

EMPLOYERS' ALERT

March 2008

Employer Held Criminally Negligent For Employee Death

WHAT'S NEW AT RUBIN THOMLINSON LLP

David Whitten was a part of a webinar that was hosted by the Canadian Payroll Association on March 5th. He discussed the importance of making the distinction between an independent contractor and an employee.

David also presented at the OBA's 7th Annual Current Issues in Employment Law on March 6th. David discussed trends in damage awards.

Janice Rubin was quoted extensively on the cover of FP Working in the National Post on March 26th. Janice was interviewed by Daryl-Lynn Carlson on her views of what an employer needs to do to stay competitive and retain good employees.

On March 26th Janice was also interviewed on CBC Newsworld, where she discussed workplace bullying.

We work with employer clients to provide optimal legal solutions to their challenging workplace issues. If you would like to know more about our practice, please do not hesitate to contact us at (416) 847-1814 or via e-mail at contact@rt-law.ca.

Employees often find themselves in positions that put their own safety, or the safety of others, at risk. Employers should be aware that they have a positive duty to protect their employees, and failure to abide by this obligation could cause criminal liability.

The recent decision in *R. v. Transpavé Inc.* is believed to be the first guilty verdict rendered against an employer for the death of an employee since the Criminal Code of Canada was amended in 2004. These amendments increased the legal obligation on corporations and their representatives to protect employees.

More specifically, these amendments, which took effect on March 31, 2004, created a positive duty under the Criminal Code of Canada on organizations and their representatives who have authority to direct how others do work or perform a task.

This obligation requires the employer, including its representatives, to take reasonable steps to prevent bodily harm to persons performing the work or task, and to the public, arising from the work or task.

A "representative" under the Code provision means a director, partner, employee, member, agent or contractor of the organization.

R. v. Transpavé Inc., involved a Quebec company that was charged criminally as a result of the death of one of its employees.

Mr. L'Ecuyer, an employee of Transpavé, died when he was crushed by a machine that was used with an unplugged emergency safety device.

According to published reports, the criminal investigation found that an optic security system on the machinery was "neutralized" and that the employee was not sufficiently trained to understand the danger that this posed.

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Upcoming Events

On April 1st Christine Thomlinson will be speaking at the Western Canada Business Forum, which is being hosted by the International Council of Shopping Centers' in Kananaskis, Alberta. Christine will be speaking about employment law for times of economic uncertainty.

David Whitten will be speaking at Miller Dallas on Thursday April 3rd about executive employment contracts.

This alert is prepared as a service for our clients and other persons dealing with employment issues. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered, and without seeking the advice of legal counsel. No part of this publication may be reproduced without prior written permission of Rubin Thomlinson LLP. This has been sent to you courtesy of Rubin Thomlinson LLP.

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The accident, unfortunately, resulted in the employee's death, something that certainly was not deliberate. Nonetheless, criminal charges were laid.

It was reported that workers had made a number of health and safety complaints against Transpavé in the past. The employer plead guilty to the charges so there was no trial. The Court ordered Transpavé to pay \$110,000 in fines for criminal negligence.

What does this mean for employers?

Because the matter did not go to trial, there is very little analysis on the standard a court will hold employers with respect to ensuring employee safety. However, some general lessons can nevertheless be learned:

- **You May Be Criminally Liable**

Both employers and managers have to recognize that their negligence in the workplace may lead to criminal liability. Ignoring apparent health and safety issues could put both you and your employees in a situation in which your conduct is being critically examined by the Court.

- **Make Sure Employees Are Trained**

The above case demonstrates how vital it is that employees and supervisors are properly trained on the use of equipment and safe practices in the workplace. In the above case it was found that because of the employee's limited training, he was not aware of the danger that was present.

- **Strict Policies Should Be Introduced and Applied**

Employers must make it clear through policy that they take health and safety very seriously. The policy should outline that failure to follow procedure will result in discipline. Further, employers must ensure that this policy is consistently applied.

Managers must also be advised that failure to ensure that employees follow policy and/or failure to discipline employees who break procedure will result in discipline to them.