

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2015-004-000311
[2015] NZDC 7934**

WORKSAFE NEW ZEALAND
Prosecutor

v

HAO & LIU UNION LIMITED
Defendant

Hearing: 5 May 2015

Appearances: S Woodhead for the Prosecutor
N Fletcher for the Defendant

Judgment: 5 May 2015

NOTES OF JUDGE E M THOMAS ON SENTENCING

Introduction

[1] Mr Feng Yun Jason Zhang had been in New Zealand for only two weeks before he suffered a terrible accident. The tragedy of this, as so often in these sorts of cases, is that that accident was entirely preventable and that it should have been prevented. The consequences for Mr Zhang and his family have been extremely tragic. He is a young man with a very sad and uncertain future. He has suffered a brain injury which has affected his ability to see, his ability to speak, his ability to move, his ability to function and perform simple day-to-day tasks. His young wife has given up all hope of a normal and happy life, let alone her own income and her own dreams, to provide the necessary full-time care. His parents have sacrificed all hope of a proud and peaceful retirement as they firstly deal with and watch ongoing developments in this terrible tragedy.

[2] The defendant company has pleaded guilty to one charge of failing to take all practicable steps to ensure that Mr Zhang was safe as he worked. To the company's credit, it and its directors have accepted responsibility from the outset. They have recognised immediately their own failings. They have accepted without reservation their own culpability in this terrible tale.

Background

[3] Mr Zhang worked for the company as a contractor. They operate a gardening and landscaping business. They were engaged to fell two large trees at a motor camp. The arborist was working in the tree. Mr Zhang and others were responsible for clearing felled branches from the work site. Mr Zhang walked underneath the area of operations. The arborist was unaware that he was there. He continued with his work and a piece of the tree trunk fell onto Mr Zhang. He immediately lost consciousness. He was taken by ambulance to hospital and suffered the various injuries that I have described.

[4] He had not been properly trained. Had he been, this would not have occurred. He was not properly supervised. Had he been, this would not have occurred. He was not wearing high visibility clothing as required by industry standards. Had he been, this may not have occurred. He was not wearing a safety helmet. Had he been, he may not have suffered injuries to the extent that he did. There were no proper lines of communication between those managing the site, the arborist and Mr Zhang and the other workers on the ground. Had there been, this would not have occurred. There was no adequate supervision of Mr Zhang and others. Had there been, this would not have occurred.

Settling reparation

[5] The High Court in a case called *Department of Labour v Hanham & Philip Contractors Ltd and Ors* HC Christchurch CRI-2008-409-2, 18 December 2008 has set out the process that I must follow in, firstly, settling on a figure for reparation and, secondly, imposing an appropriate fine.

[6] The first step is to set reparation. That is difficult in the context of this case.

[7] Mr Zhang faces an entirely uncertain future. He is at present capable of very little. The prognosis for him is not good. There is a prospect of course that he may be fully rehabilitated. There is a prospect that he may never be. We do not know the relative likelihood of each of those possible outcomes. His family is of limited means. They cannot remain in New Zealand to look after him. They will need to return him to China to look after him. Their lives, as I have said, will now revolve around their ability to provide him with the necessary care that he needs.

[8] One positive outcome from the sentencing process is that there has been a very successful restorative justice process. During the course of that process the company offered reparation of \$80,000, which was gratefully accepted by Mr Zhang and his family. In the circumstances of this case I see no reason to depart from that figure.

Setting the fine

[9] The company's culpability is significant. The steps that it needed to take which would have protected Mr Zhang were easily identifiable. The risk of harm was obvious and significant. The failure to ensure helmets, high visibility clothing, training, supervision and communication were clear and obvious departures from industry standards. The measures that the company could have taken to ensure his safety were simple, inexpensive and immediately available. I agree with the assessment of the Crown, which is not challenged by the company, that its culpability falls at the upper end of the middle band of culpability identified by the High Court in *Hanham & Philp*. An appropriate starting point would be \$90,000.

[10] The company has immediately accepted responsibility. It has taken the remedial steps that it can. It has no previous history with the Department or with anybody else. It has otherwise a clean safety record. It has, as I have said, offered to make amends. All of that would reduce the appropriate fine by a third to \$60,000.

[11] It has pleaded guilty at an early opportunity and it is genuinely remorseful. Those warrant a further discount to \$40,000.

Combining reparation and a fine

[12] The final step is to assess the overall appropriateness of the combined reparation and fine. Presently, that stands at \$120,000.

[13] The defendant company is a small operation. It is of a very modest means. The evidence before me demonstrates a low level of gross turnover, very low profits and ultimately very small returns to its individual directors. Its total holdings are measured in the very modest tens of thousands. It is in a position to pay the reparation that it has offered but only through borrowing from the directors.

[14] The Court ultimately has to strike a balance between ensuring as much as possible can be paid but not crippling the company to an extent that it effectively has to cease trading or cease trading efficiently. If it found itself in that position the reality is there would be very little reparation available.

[15] Ultimately, I find that the final figure should be \$80,000. I order that it is all paid as reparation.



E M Thomas
District Court Judge