) to load and unload palm kernel expeller (PKE) at a shed leased by ADM in South Port, Bluff (the shed). McLellan contracted TSSL and Herberts to provide trucks and drivers for this purpose.

[3] The deceased was an employee of TSSL. He died while standing at the back of his Kenworth truck after being struck by a “reversing” Hyundai loader driven by another worker. The post-mortem examination states that the deceased died at the scene of massive traumatic chest injuries.

[4] McLellan pleaded not guilty. The charges against McLellan are yet to make it to trial.

[5] Four years ago, on 3 October 2018, TSSL and Herberts pleaded guilty following amendment of the charging documents and summary of facts. They now appear for sentencing.

[6] The charge against TSSL reads:

Being a person conducting a business or enterprise (PCBU), failed to ensure so far as was reasonably practicable the health and safety of a worker who worked for the PCBU, namely [the deceased], while he was at work in the business or undertaking, namely driving a truck and loading and unloading PKE at ADM New Zealand Limited’s transitional facility, and that failure exposed the deceased to a risk of serious injury arising from working in close proximity to other trucks and mobile plant.

[7] Herberts is similarly charged:

Being a PCBU, failed to ensure so far as was reasonably practicable the health and safety of other persons, including [the deceased], who worked for Transport Services Southland Limited, was not put at risk from work carried out as part of the conduct of the business or undertaking, namely operations of the Hyundai loader owned and operated by HTL (Herberts) at ADM New Zealand Limited’s transitional facility.

[8] The victims – including the deceased’s wife, their eldest daughter aged 24 and their youngest daughter aged 15 – have been waiting for an outcome for more than five and a-half years now. They have repeatedly been given Court dates only to have

them postponed at the last minute. They feel as though they have been left in the dark and their needs have not been a priority.

[9] The three victim impact statements made for heartfelt and harrowing reading. The impact of the deceased's death on his family has been devastating and far-reaching. The impression I received from reading each of the family's victim impact statements was that this was a humble, hard-working, loving and close family of modest means who enjoyed each other's company. The wife of the deceased disclosed:

[The deceased] was my best friend. We had been married for 17 years but been together for 20 years. We met through a mutual truck-driving friend. [His] death was so sudden and it was difficult becoming a solo mother instantly. Everything was suddenly on my shoulders. I don't have a backboard any more. I don't have that someone to talk to and bounce things off ... There is a lot of uncertainty for the future. I am upset that we will miss out on experiencing our daughters getting married or starting families together. The thought of going into retirement alone is also daunting ...

[10] The deceased's wife disclosed that at Wayne Williams' initiative, she had a face-to-face, one-time meeting with the driver of the loader a few days after the deceased's death. In reference to that person's role, the deceased's wife observed:

I guess he's living through it one way and we're living through it in another. I wouldn't wish it upon my worst enemy.

[11] The conduct by Herberts and TSSL in the wake of this incident has been impressive. Whilst most of the tasks in contact with the deceased's family were carried out by Wayne Williams, the Director of TSSL, I accept that all the steps taken were a joint effort by TSSL and Herberts.

[12] TSSL has paid \$592,470.29 which includes ACC payments of \$522,198.00, and paid off the mortgage on the family home and the eldest daughter's student loan both of which \$65,458.63.

[13] Mr Williams, in his affidavit, stated:

50. I again want to express how sorry we all are about what happened on 24 February 2017. I fully acknowledge we should have done more to protect [the deceased] from harm.

51. *We deeply regret what happened to [the deceased], he was a good workmate and friend. The truck [he] drove still carries his late daughter's name.*

52. *TSSL and Herberts continue to work very hard on health and safety in our companies. We stand by our family values which are: be customer driven, walk the talk, work together, be respectful, and get home safe”.*

[14] Mr Peter Dynes, a director of Herberts, completed an affidavit in a similar vein to Mr Williams' affidavit. As I said earlier, I accept both defendant companies acted in concert.

[15] I commend TSSL and Herberts for their compassionate efforts in assisting the victims from the outset. As Mr Williams said, at para 14, "... they are just what we do."

[16] In her victim impact statement, the deceased's wife said :

... it was devastating [being] given court dates, getting all psyched up for them, and then at the last minute having them pushed out again. I have lost count how many times that has happened over the last five years. It's got to the point where I will not believe this is going to go ahead until I am sitting in the courtroom.

[17] Today, the family, TSSL and Herberts will hear the outcome of the Court's sentencing without any further delay or frustration. I did not see it as my role to enquire into the reasons for the delay. I infer there are multiple reasons, particularly when there are three defendants and one has maintained a not guilty plea but COVID-19 has also played its part. I find WorkSafe New Zealand made the correct judgment call in seeking that this sentencing proceed before the defended hearing involving McLellan.

[18] The Court has had volumes of written material to evaluate, resulting in the need to provide a principled and technical written decision. I thank Mr Finn and Mr Cowan for their comprehensive and high quality written submissions and references to the case law, all of which have been considered. I also heard further oral submissions this morning and took an adjournment to reflect on those matters before releasing this executive summary.

[19] Therefore, I will tell you the details of what the sentencing is and on or before 1 pm, Friday, 21 October 2022 (tomorrow) I will release my full sentencing remarks containing my reasons for reaching the various orders and sanctions. If I had to read it out to you now, it would take a considerable amount of time and I predict you would leave this court feeling totally confused and frustrated by the legal jargon.

Sentence

[20] The “combined packet of sanctions” against Herberts and TSSL is as follows:

- (a) **Emotional harm reparation** of \$130,000 (of which \$32,500 is to be paid by each of Herberts and TSSL within 28 days of the release of the written sentencing reasons and the balance is to be met by Herberts and TSSL if it has not been paid following the outcome of McLellan’s trial and/or sentencing.
- (b) **Consequential loss reparation** of \$120,128 (\$69,259 of which is considered paid by Herberts and TSSL. The balance is to be met by Herberts and TSSL if it has not been paid following the outcome of McLellan’s trial and/or sentencing).
- (c) **A fine** of \$212,000 (starting point of \$400,000 less discounts totalling 47 per cent for reparation and steps to assist the victims, remorse, and guilty pleas); and
- (d) **Costs** of \$1750.

[21] Herberts and TSSL confirm they have the means to pay reparation and a “reasonable fine.” However, a request has been made for a direction that the fine be paid in three equal instalments over a period of three months, due to “upcoming capital expenditure.” In the absence of other evidence, I am not satisfied that requiring payment of the fine in the ordinary way would be “disproportionately severe” (under s 8(h) Sentencing Act 2002). The request for payment to be made by instalment is declined.

Suppression

[22] WorkSafe, on behalf of the deceased's family, seeks non-publication orders in respect of the victims' names, including the deceased, his wife, and two daughters, pursuant to s 202 of the Criminal Procedure Act 2011. This is sought on the ground contained in s 202(2)(a) of the Act which relates to "undue hardship to the victims." Herberts and TSSL support the making of the orders. The Court of its own initiative makes a non-publication order for the driver of the Hyundai loader.

[23] I find there is no public interest in the names of the victims or the loader driver being published and they have already suffered profoundly. I find that the non-publication orders sought are entirely appropriate. The order is made accordingly.

[24] Finally, to the deceased's immediate family, life has been very unfair to you with the sudden death at work of your husband and father. Your father loved working in the trucking industry. I thank you for sharing with the Court the personal details of his role in your lives as a partner and father and the lifetime losses you have and will endure.

A handwritten signature in black ink, appearing to read 'N A Walsh', with a large, loopy initial 'W' and a long horizontal flourish extending to the right.

N A Walsh
District Court Judge