Managers face Criminal Convictions for Workplace Injury or Deaths



There is another court decision out of the well-known tragedy in Toronto involving five workers who fell from the thirteenth floor of a high-rise building on December 24, 2009. The men's duties on the date of the accident included pouring concrete on balconies they were using a swing stage to access. During a descent between floors, brackets failed and the swing stage collapsed. The one worker who was attached to a lifeline remained suspended mid-air and was pulled to safety, while the other five workers fell from the thirteenth floor. Four of the workers died and one sustained serious injuries. The employer, Metron Construction Incorporated ("Metron"), was fined $750,000 in 2013 upon pleading guilty to criminal negligence causing death (*R. v. Metron Construction Corp.,* 2013 ONCA 541).

In the most recent decision (*R. v. Vadim Kazenelson*, 2015 ONSC 3639), Kazenelson, a project manager with Metron was personally convicted of four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm for failing to take steps to prevent the six workers from using a motorized swing stage which had only two lifelines available.

In order to be convicted, the Crown had to prove beyond a reasonable doubt that Kazenelson (i) was criminally negligent; and (ii) that his criminal negligence caused the death or bodily harm. In particular, the Crown was required to prove the following pursuant to the *Criminal Code*:

1. That Kazenelson had the authority to direct how the workers did work or performed a task;
2. That he failed to take reasonable steps to prevent bodily harm to those workers;
3. That in doing so, he showed malicious or reckless disregard for their lives or safety; and
4. That the act or omission caused the death or bodily harm in question.

a. Authority

Kazenelson conceded that he had the authority to direct how the workers did their work and therefore he was under a legal duty as set out in the *Criminal Code* to take reasonable steps to prevent bodily harm to them.

b. Failure to Take Reasonable Steps to Prevent Bodily Harm

In assessing whether Kazenelson failed to take reasonable steps to prevent bodily harm, the court found the Ontario *Occupational Health and Safety Act* and its regulations, as well as the content of suspended access training courses to be of assistance in identifying what steps were reasonable to expect Kazenelson to take. The legislation required that a supervisor ensure that workers work in the manner and with the protective devices, measures and procedures as required by that legislation and specifically required that a supervisor advise workers of the existence of any potential or actual danger to their health or safety known to the supervisor and "take every precaution reasonable in the circumstances for the protection of a worker." In particular, regulations required employees using a suspended platform to wear a full body harness connected to a fall arrest system. Further, suspended access training emphasized the related danger and the necessity of using a fall arrest system at all times. It was clear from the legislation and the training that the presence and use of lifelines was a fundamental rule for swing stage safety.

Kazenelson joined the workers on the afternoon of the day in question using the swing stage, so it would have been obvious to him upon boarding it that there were only two lifelines available. In fact, he actually asked a subordinate about the absence of lifelines but did nothing further. The Court found that in doing nothing about the lack of lifelines and by permitting the workers to board the stage without them, he failed to take reasonable steps to prevent bodily harm to them and therefore breached his duty as imposed by the *Criminal Code*.

c. Malicious or Reckless Disregard for Lives or Safety

To prove malicious or reckless disregard for the workers' lives or safety, the Crown was required to prove a "marked and substantial departure from the conduct expected of a reasonable person in the circumstances" (para. 126). The requirement that there be fall arrest protection for each worker reflected the fact that suspended access equipment can fail. Kazenelson had taken suspended access training and even took a course that allowed him to train others. Allowing the workers to (1) use a swing stage with insufficient lifelines and (2) to access it with all of their tools despite having no information regarding the weight capacity of the stage, was characterized by the Court as a malicious and reckless disregard for the lives and safety of the workers and a marked and substantial departure of what would be expected of a reasonable supervisor.

d. Causation

The Crown was also required to prove both factual and legal causation. To determine factual causation, the court assessed whether Kazenelson's conduct was a "significant contributing cause" of the bodily injury and deaths. The court found that had Kazenelson taken steps to ensure that each of the workers were tied to a lifeline prior to boarding the swing stage, the deaths and injuries would not have occurred. Regarding legal causation, the court assessed whether Kazenelson "should be held responsible for the death or injury in the eyes of the law" (para. 135). It found that "a reasonable project manager would have contemplated the risk of equipment failure 'as part of the general risk' involved in failing to provide lifelines for workers on a swing stage suspended 100 feet or more above the ground" (para. 146), and that any negligence on the part of the workers by accepting the risk was directly related to Kazenelson's failure to do his duty. Overall, the court concluded that holding Kazenelson responsible would not equate to punishing a moral innocent.

The defense argued that the victims were contributorily negligent for boarding the

swing stage without protection and that without such negligence the injuries and deaths would not have occurred. The court refused to accept that argument stating, “a victim’s contributory negligence is no answer to a charge of crime” (para. 147), and further that such an argument was contrary to both s. 217.1 of the *Criminal Code* which places a duty on persons like Kazenelson to take reasonable steps to prevent bodily harm to workers, and occupational health and safety legislation which requires such persons “to take every precaution reasonable in the circumstances” (para. 148).

Kazenelson’s sentence is yet to be determined.

Lessons for Managers and Supervisory Staff

The *Criminal Code* is federal legislation and therefore it applies in all Canadian jurisdictions. Besides the employers themselves, individuals in positions of authority with their employer can be convicted criminally where their negligence in the course of their employment results in bodily injury or the death of workers in their charge. The sentence can range up to imprisonment for life where a death results, or up to ten years for bodily injuries. This is particularly relevant to project managers, lead hands, forepersons, and other supervisory staff in the construction industry and other industries with heightened risks to personal safety.

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