

WORKPLACE HEALTH AND SAFETY

An Ounce of Prevention is Worth a Pound of Cure

By Anthony E. Bak and Roslyn Baichoo

Workplace accidents are costly, not only to the injured party and to productivity, but also to the employer's liability, since failure to provide a safe workplace can now be a criminal offence. Transpavé Inc. of Saint-Eustache, near Montreal, is the first company in Canada to be found guilty since the *Criminal Code* was amended in 2004. It was recently fined \$100,000, plus an additional \$10,000 victim surcharge that will be contributed to provincial victim assistance programs. It is expected that this conviction will lead to others.

Transpavé makes paving stones. On October 11, 2005, Steve L'Ecuyer, a 23-year-old worker, was crushed to death as he attempted to free stones that were

blocking the operation of a machine. He had just relieved a co-worker who was going on break when the fatal accident occurred. Investigators found that a safety barrier meant to prevent the machine from operating when someone was underneath it had been disconnected because it was causing production slowdowns.

As always, preventing such situations is infinitely preferable to defending a subsequent prosecution. The *Occupational Health and Safety Act* is designed to protect employees, not employers. The Act does provide for a defence of "due diligence", if an employer can show that all reasonable steps were taken to avoid an accident. This may include demonstrating that multiple safety procedures, protocols and safeguards were built into the production process, even though the legislation does not mandate this type of redundancy. Even if safety procedures were in place at the time of the accident, if the Ministry of Labour can show that an additional safety procedure or protocol could have prevented the accident, the chances of conviction are great.

The law requires employers to report immediately to the appropriate authority any deaths or critical injuries sustained by a worker at the workplace. Employers are also prohibited from doing anything to alter the accident site until the Ministry of Labour officials conduct their investigation. In all but the most exceptional cases, the Ministry will lay charges alleging that the worker was injured due to the employer's failure to safeguard the employee adequately. An employee's conduct in deliberately failing to follow

company procedures and safety protocols is irrelevant: employee misconduct is no defence.

Company directors should be watchful on this issue, because the recent *Criminal Code* amendments make directors of corporations liable for wrongful acts committed by corporations. Senior officials may be found guilty, regardless of whether they are the actual controlling minds behind the operation.

The successful strategy in these situations is, of course, accident prevention. As with most problems, the ounce of prevention is more economically palatable and legally more successful, than the pound of cure. Directors and employers should ensure that workplace safety policies are prepared, distributed and explained to all employees. Employers should create a record of employee signatures to prove that they received a copy and participated in whatever training was offered. However, it is not enough simply to prepare and distribute these policies: they must also be updated when machinery and operation systems change.

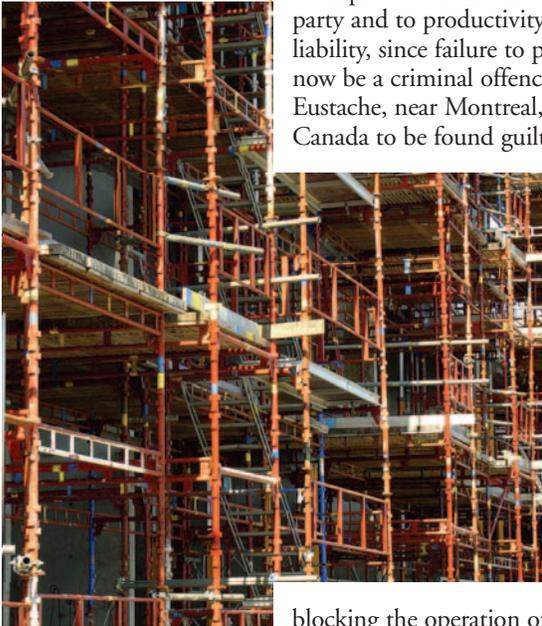
Employers should also conduct regular health and safety audits of their workplace. Consider diarizing these events and making them an integral part of the company's business plan. Identify the employees or the contractor who will conduct the audit and act on recommendations in a timely manner. Document the company's response to any recommendations and indicate the costs of compliance. Some employers have actually invited the Ministry of Labour's staff to conduct its own survey of their workplace. Some employers may not find this palatable, since the Ministry will usually find violations where none was thought to exist, but for others it is the ultimate way of ensuring compliance. At the end of the day, employers must establish that they went above and beyond the simple requirements to maintain a safe workplace. As lawyers trained in this area, we can assist with the drafting of policies and determining whether any specific regulations ought to be considered given the industry involved.



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