



Will the Basic Principles in OSH Law Enforcement, including the Onus of Proof and Penalty for Breach of Safety Laws, be Bent by Recent UK OSH Case Judgments?

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Development of OSH Laws in Hong Kong follows that in the UK:-

- Factories and Industrial Undertakings Ordinance 1955 modeled on UK Factories Act 1937
- Occupational Safety and Health Ordinance 1997 modeled on UK Health and Safety at Work etc. Act 1974

What is Onus of Proof?

- Sometimes called Burden of Proof (舉證的責任)
- Under the common law spirit (普通法精神), the burden of proof primarily rests on the prosecution (控方) in criminal proceedings, or the plaintiff (原告) in civil proceedings, and not on the defendant / respondent (被告 / 答辯人) in either proceedings

Prima Facie Evidence

- The prosecution / plaintiff has to show to the court that the necessary prima facie evidence has been established (表面證供成立)
- The purpose is to build a case to answer

Case or No Case

- If prima facie evidence has not been established, there will be no case to answer (毋須答辯).
- In this case, the defendant will be unconditionally released and the court will usually award all or part of the costs, to be borne by the prosecution / plaintiff, including judicial and legal costs, to the defendant.

Spirit Behind Common Law



- The spirit is not for the defendant to prove himself innocent / not liable, but for the prosecution / plaintiff to prove the defendant's guilt / liability.
- For those laws that impose strict liability, usually it needs to be proven beyond reasonable doubt (毫無合理懷疑)
- Otherwise the benefit of doubt goes to the defendant (疑點利益歸被告)
- When the burden of proof has been shifted to the defendant, sometimes the standard of proof is on a balance of probabilities
- Common law judgments rely heavily on precedent cases (有先例可援)

Is there any law laid down in the F&IU Ordinance (Cap. 59) that the onus is on the accused?



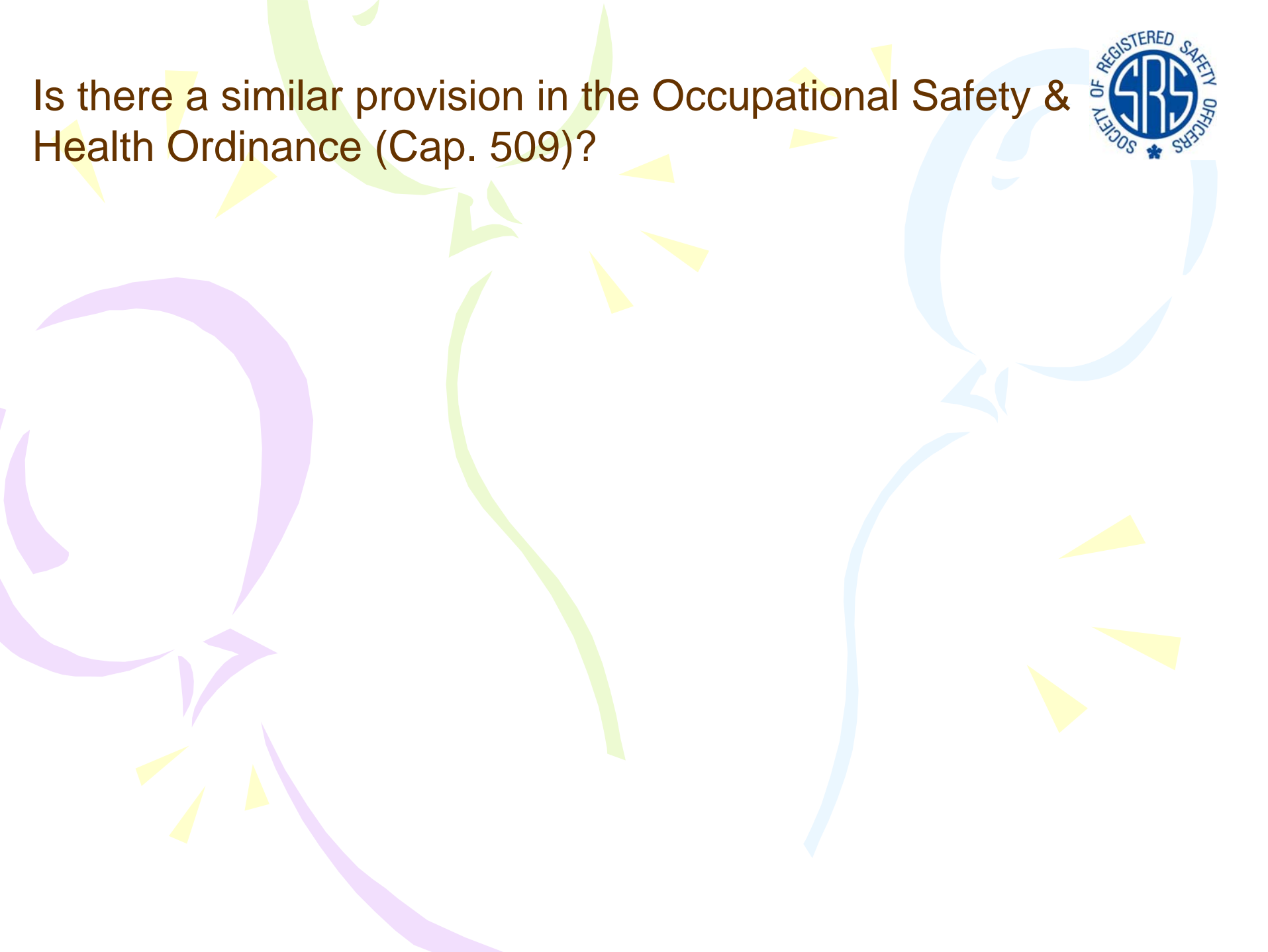
Is there any law laid down in the F&IU Ordinance (Cap. 59) that the onus is on the accused?

➤ Yes, section 18(1) of the F&IU Ordinance reads “In a proceeding for an offence under a provision in this Ordinance consisting of a failure to comply with a duty or requirement to do something so far as is necessary, where practicable, so far as is reasonably practicable, or so far as practicable or to take all reasonable steps, all practicable steps, adequate steps or all reasonably practicable steps to do something, the onus is on the accused to prove that it was not necessary, not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that he has taken all reasonable steps, or practicable steps or done the appropriate thing to satisfy the duty or requirement.”

Is there any Law laid down in the F&IU Ordinance (Cap. 59) that the onus is on the accused? (Cont'd)

➤ And also in section 18(2) of the F&IU Ordinance which reads “In a proceeding for an offence under a provision in this Ordinance consisting of an exemption from compliance with a duty or requirement to do something where it is impracticable, not reasonably practicable or rendered impracticable to comply with that duty or requirement, the onus is on the accused to prove that it was impracticable or not reasonably practicable to do more than was in fact done to comply with the duty or requirement.”

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➤ Yes, section 38 of the OSHO reads: “ In proceedings for an offence against this Ordinance involving a failure-
(a) to comply with a requirement or an obligation that has to be complied with only in so far as it is practicable or reasonably practicable to do so; or
(b) to take steps, reasonable steps or reasonably practicable steps to comply with the requirement or obligation,
the onus is on the defendant to establish that compliance with the requirement or obligation was not practicable or was not reasonably practicable, or that steps, reasonable steps or reasonably practicable steps were taken to comply with the requirement or obligation.”

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- Yes, e.g. Prevention of Bribery Ordinance Cap. 201 section 24, it is clearly written therein that “the burden of proofing a defence of lawful authority or reasonable excuse shall lie upon the accused.”

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In case of an accident, can the prosecution rely on the idea that The “accident proves itself” to shift the onus of proof?

- Generally not. Basically, there is no definite causal relationship between a negligent act and an accident that resulted, unless all other factors that may contribute to the accident are excluded.
- In the case of HKSAR v. Eastime Engineering Limited (HCMA 82/2000), the Magistrate was cited to have penned down this clause: “Being the proprietor and contractor of a construction site, you have a duty to take reasonably practical step to ensure no accident occurs. By allowing a fatal accident to occur in your construction site, you brought suspicion upon yourself” responded by the High Court Judge in this statement: “Whilst lengthy reasons are not required, some indication in these sort of circumstances is necessary to set out the suspicious acts of an appellant. By saying that the actus reus which gave rise to the prosecution occurred and that was sufficient is not enough for an appellant to determine where it had brought suspicion upon itself”. Apart from this “actus reus”, i.e. a “guilty act”, the offender needs to be shown to have “mens rea”, i.e. a “guilty mind”, in order to enable his criminal liability be established beyond reasonable doubt.

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➤ No, e.g. in *HKSAR v China State Construction Engineering Corporation HCMA 1188/2001*, the contractor was convicted for failure, under Regulations 7J of the F&IU (Lifting Appliances and Lifting Gear) Regulations, before the lifting appliance was used, to ensure that every part of the load, namely a bundle of metal water pipes which was to be raised or lowered by the lifting appliance was securely suspended or supported; and adequately secured so as to prevent danger arising to persons or property as a result of the slipping or displacement of any part of the load; and for failure, under Regulation 15B of the same set of Regulations, where the person operating the lifting appliance did not have a clear and unrestricted view of the load carried by the lifting appliance, and such view was necessary for the safe working of the appliance, to appoint and station such persons as might be necessary to give effective signals to the person operating the lifting appliance to ensure its safe working.

In the HKSAR v. China State Construction Engineering Corporation HCMA 1188/2001 case

- One of the grounds for appeal against conviction of breach of Regulation 15B of the F&IU (LALG) Regulations was that “the learned Magistrate misdirected himself that the Appellant bore the onus to show on a balance of probabilities that it was not necessary to do more than was in fact done to satisfy the statutory requirement.”
- The presiding judge, relying on the judgment of Deputy High Court Judge McMahon (concerning an appeal arising out of a conviction under the Construction Site (Safety) Regulations) in HKSAR v China Civil Engineering Construction Corporation HCMA 1020/2001 considered this ground of appeal without merit and hence dismissed this ground.

Judgment of Deputy High Court Judge McMahon in HKSAR v China Civil Engineering Construction Corporation HCMA 1020/2001:



➤ "In my view these offences are offences of strict liability. That is, it is not required of the prosecution, so far for example as Regulation 39(1) is concerned, to prove the offender intended to fail to erect a structure so as to prevent workmen being endangered. It seems quite plain to me that the offences are sufficiently ones directed to concerns of public interest and policy, namely the safety of persons employed in the construction industry so as to displace the presumption that **mens rea** is an element of the offences. The purpose of the legislation of which these regulations form a part is that of the promotion of worker, and to some extent also, public safety in the context of the construction industry in Hong Kong. Regulations such as the present imposing **strict liability** on individuals and corporations responsible for the operation of construction sites would promote such safety by enhancing the vigilance of those responsible for the safety of workers and the public in the environs of construction sites. *Gammon (HK) Ltd v Attorney General* [1985] AC 1 and *Attorney General v Fong Chin Yue* [1995] 1 HKC 21. Further the offences are ones of "mala prohibita" rather than ones of "mala in se". The offences are regulatory in nature and are not directed against any inherent evil in the conduct of individuals ... **The onus of proving (the) defence (of honest and reasonable belief in compliance) given the important purpose the regulations are directed at, i.e. preserving the safety of workers, must be upon the alleged offender. In my judgment the standard of proof is on the balance of probabilities: AG v Fong Chin Yue (supra).**"

Definition of some terms in the above judgment:

- **mens rea** is the Latin term for "guilty mind" used in the criminal law. The standard common law test of criminal liability is usually expressed in the Latin phrase, *actus non facit reum nisi mens sit rea*, which means that "the act does not make a person guilty unless the mind is also guilty".
- **mala prohibita** are those things which are prohibited by law, and therefore unlawful. It is established that when the provisions of an act of the legislature have for their object the protection of the public, it makes no difference with respect to contracts, whether the thing be prohibited absolutely or under a penalty.
- **mala in se** means evil in itself. An offence *malum in se* is one which is naturally evil, as murder, theft, and the like; offences at common law are generally *mala in se*. An offence *malum prohibitum*, on the contrary, is not naturally an evil, but becomes so in consequence of its being forbidden; as playing at games, which being innocent before, have become unlawful in consequence of being forbidden.

R v Chargot Ltd and Others [2007] EWCA Crim 3032



➤ The UK Court of Appeal held that “That state of affairs in this case was the risk of injury arising out of the use of dumper trucks. That risk cannot be gainsaid. It eventuated in the form of the accident which killed Shaun Riley ... In the present case, the prosecution, in our view, clearly established the relevant risk, namely of injury caused by driving the dumper truck. That it was a real risk, as opposed to a purely hypothetical one, **was established by the fact that there was the accident.** That was in our view sufficient to justify the requirement that the first and second appellants should have the burden of proving that they had done all that was reasonably practicable to protect against that risk ...”

➤ A brief abstract can be found in

<http://www.lawreports.co.uk/ICRE/2008/apr0.2.htm>and;

and in full in

➤ <http://www.bailii.org/ew/cases/EWCA/Crim/2007/3032.html>

R v Charget Ltd and Others [2008] UKHL 73 on appeal from [2007] EWCA Crim 3032



➤ **The UK Court of Appeal held that** “For these reasons I would reject Mr. Lissack’s primary submission that sections 2(1) and 3(1) (*of the HASAWA, equivalent to the G.D. in FIUO or OSHO*) require the prosecution to identify and prove the acts and omissions by which it is alleged that there was a breach of the duty to achieve or prevent the result that they describe. What the prosecution must prove is that the result that those provisions described was not achieved or prevented. Once that is done a prima facie case of breach is established. The onus then passes to the defendant to make good the defence which section 40 provides on grounds of reasonable practicability. A contrast may be drawn with sections 4 to 6 (*of the HASAWA*), which set out a series of more particular measures that must be taken. Where breaches of those sections are alleged, the respects in which there was a breach must be identified.” **(Words in italics are my addition)**

➤ **Judgment in full in**

<http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd081210/cargo-1.htm>

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- For civil liability to be borne by the defendant, the plaintiff needs to establish that he has **damage(s)**, and that the damages are due to the **negligence** of the defendant.
- Damage(s) necessarily means the consequence while the negligence means the act and the plaintiff has to establish the link between the two
- To establish liability, the determination of the cause of the accident is also important

How about Criminal Offences: Focus on Cause or Result?



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- But for criminal offences, it usually focuses on the act or omission itself, and the act need not be done in some circumstances. If the intention can be proven, then the charges can be laid.
- In the realm of OSH, as in other criminal proceedings, the purpose is to punish the transgressor, in order to deter him or others from repeating the same
- Moreover the outcome of an accident may be completely fortuitous, e.g. deliberate failure to ensure OSH may only result in a minor injury or no injury at all while a minor slip may result in a fatality.

Consequence considered or not?

- The key problem with criminal law is that for most offences involving injury to the victim, the defendant is only liable if it can be shown that he intended to cause the injury, or was reckless to this fact
- In the case of accidents at work, intention is rarely an issue, at least as far as causing the death or injury of a person is concerned, so recklessness needs to be proven
- And recklessness is assessed on a subjective basis for any form of injury, following *R v Gemmill & Richardson* (2003) 4 All ER 765 where it was alleged that the defendant needed to be aware that his actions could lead to the injury of the victim
- It may not be easy to establish every time that the defendant must appreciate the consequences of his actions, in particular where the line of causation is complex, unlike the simple case of a criminal assault

Recklessness (不顧後果)

➤ In 2003, in a criminal trial of two boys, aged 11 and 12, in an arson case, feeling that the traditional definition of “recklessness” after Diplock, which had been used for over two decades but was constantly under fire by legal scholars, Lord Bingham of the House of Lords saw the need for Diplock's definition to be re-invented because it left no possibility for the acquittal of persons whom the court judged could not know the risk of their actions: it was inherently unfair for 11- and 12-year-old boys to be held to the same standard as reasonable adults. Bingham therefore re-wrote a definition which firmly resolves the question of what recklessness in English criminal law actually means: that a person “acts . . . ‘recklessly’ with respect to (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.”

Consequence considered or not?

- Using this principle of judgment, the consequence should be immaterial. So long as the intention / act or omission has been proven, it will be good enough for the prosecutor to take action; need not wait for something to happen.
- But the reality is that the general public, and sometimes the law enforcement agency or even the court, tend to focus on the consequence. The worse the result, such as in a fatality, the heavier would be the penalties in most instances.
- An analogy to be drawn is drink-and-drive. The penalty for fatality caused by a drunk driver is definitely much heavier when compared to a drunk driver caught in a road block, but in terms of criminal liability, the malice is the same. Should penalties differ and why? Is the heavier penalty for the one causing fatality be a punishment seeking for justice instead of a deterrent?

Personal Liability?

➤ s. 37(1) of the HASAWA reads “Where an offence under any relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any **neglect** on the part of any director, manager, secretary, or other similar officer of the body corporate or a person who was purporting to act in such a capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”

Personal Liability?

➤ Any Similar provisions in FIUO or OSHO?

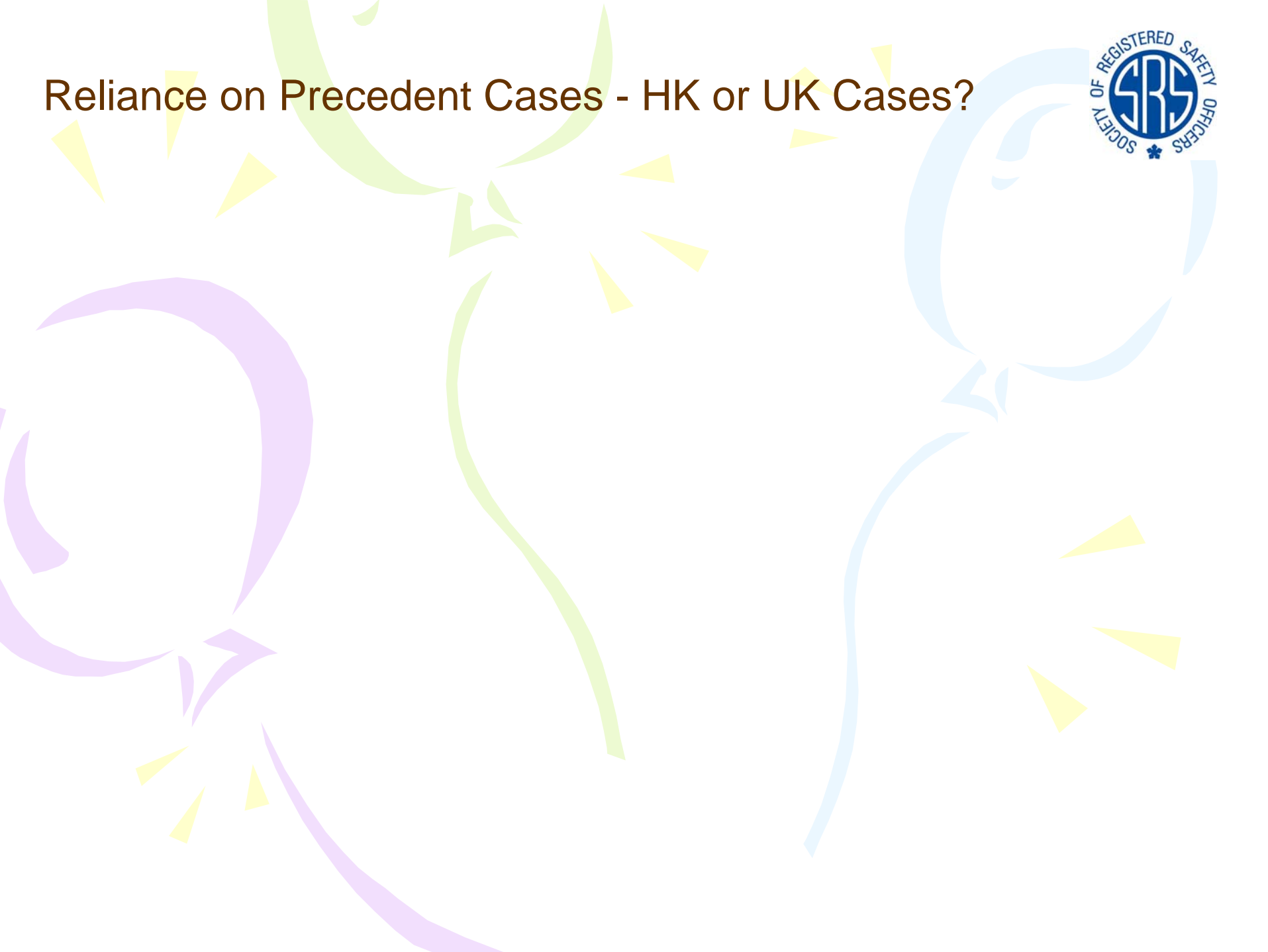
Personal Liability?

- Yes, Similar provisions in FIUO s. 14(1) or OSHO S. 33(1)

Personal Liability?

- UK case of R v P Limited and another
- The HSE appealed against the preliminary ruling at Croydon Crown Court in which the judge required subjective knowledge by the director or other officer of the company of the material facts giving rise to the offence committed by the body corporate because “consent” and “connivance” both require proof of subjective knowledge, and so should “neglect”. This, however, is not logical because then the less that directors knew of what was going on, the more likely they could escape liability as they would lack the required subjective knowledge
- Lord Justice Latham held that an officer of a body corporate that had broken health and safety laws would commit an offence as a consequence of his behaviour if he either knew of the relevant facts giving rise to the offence, or, **if he lacked that subjective knowledge,** should by reason of the circumstances have been put on inquiry as to **whether the relevant safety procedures were in place**

Reliance on Precedent Cases - HK or UK Cases?





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- Normally rely on local (HK) cases first
- But if no appropriate local case, will rely on UK cases, e.g. In the case of *HKSAR v. Otis Elevators Co. (H.K.) Ltd.* HCMA 154/2008, “the Appellant has relied on the local case of *R. v. Sime Darby Property Services Ltd* [1993] 2 HKC 485 to support its argument. In that case, Justice Bewley, the appellate judge, reversed the magistrate’s ruling that a cooling tower for air-conditioning installed on the exterior wall of a building was part of the building. The Appellant has also relied on the House of Lords case of *Price v. Claudgen Ltd* [1967] 1 WLR 575 and the Scottish case of *Lawson v. J.S. Harvey & Co. Ltd* 1968 SLT (Sh Ct) 24.”

Concluding Remarks

- Developments in U.K. may have an effect on how Magistrates as well as High Court and Supreme Court Judges judge purported violations of FIUO or OSHO!



Thank You!