

Workplace Law Bulletin

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Criminal Law and Health and Safety in the Workplace For Businesses and Their People

By Cynthia Sefton

Anyone in Canada who has the authority to direct how another person does work or performs a task should read, and pay careful attention to, the sentencing reasons of the Ontario Superior Court in what has come to be known as the “swing stage case.” A person with such authority can include not only hands-on field personnel and supervisors, but also management personnel who have the power to make decisions regarding the work to be done and the financial and other resources available to do it.

On December 24, 2009, four men died and one was seriously injured while they were performing work at a high rise building. Six people, including the project manager, were on a “swing stage” platform which collapsed. There were only two lifelines on the platform and only one was in use.

Investigations were conducted by the Ontario Ministry of Labour and by the police. Both provincial health and safety and criminal charges were laid against the companies and individuals involved in the project, including the supplier of the non-compliant swing stage.

Just over six years after the tragedy, the project manager, Vadim Kazenelson, was sentenced to three and a half years in prison on each of four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm. The sentences are to be served concurrently.

Mr. Kazenelson was found guilty of these offences on June 26, 2015. His convictions are currently under appeal and he is out on bail pending that appeal.

The project manager was the only individual who was tried criminally and who faces a prison sentence under s.217.1 of the *Criminal Code*. This section imposes a legal duty on everyone who has the authority to direct how another person does work or performs a task, “ ... to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.” This section was introduced into the *Criminal Code* in 2004 as Bill C-45, a response to another tragedy at the Westray Mine, in which those believed to be responsible for the situation did not face criminal prosecution.

The section, and other amendments setting out when persons and companies can be held to be parties to a workplace offence of criminal negligence causing death or bodily injury, have been used somewhat sparingly over these past eleven years.

In the swing stage case, the project manager was retained under contract to the repair company, Metron Construction, which was owned and operated by Joel Swartz. Metron pleaded guilty to criminal charges against it. At trial, the company was fined \$200,000. This amount was increased to \$750,000 by the Ontario Court of Appeal, notwithstanding evidence of the company’s financial difficulties. Mr. Swartz pleaded guilty to provincial Occupational Health and Safety charges and the criminal charges against him were withdrawn.

The Court’s reasons for the sentencing of Mr. Kazenelson are detailed and clear. The Court noted that the project manager had taken training courses, had hired an individual who was versed in high rise work to be his site supervisor and that he was in fact a stickler for safety.

At his trial, workers testified that prior to December 24, if he had found anyone not wearing their safety equipment, he would have fired them. So what happened that Christmas Eve?

Metron had a bonus riding on completion of the work before the end of the year. Although the Court found no evidence that Mr. Kazenelson was aware of that specific fact, he did know that the owner wanted the job to be finished. The site supervisor and the owner had planned that this work would be done by five workers on Christmas Eve in order to finish up. Mr. Kazenelson was not part of that decision. When he raised the issue of insufficient lifelines before the work started, his site supervisor told him “not to worry about it.” Mr. Kazenelson made the decision to let the work go ahead and even to go up on the swing stage with the five other men.

The Court recognized that the project manager was of good character, hardworking, devoted to his family, involved in the community and that he was remorseful. However, the objective of a prison term is to “adequately denounce [his] conduct and to deter other persons with authority over workers in potentially dangerous workplaces from breaching the legal duty set forth in s. 217.1 of the *Code* to take reasonable steps to prevent bodily harm from befalling those workers.” Mr. Kazenelson knew the risk to the workers’ lives, “but decided that it was in Metron’s interest to take a chance. As a consequence of his decision to put Metron’s interests ahead of his duty to protect the safety of the workers under his authority, four men died and a fifth suffered grievous harm.” The Court found that this decision was “a seriously aggravating circumstance,” and not a momentary lapse.

The Future For Those of Good Character

There are differences between the standard of proof required of the Crown in a provincial offence prosecution and in a criminal prosecution. For a provincial offence, the Crown has to prove beyond a reasonable doubt that a breach occurred. The burden then shifts to the defendant to prove that it, he or she took all reasonable precautions to prevent the breach. Proof by the defendant is on a balance of probabilities. Nevertheless, while a due diligence type of defence can and does succeed in law, as a practical matter, a defendant’s conduct can be examined over days, weeks and months of what the defendant should, or should not, have done. In a criminal prosecution, the legal burden always remains on the Crown to prove the offence beyond a reasonable doubt, and a defendant has no burden of proof. Again as a practical matter, the Crown will likely put forward the same witnesses and evidence in both types of prosecutions. Note that for a provincial prosecution, there need not be an injury or worse, but only a breach. Though jail time is a possibility for provincial offences, the majority of convictions result in fines.

In today’s world, businesses and their people should expect that every serious workplace injury or death will be investigated not only by provincial authorities under health and safety legislation, but also by the police under the *Criminal Code*. Whether one believes that the sentence in this case was too harsh, too lenient or completely appropriate, there is no doubt that it creates a powerful impact. The implications for individuals and businesses where workplace injuries and deaths occur are also powerful. In its conclusion, the Court stated that apart from these offences, Mr. Kazenelson was “unquestionably a person of good character,” and that this is not an unusual feature of criminal negligence cases. Quoting a previous decision, the Court stated that the objectives of deterrence and denunciation, “are particularly relevant to offences that might be committed by ordinarily law-abiding people.”

Law-abiding individuals and businesses in Canada should pay particular attention to those paragraphs which provide another reminder, if such a reminder is necessary, of the importance of conducting realistic and practical risk assessments and implementing measures to control and reduce the risks, a part of everyday business and operating decisions. The basic framework in which to do so can be summarized in the following steps:

1. Identify and understand the workplace tasks that can create risk.
2. Identify real risks to workers (including contractor workers) and others associated with the tasks.
3. Identify and implement policy and procedural measures to address the risks.
4. Provide real training on those measures.
5. Monitor/QA the performance of the tasks and compliance with the measures.
6. Identify and correct factors leading to non-compliance, including progressive discipline.
7. Start over again.

Of course, setting out a framework is the easy part and the implementation may be more difficult. But the failure to do so in a meaningful and substantive way is not only a breach of the law, but can lead to human tragedy.

For a link to the sentencing decision, [click here](#).

If you have questions regarding any aspect of workplace law, please contact any member of the Aird & Berlis LLP Labour & Employment Group or Occupational Health & Safety Team:

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