

CONSTRUCTION PROJECT MANAGER GUILTY OF CRIMINAL NEGLIGENCE IN SCAFFOLDING COLLAPSE

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On June 26th 2015 the Ontario Superior Court, following a trial, convicted Metron's project manager, Vadim Kazenelson of numerous counts of criminal negligence causing death and bodily harm in relation to the collapse of a swing stage. (See 2015 ONSC 3639.) Four workers fell 14 stories to their death and one other was seriously injured. Metron Construction Inc. had already pleaded guilty and the Ontario Court of Appeal had, despite the threat of bankruptcy, increased the company's fine on appeal from \$200,000 to \$750,000 see 2013, 300 C.C.C.(3d)212.

The reasons for convicting the project manager are instructive in helping to delineate under what circumstances management may, with confidence, delegate supervisory responsibilities to a foreman or other underlings, when such delegation may engage the manager's criminal responsibility and the threshold of causation necessary to establish liability.

REGULATORY FRAMEWORK

Section 219(1) of the Criminal Code provides that "everyone is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons."

Subsection 141 of the *Construction Projects Regulation* O.Reg.213/91 under the *Occupational Health and Safety Act* R.S.O. 1990 c. O.1 requires that a worker who is on a suspended platform, or suspended scaffold wear a full body harness connected to a fall arrest system. The lifeline must be suspended independently from the platform or scaffold and securely attached to a fixed support so that the failure of the platform or scaffold will not cause the lifeline to fail.

DELEGATION OF RESPONSIBILITY

The evidence at trial established that with the hierarchy of authority and the division of responsibility it was not unreasonable for Mr. Kazenelson to entrust the duty of inspecting the integrity of the swing stage each morning to his foreman or to any other competent worker. Similarly, when he left the site in the morning, the project manager had no reason to believe that the foreman would ascend to the top of the building with 4-5 workers but only two lifelines. (see par.20)

As project manager however, Mr. Kazenelson was in a position of authority over his foreman who directly supervised the workers who boarded the swing stage. Kazenelson regularly and routinely exercised authority in the workplace and his presence at the job site after leaving the site earlier in the day and in particular, his presence on the balconies while the work was ongoing, was an exercise of that authority.

ASSUMPTION OF CRIMINAL RESPONSIBILITY

The judge found that Kazenelson, when he returned to the site in the afternoon and boarded the swing stage, had adverted to the risk relating to absence of sufficient fall protection for the number of workers who were anticipated to use the swing stage to descend from the building. (See pars. 107(vi) and 113.) As project manager, Kazenelson had specifically asked the foreman where were the lifelines when he returned in the afternoon. Following the foreman's response "not to worry", he failed to take any action. That failure, given the project manager's advertence to the risk and his overall authority, constituted a clear breach of his duty to prevent bodily harm to the workers.

[22] "He not only did nothing, he permitted all six workers to board the stage together with their tools, and he did so in circumstances where he had no information with respect to the capacity of the stage to safely bear the weight to which it was being subjected. Mr. Kazenelson's failure to take any steps to prevent the workers from



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using the swing stage in those circumstances constituted a clear breach of his duty under s. 217.1. I am satisfied beyond a reasonable doubt that in failing to act, he showed wanton and reckless disregard for the lives and safety of the workers and thus that his omissions constituted criminal negligence."

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CAUSATION

The defence unsuccessfully attempted to suggest that the cause of the tragedy was the unforeseeable collapse of the swing stage, an intervening event beyond the defendant's control. Judge MacDonell rejected this argument, reasoning that the defendant had caused the death and bodily harm of the workers on the swing stage, despite having no responsibility and knowledge for the condition of the stage.

The Crown did not have to prove that Kazenelson's conduct was the direct or predominant cause of the death or bodily harm (at par.134) The Crown did however need to show that the causal connection of the defendant to the harm was morally blameworthy. (par. 135) There were two parts to this proof. First, any intervening act would have to be reasonably foreseeable. The test in the case of criminal negligence was similar to the test of foreseeability in strict liability offences as outlined in *R.v Rio Algom Ltd.* (1988) 3 C.E.L.R. (N.S.) 171 (Ont.C.A.) i.e. the defendant doesn't have to objectively foresee the exact future consequences of his actions just that his actions will generally cause harm. Second, the intervening act must not have overtaken the defendant's conduct.

"If the intervening act is a direct response or is directly linked to the [accused's] actions and does not by its nature overwhelm the original actions, then the [accused] cannot be said to be morally innocent of the [resulting harm]".(par. 57)

Had Kazenelson taken steps to ensure that each of the workers was tied off to a lifeline before boarding the swing stage, none of them would have fallen to the ground when the stage collapsed. With fall arrest equipment none of the workers would have died or been injured. The collapse of the stage, while unforeseeable to the defendant and also a 'but for' cause of the harms, was not determinative of the defendant's liability because the Crown only needed to prove that the defendant's failure to address the fall protection deficiencies was a significant contributing cause, not the only cause, nor even the direct or predominant cause. (at par.141) The fact that the defendant could not foresee the precise events which led to the harms suffered did not qualify as an independent intervening act which overtook the defendant's failure to follow up with the deficiencies in the fall protection equipment. The risk of the swing stage collapsing may not have been foreseeable, however the risk of something happening which would require fall protection for workers suspended 100 feet above the ground was objectively foreseeable as evidenced by section 141 of the *Construction Project Regulations*.

IMPORTANCE OF THE DECISION

There's a delicate balance between carrying out a business's due diligence under regulatory law and not exposing management to criminal responsibility. In *R.v Bata Industries Ltd.* (1992) 7 C.E.L.R. (N.S.) 245 (O.C.J.), the gold standard was set for directors and officer's regulatory liability in Ontario. Judge Ormston's reasons for judgment in that case presuppose that corporate structures allow regular reporting of legal compliance all the way up the line through to the corporate officers and ultimately to the board of directors. Similarly, the case mandates that the board must, after receiving its reports, instruct its officers and have them pass the necessary information and direction all the way down the line. Such a system of reporting and direction cannot be achieved unless those supervising are cognizant of what their underlings are doing. Had Kazenelson been properly monitoring compliance, he would have eventually known that his foreman was not inspecting the swing stage each morning and this would have exposed him to further criminal liability had he not immediately reacted to it. On the other hand, had Kazenelson not boarded the swing stage in the afternoon and realized there was insufficient lifelines, he would not have adverted to the serious safety risk present and may have escaped criminal responsibility. But this is precisely the point. When a system is in place whereby those supervising are in a position to catch deficiencies such as weak platforms and insufficient fall protection, safety issues are less likely to arise. The message must be that reasonable delegation does not mean abdication of oversight.