

## **Occupational Safety, Health and Environmental Management and the Law of Negligence in Malaysia**

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### **ABSTRACT**

*The law of negligence plays an important role in the occupational safety, health and environmental management. The use of the law of negligence to the area of occupational safety, health and environmental management is largely in reply to the necessity of every each employee to protect his or her rights and interests on the safety, health and environment at the work place. Therefore, this paper examines the used of the law of negligence in relation to the occupational safety health and environmental management from Malaysian legal perspectives, identify actions and cases, which deal with the occupational safety, health and environment at the work place. Lastly, this paper discusses the law of negligence as a means to protect employees on the safety, health and environment at the work place in Malaysia.*

### **ABSTRAK**

*Undang-undang kecuaiian memainkan peranan yang begitu penting di dalam pengurusan keselamatan, kesihatan dan persekitaran pekerjaan. Penggunaan undang-undang kecuaiian di dalam pengurusan keselamatan, kesihatan dan persekitaran pekerjaan adalah berdasarkan kepada keperluan setiap individu pekerja itu untuk melindungi hak-hak dan kepentingan-kepentingan mereka terhadap keselamatan, kesihatan dan persekitaran di tempat kerja. Sehubungan dengan itu, kertas ini akan mengkaji penggunaan undang-undang kecuaiian di dalam hubungan pengurusan keselamatan, kesihatan dan persekitaran pekerjaan di Malaysia, iaitu dengan mengenalpasti kes-kes dan tindakan-tindakan yang berkaitan dengan pengurusan keselamatan, kesihatan dan persekitaran pekerjaan di Malaysia. Akhir sekali, kertas ini akan membincangkan undang-undang kecuaiian sebagai alat di dalam melindungi para pekerja berkaitan keselamatan, kesihatan dan persekitaran di tempat kerja di Malaysia.*

## INTRODUCTION

Malaysian economic growth in the year 1996 to 2000 with an average of 4.7% annually surpassed the targeted annual growth of 3.0%. The actual Gross Domestic Product (GDP) between the period of 1996 to 1997 was 8.7% per annum, before having experienced a negative growth at 7.4% in 1998. The Malaysian government's efforts to build up the economy from mid-1998 was successful and as a result the country's economy grew at the rate of 7.2% from 1999-2000. The income per capita that suffered badly in the year 1998 has shown positive tone, by increasing even higher than the amount before the economic crisis to RM 13, 359 in 2000. The financial policy, which was introduced in 1998, helped to stimulate the country's economic growth and at the same time managed to control inflation. In addition, the unemployment rate was maintained at a low level of 3.1% (Kadir et al. 2002).

Manufacturing, construction and services were performing extremely well before the economic crisis. For example, the construction sector has been developing rapidly at 13.4% per annum between the 1996-1997 period. Unfortunately the construction sector had shrunk by 23% and 5.6% in 1998 and 1999, respectively. Nevertheless, the measures taken by the government managed to help the survival of the said sectors. As a result these sectors not only contribute to the Malaysian GDP, but also created job opportunities in Malaysia. During the 1996 to 1999 period the total overall number of workers in all industrial sectors in Malaysia was estimated at 8.5 million/year. However, these sectors need a form of systematic management especially in controlling the accident problems at the workplace. As has been reported by SOCSO for 1993-1998 period, total accident is a nightmare to employees. As an example, total fatal accident in 1993 and 1998 numbered at 653 and 1,046 cases, respectively. These figures are critical if overall total accident and those accidents involving lost of ability are taken into consideration (Kadir & Jamaluddin 2002; Kadir et al. 2002).

## INDUSTRIAL ACCIDENT IN MALAYSIA

In general, the rate of industrial accidents in Malaysia is decreasing annually between the period of 1993-1999. In the year 1993, the total accidents at workplaces for all industries in Malaysia were 133,293 cases and declined to 85,338 cases in the year 1998, a 36% reduction. Manufacturing sector has shown significant reduction from 71,291 cases in the year 1993 to 37,261 cases in 1998, a decrease of 31%. As for the construction sector, accident at workplaces had shown a drastic drop of 62% to 979 cases in 1998 (Kadir et al. 2002)

## THE LAW ON OCCUPATIONAL SAFETY, HEALTH AND ENVIRONMENTAL MANAGEMENT IN MALAYSIA

Occupational safety, health and environmental management can be divided into 2 parts. The first part is the occupational safety, health and environmental management through non-legislative approaches and the second part is the occupational safety, health and environmental management through legal means (Jamaluddin 1993a, Kadir & Jamaluddin 2002).

The occupational safety, health and environmental management through non-legislative approaches can be carried out through education, research, monitoring, public policies, guidelines and development plans (Jamaluddin 1993b, 2001; Kadir & Jamaluddin 2002). On the other hand, the occupational safety, health and environmental management through legal approaches can be classified into 2 categories. These are “occupational safety, health and environmental management through public law” and “occupational safety, health and environmental management through private law” (Muhammad Rizal 2001, 2002a, 2002b; Kadir et al. 2002)

Law governs the relationship of individuals with the State and also with other individuals. An easy approach to examine how it operates in the legal system is to classify it in the light of its relationships (Vohrah & Wu Min Aun 1991). Law may be classified into two parts. These are “public law” and “private law.” Public law governs the relationship between the state and the individual and as for private law, also known as civil law, governs the relationship between an individual and another individual (Vohrah & Wu Min Aun 1991).

Both above-mentioned laws play an important role in relation to occupational safety, health and environmental management. The development of the law on occupational safety, health and environmental management is not solely based on public law alone; anyway, private law has also made contribution to serve similar function in protecting the employees while at work. Private law, essentially the law of tort, serves as a mechanism to protect employees at work.

Law of tort may be subdivided into areas of law dealing with different types of matters affecting the actions, rights and remedies of the injured parties. There are law of nuisance, law of trespass and law of negligence. Insofar as this paper is concerned, the discussion will be focused on the law of negligence and occupational safety, health and environment in Malaysia.

## LAW OF NEGLIGENCE AND OCCUPATIONAL SAFETY, HEALTH & ENVIRONMENTAL MANAGEMENT IN MALAYSIA

There is no specific statute that governs the law of negligence in Malaysia. In the event where there is no specific statute that governs a particular private law, therefore, Civil Law Act, 1956 (Revised 1972) will come into the picture. Therefore, we will refer to section 3 of the Civil Law Act, 1956 (Revised 1972). In section 3 of the Civil Law Act, 1956 (Revised 1972) it is laid down that:

“3 (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:

- (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7<sup>th</sup> day of April, 1956;
- (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1<sup>st</sup> day of December, 1951;
- (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12<sup>th</sup> day of December, 1949.

Provided that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.”

Based on section 3 of the Civil Law Act, 1956 (Revised 1972), it is clear that, in the event, where there is no specific statute that governs a particular private law, the common law, rules of equity and statutes of general application, as administered or enforced in England shall be applied so far only as the circumstances of States of Malaysia and their respective inhabitants permits and subject to such qualifications as local circumstances render necessary (Muhammad Rizal & Syahirah 2001a). Therefore, the law of negligence in Malaysia is based on the English law of negligence.

### **Definition of Negligence**

Based on the definition given by Lord Wright in the case of *Loghelly Iron & Coal v M'Mullan* [1934]:

“Negligence means more than heedless or careless conduct.....it properly connotes the complex concepts of duty, breach and damage thereby suffered by person to whom the duty was owing.”

Based on the above-mentioned definition, it is clear that under the law of negligence, the essential elements are as follows:

- ❖ duty of care is owed by an individual who caused damage (a defendant) to another individual who suffered the damage (a plaintiff);
- ❖ there is a breach of the above-said duty;
- ❖ there is damage which is caused by the above-said breach of duty; and
- ❖ a reasonable close connection between the damage and the breach of duty (Salleh 1990).

### **Duty of Care**

The first essential element under the law of negligence is duty of care. The plaintiff is required to prove the existence of duty of care in his legal action against the defendant who caused the damage.

What is “duty of care?” In the case of *Donoghue v Stevenson* [1932] AC 562, Lord Atkin has introduced and established the “neighbour principle” as duty for every individuals or in other words, “neighbour principle” is an obligation imposed by law to every individuals.

Based on this “neighbour principle,” an individual is required to take reasonable care to avoid acts or omissions, which the individual can reasonably foresee, would be likely to injure the individual’s neighbour (Rogers 1989). The neighbour is referred to as persons who are so closely and directly affected by the individual’s act, which the individual ought reasonably to possess them in contemplation as being so affected when the individual is directing his mind to acts or omissions that are being called into question (Rogers 1989).

According to the case of *Donoghue v Stevenson* [1932] AC 562:

- (1) Parties involved are as follows:  
Plaintiff/appellant – Donoghue  
Defendant/respondent – Stevenson (Muhammad Rizal & Syahirah 2001a).

- (2) The facts of the case:  
The defendant/respondent was a manufacturer of ginger beer. The ginger beer had been bottled in opaque bottle. After that the ginger beer had been delivered and sold to a retailer. Later on, a friend of the plaintiff/appellant purchased the ginger beer from the above-mentioned retailer for the plaintiff/appellant as a gift. When the plaintiff/appellant had drunk some of the ginger beer, then, she poured out of the balance of the said drink, at that moment she was shocked when a decomposed snail came out. Subsequently, she fell seriously ill (Muhammad Rizal & Syahirah 2001a).
- (3) The plaintiff's/appellant's argument:  
The defendant/respondent as a manufacturer failed to ensure the safety of the consumer, who consumed the product. As a result, the plaintiff/appellant suffered injuries. (Muhammad Rizal & Syahirah 2001a).
- (4) The defendant's/respondent's argument:  
The plaintiff/appellant was not the contractual party, therefore, the plaintiff/appellant doesn't own the privity of the contract. As a result, the plaintiff/appellant has no right to commence her action in the said contract (Muhammad Rizal & Syahirah 2001a). In addition, under the law of contract, in order for the plaintiff to take action against the defendant in the Court of Law, the plaintiff is required to prove to the Court of Law that all the essential elements of a contract have been fulfilled (Muhammad Rizal & Syahirah 2001b).
- (5) The House of Lords held that the appellant was entitled for the compensation even though there was no privity contract between the respondent and the appellant but the respondent owed duty of care towards the appellant based on the "Neighbour Principle," where the respondent must ensure his neighbours i.e. the consumer will not suffer injuries when the consumer consumed his product (Muhammad Rizal & Syahirah 2001a).

### **Breach of Duty of Care**

Upon the establishment of the duty of care, next, the plaintiff is required to prove that the defendant has breached the duty of care. How was the plaintiff able to determine whether the defendant has breached the duty of care? The test of "a reasonable man" is the answer. At this stage, the

plaintiff is required to prove to the court of law that the defendant's acts or omissions below the standard of care of "a reasonable man."

In the case of *Glasgow Corporation v Muir* [1943] AC 448, Lord Macmillan defined "a reasonable man" as "an ordinary competent man exercising that particular act. In the case of a medical man, negligence means failure to act in accordance with the standard of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards, then he is not negligent."

### **Causation**

Next essential element under the law of negligence is that, there is damage caused by the defendant and it is due to the defendant's breach of duty. Federal Court Judge, the Honourable Raja Azlan Shah mentioned in the case of *Government of Malaysia & Ors v Jumaat Mahmud & Anor* [1977] 2 MLJ 103:

".....must be commensurate with her opportunity and ability to protect the pupil from dangers that are known.....It is not a duty of insurance against harm but only a duty to take reasonable care for safety of the pupil.....The sole question.....is a question of causation.....the injury.....in fact caused by wrongful act of the teacher.....it cannot be said that it was reasonably foreseeable."

Clearly in the above-mentioned case through the Honourable Raja Azlan Shah's judgement:

- (i) the plaintiff is required to prove that the damage, injury and/or risk was foreseeable;
- (ii) the plaintiff is also required to prove that the defendant has failed to take reasonable approaches to prevent plaintiff's injury and/or damage; and
- (iii) if the plaintiff is able to prove the above-mentioned matters, therefore, the plaintiff has established the existence of the essential element under the law of negligence i.e. there is damage caused by the defendant and it is due to the defendant's breach of duty.

In addition, the court of law in general will use a test that is known as "but for" test, in order to determine whether the damage was caused by the defendant's breach of duty.

According to the case of *JEB Fasteners Ltd. v Marks Bloom & Co.* [1983] 1 All ER 538:

- (1) Parties involved are as follows:  
Plaintiffs – JEB Fasteners Ltd.  
Defendants – Marks Bloom & Co.
- (2) The facts of the case:  
In this case, where the plaintiffs took legal action against the defendants on the ground that the defendants negligently in preparing a report on a company that caused damage and loss to the plaintiffs, who had planned to take over the above-mentioned company.
- (3) The court had used the “but for” test in the case. The court held that, it was clearly shown that the plaintiffs were going to take over the above-said company anyway; therefore, the defendants’ negligent, even if proven, it was not the caused of plaintiffs damage and loss.

#### **A Reasonable Close Connection between the Damage and the Breach of Duty**

A reasonable close connection between the damage and the breach of duty is the final element under the law of negligence.

The test for the above-said element is based on *The Wagon Mound (No. 1)* [1961] AC 388. In this case, where the defendant used a vessel, which, the defendant had negligently spilled a quantity of oil while stopping at the Sydney Harbour and subsequently, the oil flowed to the docks where ships were under repairs. Only after 60 hours from the spill, it caused fire and subsequently the fire caused damage to the docks where ships were under repairs.

At level of the Supreme Court of New South Wales, the Court gave decision in favour to the plaintiff (the owner of the dock) on the ground that the damage was the direct result of the defendant’s action.

On the appeal at the Privy Council, the Privy Council held that the plaintiff must produced the evidences to the court of law on the type or kind of damage that he suffered must be foreseeable, in order to recover damages. Unfortunately, the plaintiff failed to prove that the damage by fire was not foreseeable because only after 60 hours from the spill, it caused fire and subsequently the fire caused damage to the docks where ships were under repairs. Therefore, the Privy Council gave decision in favour to the defendant.

## EXAMPLES OF ACTIONS IN THE LAW OF NEGLIGENCE ON OCCUPATIONAL SAFETY

There are a number of cases that has been brought forward to the Court of Law on food safety for the consumer protection under the law of negligence. Among the leading cases, there are, firstly in the case of Kee Su Ngoy v Teh Bok [1989] 2 CLJ 841, secondly in the case of Mohamad Husin v Shum Yip Leong Rubber [1972] 1 MLJ 17 and finally in the case of Wong Soon San v Malayan United Industries Co. Ltd. [1967] 1 MLJ 1.

According to the case of Kee Su Ngoy v Teh Bok [1989] 2 CLJ 841:

- (1) Parties involved are as follows:

Plaintiff – Kee Su Ngoy

Defendant – Teh Bok

- (2) The facts of the case:

Kee Su Ngoy as the plaintiff worked as an operator of a moulding machine at a factory owned by Teh Bok as the defendant. One day, the plaintiff was involved in an accident while operating the said moulding machine. The plaintiff had suffered serious injury where she had loss her right hand. As the result of the said accident, her right had to be amputated.

- (3) The plaintiff's argument:

The defendant as the owner of the factory failed to ensure the safety of the employees when operating machines in the factory. As the result, the plaintiff suffered injuries. The plaintiff had brought evidences that the said machine, which caused serious injury to the plaintiff, had not been serviced annually for the last three years. This factor has created high risk and became dangerous to the operator of the said machine.

In addition, the plaintiff told the court that she was never given a proper training in dealing with the said machine

- (4) The defendant's argument:

The plaintiff failed to take proper measures in operating the said machine and the injury suffered by the plaintiff was basically derived from carelessness of the plaintiff.

- (5) The Court held that the defendant as the employer failed to take proper measures in order to safeguard the safety of the employees. The defendant had failed to ensure the safety of the operators of the machines in the factory since the machine had

not been serviced annually for the last three years. The defendant had also failed to ensure all the employees being given proper training in dealing with machines. In this case, the court found that the plaintiff has established all the four essential elements under law of negligence; therefore, the court gave decision in favour of the plaintiff and the defendant was required to pay compensation to the plaintiff.

Next in the case of *Mohamad Husin v Shum Yip Leong Rubber* [1972] 1 MLJ 17:

- (1) Parties involved are as follows:  
Plaintiff – Mohamad Husin  
Defendants – Shum Yip Leong Rubber
- (2) The facts of the case:  
Mohamad Husin the plaintiff worked as a feeding operator of a clicking press machine at a factory owned by Shum Yip Leong Rubber as the defendants. The plaintiff worked together with a person by the name of Mustakim. Mustakim worked as a machine operator of the same clicking press machine with the plaintiff. One day, the plaintiff was involved in an accident while operating the said clicking press machine. The plaintiff had suffered serious injury where he had lost four fingers of his right hand. As a result of the said accident, the said right hand fingers had to be amputated.
- (3) The plaintiff's argument:  
The defendants as the owner of the factory failed to ensure the safety of the employees when operating machines in the factory. As a result, the plaintiff suffered injuries. The plaintiff had brought evidence that the defendants failed to provide a safe environment of work for the defendants' employees. This factor has created high risk and became dangerous to the operators of the all machines in the said premise.
- (4) The defendants' argument:  
The plaintiff failed to take proper measures in operating the said machine and the injury suffered by the plaintiff was basically derived from carelessness of the plaintiff.
- (5) The Court held that the defendants as the employer failed to take proper measures in order to safeguard the safety of the

employees. The defendants had failed to ensure the safety of the operators of the machines in the factory since there was no system of work to protect defendants' employees. The defendants had also failed to ensure that all the employees were given proper training in dealing with machines. In this case, the court found that the plaintiff has established all the four essential elements under law of negligence; therefore, the court gave decision in favour of the plaintiff and the defendants were required to pay compensation to the plaintiff.

Finally in the case of *Wong Soon San v Malayan United Industries Co. Ltd.* [1967] 1 MLJ 1:

- (1) Parties involved were as follows:

Plaintiff – Wong Soon San

Defendants – Malaysian United Industries Co. Ltd.

- (2) The facts of the case:

Wong Soon San as the plaintiff worked as an operator of a fettling and trimming machine at a factory owned by Malayan United Industries Co. Ltd. as the defendants. One day, the plaintiff was involved in an accident while operating the said fettling and trimming machine. The plaintiff had suffered right eye injury.

- (3) The plaintiff's argument:

The defendants as the owner of the factory failed to ensure the safety of the employees when operating machines in the factory. As a result, the plaintiff suffered injuries. The plaintiff had brought evidences that the defendants had failed to provide face shields or goggles to the employees while operating the machines in the said factory. This factor has created high risk and became dangerous to the operators of the said machines.

- (4) The defendants' argument:

The plaintiff failed to take proper measures in operating the said machine and the injury suffered by the plaintiff was basically derived from carelessness of the plaintiff. In addition, the plaintiff failed to adjust properly the said machine's deflector, as the result of the plaintiff's action had caused zinc trimming to fly into the plaintiff's right eye.

- (5) The Court held that the defendants as the employer failed to take proper measures in order to safeguard the safety of the employees. The defendants had failed to ensure the safety of the operators of the machines in the factory since the defendants failed to provide face shields or goggles to the employees while operating the machines in the said factory. In this case, the court found that the plaintiff has established all the four essential elements under the law of negligence; therefore, the court gave decision in favour of the plaintiff and the defendants were required to pay compensation to the plaintiff. However, the court refused to grant 100 % compensation claims made by the plaintiff since the plaintiff failed to adjust properly the said machine's deflector to protect himself. Therefore, the plaintiff was only entitled to 70 % of the compensation claims made by the plaintiff because of the plaintiff's contributory negligence.

#### CONCLUSION

Based on the above discussion, in order for an individual to take action under the law of negligence on occupational safety, the individual employee is required to prove to the court of law that the existence of duty of care in his legal action, in which, there is a breach of the above-said duty and there is damage caused by the above-mentioned breach of duty; and lastly, there is a reasonable close connection between the damage and the breach of duty.

In addition, there are advantages and disadvantages associated with an action under law of negligence. The advantages are, firstly, there is no requirement to prove that the injured party (the plaintiff) and the party that caused the injury (the defendant) having the privity of a contract, and secondly, there is no requirement to demonstrate loss by other members of the public (Rogers 1989; Salleh 1990; Wolf & White 1995).

As for the disadvantages, there are, firstly, the courts have shown reluctance and refusal to award based on pure economic loss, therefore it is must be on personal injury or damage, and secondly, under the law of negligence, the evidential burden is great which caused difficulty for the injured party (the plaintiff) to prove a causal link between the defendant's actions and damage suffered by the plaintiff, and further proving that a duty of care is owed by the defendant, which the defendant has breached the duty and at the end caused the damage (Rogers 1989; Salleh 1990; Wolf & White 1995).

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