Project Manager Convicted of Criminal Charges in Christmas Eve Swing Stage Collapse

By: Ryan Conlin and Frank Portman

The tragic Christmas Eve 2009 swing stage collapse which led to the deaths of four workers and the serious injury of another at a west Toronto construction site continues to have legal repercussions and break new ground in health and safety law (see our earlier update on the prosecution of the corporate employer here.) The Superior Court of Justice has just released one of the most significant decisions ever decided under the **Criminal Code** in the context of OH&S.

In **R v Kazenelson**, the accused was the project manager for the employer at the accident site. Six employees boarded a swing-stage at the 12th story of the construction site. When the accused stepped onto the swing stage, it collapsed. Only one worker was using a safety lifeline. One other such lifeline had been lowered but was not in use. Five employees fell to the ground below, four of whom died with the fifth suffering catastrophic injuries. The accused managed to pull himself onto a nearby balcony to safety.

Bill C-45

The amendment of the **Criminal Code** by Bill C-45 in 2003 clarified that any person who can direct work has an obligation to take reasonable steps to prevent bodily harm to others. Failure to do so can amount to criminal negligence, and if that criminal negligence causes death or bodily harm, is a criminal offence.

Simply showing a breach of the **Occupational Health and Safety Act** (the "OHSA") is not enough to sustain a charge of criminal negligence. In order to prove the offence, the Crown must show:

1. The conduct of the accused represented a "marked and substantial" departure from what could be expected of a reasonably prudent person in the circumstances; and
2. That the conduct resulted in death or bodily harm to an individual.

R v Kazenelson

The accused's role was to oversee the working foreman, who was responsible for the daily inspection of the swing stage. The working foreman was among the workers who were fatally injured.

The Court found that the **Criminal Code** confirmed the duty the accused had towards the workers as their manager. The Crown alleged that the accused was aware that only two fall arrest lines had been lowered to the workers, despite there being at least six, and ultimately seven, workers on the swing stage (including the accused himself). Only one of those lines was used.

The Crown further alleged that the accused failed to take steps to assess the capacity of the swing stage (no such information was provided by the company which provided it) and failed to ensure the swing stage was properly inspected.

The accused argued that he should not be held liable for criminal negligence on the basis that two "independent intervening acts" actually caused the deaths of the workers. The accused pointed to the fact that the company was sent a defective swing stage, and thus it was not foreseeable to the accused that it would collapse. Secondly, the accused argued that the workers who fell were trained in the proper use of fall protection and made their own choice to get on the swing stage with only two lifelines.

The Court categorically rejected the arguments of the accused. It found that the duty of the accused, given his position, required him to take proactive measures once he identified the hazard, which the accused failed to do. He could not rely on the training of the workers to defend himself from failing to take what the Court found were the most basic steps to prevent the accident.

The Court also found that the fact that the primary cause of the accident may have been the collapse of the swing stage was not relevant to whether the accused's negligence caused the deaths of the workers.

The Court found that **but for** the accused's negligence in not preventing the workers from working without using proper fall arrest protection, the injuries and deaths would not have occurred. The Court found that the accused was well aware that there were only two lifelines on the swing stage, and yet he failed to take any steps to prevent the workers from using it. The Court found that the absence of any evidence of direction of pressure from the accused to the workers to use the swing stage does not prevent a finding of criminal negligence.

As a result, the accused's criminal negligence was causally linked to the deaths and injuries of the workers, completing the elements of the offence. The accused was found guilty on four counts of criminal negligence causing death, and one count of criminal negligence causing bodily harm. The accused has a right to appeal the conviction, although it appears unlikely that there is a basis to do so.

The conviction marks the first time an Ontario court has found an individual guilty under the provisions of Bill C-45.

The accused's sentence has not yet been pronounced. The maximum sentence for a conviction of criminal negligence causing death is life imprisonment. It is our view that a significant term of incarceration is very likely in this case.

This conviction follows several years of increasingly aggressive prosecutions of health and safety violations, including jail time (see our update on such penalties here) as well as prosecutions under the **Criminal Code**.

Implications

Although Crown prosecutors have shown more willingness to lay heavier charges and request stiffer sentences with respect to workplace accidents, the requirements of health and safety legislation have not been changed by these recent prosecutions. The Court confirmed that a violation of the OHSA or regulations does not in and of itself mean that the accused is guilty of criminal negligence.

However, it is clear from the case that the Crown will be able to establish criminal negligence where a worker is committing an obvious health and safety violation and the employer or supervisor takes no steps to prevent it.

Practically speaking, this means that a number of fact situations which have ordinarily been prosecuted under the OHSA could very well be treated as criminal negligence by prosecutors and the Courts. For example, take the situation where workers routinely back up vehicles without a signaller in contravention of both company rules and the OHSA. No employee has ever been disciplined for contravening the signaling rules and supervisors have witnessed frequent contraventions. If an accident where to occur, criminal prosecution of the company and supervisors is a very real possibility.

Further, take the example of a roofing project where workers and a supervisor are wearing fall protection, but are not tied off. The evidence shows that workers frequently failed to tie off in the presence of supervisors. If an accident where to occur, it seems clear that a conviction for criminal negligence would be difficult to avoid for both the company and the supervisor. This case makes it clear that allowing workers to violate basic safety rules will establish criminal negligence.

It remains to be seen whether prosecutions for criminal negligence will become more common. However, this decision makes it clear that blatant disregard for OH&S obligations will result in a criminal conviction.

We will provide a further update once the Court imposes a sentence in this matter.

This Update was first published on First Reference Talks.

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