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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DILSHOD MARUPOV et al v. METRON CONSTRUCTION INC. et al

BEFORE: Master R. Dash

COUNSEL: Chris Alfonso, for the defendant Swing N' Scaff Inc.

Ann Christian-Brown, for the defendant Her Majesty the Queen in Right of Ontario (Ministry of Labour)

Eric Katzman, for the defendant Into (1972) Inc.

REASONS FOR DECISION

[1] The defendant Swing N' Scaff, supported by the defendant Into, move to compel the defendant Ontario (Ministry of Labour) to answer questions refused at the examination for discovery of its representative Henrik Vogt on June 24, 2013. The action arises out of the collapse of a swing-stage used during balcony repairs on December 24, 2009 and which resulted in several deaths and personal injuries. The swing stage has interchangeably been referred to as a scaffolding or a "suspended stage" or as the "subject platform". I refer to refusal numbers as set out in the moving party's charts attached as Schedule A to their notice of motion.

QUESTIONS REFUSED ON THE BASIS THEY RELATE TO POLICY DECISIONS

[2] Refusals 1, 2, 5, 6 and 7 deal with the education, training and experience of the Ministry's inspector assigned to the job site, Mr. Naseer. Questions 3, 9 and 10 deal with Mr. Naseer's workload (although #10 has now been answered subject to follow up questions).

[3] The pleadings against the Ministry as contained in the statement of claim were adopted by the moving defendants in their crossclaim against the Ministry. Paragraph 18 alleges that the Ministry has "a mandate to set, communicate and enforce workplace standards". Paragraph 29 sets out particulars of negligence against the Ministry including allegations that it "failed to enforce the statutory requirements for safety" under the Ontario Health and Safety Act ("OHSA"), it "failed to properly train its…employees to inspect the scaffolding and enforce" the statutory requirements for safety, it hired an employee "who was incompetent and who did not

use the requisite care in inspecting the premises and the scaffolding", it lifted a stop work order before it was safe to do so, it allowed work to proceed at the site and allowed work to proceed on the scaffolding without inspecting it when other scaffolding was found deficient, it "did not conduct regular reviews or inspections of the scaffolding and the property even though it knew or ought to have known of the long-standing non-compliance" of the owners with respect to safety requirements.

[4] Prima facie, questions about the inspector's education, training and experience would be relevant to the allegations that the Ministry failed to properly train its employees and that it hired incompetent employees. Questions about the inspector's workload inform how the inspector allocated his time, when he inspected and why he failed to inspect the particular scaffold prior to the incident and would be relevant to allegations in the statement of claim that the inspector failed to enforce safety requirements, failed to use requisite care in inspecting, allowed work to proceed without inspecting and failed to conduct regular inspections despite a history of non-compliance.

[5] In its statement of defence the Ministry pleads that the plaintiff's allegations "concern policy considerations for which the Crown is not liable at law. No duty of care is owed to the plaintiffs for policy or planning functions of the crown that involve the allocation of resources and policy choices" (paragraph 15). It "denies that there is any liability in respect to decisions of its servants and agents regarding whether to inspect suspended platforms, when to conduct inspections and the frequency of such inspections" and pleads "that these decisions are policy decisions relating to the allocation of resources and are not justiciable" (paragraph 16). Finally it denies that it owes a private law duty to the plaintiffs "for the exercise of discretion" of its employees "regarding whether or how to carry out the regulatory mandate assigned to the Ministry of Labour" (paragraph 17). It also specifically denies that its employees caused or contributed to the plaintiffs' injuries (paragraph 10), that its employees breached any statutory duties (paragraph 11) or that its employees were negligent (paragraph 12).

[6] "Core policy" government decisions protected from action in tort are decisions based on "public policy considerations, such as economic, social and political factors" and are generally made "by legislators or officers whose official responsibility requires them to assess and balance public policy considerations." They are protected because the "weighing of social, economic and political considerations to arrive at a course or principle of action is the proper role of government, not the courts."[1]

[7] On the other hand, governments may attract liability in tort "where government agents are negligent in carrying out prescribed duties."[2]

[8] The Ministry argues that decisions respecting when and whether to inspect and the frequency of inspections are core policy decisions made by the inspectors based on allocation of resources by the Ministry, for which the Crown cannot be held liable. It pleads (in paragraph 13) that when the inspector attended at the construction site to conduct inspections, he did not

[1] *R. v. Imperial Tobacco Canada Inc.*, [2011] 3 S.C.R. 45, [2011] S.C.J. No. 42 (SCC) at paragraphs 87 and 90
[2] *R. v. Imperial Tobacco Canada Inc.*, supra at paragraph 72.

observe the subject platform and consequently did not inspect it. The Ministry concedes that if the swing stage had been inspected, the Ministry could be held vicariously liable for a negligent inspection and in that case questions about the inspector's training and experience would be relevant questions. They argue however that since the stage was not inspected, and since the decision whether to inspect was a policy decision based on allocation of resources, there could be no liability and as such, questions about the inspector's training and experience would not be relevant and need not be answered.

[9] Similarly they argue that since the decisions about when and whether to inspect and frequency of inspections are policy decisions made with respect to allocation of public resources, questions about the inspector's workload and whether it had on any bearing on the frequency or timing of his inspections are not relevant and need not be answered.

[10] Although no reply was delivered to the Ministry`s statement of defence, rule 25.08(4) deems that the party not delivering a reply "shall be deemed to deny the allegations of fact made in the defence of the opposite party".

[11] The moving defendant does not concede that Mr. Naseer failed to observe or to inspect the particular swing stage that collapsed. It is not my role to determine if he inspected the swing stage. That will be an issue of fact for trial. The Ministry concedes that if he inspected the swing stage, questions about his experience and training would be relevant. As a result those types of questions are relevant to a matter which is in issue in the action and would need to be answered. That of course does not dispose of the workload questions.

[12] There is a second reason why questions about the inspector`s training and experience as well as the workload questions must be answered. The moving defendant denies that the decision by the inspector as to whether and when to inspect and the frequency of inspections is a matter of policy which is non-judiciable. Clearly the allocation of resources by the government to the Ministry of Labour and the allocation of those resources by the Ministry of Labour (including numbers of inspectors) to the department that inspects construction sites is a matter of policy. The position of the moving defendant however is that the decisions on the ground by the inspectors, given the limitations on their resources, including when to inspect and how often to inspect are operational, not policy decisions. As such, a failure to properly determine when and whether a particular site or scaffold should be inspected in all the circumstances that are known or should have been known to the inspector could, if such determinations are made negligently, result in vicarious liability against Ontario. This is a compelling argument and not one that can be determined on a refusals motion. It is not a frivolous argument.

[13] Therefore, while there can be no liability for policy decisions by the government, it is an open question whether discretionary decisions by inspectors as to when or whether to inspect and frequency of inspections are core policy decisions of Her Majesty or whether they are operational decisions of employees carrying out their legislative mandate to enforce safety under the OHSA. That is a question best left to the trial judge or a summary judgment motion, but it is not my role on a productions and discovery motion to determine whether the inspector is making policy decisions.

[14] The relevance of questions are governed by the pleadings. A failure to inspect properly or at all, if circumstances should have required an inspection, is relevant to the pleaded particulars of negligence in the statement of claim such as "it allowed work to proceed on the scaffolding without inspection" when other scaffolding on the premises were found to be deficient or "it did not conduct regular reviews or inspections of the scaffolding" when they knew or ought to have known of non-compliance issues.

[15] As a result, until a judge at trial or on summary judgment determines either that the inspection decisions were policy rather than operational decisions or that the pleadings against Ontario cannot stand, the questions relating to negligent non-inspection must, at this stage be answered. The parties must have the opportunity to examine on that evidence in order that it is available at trial in the event that the trial judge determines that the decisions in issue were not policy decisions. This would include all factors that may have played a role in those decisions, including the inspector's experience and training as well as his caseload.

[16] I will look at the specific questions refused.

[17] Refusal 1: Mr. Naseer's resume is relevant to education, experience and training. That does not mean that Mr. Naseer must go out and create a resume. The Ministry must produce whatever resume they had on file at the time Mr. Naseer applied for the job or was hired in order to test if they hired a competent inspector. If he has prepared a revised resume between the date of his hire and December 23, 2009 it should also be produced to test if he had the appropriate qualifications to make decisions about when, whether and how to inspect as of the date of the incident.

[18] Refusals 2, 6, 7 relate to education and training, both before and after he was hired by the Ministry. What is relevant is the total of all education and training that could relate to his ability to inspect a job site and which bore upon his decisions to inspect and not just his training at the Ministry. I note that refusal 6 is restricted to training at prior employers with respect to health and safety issues. These questions are relevant and proportionate and shall be answered. Refusal 5, to provide his employment history from graduation until his hiring at the Ministry, a period of 30 years, is too broad and disproportionate to the information required for the issue and it need not be answered. In any event it will, to a large extent be answered when his resume is produced.

[19] Refusals 3, 9 and 10 relate to Mr. Naseer's caseload at the time he was or should have been inspecting. 10 has been answered. The answer to 9 is incomplete and requires particulars. 3 shall be answered.

PRE-INCIDENT GUIDELINES

[20] Refusal 21 asks for "annual sector plans" (which has been described to me as pinpointing hazards or risks that an inspector should be on the alert for or "red flags") from 2006, when Naseer was hired, to 2009. The Ministry has provided the 2008-2009 sector plan which is said to have been in effect in December 2009. I am advised that the alerts are not cumulative from one year to the next. Therefore the plaintiffs are entitled to know all of the hazards or risks that

Naseer has been made aware of over the course of his employment and which would have been known to him and considered by him at the time he determined whether to inspect and the extent of the inspection. Naseer was hired in 2006 and as a result the Ministry must produce the sector plans for 2005-06, 2006-07 and 2007-08.

[21] Refusal 4 asks for all "internal guideline documents" that were provided to Naseer from 2006 to 2009 that relate to the issues in this action and the type of project that were dealt with. It is not clear to me what the Ministry has in its possession and what it has already produced (in addition to the sector plans set out at Refusal 21). In their factum they indicate that a copy of the "Guidelines" in effect from 2006 to 2009 has already been produced. I am also told that year-end policy statements have been provided for 2008 and 2009. I am told that the Policy Manual currently in existence has been provided or at least the table of contents for the construction sector. It is difficult to rule on this refusal based on the information provided. Nonetheless it is clear to me that the moving party is entitled to all policy manuals or other guideline documents relating to the type of project or issues in this action that were provided to Naseer over the course of his employment from 2006 to 2009. The question shall be answered in that light.

CHANGES IN POLICY SINCE INCIDENT

[22] Refusals 12, 22 and 26 relate to changes in written policy after the incident in regards to issues in the litigation including revisions to the policy manual and training materials and field visit policy. Although the word "policy" manual is used, they are clearly more akin to training or procedural documents. To the extent the documents may include government "policy", the manner in which the inspector carried out that that policy would still be relevant.

[23] These questions are designed to elicit any changes in training, operations or alerts that may have been instituted following and possibly as a result of the incident in this action. Generally, "remedial measures" could provide evidence of what was reasonable in the circumstances, whether a defendant took reasonable care or whether a defendant met a reasonable standard.[3] They may have some probative value in demonstrating prior knowledge of a potential hazard or the feasibility of taking precautionary measures.[4] Such questions are to be permitted at the discovery stage, while leaving matters of admissibility and weight to the trial judge.[5] If the plaintiff offers evidence of remedial measures at trial, the trial judge "must balance the probative value of the evidence against its prejudicial effects."[6]

[24] In this case the changes in the manuals may reveal for example that particular alerts or a necessity for more frequent inspections or how inspections should have been carried out should have been in effect prior to the incident. It could reveal whether the procedures for hiring and training of inspectors by the Ministry were deficient. As such, evidence of remedial measures, such as those contained in revised training or policy and procedure manuals could help resolve

[3] *Sandhu v. Wellington Place Apartments*, 2008 ONCA 215 (C.A.) at paragraphs 56 and 63.
[4] *Algoma Central Railway v. Herb Fraser and Associates Ltd.*, [1988] O.J. No. 1849, 66 O.R. (2d) 330 (Div. Ct.) at paras. 12 and 13.
[5] *Algoma Central Railway*, supra at paragraphs 20 and 25.
[6] *Sandhu v. Wellington Place Apartments*, supra at paragraph 60

issues of negligence. That will be a matter for the trial judge, as will the question whether the changes made were changes of core policy (which cannot attract liability) or changes in the way that government employees carry out their assigned duties (which can attract liability). In either case the questions will be answered at this stage since the evidence of remedial measures could help resolve issues of negligence as defined by the pleadings.

[25] The changes that the Ministry must address by these questions will be restricted to changes in the inspections of construction sites where scaffolding or swing stages are used or generally in situations where fall protection is required.

PRIOR SWING STAGE INCIDENT

[26] Refusals 17, 18 and 19 all relate to prior swing stage accidents. Refusal 18 (written complaint) has been satisfied and the Ministry agrees to answer refusal 19 (swing stage accident statistics). Refusal 17 asked "when and where" the other critical swing stage accident occurred in 2009. Although the Ministry provided the date it advised "in Toronto" as the location. That answer is incomplete. An address must be provided.

THE ADVISORY PANEL

[27] Following this incident an expert advisory panel on occupational health and safety (the "Tony Dean panel") was established, which was supported by a secretariat from the Ministry. The moving party withdraws refusal 23 (the names of members of the secretariat). The witness indicated that there may have been some internal reports prepared for the panel with regards to training and fall protection. In refusal 24 the Ministry is asked for any reports provided to the panel dealing with issues relevant to the litigation and in particular dealing with swing stages and the relevant legislation. No privilege has been claimed over the reports. They appear to be relevant to the issues respecting negligent inspection of swing stages, although it is not possible to be certain as they have not been produced. The question will be answered.

WHAT DOCUMENTS DID THE INSPECTOR REVIEW?

[28] Refusal 8 asks Mr. Naseer to review the productions of the defendant Metron and identify which documents he reviewed, I assume prior to the incident. This is relevant to the issue of why, whether and how he conducted his inspections at the site. The documents involved are voluminous. Metron has produced in excess of 300 tabbed documents, many of which are in excess of 50 pages. In my view the question as stated in the chart is disproportionate to the information required. In any event, a review of the transcript reveals not a refusal, but an agreement by Mr. Stieber, the lawyer for the moving party, to look at the list of documents and identify to the Ministry those specific documents that they wish to ascertain whether they were reviewed by Mr. Naseer. The question as such will be answered once the lawyers for Swing N' Scaff identify the documents that they wish to know whether they were reviewed by Mr. Naseer.

THE ENGINEERING REPORT

[29] Refusal 15 concerns an engineering report prepared as a result of investigation conducted following the incident and that I ordered released in my May 6, 2013 order. The question was whether the Ministry's witness Mr. Vogt accepted the opinions contained in the report. This question need not be answered for two reasons. Firstly it is too vague and does not specify what opinions were "accepted". Secondly, a party is entitled to the "position" of an adverse party on an issue in the action, but not whether a party accepts opinions in a report that has not been tendered as an expert report. The Ministry's answer is that if it intends to rely on any of the engineering reports at trial (as expert reports) it will advise under rule 53.03. In my view the Ministry's answer was correct and the refusal was proper. The question need not be answered.

AGREED QUESTIONS

[30] Refusals 13 and 14 deal with the post incident investigations by the Ministry. In my order of May 6, 2013 in a rule 30.10/Wagg motion I ordered the release of limited documents resulting from post incident investigations, but delayed consideration of the remaining documents given ongoing criminal and regulatory charges. I ordered that the motion could be brought back on at the earliest of the conclusion of all charges at the trial level except sentencing, six months before the pre-trial in this action or November 6, 2014. One charge has yet to be concluded and the other dates have not yet passed. Requiring answers to those questions at this time would circumvent that order. The moving party agrees to adjourn this motion relating to those refusals until after one of the pre-conditions in my May 6, 2013 order occurs. If the criminal charges are concluded, there may not be opposition to the motion.

[31] The moving party agrees that refusals 10 (as previously discussed), 11, 16, 18, 20, 25, 27 and 28 have now been answered subject to proper follow up questions. As previously indicated the moving party withdraws refusal 23.

COSTS

[32] There was some division of success, but the moving party was substantially successful and is entitled to its costs. Further, some of the questions which the moving party conceded were answered were answered only after service of the motion. The moving party submitted a costs outline for $13,461 actual costs and would have sought partial indemnity costs of $6,460 based on full success (inclusive of $772 disbursements but before HST). They suggest $5,000 costs would account for the modest division of success. The Ministry suggests appropriate costs would be in the range of $2,000 to $2,500. The Ministry's own costs outline would have claimed partial indemnity costs of $2,542 (inclusive of $80 disbursements) had they been successful. The motion was of moderate complexity. Both parties provided extensive motion materials, factums and authorities. The moving party's costs outline suggests a possibility of some duplicated costs among the two lawyers and articling student in meeting with each other and reviewing motion materials. In my view costs of $4,000 inclusive of disbursements and HST is fair and reasonable in all the circumstances and should be within the reasonable expectations of the responding party.

ORDER

[33] I hereby order as follows:

(1) Questions refused at the examination for discovery of Henrik Vogt on behalf of the defendant Her Majesty the Queen in Right of Ontario (Ministry of Labour) and marked as refusal numbers 1, 2, 3, 4, 6, 7, 9, 12, 17, 19, 21, 22, 24 and 26 shall be answered within 30 days. Refusal number 8 shall be answered within 30 days after the moving party identifies the documents it wishes reviewed.

(2) Questions marked as refusal numbers 5 and 15 need not be answered.

(3) Questions marked as refusal numbers 10, 11, 16, 18, 20 25, 27 and 28 have been answered subject to proper follow up questions.

(4) Questions marked as refusal number 23 is withdrawn.

(5) Questions marked as refusal numbers 13 and 14 are adjourned sine die.

(6) The defendant Her Majesty the Queen in Right of Ontario (Ministry of Labour) shall pay to the defendant Swing N' Scaff Inc. its costs of this motion within 30 days fixed in the sum of $4,000.00.

Master R. Dash

DATE: June 13, 2014