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President's Message

My recent talks on Problem Solving in Accident Investigation and OSH Law, jointly organized with Hong Kong Polytechnic University, had been completed. Thanks to both the HK Polytechnic University, in particular to Dr. Aron Kwok, for the arrangement of the venues and also to the EC Members who team up with me in the talks sharing their knowledge and experience in the above topics. Apart from the two talks mentioned, other EC Members have also talked on Accident Investigation. I hope members who had attended any or all of the talks found them informative and useful.

Talking about CPD Talks, the Society will continue to organize such talks up to June 2010, the deadline date for the second CPD cycle. The Society is also actively organizing another AGM Afternoon CPD Talk in June, on the same day of the AGM Dinner. I take this opportunity to again advocate active participation of members in the functions. The EC are also voluntary folks working so hard to bring all these together so that members can both benefit from the knowledge and experience shared, and in gaining the required CPD points to fulfill both the legal and other professional associations' requirements.

Talking about AGM, there will be another round of election of EC Members. I encourage those who have a heart to serve peers in this field to step forward by standing for the election.

The progress on the Occupational Safety and Health Federation has been quite slow in the past months, due to the need for the organizing committee to clarify some legal issues. Right now, SRSO is represented by Johnny, Jesse and myself in the organizing committee. The Federation will most likely be a legal entity and not just a joint liaison party as we envisage there will be legal implications when it finally comes to election, financial matters, disciplinary proceedings etc. More information will be announced at a later suitable time.



Leung Chiu Ming, Michael

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?

Leung Chiu Ming, Michael

Introduction

It has always been a bone of contention, in particular in prosecution cases under the General Duties requirements, viz. s. 6A of the Factories and Industrial Undertakings Ordinance or s. 6 of the Occupational Safety and Health Ordinance, that the occurrence of an accident is sufficient to show that there has been some degree of lack of adequate control, or using a civil case terminology "negligence", on the part of the proprietor or employer under the said Ordinances respectively. Does it suffice to say so? In addition, should criminal law offence be established on the cause or the result in case of an accident. Will intention count? If intention does not come into play, then why would "mens rea" (i.e. guilty mindset) be considered in some criminal offences, such as intention to inflict bodily injury, or in OSH laws, imprisonment terms in some penalties involving recklessness? But if the result (or sometimes called the consequence) is not crucial in criminal offences, then why would we cry out for heavier penalty for a case involving six fatalities than a simple industrial accident involving minor injury due to fall from height? Why would the prosecutor and even the court consider shutting those drunk drivers causing fatalities on the road behind the bars while those caught driving drunk on road blocks are simply fined and at most re-education demanded? Finally, when it comes to terms such as consent, connivance, should knowledge of the breach in OSH law be a critical factor in assessing personal liability? Would it result in senior management trying to escape having knowledge of OSH requirements in order to escape being caught? The purpose of this article is to prompt readers to have further thought on these aspects.

The Local Statutes

Is there any law laid down in the F&IU Ordinance (Cap. 59) that the onus is on the accused? The answer is 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." Similarly, section 18(2) of the F&IU Ordinance 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."

A parallel is found in section 38 of the OSHO which 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."

In fact, the burden of proof on the defendant can also be found in other local statutes. An example is the Prevention of Bribery Ordinance Cap. 201 section 24, in which it is clearly written therein that "the burden of proofing a defence of lawful authority or reasonable excuse shall lie upon the accused."

Past Local Court Cases

There are some High Court Magistracy Appeal rulings on this issue whereby the High Court Judge overturned the judgment of the Magistrate Court Judge in favour of the interpretation that there is no causal relationship between the so-called negligence and an accident. Inherent in this statement is the fact that even legal professionals are not on a united front in the interpretation of such causal relationship. 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 reasonable 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 have enable his criminal liability be established beyond reasonable doubt.

Then, does it mean that it will be very difficult for the onus of proof be shifted to the accused other than in the above cases involving reasonable practicability. Not always, e.g. in HKSAR v China State Construction Engineering Corporation HCMA 1188/2001, the contractor was convicted for failure, under Regulations 7] 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. 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. 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)*."

[Notes: "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.]

U.K. Case on The Burden of Proof

It is well recognized as a basic premise of common law that it is the duty of the prosecution to prove a *prima facie* case before taking out prosecution, or otherwise there will be no case to answer. The burden of proof is initially on the prosecutor to establish that the defendant has committed an offence, rather than the defendant proving itself innocent in the first place. It is not until and unless the prosecution has gathered sufficient evidence to prove a *prima facie* case should the onus of proof be shifted to the defendant that he has taken reasonably practicable steps as required by the law to safeguard his employees. However, in the recent case of *R v Charget Ltd and Others* [2007] EWCA Crim 3032 in U.K., the 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 ..."

[Note: A brief abstract can be found in <http://www.lawreports.co.uk/ICRE/2008/apr0.2.htm> and in full in <http://www.bailii.org/ew/cases/EWCA/Crim/2007/3032.html>]

The U.K. HSE further appealed to the House of Lords, and the final judgment was recorded in *R v Charget Ltd and Others* [2008] UKHL 73 on appeal from [2007] EWCA Crim 3032 which 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)

[Note: Judgment in full in <http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/id081210/chargo-1.htm>]

Criminal and Civil Case - Guilty Mind or Guilty Act and in an Accident Case, Cause or Result?

Picking up on this "guilty mind" and "guilty act", should civil liability be focused on the cause (act or omission) or the effect (consequence)? 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 Offence? Should it be focused on the cause or the result? 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. However, the key problem with criminal law prosecutions on OSH law violations 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. On assessing recklessness, in 2003, in a

criminal trial of two boys, aged 11 and 12 involving an arson case, Lord Bingham of the House of Lords saw the need for Diplock's traditional 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." In this case, the two kids have knowledge of the risk but not the consequence of the damage. Using this principle of judgment, the consequence of an accident 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 a fatality, the heavier would be the penalties in most instances. Should a heavier penalty imposed on the one causing fatality be a punishment seeking for justice instead of a deterrent?

Personal Liability in Breaches of OSH Laws

Picking along the line of argument on "recklessness", section 37(1) of the U.K. Health and Safety at Work etc Act 1974 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." Similar provisions are found in the Factories and Industrial Undertaking Ordinance section 14(1) or Occupational Safety and Health Ordinance section 33(1). In the recent 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. Appeal Court Judge 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. So, it maintains the basic legal ground that ignorance should not form a defence.

Conclusion

The above is only a penny of thought from a layman. Legal practitioners should give some thoughts on the rationality of the arguments behind. Some may ask why U.K. judgments may affect us? In High Court Magistracy Appeal cases and Supreme Court Cases, it is common law practice that precedent cases have binding effect on consideration of the judgments. Normally lawyers would rely on local High Court and Supreme Court cases to establish their arguments, but if there is no appropriate local court case, then they 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.

[Note: Information on most local High Court Magistracy Appeal and Supreme Court Cases involving the Factories and Industrial Undertakings Ordinance and the Occupational Safety and Health Ordinance can be found in the website of the Judiciary, viz. <http://www.judiciary.gov.hk>. Readers have to use the Search engine and Advanced Search engine on that webpage to locate the relevant cases.]

So based on the turn of the tide brought about by new High Court rulings, there may exist a much quicker and earlier shift of the onus of proof to the defendants. In addition, to reduce or even avoid personal liability in OSH offences, you have to establish safe working procedures of the operations. If you work for a client, or contractor, the new risk is for real, not hypothetical.

Seminar on Preparation for the Second Wave Human Swine Influenza

3 February 2010

Event Report

The professional seminar, jointly organized by The Hong Kong Institution of Engineers-Control, Automation & Instrumentation Division (HKIE-CAD), The Hong Kong Institution of Engineers- Safety Specialists Committee (HKIE-SSC), Hong Kong Association of Risk Management and Safety (HKARMS), Hong Kong Institute of Utility Specialists (HKIUS), The Institution of Mechanical Engineers (Hong Kong Branch) (IMechE (HK)), Guangdong Automation Association (Hong Kong) (GAAHK), The Hong Kong Occupational Safety and Health Association (HKOSHA), The Institute of Measurement and Control (Hong Kong Section) (InstMC (HK)), The Society of Operations Engineers (Hong Kong Region) (SOE (HK)), Society of Registered Safety Officers (SRSO) & Department of Land Surveying & Geo-Informatics, The Hong Kong Polytechnic University was held successfully on 3 February 2010 in TU201, The Hong Kong Polytechnic University which over 150 participants had attended the seminar.

Before the seminar started, Dr. Johnnie CHAN, JP, Deputy Commissioner, Ops of Auxiliary Medical Services (AMS) introduced the speaker, Dr. Man Chung CHAN, Chief of AMS Health Protection Unit.



Souvenir was presented to Dr. CHAN by the supporting organisations.

Speaker, Dr. CHAN introduced the emergency response level under the government's preparedness plan for influenza pandemic has been activated since May 2009. The HK Government also provides human swine influenza vaccines for 5 target groups. This seminar provided timely information to our audience by updating the nature and symptoms of the virus, as well as what we can do to reduce the risk of contacting the deadly virus. Dr. Chan also clarified people's misconception of the vaccination schemes and shared with us his unique view from another perspective. Dr Chan encouraged attendee the preparedness of the human swine influenza. And let us know that Hong Kong is vigilant and prepared.

The seminar ended by an interactive question-and-answer session. The seminar was interesting and informative which successfully delivered the knowledge to the attendees. It gave them insights towards the topic. We specially thank the speaker Dr. CHAN for sharing his valuable experience and the seminar ended with a round of loud applauds.



The seminar had attracted 150 participants to attend.

Occupational Safety and Health Seminar on 23 January 2010

Occupational Safety and Health Seminar held on 23 January 2010, venue at The Hong Kong Polytechnic University.



Speaker: Mr. Jesse HAU – Secretary of SRSO

Topic on “The Ways Behind the Accident Investigation”



Speaker: Dr. Aron KWOK

Topic on “How to Write an Accident Report – A Personal View”



Occupational Safety and Health Seminar on 27 February 2010

Occupational Safety and Health Seminar held on 27 February 2010, venue at The Hong Kong Polytechnic University.



Speaker: Mr. Michael Leung – President of SRSO

Topic on “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?”



Speaker: Dr. Norbert FAN
– Ex-Committee Member of SRSO Topic on “OSH Law in UAE”

The following applications were approved by the Executive Committee of the The Society of Registered Safety Officers:

363	CHENG CHI HON	鄭志漢 (Member)
364	CHAN KEI CHI	陳紀志 (Member)



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Gammon Construction is a leading construction and engineering services group committed to finding innovative solutions for our customers. Headquartered in Hong Kong for over 50 years, we have built a distinguished reputation for delivering high quality and complex projects throughout Hong Kong, China and Southeast Asia. We have long realized that our business, and the way we do business, has an impact on the economy, the society and the environment. We are fully committed to building for a better quality of life and living environment in a safe and sustainable manner.