

Project Manager Convicted of Criminal Negligence in Christmas Eve Scaffolding Collapse



Sometimes changes in the OHS and related laws are driven by safety incidents. For example, the Westray mining tragedy resulted in Bill C-45 and changes to the law on criminal negligence as it applies to serious safety incidents. More recently, a tragedy at an Ontario construction project on Christmas Eve 2009 resulted in the establishment of the Dean Panel and changes in that province's OHS laws and overall approach to regulating workplace safety. As a result of that incident, several companies and individuals were charged with OHS violations and/or criminal negligence. Most of those cases have already been resolved. But in a recent decision, an Ontario court ruled on whether the project manager was guilty of criminal negligence. Here's a look at the verdict and the court's rationale.

THE CASE

What Happened: A construction company was hired to repair the balconies on two apartment buildings. On Christmas Eve, five workers and their foreman were working from a swing stage. Only one of them was attached to a fall protection life line. As the swing stage descended, brackets connecting the platforms failed, sending the foreman and four workers to the ground below. Only one worker survived, albeit with very serious injuries. The worker attached to the life line was left dangling in the air until he was pulled to safety. As a result, the project manager for the balcony work was charged with four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm.

What the Court Decided: The Ontario Superior Court convicted the project manager of all five charges.

The Court's Reasoning: The hierarchy of authority for the project was that the foreman reported to the project manager and the workers reported to the foreman. So the project manager was someone with the authority to direct how another person does work and thus had a legal duty under Sec. 217.1 of the *Criminal Code*, said the court. (He also would be considered a supervisor under the OHS law, the court added.) The day of the incident, the manager knew that the swing

stage had only two life lines for the six workers who'd be using it. Once he was aware that there was inadequate fall protection, he was under a duty to rectify the situation, explained the court. Instead, the manager let the workers with their tools board the swing stage without knowing whether it could bear that weight. And to make matters worse, he later boarded the swing stage himself without fall protection. The court concluded that 'in failing to act, he showed wanton and reckless disregard for the lives and safety of the workers' and thus his omissions constituted criminal negligence. And his criminally negligent conduct was a significant contributing cause of the deaths and injuries suffered by the workers, ruled the court [*R. v. Vadim Kazenelson*, [2015] ONSC 3639 (CanLII), June 26, 2015].

ANALYSIS

Criminal negligence cases for safety incidents are still rare. But this incident seemed well-suited for such charges given the magnitude of the tragedy and the serious mistakes made by various parties. The court in *Kazenelson* ultimately found that the project manager's conduct not only demonstrated a wanton and reckless disregard for the lives and safety of the workers but also was a marked and substantial departure from what a reasonable supervisor would have done in the circumstances. It's interesting to note that in reaching this conclusion, the court relied only on evidence regarding the events of Dec. 24, 2009, and rejected evidence suggesting that the manager's performance before that date was substandard, stating that such evidence of his general performance was irrelevant.

As to the other companies and individuals charged in this incident, the construction company that employed the project manager, Metron Construction Corp., previously pleaded guilty to criminal negligence causing death and was ultimately fined \$750,000. Company president Joel Swartz pleaded guilty to four OHS violations and was fined \$90,000. The company that supplied the swing stage, Swing N Scaff Inc., was fined \$350,000 for failing to ensure the platform was in good condition. Its director, Patrick Deschamps, was fined \$50,000 for two safety offences.