CITATION: R. v. VADIM KAZENELSON, 2015 ONSC 3639
COURT FILE NO.: 13-0000083
DATE: 20150626

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	
	)	Rochelle Direnfeld and Elizabeth Moore for the Crown
– and –	)	
	)	
VADIM KAZENELSON	)	
	)	Louis P. Strezos, Shannon O'Connor and Kate Woodcroft for Vadim Kazenelson
	)	
	)	
	)	

MacDonnell, J.

[1] On January 5, 2015 Vadim Kazenelson appeared before this court and was arraigned on an indictment charging him with four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm. All five charges arise from a single incident, which occurred on December 24, 2009. Mr. Kazenelson pleaded not guilty to all counts. On April 10, 2015, the final submissions of counsel were heard. Mr. Kazenelson is before the court today for judgment.

A. Overview of the Decision

[2] Throughout the fall of 2009, Metron Construction Incorporated ("Metron") was engaged in repairing the concrete balconies of the two eighteen-story apartment buildings at 2737 and 2757 Kipling Avenue in Toronto. The work involved chipping away loose or deteriorated concrete, installing wooden forms, and pouring fresh concrete to restore the balconies to their original state. Metron's workers gained access to the balconies by means of motorized 'swing stages' suspended from the roofs of the buildings.

[3] As Christmas approached, the project was behind schedule. The work had been completed at 2737 Kipling but much was left to be done at 2757. Metron had a $50,000 bonus riding on its ability to complete the work by the end of the year.

[4] On the morning of December 24, 2009, Dilshod Marupov, Aleskey Blumberg, Vladimir Korostin and Shohruh Tojiddinov boarded a swing stage at ground level at 2757 Kipling with their foreman, Fayzullo Fazilov. A sixth worker, Aleksandrs Bondarevs, either accompanied them on the stage or joined them later. The stage was a modular model, made up of four ten-foot

platforms bracketed together. It was long enough to permit the workers to work on two balconies at a time, and on December 24th it was suspended over the balconies for the apartments numbered 05 and 06 on each floor. For that reason, the location where it was set up was referred to as 'drop 5/6'.

[5] As of December 24th, the chipping and form work had been completed for all of the balconies in drop 5/6. The task of the workers who boarded the swing stage that morning was to begin pouring concrete on the 18th floor and to work their way down the building. As they finished pouring on each floor, they boarded the stage and lowered themselves to the floor below. By the end of the day, at about 4:30 p.m., they had completed pouring on the balconies on the 13th floor.

[6] As a matter of law (and of industry practice) every person working on a swing stage must be protected from the danger of a fall. To comply with that obligation at the Kipling site, Metron employed a 'fall arrest system'. A fall arrest system is comprised of a full body harness with a lanyard that attaches to a vertical lifeline that is anchored to an independent fixed support on the roof of the building. Only one worker at a time may use a lifeline. Put another way, every person working on a swing stage must be attached to a separate lifeline.

[7] Notwithstanding those requirements, at no point on December 24 were there more than two life lines in place for the 5 or 6 workers who were using the swing stage in drop 5/6.

[8] After they finished pouring concrete in the balconies on the 13th floor, the workers loaded their tools onto the swing stage and climbed aboard for the descent to ground level. When Shohruh Tojiddinov boarded, he attached his lanyard to one of the two lifelines. That left one lifeline for all of the remaining workers. None of them attached themselves to it. The motors for the stage were engaged and the stage began to descend. Within a matter of seconds, the brackets connecting the two centre platforms failed, causing the platforms to separate and the stage to collapse and sending Fazilov, Blumberg, Korostin, Bondarevs and Marupov hurtling toward the ground, 100 feet below. Miraculously, Mr. Marupov survived the fall, but the other four men were killed. Mr. Tojiddinov, the only worker tied off to a lifeline, was left suspended in midair until he was pulled to safety onto a balcony.

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[9] The president and sole shareholder of Metron was Joel Swartz. In the summer of 2009 he retained the defendant, Vadim Kazenelson, to be the 'project manager' for the Kipling restoration project. Mr. Kazenelson in turn hired Fayzullo Fazilov as the on-site supervisor or foreman. The hierarchy of authority, as Swartz envisioned it, was "the project manager reports to me, the site supervisor reports to the project manager, and all the workers report to the site supervisor…" It is not disputed that Mr. Kazenelson was someone with "the authority to direct how another person does work", and thus that he was under a legal duty pursuant to s. 217.1 of the *Criminal Code* "to take reasonable steps to prevent bodily harm to that person…arising from that work…" The allegation of the Crown is that Mr. Kazenelson breached that duty in multiple respects, both in the days, weeks and months leading up to December 24, 2009 and in the course of the events of that tragic day.

[10] With respect to what happened before December 24, the Crown alleges that Mr. Kazenelson's conduct revealed "a general pattern of poor practices…in relation to health and safety". The Crown submits that Mr. Kazenelson's "substandard" management of the project was "reflected in a lack of record-keeping and a lack of clear practices, policies, supervision and enforcement",[1] that he failed to ensure that Mr. Fazilov and the other workers were adequately trained and supervised, and that he took no steps to ensure that the equipment the workers used, and in particular the swing stage that collapsed on December 24, was properly inspected. While Mr. Kazenelson's conduct prior to December 24 may not have played a direct role in the swing stage collapse, the Crown submits, it forms "an important part of the context in which to analyze whether or not [his] conduct on December 24 amounts to criminal negligence".[2]

[11] It is not disputed that Mr. Kazenelson was at the job site for a brief period of time at the beginning of the day on December 24. The Crown alleges that Mr. Kazenelson knew that more workers than usual would be working in drop 5/6 and that the only way to access the balconies would be by way of the swing stage. Accordingly, the Crown submits, the situation demanded that before leaving the job site Mr. Kazenelson take steps to confirm that the stage could hold the weight of the workers who would be using it, that it was in a safe condition, and that there were a sufficient number of lifelines. The Crown alleges that Mr. Kazenelson failed to take any of those steps.

[12] The Crown further alleges that when Mr. Kazenelson returned in the afternoon he had the swing stage bring him up to the balconies where the workers were pouring concrete. At that point, the Crown submits, Mr. Kazenelson could not have failed to notice that there were only two lifelines for the six workers who would need to use the stage to return safely to the ground. As a person charged with a duty under s. 217.1 of the *Criminal Code* to take reasonable steps to protect the safety of the workers, the Crown submits, Mr. Kazenelson was obligated to take immediate action, either by having additional lifelines dropped from the roof or by preventing more than two workers at a time from getting onto the swing stage. Instead, he did nothing and not only permitted all six workers to board the stage but got on himself.

[13] The Crown alleges that Mr. Kazenelson could not have known what the capacity of the swing stage was because it had arrived at the job site without that information. Further, he took no steps to ensure that the stage was properly inspected before its use on December 24. Accordingly, the Crown submits, his failure to prevent the workers from boarding the stage without lifelines was not only a breach of duty, it was a marked and substantial breach and demonstrated wanton and reckless disregard for the lives and safety of the workers. Accordingly, the Crown submits, it constituted criminal negligence.

[14] Finally, the Crown submits, Mr. Kazenelson's failure to take reasonable steps to prevent harm to the workers was a significant contributing cause of the deaths and serious injuries that resulted when the stage collapsed and thus he should be found guilty as charged on each of the counts before the court.

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[1] Crown's written submissions, paragraph 210
[2] *Ibid*, paragraph 211

[15] On behalf of Mr. Kazenelson, the defence stresses that these proceedings are not an inquest or a public inquiry. This is, rather, a criminal trial concerning allegations of criminally negligent conduct that is specified to have occurred on December 24, 2009. While not conceding that Mr. Kazenelson's general performance as a project manager was substandard from an occupational health and safety perspective, the defence submits that the quality of his general performance is of no assistance in determining whether anything that he did or failed to do on December 24 amounted to criminal negligence.

[16] The defence concedes that at the end of the day on December 24, Mr. Kazenelson was with the workers as they boarded the swing stage. However, the position of the defence is that the workers boarded from the 12th floor balconies, not the 13th. The defence submits that Mr. Kazenelson was never on the swing stage in drop 5/6 at any point on December 24. Apartment 1205 was an empty apartment that the workers were using to get water to mix the concrete, and the defence submits that at the end of the day Mr. Kazenelson came up to that apartment by way of the elevator and went out onto the balcony just as the workers were preparing to descend to the ground. At that point, he noticed for the first time that there were only two lifelines. He asked his foreman, Mr. Fazilov, where the lifelines were and Fazilov told him not to worry. In that regard, the defence submits that "Mr. Kazenelson did just as the Crown submits he should have done: when he was made aware that there were more than 2 workers working on drop 5/6, he took immediate steps to begin to rectify the situation by inquiring about lifelines."[3]

[17] The defence submits that nothing that Mr. Kazenelson did or failed to do on December 24 constituted a breach of his duty to take reasonable steps to prevent harm to the workers. In any event, if there were any such breaches they did not amount to wanton or reckless disregard for the lives and safety of the workers.

[18] Further, the defence submits, there were two 'independent intervening acts', either of which was sufficient to sever the connection between any breaches of duty on the part of Mr. Kazenelson and the deaths and injuries suffered by the workers. First, the design of the swing stage was so defective that from the time it left the factory it was "a ticking time bomb". The defence submits that it could not reasonably have been foreseen that after less than two months of use it was ready to collapse under its own weight. Second, the five workers who fell were trained and experienced and *they* made the decision to get onto the stage notwithstanding the absence of lifelines, without any direction or pressure from Mr. Kazenelson. Accordingly, the defence submits, Mr. Kazenelson should be acquitted on all counts.

[19] In my opinion, Mr. Kazenelson's performance as project manager prior to December 24, 2009, even if substandard, had nothing to do with why six of his workers found themselves on a swing stage 100 feet in the air without the basic fall protection required by both law and industry practice. The evidence concerning Mr. Kazenelson's general performance as project manager over the course of the Kipling project is of no assistance in determining whether his failure to prevent the workers from boarding the stage was a breach of the duty imposed on him by s. 217.1 of the *Criminal Code*, or whether any such breach showed a wanton or reckless disregard

[3] Defence written submissions, at paragraph 200

for the lives or safety of the workers. The extensive evidence adduced by the Crown concerning the training the workers received, the records that were kept, the meetings that were held and the general level of safety compliance on the job site is largely irrelevant to the central issues on this trial.

[20] Further, accepting that a proper inspection of the swing stage at the beginning of the workday on December 24 would have revealed that it was unsafe, I am not satisfied that the failure to conduct such an inspection has been brought home to Mr. Kazenelson. On the evidence in this case with respect to the hierarchy of authority and the division of responsibility on the Kipling project, it was not Mr. Kazenelson's duty to personally inspect the swing stages every morning. It was not unreasonable to entrust that duty to Mr. Fazilov or to any other competent workers. I am also not satisfied that there was reason for Mr. Kazenelson to believe, before he left the site in the morning, that Fazilov was going to ascend to the top of the building with four or five other workers but only two lifelines.

[21] However, I am satisfied beyond a reasonable doubt that upon his return in the afternoon Mr. Kazenelson became aware, well in advance of the collapse of the stage, that that there were only two lifelines available for the six workers who were working their way down from the top of the building. Mr. Kazenelson was aware of that because when he returned he joined the workers as they continued to pour concrete, and when he joined them they were either on or above the 13th floor. He could only have joined them at that level by taking the swing stage from the ground or from the 12th floor, and in either case it would have been obvious to him when he boarded the stage that there were only two lifelines. Indeed, the defence urged me to accept the evidence that when Mr. Kazenelson joined the workers he asked Mr. Fazilov *why* there were only two lifelines. I reject the submission that Mr. Kazenelson discharged his duty under s. 217.1 by *asking* Fazilov about the absence of lifelines. Mr. Kazenelson not only was in a position of authority over the workers who took direction from Mr. Fazilov, he was in a position of authority over Mr. Fazilov, and his presence on the balconies that afternoon was an exercise of that authority.

[22] Once Mr. Kazenelson became aware that fall protection was only available for a maximum of two persons, he was under a duty to take steps to rectify the situation. 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 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.

[23] Criminally negligent conduct is not *per se* a crime. It becomes criminal only where it causes death or bodily harm. I am satisfied beyond a reasonable doubt that Mr. Kazenelson's failure to take steps to ensure that each of the workers who boarded the stage at the end of the day had a lifeline was a significant contributing cause of the harm that resulted. I reject the submission that the fact that the stage would have collapsed in any event was a circumstance that severed the chain of causation. I also reject the submission that because the workers who boarded

the stage were aware of the need for fall protection and were not directed or pressured by Mr. Kazenelson the causal chain was severed.

[24] Accordingly, I conclude that the Crown has proved beyond a reasonable doubt that Mr. Kazenelson's criminal negligence caused the deaths and bodily harm charged in the five counts in the indictment.

B. The Evidence

(i) The events leading up to December 24

[25] Although the allegations of criminal negligence against Mr. Kazenelson concern the events of December 24, 2009, the Crown led extensive evidence in relation to the entire history of the restoration project and the manner in which Mr. Kazenelson performed his role as the project manager. To the extent that this evidence sheds light on the nature of Mr. Kazenelson's authority over the workers and on the manner in which he exercised that authority, it is relevant to a determination of whether he was a person with a legal duty to take reasonable steps to prevent bodily harm to the workers and to a consideration of what steps it would have been reasonable for him to take to fulfill that duty.

[26] The Crown led much of that evidence, however, for a second purpose, namely to show "a general pattern of poor practices" on the part of Mr. Kazenelson "in relation to health and safety". The Crown concedes that most of those practices did not play a direct role in the chain of events that led to the deaths and injuries that occurred on December 24, 2009. The Crown submits, however, that they form "an important part of the context in which to analyze whether or not [his] conduct on December 24 amounts to criminal negligence".[4]

[27] In what follows, I will summarize some of the evidence that pertains to the first of those purposes but I do not intend to review the bulk of the evidence that goes only to the second. In my view, most of the latter evidence is irrelevant to a determination of whether anything that Mr. Kazenelson did or failed to do on December 24 amounted to criminal negligence. The Crown's submission that it is relevant as "context" is in reality an argument that Mr. Kazenelson was the kind of project manager who was likely to breach his duty to protect his workers. In other words, it amounts to little more than evidence of bad character.

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[28] In the spring and early summer of 2009, Joel Swartz was in the midst of preparing a bid for the Kipling restoration project on behalf of his company, Metron Construction. In the course of those preparations, he was introduced to Mr. Kazenelson by a mutual acquaintance. Mr. Kazenelson had his own construction company but he had no experience in relation to concrete restoration on high-rise buildings and he had never worked with suspended access equipment such as swing stages. After a number of discussions, it was agreed that Mr. Kazenelson would be the project manager for the Kipling job.

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[4] fn. 1 and 2, *supra*

[29] Mr. Kazenelson was not to receive a regular pay cheque for performing that role. The agreement, rather, was that at the end of the project he would get 25 to 30 per cent of the net profits. Mr. Swartz and Mr. Kazenelson did not discuss the precise number of hours that Mr. Kazenelson was expected to be at the Kipling site. Mr. Swartz was aware that Mr. Kazenelson had other projects and he had no objection to Mr. Kazenelson pursuing them provided that the Kipling project was his priority. In Mr. Swartz's view, a project manager works the hours that are needed to fulfill the role – one hour or less on some days, much more on others – 'whatever is needed to finish the project'. However, he expected Mr. Kazenelson to at least to touch base with the site supervisor every day.

[30] Swartz and Kazenelson had an understanding about the responsibilities of the site supervisor. As described by Mr. Swartz, "the project manager reports to me, the site supervisor reports to the project manager, and all the workers report to the site supervisor". It was to be Mr. Kazenelson's responsibility to ensure that the site supervisor was properly trained and to monitor his performance but it was the site supervisor who was to be first and foremost responsible for safety on the job. In Swartz's view, for example, the site supervisor was to be the one to ensure that the workers were wearing all of the safety equipment and complying with all of the safety rules.

[31] Mr. Kazenelson hired Fayzullo Fazilov to be the site supervisor. Mr. Swartz did not meet Fazilov before Mr. Kazenelson hired him, although he discussed the hire with Mr. Kazenelson. Mr. Kazenelson told him that Fazilov had been doing balcony restoration work for 1½ to two years, both as a worker and as a supervisor

[32] Mr. Kazenelson assisted Swartz in the estimation of the number of workers and swing stages that would be required and in developing a schedule for the completion of the work. Because many of those who do this kind of work are of Russian background, Mr. Kazenelson looked for workers by placing ads in Russian-language newspapers. He was also involved in ordering the swing stages to be used on the project. The first stages were ordered in September. Mr. Kazenelson was the contact person for the delivery of those stages. Mr. Swartz directed him to either supervise the installation or to designate a qualified person to do it.

[33] The initial plan was that the project would begin in September and be finished by the beginning of December. For a number of reasons, the start of the work was delayed. Near the end of October, Mr. Swartz contacted an Ottawa supplier, Swing N'Scaff, and ordered two more stages, 40-foot modular models. Mr. Kazenelson spoke to the director of Swing N'Scaff, Patrick Deschamps, told him that he would be doing the installation, and gave him the details of what was needed. The stages arrived on October 27, 2009. One of them, the one that ultimately collapsed on December 24, was assembled and installed in drop 5/6.

[34] The stages that were delivered on October 27 were designed and manufactured by Swing N'Scaff. Mr. Deschamps had been of the view that most of the commercially available stages were ill-suited for heavy work. He decided to take the basic design of one of the better models on the market and improve it. The modular stages shipped to the Kipling site were products of that process. Swing N'Scaff did not have the load capacity of their stages tested by a professional engineer and they did not affix capacity labels to them. Technical sheets were delivered to the

customer along with the stages, but the sheets were for the stages upon which Mr. Deschamps' 'improved' design was based, not for the stages that were actually being sent.

[35] Mr. Swartz instructed Mr. Kazenelson that he was to inspect the stages once they were installed. After that, the daily inspections were to be the responsibility of the site supervisor and the workers. Swartz testified: "The way we set the project up was the workers worked in teams of a minimum of two, and those workers inspected their own swing stages in the morning, and Fazilov went up on the roof in the morning and checked the roof anchors every day".

[36] The evidence is contradictory with respect to whether Mr. Kazenelson was present when the stage in drop 5/6 was assembled but it is clear that he checked it after it was installed. Mr. Swartz testified that Mr. Kazenelson called and advised him that he did not like the way it had been assembled, and that he had reassembled it. Mr. Kazenelson's re-assembly is reflected in a note that he made on a weekly inspection sheet completed on November 9, 2009.

[37] On November 10, Metron ordered two more stages from Swing N' Scaff, and once again Mr. Kazenelson was the person who communicated the details of what was required to Mr. Deschamps.

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[38] At the end of August, prior to the commencement of the work, Mr. Swartz sent Mr. Kazenelson for the three-day training course offered by the Construction Safety Association of Ontario (CSAO) in relation to suspended access equipment. The CSAO was an agency funded by the insurance premiums paid to the Workplace Safety and Insurance Board by employers in the construction industry. Following successful completion of the three-day course, Mr. Kazenelson also took the one-day instructor's course. Mr. Swartz wanted Mr. Kazenelson to take the latter course so that he could provide swing stage training to any worker who did not have it.

[39] Andre Robichaud was the consultant who taught the three-day course. He explained that the intent of the course was to drive home to the participants that the major cause of fatalities on construction projects is falls, that the danger of a fall is constantly present when working on suspended access equipment, that every worker on such equipment must be protected by a fall arrest system at all times, and that suspended access equipment must be regularly inspected to ensure that it is in a safe condition. The fundamental importance of a fall arrest system was reinforced during the 'hands-on' portion of the course – if any participant were to step onto a swing stage without first 'tying-off' to a lifeline, the participant would automatically fail the course, even if the stage were resting on the ground.

[40] Mr. Robichaud testified that one of the basic questions that the course aimed to teach the participants to ask before using suspended access equipment was 'will it be strong enough?' If a swing stage is overloaded, either the support system or the platform of the stage itself could fail, resulting in a catastrophe. In that regard, the importance of swing stages having capacity labels was stressed. Indeed, the participants were told that if a stage did not have such a label it should not be used.

[41] As I have said, one of the tasks assigned to Mr. Kazenelson by Mr. Swartz was to provide swing stage training to any workers who did not have it. While the adequacy of the training that Mr. Kazenelson provided was very much in issue in this trial, the evidence is that he did make an effort to determine whether workers had been previously trained,[5] and that he did provide training to some of those who had not.[6]

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[42] The hierarchy of authority contemplated by Mr. Swartz was that the workers would take direction from Mr. Fazilov, who would take direction from Mr. Kazenelson, who would answer to Mr. Swartz. The testimony of the workers makes it clear that that was how authority was exercised in practice. Virtually every worker testified that the day-to-day direction that they received came from Mr. Fazilov, who was constantly at the job site, working along with them. Mr. Kazenelson was there regularly but not constantly, not necessarily every day and not necessarily all day. Generally speaking, when he was at the job site Mr. Kazenelson spoke to Fazilov rather than to the workers. It appeared to many of those who observed the interactions between Mr. Kazenelson and Mr. Fazilov – *e.g.*, Kamal Berrada, Anton Cealii, Shohruh Tojiddinov, Sergey Vlasenko and Bakhodir Kamilov – that Mr. Kazenelson was giving Fazilov instructions with respect to the work to be done.

[43] The evidence of Sohail Naseer also sheds light on Mr. Kazenelson's authority over the work at the Kipling site. Mr. Naseer was a Construction Health and Safety Inspector employed by the Ministry of Labour. His responsibilities included ensuring that the rules and regulations in relation to safety on construction sites were obeyed. His first visit to the Kipling site was on October 20, 2009. The Notice of Project that was posted at the site identified Mr. Kazenelson as the "Supervisor in charge of Project". Mr. Naseer noticed that a swing stage was being improperly used, giving rise to a safety concern. He spoke to the workers and someone called Mr. Kazenelson, who arrived 15 or 20 minutes later. Mr. Kazenelson remained throughout Mr. Naseer's two-hour visit. Naseer identified a number of things that had to be rectified, discussed them with Mr. Kazenelson, and issued a Stop Work Order. Mr. Kazenelson signed Naseer's Field Report as "Supervisor".

[44] The following day, October 21, Mr. Naseer received a call from Mr. Kazenelson indicating that the work that had been ordered the day before had been completed. Naseer returned to the site and met again with Mr. Kazenelson. Not all of the issues had been resolved, but Mr. Kazenelson asked Naseer to wait while the work was being completed. Naseer waited for about three hours. Eventually, he completed another Field Report, had Mr. Kazenelson sign it and left with the Stop Work Order still in place. The next morning, Mr. Naseer received a voice mail from Mr. Kazenelson telling him that the work had now been done. Naseer attended at the site at 10:30 a.m. Fazilov was there when Naseer arrived, and Mr. Kazenelson arrived later. Naseer was satisfied that the required work had been done and he lifted the Stop Work Order. Once again, Kazenelson signed the Field Report.

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[5] See, *e.g.*, the evidence of Eduard Shein, Anton Cealii and SergeyVlasenko

[6] See the evidence of Aduard Aronov and Mykhaylo Chernikov. According to Chernikov, the training may have taken an entire day.

[45] Mr. Naseer made a further visit to the site on November 12, this time in response to a complaint about falling debris. Upon arrival he met with Mr. Kazenelson and discussed the complaint with him. He was at the scene with Kazenelson for about 90 minutes. Again, Mr. Kazenelson signed the Field Report. On November 23, Mr. Naseer went back to the Kipling site to discuss another complaint about falling debris. Mr. Fazilov was there, but not Mr. Kazenelson. Mr. Naseer set up a meeting at the site with Joel Swartz. On November 25, Mr. Naseer attended for the meeting. Mr. Kazenelson was also present. In the course of the meeting, Mr. Kazenelson raised an issue about the tenants' access to the balconies, and there was a discussion about securing the balcony doors.

[46] While the work was progressing, Mr. Swartz did not go to the job site often, but closer to Christmas the frequency of his visits increased to about four days a week. Throughout the project, Mr. Kazenelson had kept him informed of developments. He had given Kazenelson a logbook in which to record the hours the workers worked and to note important occurrences, such as attendances by the Ministry of Labour. Mr. Kazenelson took the book to the Metron office every week so that the staff would know what to pay the workers. Incidents at the job site could come to Swartz's attention in this way, but if there were incidents he would know about them right away because Mr. Kazenelson would call him. He testified that he and Mr. Kazenelson had regular telephone conversations as well as meetings on and off the job site.

[47] A number of events that Mr. Kazenelson recorded in the logbook demonstrate that he was paying attention to what was going on at the job site. For example, he noted that one worker should be docked a dollar an hour for not wearing his hard hat. He noted that the work of Nazarcelo Lugtu's crew had to be redone. When Lugtu's crew was fired, he noted that they should not be paid because some equipment was missing. In addition, Mr. Swartz testified that Mr. Kazenelson told him directly about the poor quality of the work done by Lugtu's crew.

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[48] Because of the delay in beginning the work, it became apparent that not only was the projected completion date of the end of November unreachable but that the prospect of finishing by the end of the year was very much in doubt. This posed a problem for the owners of the building, Fishman Holdings. Fishman had a major refinancing planned that could not proceed until the restoration project was finished. Sometime around the beginning of November, Fishman offered Metron a $50,000 "bonus" if the work were completed by the end of year. When Mr. Swartz received the offer, he sat down with Mr. Kazenelson to discuss whether a New Year's deadline could be met. They decided that it could if they brought in more workers and obtained more swing stages. Together, they drew up a new schedule for the completion of the work.

[49] Mr. Swartz testified that although the profit margins on the project were thin, the workers were not cutting corners to meet the deadline. The Crown took Mr. Swartz through a number of issues that arose on the job site in the month leading up to the collapse. To one extent or another, Mr. Kazenelson was involved in resolving those issues. It is clear from the emails between Mr. Swartz and Fishman that Mr. Swartz was quite concerned about meeting the deadline. Efforts were being made by everyone, including Mr. Kazenelson, to accomplish that goal. Mr. Swartz testified, for example, that in the week prior to December 24 'pretty much all of [my] discussions

[with Kazenelson] were about what is going on today, what are we getting accomplished, are we getting completed what we expected to get completed.' On December 18, at the suggestion of Mr. Kazenelson, a hoist was ordered to assist in the movement of the concrete in drop 5/6. Importantly, however, Mr. Swartz testified that he never told Mr. Kazenelson about the bonus that would be paid if the deadline were met.

[50] As of December 23, the job was close to being finished. At the end of the day on the 23rd, Mr. Kazenelson convened a meeting of the workers. One of the things discussed was whether the workers could finish the work 'tomorrow'. According to Aduard Aronov, "we said yes, we thought we could finish tomorrow". Aronov agreed that Mr. Kazenelson was "putting absolutely no pressure on us". None of the other workers testified that they felt that they were being pressured to meet a deadline.

[51] In the course of the trial, I ruled that certain statements of Mr. Fazilov could be admitted as circumstantial evidence tending to support an inference that the pace of the work was being driven by pressure to meet the deadline. In the end, it is unnecessary to take those statements into account and I disregard them. The only reasonable inference from the balance of evidence is that while efforts were being made to meet the deadline, those efforts had no impact on whether the work was being carried out in a safe manner, at least not before December 24.

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[52] As I have said, the Crown submits that Mr. Kazenelson's general performance as a project manager prior to December 24 forms "an important part of the context in which to analyze whether or not [his] conduct on December 24 amounts to criminal negligence". In my opinion, most of the evidence that the Crown relies on in that respect is irrelevant to a determination of the central issues in this case.

[53] Any inadequacy in the training or supervision provided by Mr. Kazenelson had nothing to do with why six workers got onto the swing stage without sufficient lifelines at the end of the day on December 24. The evidence is clear that everyone who worked at the site was well aware of the importance of being tied off to a lifeline while working on a swing stage. Bakhodir Kamilov testified he never saw anyone working without a lifeline and that he never worked without one. Shohruh Tojiddinov testified that he always tied off to a lifeline when he was on a stage and that prior to December 24 he never saw anyone else not tied off. He agreed that "the rule was very clear…that you had to wear your harness and your lanyard", and that he did not need to be told that every day because it was obvious. Eduard Shein testified that the usual practice was to have two workers on a stage and two lifelines, and that if a third worker was on a stage a third lifeline would be dropped. Sergey Vlasenko also testified that the rule was clear that the workers had to be tied off when working on a swing stage.

[54] Both Shein and Vlasenko pointed out that being attached to a lifeline on the longer stages could cause problems at higher levels because it was harder at those elevations to pull the lifeline along the stage. Both testified that on occasion they might untether themselves in that situation but both made it clear that this was against the rules. As Shein put it, if either Fazilov or Mr. Kazenelson had caught him working without a lifeline he would have been fired.

[55] Nazarcelo Lugtu and Hilardo Gatchalian both described an incident in which Fazilov and one of his crew took a stage from ground level to the roof without tying off to the lifelines. To be clear, Mr. Kazenelson was not on site when this occurred. What is noteworthy about this incident is that it appears to have stood out to both Lugtu and Gatchalian as a clear exception to the general rule that everyone at the job site understood and followed, namely that workers on a swing stage were to be tied off at all times.

[56] Kamal Berrada was often at the site in his capacity as Fishman's consulting engineer, and he was on a swing stage a number of times. He testified he never saw anyone without a lifeline. Mr. Naseer, the Construction Health and Safety Inspector, visited the site 9 times between October 20 and December 17. It is a reasonable inference that apart from the small number of specific issues discussed earlier in these reasons, none of which was particularly significant, he never noticed any safety concerns. Anton Cealii agreed that he never had any concerns about safety while working at the Kipling site, and that the rule for everyone was "check (your equipment)".

[57] Further, as the defence noted in its written argument, four of the five person who fell from the stage *had* received fall arrest training and the fifth, Dilshod Marupov, had received at least some instruction from Fazilov. While the instruction received by Mr. Marupov was no doubt insufficient to meet the industry standard, his testimony was that he was aware of the need to tie off.

[58] In all of the circumstances, it would be unreasonable to attribute the decision that the workers made on December 24 to get onto the stage notwithstanding the absence of lifelines to a deficiency in their training.

[59] The Crown also led evidence in relation to the absence of training records and substandard safety meetings. Again, however, these things had nothing to do with why the workers boarded the stage or why the stage collapsed.

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[60] The Crown's submission that Mr. Kazenelson failed to properly supervise Mr. Fazilov appears to rest on the assumption that the absence of evidence that he did supervise him is evidence that he did not. Such an assumption, of course, would reverse the burden of proof. Mr. Swartz testified that Mr. Kazenelson told him that Fazilov had been doing balcony restoration, both as a worker and a supervisor, for 1½ to two years. Notwithstanding that, Fazilov was still required to take a fall-arrest training course. Although, for reasons I will come to, I am satisfied that Mr. Kazenelson failed to adequately supervise Fazilov on the afternoon of December 24, the Crown has failed to demonstrate that any prior inadequacies in the supervision of Fazilov had anything to do with why the workers boarded the stage without lifelines.

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[61] In relation to Mr. Kazenelson's allegedly substandard performance as a project manager, the Crown also relies on the evidence of Robert Molina, a structural engineer employed by the Ministry of Labour. Mr. Molina attended at the site on the evening of December 24, after the

collapse. He observed that the counterweight system for an outrigger beam supporting the swing stage had been set up in an incompetent manner, that the outrigger beam for the hoist had been placed in a position where it was capable of rupturing a gas line, and that the counterweights for the hoist had spilled onto the ground. Mr. Molina readily agreed that none of these safety deficiencies had anything to do with the chain of events that caused the stage to collapse or the workers to fall. While I permitted those observations to be adduced pending final argument, I am now of the view that they are irrelevant to any issue that has to be decided in this case, and I disregard them.

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[62] Assuming that a proper inspection of the swing stage would have revealed the problems that caused the collapse, the Crown has failed to connect the failure to conduct such an inspection to Mr. Kazenelson. The evidence of Mr. Abramovici, a metallurgical engineer with over 40 years' experience, was that the swing stage failed as a result the following problems:

> (i) The "b welds" were fractured from the moment of welding, and offered no structural support. There were 16 "b" welds on the four modules that made up the stage and every one of them was cracked from the moment the weld was made.
>
> (ii) The horizontal and vertical welds of joints 2C and 2H were deficient, and over time and use they cracked, eventually providing no structural support.
>
> (iii) As a result of a faulty design process, the bolt holes were too large, allowing the bolts to eat away at the ligaments as the swing stage was used.
>
> (iv) Again as a result of a faulty design process, the ligaments were too small.

[63] As I understood Mr. Abramovici's evidence, only the cracks to the b welds would have been visible when the stage was assembled and installed at the Kipling site. The balance of the defects would only have become apparent after a period of use. In assessing whether Mr. Kazenelson was at fault for not noticing those cracks at the time of his initial inspection, it should be borne in mind that not only had the certified welders who did the welding not noticed them, neither had anyone at Swing N' Scaff. Nor had Mr. Lugtu, who assembled the stage. Mr. Lugtu was a very experienced worker and he testified that he specifically checked the welds. In the circumstances, it would be unreasonable to characterize Mr. Kazenelson's failure to notice the cracks to the b welds as negligence.

[64] I accept that at least by December 24 a proper inspection would have revealed the other defects that contributed to the collapse. However, as I mentioned earlier, Mr. Swartz testified that he instructed Mr. Kazenelson that the daily inspections were to be the responsibility of Fazilov, as the site supervisor, and the workers who actually used the stages. The evidence is that Mr. Kazenelson believed that Fazilov was experienced in balcony restoration work. The Crown has failed to show that Mr. Kazenelson had reason to think that Fazilov was not doing what was expected of him in relation to inspecting the equipment. To put it another way, while the Crown has proved that the stage in drop 5/6 was in a dangerous condition on December 24 and that it

should not have been in use, the Crown has not shown that the fact that it was being used was the consequence of a breach of Mr. Kazenelson's duty to protect the workers.

(ii) The events of December 24

[65] It is not in dispute that both Mr. Kazenelson and Mr. Swartz attended at the Kipling site for a period of time at the beginning of the day on December 24. Mr. Swartz testified that he arrived prior to Mr. Kazenelson and that he had a conversation with Mr. Fazilov about the plans for the day. Fazilov told him that a bit of work was to be done in drop 9 and then the workers were going to be pouring concrete in drop 5/6. When Mr. Kazenelson arrived, Mr. Swartz repeated what Fazilov had told him, and Mr. Kazenelson 'agreed' with it. Mr. Kamilov's recollection was that Mr. Kazenelson was complaining that the workers had not yet started working. Kamilov was feeling ill and decided to go home. When he left, Mr. Kazenelson was still at the site, with the workers gathered around him.

[66] Mr. Kazenelson then left the site and did not return until some point in the afternoon. What he did when he returned is a matter that is in dispute. As I have said, the task of the workers in drop 5/6 that day was to begin pouring concrete on the 18th floor and to work their way down the building. It was necessary to use the swing stage for that purpose because with one exception the balcony doors in drop 5/6 had been screwed shut to prevent tenants from interfering with the work. The one exception was the door for apartment 1205. It was not screwed shut because the apartment was vacant and the workers were using it to get the water they needed to mix concrete.

[67] The position of the Crown is that when Mr. Kazenelson returned in the afternoon, Fazilov and the others were working somewhere above the 13th floor. The Crown's theory is that Mr. Kazenelson had the stage bring him up to the workers so that he could help in the mixing and pouring of concrete. By the end of the day, the pouring had been completed in the balconies on the 13th floor. At that point, the Crown alleges, Mr. Fazilov, the five other workers and Mr. Kazenelson all boarded the swing stage from the 13th floor balconies. Within seconds, the stage collapsed. Mr. Tojiddinov was the only person attached to a lifeline, and he was left dangling in the air. Mr. Kazenelson managed to scramble onto the balcony for apartment 1205, and he pulled Mr. Tojiddinov onto that balcony. The other five workers fell to the ground.

[68] The defence agrees that Mr. Kazenelson was on the balcony of apartment 1205 *after* the stage collapsed, and that he pulled Mr. Tojiddinov onto it. However, they submit, Mr. Kazenelson never helped the workers mix or pour concrete and he was never on the swing stage. Rather, shortly before the end of the day he took an elevator to the 12th floor, walked through apartment 1205, came onto the balcony as the workers were boarding the swing stage, and saw for the first time that there insufficient lifelines. At that point, the defence submits, Mr. Kazenelson questioned Mr. Fazilov about the absence of lifelines and was told not to worry. Almost immediately after the workers finished boarding, the stage collapsed. When that occurred, Mr. Kazenelson was still standing on the balcony of apartment 1205.

[69] The testimony of Mr. Tojiddinov played a role in the development of the Crown's narrative of events. Indeed, the defence submits that the Crown's allegation that Mr. Kazenelson

was on the 13th floor and that he was on the stage when it collapsed rests substantially on that testimony. The defence submits that almost all of Mr. Tojiddinov's evidence should be rejected as incredible and unreliable.

[70] There are many reasons to be concerned about the credibility and reliability of Mr. Tojiddinov's account of the material events. The most obvious frailty is that the account that he gave here in relation to the role that Mr. Kazenelson played in those events is a different account from the one that he gave to the police on the day after the collapse and to the Ministry of Labour 2½ weeks after that.

[71] On December 25, Mr. Tojiddinov told the police that he had been on the ground operating the hoist, that Mr. Kazenelson was with him, that the two of them went up to the 13th floor in the elevator and that they then went through an empty apartment onto the 13th floor balconies. He told the police that Mr. Kazenelson did *not* get onto the swing stage. Mr. Tojiddinov was not under oath when he made that statement, but he was, two weeks later, on January 11, 2010, when he was interviewed by investigators with the Ministry of Labour. At that time he essentially repeated the account that he had provided to the police on December 25. Specifically, he reaffirmed that while six persons had boarded the stage, Mr. Kazenelson had remained on the balcony.

[72] Mr. Tojiddinov agreed that his testimony was inconsistent with what he had told the police and the Ministry of Labour. His explanation was that almost immediately after the collapse, while the surviving workers were still huddled at the site, Mr. Kazenelson began asking him to distance him from involvement in what had happened. He said that Mr. Kazenelson told him "I have a family". Mr. Tojiddinov testified that he agreed to lie because he felt sorry for Mr. Kazenelson.

[73] It is not clear when the account that Mr. Tojiddinov gave in court first surfaced, but it appears that he maintained the essence of his original account through a further three police or Ministry of Labour interviews, one of which (on April 17, 2010) was again under oath or solemn affirmation.

[74] The fact that Mr. Tojiddinov has made prior statements under oath that are inconsistent with his testimony here is not the only matter that gives rise to concern about his credibility and reliability. Another area is his evidence about a meeting that he had on April 14, 2011 with Detective Sedore and Constable Nebogatova. In that meeting, Tojiddinov told the officers, contrary to his prior statements, that he had not been operating the hoist on December 24. In cross-examination, the suggestion was put to him that he had changed his story because he was having financial and immigration problems, he did not have a job, he was in danger of being deported and he wanted help from the officers. Mr. Tojiddinov claimed to have no memory of the April 14 meeting. He agreed that he had immigration problems but he insisted that he did not recall discussing those problems with the police. In my opinion Mr. Tojiddinov's testimony in that respect was not credible. I do not accept that he cannot recall going to the police for help on something as important to his life as whether he was going to be deported.

[75] There were a number of other areas in which it was suggested that Mr. Tojiddinov could not keep his story straight. It was suggested, for example, that between the first and second days of his examination in-chief, his memory had suspiciously improved. It is true that Mr. Tojiddinov's memory was more expansive on the second day, but in fairness the Crown had not attempted to refresh his memory on the first day, and I did not take the Crown's success in doing so on the second day to be an indication that Mr. Tojiddinov had forgotten his 'script'.

[76] Mr. Tojiddinov was also cross-examined on, among other things, how often Mr. Kazenelson spoke to him about work, how many balconies Mr. Kazenelson had worked on that day, how quickly the stage collapsed after everyone got on, and whether the floor that he ended up on after the collapse was the last floor that had been worked on. There were inconsistencies in those areas, and those inconsistencies are relevant to an assessment of Mr. Tojiddinov's reliability and credibility. In fairness, however, some of frailties in his evidence were either minor or no more than one would expect from an unsophisticated witness who was testifying more than five years after the relevant events. Many of his memory failures were not about what had happened but about what he had said on other occasions about what had happened. Through no fault of counsel, cross-examination in that regard was often difficult because not only were the questions and the answers here being filtered through interpreters, so too had been the prior statements with respect to which the witness was being challenged.

[77] Be that as it may, the fact that Mr. Tojiddinov has provided two different versions of the material events, both of them under oath, and the fact that he was less than truthful here about his memory of the April 14, 2011 meeting with the police, makes reliance on his testimony dangerous. Before acting on his testimony, I agree, I should be satisfied that there is confirmation for it. I am satisfied, however, that there is substantial confirmation for the material portions of his account.

(a) Mr. Tojiddinov's testimony that the workers boarded the stage from the 13th floor balconies

[78] Mr. Tojiddinov testified that the workers boarded the stage from the 13th floor balconies. The defence submits that Mr. Tojiddinov's testimony in that respect should be rejected. The position of the defence is that the workers boarded from the 12th floor balconies, which would explain how Mr. Kazenelson could have been on the balcony for apartment 1205 after the collapse without having ever been on the stage.

[79] There are a number of circumstances that, taken together, overwhelmingly confirm Mr. Tojiddinov's evidence that the workers were on the 13th floor when they boarded the stage at the end of the day:

> (i) The evidence is that the installation of the forms for the concrete repairs in drop 5/6 had been completed before December 24. What the workers were doing on the 24th was pouring concrete into the forms, beginning at the top of the building and working down.
>
> (ii) The photographs of the balconies on the 12th and 13th floors in drop 5/6 together with the observations of Guy Costa, a Health and Safety Officer with the Ministry of

Labour, leave no room for doubt that the last balconies on which concrete was poured on December 24th were the balconies for apartments 1305 and 1306.

(iii) The position of the swing stage at the moment of collapse is inconsistent with the workers having boarded from the 12th floor balconies. On December 25th 2009, the day following the collapse, Mr. Molina attended at the scene and made measurements. Based on those measurements, there is no real dispute as to the position of the swing stage at the moment it collapsed.[7] Mr. Molina found that the height of each balcony (floor to ceiling) was 96 inches. The bottom of the swing stage – that is, the platform on which the workers were standing – was 51¼ inches above the floor of the 12th floor balconies. Thus, at the moment of collapse, the bottom of the stage was about 45 inches below the bottom of the 13th floor balcony. However, the railing of the stage on the balcony side was 26¾ inches above the floor of the stage, which means that the railing of the stage was 78 inches (51¼ plus 26¾, or 6½ feet) above the floor of the 12th floor balconies, and only 18 inches below the bottom of the 13th floor balcony. If the workers were working on the 12th floor balconies, it makes no sense that they would have parked the stage at that location.

(iv) It also makes no sense, however, that the position of the stage at the moment of collapse was its position when the workers climbed aboard. Based on Mr. Molina's measurements, the floor of the stage would have been close to 8 feet below the top of the railing of the balconies for the apartments on the 13th floor.[8] The only reasonable inference is that the workers had boarded the stage on the 13th floor, that the stage had started to descend, and that it collapsed after descending several feet.

(v) In arguing against the viability of that explanation, the defence urged the court to find, based on Mr. Tojiddinov's evidence, that the stage collapsed within a second of everyone getting on. That would have left no time for it to have descended several feet from the 13th floor. A fair reading of Mr. Tojiddinov's evidence, however, is that he could not be precise as to how quickly the stage collapsed after everyone boarded. At one point he said that it might have been as long as 15 or 20 seconds.

(vi) Had the workers been working on the 12th floor balconies, there would have been no need for all six of them to clamber up and over the railing of the stage, 6½ feet above the floor, because at least some of them could have exited through apartment 1205 and taken the elevator.

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[7] Based on a subsequent examination of photographs, Mr. Molina developed an alternate theory concerning the position of the stage, which counsel have referred to as the 'downward drift' theory. I agree with the defence that the basis for this alternate theory is so frail and speculative that the theory should be rejected.

[8] That is, 42¾ inches from the top of the balcony railing to the top of the floor slab, 7¼ inches to the bottom of the floor slab, 18¼ inches to the top of the railing of the stage, 26¾ inches to the stage platform, for a total of 95 inches, or 7 feet, 11 inches.

[80] Taken together, those circumstances not only confirm Mr. Tojiddinov's evidence that the workers boarded the stage on the 13th floor, they establish that fact independently of his evidence.

[81] Much was made of the fact that Mr. Tojiddinov had told the police that he had been operating the hoist at ground level that afternoon, and that Mr. Kazenelson was with him. However, Mr. Tojiddinov was clearly on the same floor as the workers at the end of the day – how else could he have gotten onto the stage with them just before it collapsed? The only reasonable inference is that at the end of the day he was working with the others pouring concrete.

(b) Mr. Tojiddinov's testimony that Mr. Kazenelson was with the workers on the 13th floor balconies

[82] Mr. Tojiddinov's testimony was that not only were the workers on the 13th floor balconies at the end of the day, so too was Mr. Kazenelson. Once again, there are a number of circumstances that tend to confirm Mr. Tojiddinov's evidence.

[83] First, one part of Mr. Tojiddinov's evidence that the defence urged the court to accept was his testimony that when Mr. Kazenelson came up to where the workers were, as they were boarding the stage, he asked Fazilov 'where are the lifelines'. I accept that Mr. Kazenelson said that. However, bearing in mind that I am satisfied that the workers were on the 13th floor balconies, the only reasonable inference is that Mr. Kazenelson was as well. If the workers were on the 13th floor balconies and Mr. Kazenelson was on the 12th floor, they would have been separated not only by the floor and railings of the 13th floor balconies but also by the 40-foot swing stage. Mr. Kazenelson would not have been in a position to see what the workers were doing or to be having a conversation with Fazilov about lifelines.

[84] Second, it makes no sense that Mr. Kazenelson would have gone to the 12th floor simply to stand by himself on the balcony of apartment 1205. The work was behind schedule, the deadline for completion was fast approaching, Mr. Kazenelson had asked the workers if they could finish the work by the end of the day and they were clearly not going to be able to do that. Circumstantially, those considerations tend to confirm Tojiddinov's evidence that Mr. Kazenelson went to where the work was occurring, namely on the 13th floor balconies.

[85] Third, there is the evidence of Marissa Ortiz. It is common ground that after the collapse both Mr. Kazenelson and Tojiddinov were on the balcony for apartment 1205. Ms Ortiz was the property manager of the two buildings at the Kipling site. On the afternoon of December 24 she was in her first floor apartment at 2737 Kipling when she heard a loud bang. She went to her balcony to see what was going on, and she saw the two pieces of the swing stage hanging in the air. She saw someone trying to climb onto a balcony and another person standing on the balcony. She immediately ran over to 2757 Kipling, where she met up with Mr. Kazenelson. She asked him what had happened and he said that his guys fell. She asked him if he was 'there', and he said yes. She asked him if he was the one hanging on the balcony and again he said yes. She asked if he was okay and he said yes.

[86] Ms Ortiz was not sure whether Mr. Kazenelson understood her question about hanging on the balcony, for two reasons. First, he was really nervous at the time. Second, the elevators in the building were very slow and she wondered whether he would have had time to get down to the ground in the interval between when she saw the persons on the balcony and her arrival. She was cross-examined about whether she was sure that Kazenelson actually said what she reported, but in my view the cross-examination did not raise any doubt about what she had said in-chief. In re-examination she adopted her prior statement that Mr. Kazenelson told her it was he who was hanging 'from' the balcony.

[87] I accept Ms Ortiz's evidence that what she saw was one person 'hanging from' the balcony and one person standing on the balcony. The defence submits that the Crown's theory is that only one person was ever hanging from the 12th floor balcony – namely Mr. Tojiddinov – and thus that it would not make sense that Mr. Kazenelson would have said that it was he who was hanging there. However, it is not the Crown's position that the only person who was ever hanging from the balcony was Tojiddinov. The Crown's position is that Mr. Kazenelson was on the swing stage when it collapsed and that he somehow managed to scramble to safety. The explanation that Mr. Kazenelson gave to Mr. Tojiddinov was that he had been hanging onto Tojiddinov's lifeline and the balcony, and that when the stage broke he had managed to pull himself onto the balcony. The statement that Ms Ortiz testified that Mr. Kazenelson made – that he had been hanging from the balcony – is *not* inconsistent with the Crown's theory of what happened.

[88] I agree that the person whom Ms Ortiz *saw* hanging from the balcony was probably Mr. Tojiddinov and that the person standing on the balcony must have been Mr. Kazenelson, but Mr. Kazenelson would not have known at which point in the scramble to safety Ms Ortiz had made her observation.

[89] I find as a fact that Mr. Kazenelson made the statement that was testified to by Ms Ortiz. That statement tends to confirm Mr. Tojiddinov's evidence that Mr. Kazenelson had been with the workers on the 13th floor and that he boarded the stage with the workers. It also tends to confirm his evidence of the explanation that Mr. Kazenelson gave for how he was able to scramble to safety. Indeed, when combined with the circumstantial evidence concerning the collapse of the stage, the statement to Ms Ortiz constitutes an independent basis for inferring that Mr. Kazenelson must have boarded the stage.

[90] Fourth, the evidence of Mykhaylo Chernikov also tends to confirm the testimony of Mr. Tojiddinov. Mr. Chernikov was putting up forms in drop 7/8 all day on December 24. He testified that he saw Mr. Kazenelson at the Kipling site at the beginning of the day but then did not see him until after lunch. After lunch, he noticed Mr. Kazenelson's white SUV on site, and then he saw him on "the balcony" in drop 5/6. He was not sure about the floor, but he said it was "maybe the 14th". He said that Mr. Kazenelson was holding a big shiny thermos and that he was drinking from it. He said that it was "not too long before the accident", but how long before was unclear. After refreshing his memory, he said that it was around 3:00 or 3:30 p.m. After being referred to his December 24th statement to the police, he said it was half an hour to 45 minutes before the collapse. In cross-examination by the defence, he said it may have been "15 minutes or half an hour before", that it was "hard to tell".

[91] Mr. Chernikov was asked if there were other workers on the balcony with Mr. Kazenelson, and he responded: "They were there, but I didn't… I know they were there but he was standing and they were just kneeling… So I didn't see them". He explained that they were kneeling behind the balcony guardrail, inside the balcony. I did not understand that response to leave open the possibility that Mr. Kazenelson was on a different balcony from the workers. That possibility was never suggested to Mr. Chernikov. He would know what floor the workers were on because of where the 40-foot swing stage was located. I am satisfied that Chernikov perceived Mr. Kazenelson to be on the same balcony as the workers.

[92] The Crown was granted leave to cross-examine Mr. Chernikov on a portion of a statement that he gave to the police a few hours after the collapse of the stage. In that statement, he had said that "around 2 or 3 o'clock [Kazenelson] went on the stage as well". Mr. Chernikov acknowledged that he had made that statement but he declined to adopt it as the truth.

[93] In examination in-chief, Mr. Chernikov was clear that the person he saw on the balcony was Mr. Kazenelson. Mr. Chernikov was well situated to make that determination – he had worked at the Kipling site for about a month, Mr. Kazenelson regularly came to the site, Mr. Kazenelson had spent an entire day training and testing him, and he had seen Mr. Kazenelson at the site that morning. Further, at the time he made his observation Mr. Chernikov was working on drop 7/8, which is separated from drop 5/6 by what appears to be about 20 to 30 feet. Mr. Chernikov's stage was a couple of floors above where Kazenelson was standing, but they were not far apart. He was able to observe that the object in Mr. Kazenelson's hands was a thermos, that it was big, that it was shiny, and that he was drinking from it.

[94] At the end of the examination in-chief, however, Mr. Chernikov said that he had "assumed" that the person was Mr. Kazenelson. In light of what I have just said, that was a surprising answer. In any event, I am satisfied that while he may have been unable to say why he knew it was Kazenelson, he believed that it was. His sudden uncertainty, which followed on the heels of his departure from what he had told the police about Mr. Kazenelson boarding the stage, did not strike me as genuine.

[95] In any event, Mr. Chernikov never resiled from his evidence that he saw a man who he assumed to be Mr. Kazenelson standing on the balcony drinking from a thermos as the workers continued to mix and pour concrete. Bearing in mind that Fazilov was a 'working supervisor', that is, someone who worked alongside his men, it seems more probable than not that this person, who was watching the work rather than doing it, was Mr. Kazenelson, particularly in light of the fact that it is undisputed that Mr. Kazenelson was either on the same balcony as the workers or the one below.

[96] On the totality of the evidence – the circumstantial evidence, the evidence of Chernikov, the evidence of Ortiz, and the evidence of Tojiddinov – I am satisfied beyond a reasonable doubt that Mr. Kazenelson was on the 13th floor balconies with the workers.

(c) Mr. Tojiddinov's testimony that Mr. Kazenelson boarded the stage with the workers

[97] Mr. Tojiddinov's testimony was that Mr. Kazenelson not only was with the workers on the 13th floor balconies when they boarded the stage at the end of the day, but that he boarded with them.

[98] For the reasons I have stated, I am satisfied beyond a reasonable doubt that Mr. Kazenelson was on the 13th floor balconies with the workers at the end of the day. Once that finding is made, the circumstantial evidence strongly confirms Mr. Tojiddinov's evidence that Kazenelson boarded the stage with the workers.

[99] First, because the balcony doors had been screwed shut, the only way to get off the 13th floor was by way of the swing stage – it would make no sense for Mr. Kazenelson to remain by himself on a 13th floor balcony when the stage departed. Second, it is undisputed that after the collapse Mr. Kazenelson was on the balcony of apartment 1205. If, as I have found, he was on the 13th floor prior to the collapse, he could only have gotten to the 12th floor by way of the swing stage. And third, he told Marissa Ortiz that it was he who had been "hanging from" the balcony.

[100] The defence submits that if Mr. Kazenelson had been on the swing stage and not tied off he would have suffered the same fate as the five workers who fell. In that regard the defence relies on the evidence of Mr. Abramovici as to the mechanism of the collapse and the speed with which it must have occurred. In the circumstances, the defence submits, Mr. Kazenelson could not have made it off the stage and onto the balcony of apartment 1205.

[101] According to Mr. Tojiddinov, however, Mr. Kazenelson explained that "…he was holding on to the balcony, holding on to the lifeline, and he had just enough time to climb over." There is nothing implausible about that explanation. It would have been sensible for Mr. Kazenelson to be holding onto Tojiddinov's lifeline if he was not attached to one himself, and sensible to maintain manual contact with the balcony as the stage began to descend. As I said earlier, Mr. Tojiddinov's evidence as to what Mr. Kazenelson told him finds support in the statement that Mr. Kazenelson made to Marissa Ortiz – that he had been 'hanging' on or from the balcony after the collapse.

[102] Once it is accepted that Kazenelson was on the 13th floor balcony prior to the workers boarding the stage, then completely apart from Mr. Tojiddinov's testimony the only reasonable inference is that Mr. Kazenelson used the swing stage to get there (either by having it sent down to ground level or by having it collect him on the 12th floor) and that he was on the swing stage when it collapsed. However, and in any event, the circumstantial evidence provides compelling confirmation for Tojiddinov's account.

[103] I am satisfied beyond a reasonable doubt that Kazenelson was on the stage at the time of the collapse.

(d) Mr. Tojiddinov's testimony that Mr. Kazenelson was assisting the workers to mix and pour concrete

[104] Mr. Tojiddinov testified that Mr. Kazenelson was not only with the workers on the 13th floor but that he was assisting them by mixing concrete. He further testified that Mr. Kazenelson may have done this on more than one floor. Neither the evidence of Ms Ortiz nor that of Mr. Chernikov tends to confirm those parts of Tojiddinov's testimony.

[105] With respect to whether Mr. Kazenelson helped the workers on more than one floor Mr. Tojiddinov's evidence was equivocal. In examination in-chief, he said it was more than one but in cross-examination he said it was only one. In re-examination he reverted back to 'more than one'. I am not prepared to find that it was more than one.

[106] However, I believe Mr. Tojiddinov's evidence that Mr. Kazenelson was assisting in the work on the 13th floor balconies. I do so because for the reasons I have explained I am satisfied beyond a reasonable doubt that he was telling the truth when he testified that Mr. Kazenelson was with the workers on those balconies and that he boarded the stage at the end of the day. If he was telling the truth about those things, what would be the basis for doubting his evidence that Mr. Kazenelson was assisting with the work? Having said that, whether Mr. Kazenelson was physically assisting the workers or merely supervising them is a minor point and nothing of significance turns on it.

(iii) Summary of factual findings

[107] In my opinion, the evidence establishes the following facts:

> (i) As site supervisor, Fayzullo Fazilov had the primary responsibility for supervising the workers, assigning their tasks and ensuring that safety requirements were observed. However, it was Mr. Kazenelson's responsibility, one that he routinely and regularly exercised, to supervise Fazilov, to instruct him with respect to the tasks to be performed, to maintain records of the workers' hours and to deal with issues such as those that arose with the Ministry of Labour. Mr. Kazenelson was on top of workplace issues, he monitored what was going on and where necessary he exercised authority over the workers. Fazilov was the foreman, but Mr. Kazenelson was the boss and all the workers knew it.
>
> (ii) Mr. Kazenelson was aware that Metron was under pressure to finish the restoration work by December 31. While he may not have known about the $50,000 bonus that Fishman had offered, he and Mr. Swartz had had discussions in mid-November about the steps to be taken if the work was to be done by the end of the year. In the week or so before December 24, the pace of the work had significantly increased. On the evening of December 23, the day before the collapse, Mr. Kazenelson spoke to the workers and asked if they would be able to finish the work the next day. However, there is no evidence, apart from what occurred on December 24, that corners were being cut in order to meet the deadline.
>
> (iii) When Mr. Kazenelson attended at the Kipling site on the morning of December 24, he knew that the focus of the work that day was to be the pouring of concrete in drop

5/6, that most of the workers were going to be engaged in that task, and that they were going to have to use the 40-foot swing stage to gain access to the balconies. Mr. Kazenelson had no knowledge as to what the capacity of the stage was because it had arrived without a capacity label.

(iv) Mr. Kazenelson was well aware that each worker who boarded the swing stage would have to be tied off to a separate lifeline. However, I am not satisfied that he knew, before he left the site that morning, that Mr. Fazilov was going to proceed without dropping additional lifelines for the additional workers.

(v) Mr. Kazenelson returned to the Kipling site in the afternoon, after lunch, perhaps toward the end of the day, but while the workers were still pouring concrete. When he returned, he went up and joined the workers. I am not able to determine whether they were working *above* the 13th floor at that point. However, I have no doubt that they were not below the 13th floor.

(vi) The only way that Mr. Kazenelson could have joined the workers on the 13th floor or above was by having the swing stage take him there. I am unable to determine whether he had the stage pick him up at ground level as Mr. Tojiddinov described, or whether he took the elevator to the 12th floor and boarded the stage from apartment 1205. In either event, two workers had to be on the stage when it came to collect him because both motors had to be engaged for the stage to operate. In the circumstances, I have no doubt that at least by the point at which Mr. Kazenelson boarded the stage to join the workers he was aware that there were only two lifelines for everyone who was working in drop 5/6.

(vii) At some point after Mr. Kazenelson arrived on the balconies where the concrete was being poured, he asked Fazilov, in substance, 'where are the lifelines?' and Fazilov told him 'don't worry about it'. Mr. Kazenelson said nothing else and did nothing else in relation to the absence of lifelines.

(viii) Mr. Kazenelson was either assisting the workers in mixing and pouring the concrete or he was supervising them as they worked. Because I cannot determine whether the workers were on a floor higher than the 13th when Mr. Kazenelson joined them, I cannot determine whether he travelled from floor to floor with them as they worked their way down the building. At the end of the day, however, he was with them on the 13th floor balconies.

(ix) After pouring concrete on the 13th floor, the workers loaded their tools onto the swing stage in preparation for the trip to ground level. Mr. Kazenelson assisted them in that regard. Then, Mr. Fazilov, the five other workers and Mr. Kazenelson all boarded the stage. The only person who tied off to a lifeline was Mr. Tojiddinov. Mr. Kazenelson was the last person to board. I am satisfied that the motors were engaged, that the stage began to descend and that it descended several feet before the two centre modules of the stage separated, the stage collapsed, and Fayzullo Fazilov, Aleksey Blumberg, Vladimir Korostin, Aleksandrs Bondarevs and Dilshod Marupov fell 100

feet or so to the ground. Mr. Tojiddinov, the only person who was tied off to a lifeline, was left dangling in mid-air. Mr. Kazenelson, who had been holding on to Tojiddinov's lifeline, managed to scramble onto the balcony of apartment 1205.

C. Analysis

(i) Has the Crown Proved that Mr. Kazenelson was Criminally Negligent?

[108] In order to succeed on the five counts before the court, the Crown must prove beyond a reasonable doubt (i) that Mr. Kazenelson was criminally negligent, and (ii) that by his criminal negligence he caused death or bodily harm.

[109] 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." In this case, the Crown relies on part (b) of that definition. That is, the Crown alleges that Mr. Kazenelson failed to do something that it was his duty to do.

[110] Section 219(2) of the *Code* provides that for the purposes of s. 219(1), "duty" means a duty imposed by law. The duty relied on by the Crown is the duty imposed in s. 217.1 of the *Code*, which obliges 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".

[111] Accordingly, to establish the *actus reus* of criminal negligence causing death (or bodily harm), the Crown must prove:

(a) that Mr. Kazenelson had the authority to direct how the workers employed by Metron did work or performed a task;

(b) that he failed to take reasonable steps to prevent bodily harm to those workers; and

(c) that in doing so, he showed wanton or reckless disregard for their lives or safety.

[112] Proof of 'wanton or reckless disregard' requires proof that that Mr. Kazenelson's conduct was a marked and substantial departure from what a reasonable person would do in the same circumstances.

[113] The "marked and substantial departure" standard applies not only to the *actus reus* of criminal negligence but also to the *mens rea*. A modified objective test is to be used in this respect. I am required to consider the facts that existed at the material time in light of Mr. Kazenelson's perception of them and to assess whether, in that context, his conduct constituted a marked and substantial departure from what would be reasonable in the circumstances. The Crown must prove either that Mr. Kazenelson adverted to an obvious and serious risk to the lives or safety of the workers and failed to act, or that he gave no thought to an obvious and serious risk and the need to take care.

[114] Insofar as the counts of criminal negligence causing death are concerned, the Crown must prove an additional element, namely that a risk of bodily harm that was neither trivial nor transitory was objectively foreseeable: *R. v. M.R.*, 2011 ONCA 190, at paragraph 41.

(a) Did Mr. Kazenelson have the authority to direct how the workers employed by Metron did work or performed a task?

[115] The defence concedes that Mr. Kazenelson had the authority to direct how the Metron workers did their work and thus that he was under a legal duty to take reasonable steps to prevent bodily harm to them.[9] That concession was well-founded in the evidence. As I have said, Mr. Kazenelson regularly and routinely exercised authority in the workplace and his presence at the job site on the afternoon of December 24, and in particular his presence on the balconies while the concrete was being poured, was an exercise of that authority. I am satisfied beyond a reasonable doubt that Mr. Kazenelson's duty under s 217.1 was engaged when he joined the workers that afternoon.

(b) Did Mr. Kazenelson fail to take reasonable steps to prevent bodily harm to the workers?

[116] In determining whether Mr. Kazenelson failed to take reasonable steps to prevent bodily harm to the workers, the provisions of the *Occupational Health and Safety Act*, R.S.O. 1990, Chapter O.1 (*OHSA*) and the regulations passed thereunder are instructive.

[117] Section 1 of *OHSA* defines a "supervisor" as "a person who has charge of a workplace or authority over a worker". Mr. Kazenelson clearly fell within the scope of that definition. The *Act* further provides:

> **27.** (1) A supervisor shall ensure that a worker,
>
> (a) works in the manner and with the protective devices, measures and procedures required by this Act and the regulations; and
>
> (b) uses or wears the equipment, protective devices or clothing that the worker's employer requires to be used or worn.
>
> (2) Without limiting the duty imposed by subsection (1), a supervisor shall,
>
> (a) advise a worker of the existence of any potential or actual danger to the health or safety of the worker of which the supervisor is aware;
>
> … and
>
> (c) take every precaution reasonable in the circumstances for the protection of a worker.

[118] *Ontario Regulation 213/91*, "the *Construction Regulation*", was made under the authority of *OHSA*. The following sections of the *Regulation* are relevant to this case:

> **1.** (1) In this Regulation,

[9] At paragraph 51 of their written submissions

"fall arrest system" means an assembly of components joined together so that when the assembly is connected to a fixed support, it is capable of arresting a worker's fall;

***

26. Sections 26.1 to 26.9 apply where a worker is exposed to any of the following hazards:

1. Falling more than 3 metres…

***

26.1 (2) [If] it is not reasonably possible to install a guardrail system as that subsection requires, a worker shall be adequately protected by at least one of the following methods of fall protection:

…

3. A fall arrest system… that meets the requirements of section 26.6.

***

26.6 (1) A fall arrest system shall consist of a full body harness with adequate attachment points and a lanyard equipped with a shock absorber or similar device.

(2) The fall arrest system shall be attached by a lifeline or by the lanyard to an independent fixed support that meets the requirements of section 26.7.

***

26.9 (1) This section applies to a lanyard or lifeline that is part of a travel restraint system or a fall arrest system.

…

(3) Only one person at a time may use a lanyard.

…

(6) Only one person at a time may use a vertical lifeline.

***

141 (1) A worker who is on or is getting on or off a suspended platform, suspended scaffold or boatswain's chair shall wear a full body harness connected to a fall arrest system.

(2) Every lifeline used with a suspended platform, suspended scaffold or boatswain's chair,

(a) shall be suspended independently from the platform, scaffold or boatswain's chair; and

(b) shall be securely attached to a fixed support so that the failure of the platform, scaffold or boatswain's chair or its supporting system will not cause the lifeline to fail.

[119] Working without lifelines in the circumstances that existed in drop 5/6 on the afternoon of December 24 was a patent violation of the provisions of the *Construction Regulation*. Mr.

Kazenelson's failure to ensure that the workers did not violate those provisions was a breach of the duty imposed on him, as a supervisor, by s. 27(1) of *OHSA*.

[120] Establishing a breach of *OHSA* or the *Construction Regulation* does not *ipso facto* establish a breach of the duty imposed by s. 217.1 of the *Criminal Code*. The duty imposed on a "supervisor" under s. 27(1) of *OHSA* is not identical to the duty imposed on a person in authority under s. 217.1 of the *Code*. However, *OHSA* and its regulations are aimed at ensuring the health and safety of workers in the workplace and thus they can assist in identifying what steps it is reasonable to expect a person subject to a duty under s. 217.1 to take to prevent bodily harm in the workplace.

[121] Assistance in that regard is also provided by the content of the suspended access training courses provided to the construction industry by the CSAO. As Mr. Robichaud indicated, those courses were designed to drive home to the participants that the major cause of fatalities on construction projects is falls, that the danger of a fall is constantly present when working on a swing stage, and that every person on a swing stage must be protected by a fall arrest system at all times.

[122] Considered as a whole, the provisions of *OHSA* and the *Construction Regulation* and the industry standards pointed to by the CSAO training courses make it clear that the requirement that anyone working on a swing stage must be protected by a fall arrest system is as fundamental a rule for the prevention of workplace injury as one can devise. When Mr. Kazenelson returned to the Kipling site on the afternoon of December 24, he knew that six workers were working on the balconies on the upper floors in drop 5/6, that they were using the swing stage to move from floor to floor, and that they would need to use the stage to make it to safety at the end of the day. By the time he boarded the stage to join the workers, he also knew that contrary to the fundamental rule for swing stage safety there were only two lifelines.

[123] When Mr. Kazenelson arrived on the balconies where the men were working he asked Fazilov where the lifelines were, and Fazilov told him not to worry. At paragraph 200 of their written submissions, defence counsel state:

> The defence submits that Mr. Kazenelson did just as the Crown submits he should have done: when he was made aware that there were more than 2 workers working on drop 5/6 he took immediate steps to begin to rectify the situation by inquiring about lifelines.

[124] Mr. Kazenelson's question about the absence of lifelines and his acceptance of Fazilov's admonition not to worry was *not* a step toward protecting the workers from harm. He was Fazilov's boss. Fazilov took direction from him, not the other way around. Apart from asking that question, Mr. Kazenelson did nothing else. He was on the balcony for some time before the workers began to board the stage to return to the ground. He not only did nothing to prevent them from boarding, he boarded the stage himself.

[125] In doing nothing about the absence of lifelines and by permitting the workers to board the stage without them, Mr. Kazenelson failed to take reasonable steps to prevent bodily harm to the workers. I am satisfied beyond a reasonable doubt that his conduct was a breach of the duty imposed on him by s. 217.1 of the *Criminal Code*.

(c) Did Mr. Kazenelson show wanton or reckless disregard for the lives or safety of the workers?

[126] A breach of s. 217.1 does not necessarily constitute wanton or reckless disregard for life or safety: *R. v. Leblanc*, [1977] 1 S.C.R. 339; *R. v. Peterson* (2005), 201 C.C.C (3d) 220 (Ont. C.A.), at paragraph 40; *R. v. Lilgert*, 2014 BCCA 493, at paragraphs 38 to 40. To establish wanton or reckless disregard, the Crown must prove a marked and substantial departure from the conduct expected of a reasonable person in the circumstances.

[127] The fundamental rule requiring fall arrest protection for each worker on a swing stage is a reflection of the simple fact that suspended access equipment can fail. The risk of such a failure is brought home to everyone who undergoes the suspended access training provided by the CSAO. Mr. Kazenelson had not only taken that training, he had followed it up with a course equipping him with the ability to train others. I am satisfied that he knew that swing stages are not fail safe. When he returned to the job site in the afternoon of December 24th, he became aware that six of his workers were more than 100 feet above the ground using a swing stage with only two lifelines. Not only did he fail to do anything to rectify this fundamental breach of the *Construction Regulation*, the standards of the Construction Safety Association, and industry practice, he permitted the workers, at the end of the day, to board the swing stage with all of their tools. The recklessness of his conduct was exacerbated by the fact that he had no information with respect to the capacity of the stage and thus no way of knowing whether it was capable of carrying the weight of all seven persons who boarded it. His conduct can only be characterized as a wanton and reckless disregard for the lives and safety of the workers and as a marked and substantial departure from what a reasonable supervisor would have done in the circumstances.

(d) Has the Crown proved the requisite degree of fault for a finding of criminal negligence?

[128] To prove the *mens rea* for criminal negligence, the Crown must prove *either* that Mr. Kazenelson adverted to an obvious and serious risk to the lives or safety of the workers and failed to act, *or* that he gave no thought to the risk and the need to take care. Further, the Crown must prove that a risk of bodily harm that was more than trivial or transitory was objectively foreseeable.

[129] The question that Mr. Kazenelson asked Mr. Fazilov about the missing lifelines clearly shows that he adverted to the serious risk to the lives and safety of the workers inherent in working on a swing stage without fall arrest protection. He saw the danger inherent in working without lifelines and he failed to act. The risk of grievous bodily harm flowing from the failure to provide fall arrest protection was objectively foreseeable.

(e) Conclusion re criminal negligence

[130] I am satisfied beyond a reasonable doubt that Mr. Kazenelson's failure to take reasonable steps to prevent bodily harm to the workers in relation to the work over which he had authority was a breach of the duty imposed on him by s. 217.1 of the *Criminal Code*. I am also satisfied that in failing to take reasonable steps in that respect Mr. Kazenelson showed a wanton and reckless disregard for the lives and safety of the workers, and that his failure to act was a marked and substantial departure from what a reasonable supervisor would have done. The risk of serious harm was foreseeable, he had adverted to that risk, and he failed to act. Accordingly, I am satisfied beyond a reasonable doubt that Mr. Kazenelson was criminally negligent.

(ii) Did Mr. Kazenelson's Criminal Negligence Cause the Deaths and Bodily Harm?

(a) Introduction

[131] Criminal negligence, *simpliciter*, is not a criminal offence. It is only an offence if it causes death or bodily harm. The position of the defence is that even if any acts or omissions on the part of Mr. Kazenelson amounted to criminal negligence, they did not cause the deaths and injuries that occurred when the swing stage collapsed and the five workers fell.[10]

[132] In order to establish that a person is responsible for causing a death or bodily harm, the Crown must prove that the person caused the death or bodily both in fact and in law: *R. v. Nette*, [2001] 3 S.C.R. 488, at paragraph 44. That is, the Crown must prove both factual causation and legal causation.

[133] Factual causation involves an inquiry into how the death or injury occurred in a medical, mechanical or physical sense, and with the contribution of the accused to that result. The question is generally resolved by asking whether 'but for' the conduct of the accused the death or bodily harm would have occurred: *R. v. Maybin*, [2012] 2 S.C.R. 30, at paragraph 15; *R. v. J.S.R.*, 2008 ONCA 544, at paragraph 17.

[134] To prove factual causation, the Crown does not have to prove that the conduct of the accused was the direct or predominant cause of the death or bodily harm. It is no defence to say that the conduct of another was a greater or more substantial cause: *R. v. Kippax*, 2011 ONCA 766, at paragraph 24. The criminal law does not recognize contributory negligence, nor does it have any mechanism to apportion responsibility for harm occasioned by criminal conduct once sufficient causation has been found: *Nette*, at paragraph 49; Glanville Williams, *Textbook of Criminal Law* (1983), at p. 396. The Crown need only prove that the conduct of the accused was a significant contributing cause.

[135] Where factual causation is established, the remaining issue is legal causation. Legal causation is concerned with the question of whether the accused *should* be held responsible for the death or injury in the eyes of the law. It narrows the field of factual causes to those that are sufficiently connected to the harmful result to warrant the attribution of legal liability. It is based on concepts of moral responsibility: *Maybin*, at paragraph 16.

[136] One of the ways that legal causation narrows the field is by means of the doctrine of intervening acts. That doctrine recognizes that in some circumstances other causes may intervene in a way that would make it unfair to attribute responsibility for a resulting harm to the accused. In assessing whether it would be unfair, two approaches have emerged in the case law.

[137] The first approach looks to whether the intervening act was objectively or reasonably foreseeable. An intervening act that was reasonably foreseeable will not usually relieve the offender of responsibility, but an act that can be characterized as "extraordinary" or "unusual"

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[10] At paragraph 3 of their written submissions.

might do so: *Maybin*, at paragraphs 30-31. The more difficult issue is determining what it is that has to be reasonably foreseeable. In *Maybin*, Justice Karakatsanis resolved that issue as follows:

> [It] is the general nature of the intervening acts and the accompanying risk of harm that needs to be reasonably foreseeable. Legal causation does not require that the accused must objectively foresee the precise future consequences of their conduct. Nor does it assist in addressing moral culpability to require merely that the risk of some non-trivial bodily harm is reasonably foreseeable. Rather, the intervening acts and the ensuing non-trivial harm must be reasonably foreseeable in the sense that the acts and the harm that actually transpired flowed reasonably from the conduct of the appellants. If so, then the accused's actions may remain a significant contributing cause of death.[11]

[138] The second approach considers whether the accused's conduct was effectively overtaken by a more immediate causal action that was independent of the accused's conduct, making the intervening act the sole cause in law: *Maybin*, paragraphs 27, 46. For that to occur, the independence of the intervening act must be apparent. It must appear that the insofar as the harmful result is concerned, the conduct of the accused was "not operative at the time of the [harm]".[12] "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]".[13]

[139] Justice Karakatsanis cautioned that assessments of foreseeability or independence are analytical aids, not new standards of legal causation:

> Neither an unforeseeable intervening act nor an independent intervening act is necessarily a sufficient condition to *break* the chain of legal causation. Similarly, the fact that the intervening act was reasonably foreseeable, or was not an independent act, is not necessarily a sufficient condition to *establish* legal causation. Even in cases where it is alleged that an intervening act has interrupted the chain of legal causation, the causation test articulated in *Smithers* and confirmed in *Nette* remains the same: Were the dangerous, unlawful acts of the accused a significant contributing cause of the victim's death? …Any assessment of legal causation should maintain focus on whether the accused should be held legally responsible for the consequences of his actions, or whether holding the accused responsible for the death would amount to punishing a moral innocent.[14]
> [emphasis in the original]

(b) Has factual causation been proved?

[140] The finding of criminal negligence against Mr. Kazenelson is centered squarely on his conduct when he returned to the Kipling job site on the afternoon of December 24 and became aware that only two lifelines had been dropped for the six workers who were using the swing stage in drop 5/6. Not only did he fail to do anything to rectify this obvious and serious peril, he permitted all six of the workers to climb on board the stage with their tools.

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[11] at paragraph 38
[12] at paragraph 59
[13] at paragraph 57
[14] at paragraphs 28-29

[141] If Mr. Kazenelson had 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. If they had not fallen, the deaths and injuries would not have occurred. Thus, Mr. Kazenelson's breach of duty was a 'but for' cause of the deaths and injuries. It is true that the collapse of the stage was also a 'but for' cause of those harms, but the Crown does not have to prove that an accused's conduct was the only cause, nor does it have to prove that it was the direct or predominant cause. The Crown need only prove that it was a significant contributing cause. I am satisfied beyond a reasonable doubt that Mr. Kazenelson's negligence was a substantial contributing cause of the harm suffered by the five workers who fell and thus that factual causation has been proved.

(c) Has legal causation been proved?

[142] The focus of the defence submission in relation to causation is on the issue of legal causation. The defence submits:

> There are two intervening events that break any causal relationship…between Mr. Kazenelson's acts/omissions and the collapse of the swing stage: (1) the swing stage was improperly manufactured; and (2) the independent intentional acts of the 5 Metron workers who stepped on the stage without lifelines.[15]

[143] With respect to the first of those circumstances, the defence submits that the evidence of Mr. Abramovici makes it clear that the stage was so poorly designed that it was a 'ticking time bomb', doomed to suddenly collapse under normal use. The defence submits that Mr. Kazenelson could not reasonably be expected to have foreseen that eventuality. With respect to the second circumstance, the defence submits:

> The 5 Metron workers who boarded the swing stage without lifelines were men of responsible years, of sound mind and had full knowledge of what they were doing… The independent acts of these grown, experienced [men] overtook any alleged act or omission by Mr. Kazenelson. In the absence of any direction or pressure by [him] for the workers to board the stage without adequate lifelines, the independent actions of these trained, experienced adult men is an independent intervening act that breaks the chain of causation...[16]

[144] I do not accept that either of those circumstances severs the causal link between Mr. Kazenelson's criminally negligent conduct and the deaths and injures that resulted.

[145] The fact that Mr. Kazenelson may have had no reason to believe that the stage in drop 5/6 was about to collapse does not make the collapse an intervening event in the relevant sense. The Supreme Court made clear in *Maybin* that "it is the general nature of the intervening acts and the accompanying risk of harm that needs to be reasonably foreseeable. Legal causation does not require that the accused must objectively foresee the precise future consequences of their conduct." In his *Textbook of Criminal Law* (1983), Glanville Williams stated:

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[15] At paragraph 230ff of their written submissions
[16] At paragraph 236

> We may express the principle by saying that a risk is involved in the defendant's conduct, and an event is within the risk, if a reasonable person would have contemplated the event as part of the general risk involved in such conduct, whether as the major risk or as some subsidiary risk; *and it is immaterial that a subsidiary risk was so unlikely in itself that if it had stood alone the conduct would not have been negligent."*[17]
> [emphasis added]

[146] The relevant question, therefore, is whether 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. In my opinion, the only possible answer to that question is yes. The risk of equipment failure was not only an objectively foreseeable risk, it was virtually the entire reason why the provision of a fall arrest system was regarded as the fundamental rule of swing stage work.[18] The failure of the swing stage, even if unexpected, was not an event that was outside the ambit of the general risk animating the requirement for a fall arrest system. It is not necessary that the precise cause of the failure have been foreseen.

[147] Further, the conduct of the workers in boarding the swing stage without fall arrest protection was not independent of the conduct of Mr. Kazenelson. In *Maybin*, Justice Karakatsanis observed that "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]". The acceptance of dangerous working conditions is not always a voluntary choice, but assuming voluntariness any decision that the workers made to board the stage without fall arrest protection was directly linked to the failure of Mr. Kazenelson to ensure that they had access to that protection. The defence submission in this regard amounts to an argument that a victim's contributory negligence should sever the factual connection between an accused's conduct and the deaths or injuries that resulted. However, "a victim's contributory negligence is no answer to a charge of crime… [It] is generally no defence that the victim laid himself open to the act, or was himself guilty of negligence bringing it about".[19] See also *R. v. Lesuk*, [2000] 7 W.W.R. 462 (Man. C.A.) at paragraph 30.

[148] The premise underlying the defence submission is that the workers were solely responsible for their safety. That premise runs head-on into s. 217.1 of the *Criminal Code* and ss. 27(1)(a) and (c) of *OHSA*. The former provision puts a duty on persons like Mr. Kazenelson to take reasonable steps to prevent bodily harm to workers. The latter provisions require such persons "to take every precaution reasonable in the circumstances" for the safety of workers and, more specifically, to ensure that a worker "works in the manner and with the protective devices, measures and procedures required by [the] Act and the regulations".

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[17] At page 389
[18] See, for example, s. 141(2)(b) of the *Construction Regulation*.
[19] Glanville Williams, *Textbook of Criminal Law* (1983), at p. 396

[149] In *Maybin*, Justice Karakatsanis emphasized that although assessments of the foreseeability and independence of intervening events are helpful analytical tools, the central question remains whether the conduct of the accused was a significant contributing cause of the harm that resulted. She stated: "Any assessment of legal causation should maintain focus on whether the accused should be held legally responsible for the consequences of his actions, or whether holding the accused responsible … would amount to punishing a moral innocent."[20]

[150] Mr. Kazenelson's criminally negligent conduct, as I have described it, was a significant contributing cause of the deaths and injuries suffered by the workers. The risk of equipment failure and a consequent fall was well within the ambit of the general risk associated with a failure to ensure that lifelines were provided. Any negligence on the part of the workers in accepting that risk was directly related to Mr. Kazenelson's failure to do his duty. Holding him responsible for the deaths and injuries that resulted would not amount to punishing a moral innocent. Legal causation has been proved beyond a reasonable doubt.

D. Disposition

[151] For the foregoing reasons, Mr. Kazenelson is found guilty on each of the five counts before the court.

MacDonnell, J.

Released: June 26, 2015

[20] At paragraph 29