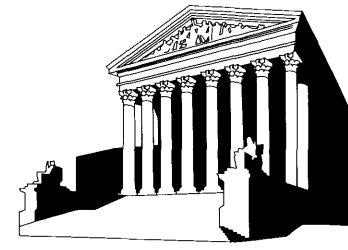
Safety Matters



Several events have transpired recently to underscore yet again how important the issue of safety is for the local construction industry. This month regular contributor *J.A. McInnis* takes a look at how some of these events relate to one major area of site safety: safety whilst working at a height.

Background

Caselaw, legislation and codes are routine means of regulating safety within the construction industry. Lately, one particular aspect of site safety, namely working at a height, has been dominating the news. Two recent court cases, one new Code of Practice, and some new legislation all touch on the question of safety while working at a height. These can be examined in turn.

The Cases

In two new unreported cases, *Poon Hau Kei v Ho Shui Keung t/a Keung Kee Scaffolding and Another* and also *Siu Chi Moon v Rainfield Design and Associates Limited,* individuals sued for serious injuries sustained in falls from scaffolding. Both cases, which were decided by the Court of Appeal, raise policy questions as to why individuals are suing for injuries sustained at work in the first place; and particularly if they raise issues of entitlements. It prompts one to ask whether the legislation is either so unclear or limiting in its wording that individuals injured at work are unable to bring themselves within the protection it is intended to afford and thus be able to claim its benefits? In addition, the fact that these types of cases are so routinely taken suggests that the legislation may not be fulfilling its broadest compensatory aims.

Turning from this policy question the legal issues may be shortly put:

In *Poon Hau Kei* the issue was whether the second respondent, a "joint venture" between Hsin Chong Construction Co Ltd and Taylor Woodrow International Ltd, was a "principal contractor" under the Employees' Compensation Ordinance, and thus whether it could be formally joined in the lawsuit against the scaffolder. The joint venture objected to being named as a party on the basis that they were only a "management contractor" and thus argued it was outside the meaning of a principal contractor in the legislation. The Court of Appeal agreed with the joint venture's interpretation of the wording of the legislation. In coming to this view, the Court considered the terms of the management contract and the legislation to conclude that the joint venture management contractor did not have to pay employees' compensation, was therefore not liable, and thus could not be joined as a party in the lawsuit. It was relevant for the Court that another contractor, which was not named as a party, had filed a notification of the accident acknowledging itself to be principal contractor, and which was also the view of the Labour Department.

Conversely, in the *Siu Chi Moon* case, the injured plaintiff sued the defendant contractor successfully for breach of statutory duty under the Factories and Industrial Underakings Ordinance when it failed to provide safe access to and egress from the site; notably by seeing there was a ladder available to the plaintiff during his work. There are other aspects to these cases but the point can still be made that falls from scaffolding and who is liable to compensate those injured in such cases is a real problem locally and one which is being fought over in court.

New Code of Practice

Partly in response to the number of accidents sustained while working at height the Labour Department has just published a new *Code of Practice for Safe Use and Operation of Suspended Working Platforms* ("*Safe Use Code*") that seeks to provide guidance to owners. Like other codes, the intention is not to lay down legal rules, which is done by regulations, but to provide some standards against which activities can be judged. Owners or employers are thus not prosecute, as such, for breach of codes, but codes can be, and often are, factors taken into account by the courts in judging whether a breach of the relevant regulations has taken place.

The *Safe Use Code* is intended to assist owners and employers to establish safe systems of work for every operation involving suspended working platforms, not only for the safety of those working at a height, but also those working in connection with, near or below such platforms. In general the safe use and operation of the platforms is the responsibility of the owner, employer, manager and supervisor on the project. Various work profiles dictate the type of platform to be used. Provisions ensure regular testing and examination by registered professional engineers is done both after erection and following substantial repairs. Personnel working on, near, or in connection with the

platforms are expected to take care of both themselves and others. The *Safe Use Code* also sets out relevant safety procedures, instructions and emergency procedures. With regard to those working on such platforms, appropriate safety harnesses and properly attached lanyards to independent lifelines or anchorages are required. It may be noted that in both the *Poon Hau Kei* and *Siu Chi Moon* cases, the injured individuals were not wearing safety harnesses.

New Legislation

The two cases mentioned and the *Safe Use Code* come, coincidentally, with the release of amendments governing another aspect of this topic; that is new legislation. The new legislation, tabled as amendments in bill form, pertains primarily to the Factories and Industrial Undertakings Ordinance. Shortly put, the amendments have two principal objectives:

1) to upgrade the qualifications of certain safety officers working at designated industrial undertakings; and
2) to expand the Commissioner for Labour's power to make new regulations requiring proprietors and contractors to develop, implement, and maintain management systems relating to the safety of their personnel.

The upgrading of the qualifications will follow consequent upon recognition of certain safety training courses and later certification for those who attend them. At some point in the future, all employers of relevant industrial undertakings will not be allowed to employ a safety officer who has not been so trained and certified. A schedule to the Bill makes clear that construction work qualifies for inclusion under the proposed scheme and thus safety officers in construction companies will have to meet the proposed new standards for training and eligibility to remain in their posts. The wide new powers given to the Commissioner to make regulations, quite apart from those that he already has in this regard, make clear that very detailed provisions will likely be forthcoming in the regulations once announced.

Summary

It can be seen from the short synopsis given here that injuries resulting from falls when working at a height is a current problem in the local construction industry. However, it is a problem which also reveals differing trends regarding responsibility and liability. On the one hand *Poon Hau Kei* has reduced the responsibility of management contractors for such events; while on the other hand, *Siu Chi Moon*, the *Safe Use Code* and the amending legislation have served to increase responsibility through additional and broader grounds for taking action for breach of statutory duty or in negligence. In the end, and despite whichever trend one prefers, it is clear that safety matters. ■AAC

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