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LAW ON SAFETY AND HEALTH IN MALAYSIA

(UNDANG-UNDANG KESELAMATAN DAN KESIHATAN DI MALAYSIA)

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ABSTRACT

In today's world, rapid economic development has not only led to significant improvements in incomes and the quality of life, but also resulted in great increases in the number of people killed and injured at work. For decades, industries have embraced many systems to minimise workplace accidents and incidents, yet despite the best intention, there has been little reduction in the rate at which people are killed or injured at work. Similar scenario prevails in Malaysia, when statistics from the Social Security Organisation reports indicated that although the number of occupational accidents has reduced gradually, workers especially those in the manufacturing sector still suffer a high level of occupational accidents almost every year. To overcome this problem, the government has come out with a legislative framework to deal with this situation. This study therefore has the purpose of examining safety related matters at work, strictly from the legal point of view. Its objectives are to review the historical background of the implementation of the laws related to safety and health at work; to identify the relevant legislations; and to analyse the extent of the employers' duties and liabilities related to safety at work under the common law. Qualitative method prone to the legal style of doing research was employed to achieve all the objectives. Hence the data referred in this study consist of all secondary data found in the legislations, legal journals, thesis and law publications. It was found in this study that as a result of several weaknesses in the previous legislations namely the Machinery Ordinance 1953 and Factories and Machineries Act 1967, Occupational Safety and Health Act (OSHA) was enforced in 1994. It provides general guidelines on how to create a safe environment at work. Subsequently many regulations, guidelines and codes of practice which provided more detailed provisions were introduced under OSHA 1994. The results also showed that besides the statutory obligations, employers also have a duty, under the common law, to provide a safe system of work to their workers, failing which an action of negligence could be taken against them in court.

ABSTRAK

Hari ini, pembangunan ekonomi yang pesat bukan sahaja telah meningkatkan pendapatan negara dan kualiti hidup, tetapi juga telah meningkatkan jumlah mereka yang mati atau cedera di tempat kerja. Bertahun-tahun lamanya, pihak industri telah melaksanakan beberapa sistem untuk mengurangkan kadar kemalangan dan insiden di tempat kerja, tetapi malangnya tidak banyak perubahan yang dapat dilihat. Senario di Malaysia juga tidak berbeza, apabila statistik dalam lapuran tahunan Pertubuhan Keselamatan Sosial menunjukkan bahawa walaupun jumlah kemalangan di tempat kerja semakin berkurangan, pekerja, terutamanya di sektor pembuatan masih mengalami jumlah kemalangan yang tinggi hampir setiap tahun. Untuk mengatasi masalah ini, kerajaan telah mengemukakan satu rangka perundangan. Oleh itu kajian ini mempunyai tujuan untuk mengkaji hal ehwal keselamatan di tempat kerja dari aspek perundangan. Objektif kajian ini ialah untuk mengkaji sejarah pelaksanaan undang-undang berkaitan keselamatan dan kesihatan pekerjaan; untuk mengenalpasti undang-undang yang berkaitan; dan untuk menganalisa sejauhmana tanggungjawab majikan berkaitan hal ini di bawah ‘common law’. Kaedah kualitatif mirip kepada corak kajian perundangan telah digunakan dalam kajian ini. Oleh itu data-data yang dirujuk terdiri dari data sekunder yang diperolehi dari akta-akta yang berkaitan, jurnal undang-undang, thesis dan juga buku undang-undang. Kajian ini mendapati bahawa akibat dari kekurangan yang ada dalam undang-undang yang lepas seperti Ordinan Machinery 1953 dan Akta Kilang dan Jentera 1967, Akta Kesihatan dan Keselamatan Pekerjaan (AKKP) telah dikuatkuasakan pada 1994. Ia memperuntukkan panduan am untuk mewujudkan tempat kerja yang selamat. Selepas itu beberapa peraturan, panduan dan kod praktis yang memperuntukkan panduan yang lebih terperinci telah diperkenalkan di bawah AKKP 1994. Kajian ini juga mendapati bahawa selain dari tanggungjawab statutori, majikan juga mempunyai tanggungjawab di bawah ‘common law’ untuk menyediakan satu sistem kerja yang selamat kepada pekerja-pekerja mereka, di mana kegagalan melaksanakan tanggungjawab tersebut boleh mendedahkan seseorang majikan kepada tindakan kecuaian di mahkamah.

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CHAPTER I

INTRODUCTION TO THE RESEARCH

1.1 Introduction

As a result of the ever-increasing pace of worldwide liberalization of trade and economies, as well technological progress, the problem of occupational accidents and diseases are becoming more and more global concern, particularly in developing countries. Working conditions for the majority of the world's workers do not meet the minimum standards and guidelines set by international agencies. Occupational health and safety laws cover only about 10 percent of the population in developing countries, omitting many major hazardous industries and occupations (La Dou, 2003).

Industrially developed countries and developing countries have different priorities in safety and health. Priorities in industrially developed countries are "stress", "aged workers", "workers right to know", "chemicals", "ergonomics", "occupational safety and health management systems" and "health services". Priorities in safety and health in industrially developing countries are: "agriculture", "hazardous occupations like construction and mining", "major hazard control", "small enterprises", "informal sector", "occupational diseases reporting" and "safety, health and child labour" (Kawakami, 2001).

Rapid economic development in the Asian and Pacific region has led to significant improvements in incomes and the quality of life. However, rapid industrialization has also resulted in great increases in the number of people killed and injured at work. To protect workers from increasing occupational hazards, urgent action is required at all levels.

According to the the International Labor Organization (ILO), it is estimated that every year about 2 million workers are killed due to work-related accidents and diseases and 270 million occupational accidents and 160 million work-related diseases are occurring. The economic loss related these accidents and diseases are estimated to amount 4% of world gross national product (Kawakami, 2001).

Various measures have been taken by the governments, employers and workers to fight this huge social deficit from negative impacts of work. These included both regulatory and voluntary measures. The approach of managing occupational safety and health (OSH) in a systematic way through management system at the enterprise level has become increasing popular in recent years.

To meet the need of workers and employers, new trends had emerged in safety and health legislation. More attention is being paid to cover all occupations, including the informal sector. Clear national policies are being developed. In Asia, there is a clear trend to develop comprehensive safety and health laws covering all occupations. Malaysia is the first Asian country to have enacted Safety and Health Act covering all occupations in 1994. ILO assist countries to implement such laws, for example, in

Malaysia training materials and checklists are being developed for labor inspectors, covering the agricultural, forestry, fishing, service and transportation industries as well as the self-employed (Kawakami, 2001).

ILO member states have developed international labour standards on OSH. The ILO Occupational Safety and Health Convention (No.155, 1981) is the most important which requires governments to set clear national policies and legislation and to provide effective labour inspection services. Employers need to establish safety and health programmes to ensure safe and healthy work environments. Workers need to cooperate with employers' safety and health programmes and they have the right to participate in safety and health improvements (Kawakami, 2001).

1.2 BACKGROUND OF THE STUDY

In Malaysia, the traditional approach to providing safety and health at the workplace was based on the popular view that the government can avoid occupational hazards through enforcement of detailed regulations. However, this heavy reliance on government has now given way to a new strategy of promoting a tripartite approach to occupational safety and health in all sectors of the economy.

Malaysia has a population of over 21 million, with 13 million workers in more than 600 000 workplaces. However, it has been estimated that of these workplaces less than 4% had more than 10 workers (Sadhra et al., 2001). The small workplaces include smallholders, contract labourers, and self employed workers. Rapid industrialization has resulted in a change in the distribution of economic activity within Malaysia. High

employment growth in the manufacturing services and construction sector have replaced agriculture and other primary industries where there has been relatively sluggish growth (Sadhra et al. 2001). These shifts have occurred in tandem with changes in the epidemiology of several diseases within Malaysia. The prevalence of communicable diseases has declined with a concomitant increase in non-communicable diseases. In 1960 the principal causes of hospital admissions were gastroenteritis, tuberculosis, and malaria. In 1990, cardiovascular disease, neoplasms, accidents, and mental disorders were more predominant (Sadhra et al., 2001).

Between 1985 and 1988 the number of cases of occupational diseases and injuries compensated within Malaysia rose by 40% (Sadhra et al., 2001). This may have been due partly to improved medical services and systems for administration of benefits, but probably also reflects a true increased incidence. The available data indicate significant under-recognition and reporting of occupational injuries and diseases rather than their successful prevention. Thus, occupational and work related disease remains a considerable problem within Malaysia (Sadhra et. Al, 2001)

In recognition of the need for research into health issues, a government central fund for research and development was created during the fifth Malaysia Plan (1986-1990). The fund was administered by the Ministry of Science, Technology, and Environment with a process termed intensified research priority areas, which generated a list of health research priorities. The list was subsequently reviewed for the seventh Malaysia Plan (1996-2000) and seven target areas for research were identified. Occupational and environmental health was one of these target areas.

1.3 STATEMENT OF PROBLEM

Occupational safety and health is the discipline concerned with preserving and protecting human and facility resources in the workplace. Standards of Occupational Safety & Health **(OSH)** are normally set out in legislation. Governments have long realized that poor Occupational Safety & Health **(OSH)** performances usually result in costs to the respective states. The focus of Occupational Safety & Health **(OSH)** is to have a healthy and productive workforce for the good of the people and the nation (Abdul Rahman, 2006).

The measurement of success and failure of occupational health and safety has traditionally been demonstrated by the use of "after the loss**"** type measurements such as injury frequency and severity. These measurements alone have proven to be insufficient in evaluating the true state of Occupational Safety & Health (OSH) within the organization. Employees and managers working together can do far more than a few safety and health specialists to promote Occupational Safety & Health (OSH)**.**

In 1952, Japan had an industrial injury and illness rate 5 times that of the US. By 1999, the situation had reversed and the US had an injury and illness rate almost 6 times as high as that of Japan. Japanese safety and health management systems are integrated into the overall production and planning system. In plants, management takes safety and health concerns into account during the initial stages of planning and engineering processes. Individuals, from the CEO to the production workers, have their safety and health responsibilities spelled out in precise detail. More importantly, they take their responsibility very seriously.

For decades, industries have embraced many systems to minimize workplace accidents and incidents. Yet despite the best intentions, there has been little reduction in the rate at which people are killed or injured at work. Of all the major factors or accidents, the main reason still owes to the attention of daily signals and warnings that people choose not to adhere to.

Occupational Safety & Health (OSH) standards are mandatory rules and standards, set and enforced to eliminate or reduce Occupational Safety & Health (OSH) hazards in the workplace. Occupational Safety & Health (OSH) standards aim to provide at least the minimum acceptable degree of protection that must be afforded to every worker in relation to the working conditions and dangers of injury, sickness or death that may arise by reason of his or her occupation. The provision of Occupational Safety & Health (OSH) standards by the state is an exercise of the police power, with the intention of promoting welfare and well-being of workers.

Among some of the real problems raised by Occupational Safety & Health (OSH) experts surrounding the effective implementation of work safety and health in this region according to a study in 2003 are such as lack of concern by management; lack of awareness and trained Occupational Safety & Health (OSH) personnel; and weak enforcement of Occupational Safety & Health (OSH) standards. In 2005 alone, Socso had paid out RM 890 million in compensation to workers who were involved in industrial accidents compared to RM 840 million in 2004 (Abdul Rahman, 2006).

In addition the safety and health problems are exacerbated when looked at in relation to the companies that are involved in the manufacturing sector which is complex in its

structure. The majority of the firms involved are in the small and medium-scale industries where the unionization of workers is low or absent. Further, some of these small-scale industries are family-owned businesses with family labour. Additionally there are home-based industrial activities which provide services to the larger manufacturing industries, e.g. assembly of components at home. It is impossible to expect the enforcement or compliance of standards of occupational safety and health at these kinds of work establishment.

1.4 PURPOSE OF STUDY

The purpose of this study is to examine safety related matters strictly from the legal point of view.

1.5 SIGNIFICANCE OF THE STUDY

OSH is a multidisciplinary field that requires collaboration between individual people and organizations with different expertise and functions for its goals to be achieved. Many studies have been conducted looking at the management, technical and medical aspect of OSH and studying various issues related to them. However, not many studies had been undertaken to look at OSH purely from the legal perspective. Therefore, initiatives have been done to explore OSH in this study, from the legal aspect covering not only the statutory law but also the common law as well. The information provided in this study therefore serves as a basic guideline for safety practitioners to familiarize themselves with the legal aspect of OSH from both perspectives (the statutory and common law perspective).

1.6 OBJECTIVES OF STUDY

This study adopts the qualitative approach with a view to study the scope of laws and regulations in occupational safety and health, is the first of its type due to its comprehensive nature which is done purely from the legal perspective. It has three main objectives which are as follows:

1. To review the historical background of the implementation of laws relating to safety and health at work in Malaysia;
2. To identify the relevant legislations (including regulations, guidelines and code of practice) enacted under the manufacturing industry;
3. To analyze the extent of the employer's duties and liabilities related to safety at work, under the common law.

1.7 SCOPE OF STUDY

1. This research will focus only on the manufacturing industry in Malaysia.
2. Areas of study is limited to the following:
    a. Identifying all laws, regulations, codes of practices and guidelines relating to safety and health at workplaces which come under the purview of the parent act i.e. Occupational Safety and Health Act 1994,
    b. Analyzing employer's duty and liability arising from the implementation of the safety and health laws of Malaysia under the common law.

1.8 BENEFITS OF THE STUDY

The research community will benefit as the in-depth analysis provided by the current research will allow them to identify areas of concern and conduct further research that will build on the existing local database in the area of safety and health.

1.9 RESEARCH METHODOLOGY

Research in the field of OSH is an essential aspect of the promotion of health at work. Such research can provide essential information about OSH priorities within Malaysia. One of the most difficult questions that need to be considered in OSH is the selection of research priorities. Most legal research normally employs the qualitative approach. As the current research involves the reviewing of safety and health laws currently being enforced in Malaysia, a content analysis of the secondary data was employed.

The primary purpose of this study was to examine safety at work matters strictly from the legal perspective. In achieving objective 1, that is to review the historical background of the implementation of laws relating to safety and health at work in Malaysia, sources were acquired from secondary data obtained from the libraries of relevant government and non-government agencies specifically the Parliament, National Institute of Occupational Safety and Health (NIOSH), Department of Safety and Health (DOSH) and Malaysian Trade Union Congress (MTUC). In achieving the second objective, i.e. to identify the relevant legislations (including regulations, guidelines and codes of practices) enacted under the manufacturing

industry, references were made to the all the relevant documents found at the same library as mentioned earlier particularly in NIOSH and DOSH. This was conducted by compiling a comprehensive list of all relevant laws, regulations, Codes of practices and guidelines that are enacted in the area of safety and health at work places in Malaysia. This undertaking of the second objective is to enable employers to update themselves with the latest standards and guidelines they have to comply with when carrying out various activities that have consequences on the safety and health at their workplaces. The last objective, that is to analyse the extent of the employer's duties and liabilities related to safety at work, under the common law, was obtained through secondary data particularly law books and legal journals obtained in libraries at the University of Malaya, Islamic International University and Malaysian National University.

Unlike the first objective which was approached in a narrative manner, the second and third objectives were discussed more rigorously by referring to real cases cited in the legal journals. However, although references to cited cases were abundance, most of them come from the United Kingdom and there was no reference to the Malaysian cases as not many of them were reported in the Malaysian legal journals. Nevertheless, this does not prevent all the objectives of this research from being achieved.

1.10 LIMITATIONS OF STUDY

As this study examines safety related matters strictly from the legal point of view, therefore this study has limitations based on the research design employed i.e. qualitative research design. The task is approached with a lawyer's bias:

hence the emphasis on sections of the relevant legislations and cases reported in the legal journals. Certain segments of the study employ secondary data which was obtained from the various governmental agencies and companies in the manufacturing industries, thus relies on the accuracy of their reporting when making conclusions and recommendations. However this is unavoidable as cost and time factors have necessitated that such a practical approach be considered.

CHAPTER TWO

THE MALAYSIAN MANUFACTURING SECTOR

2.1 Introduction

As this study looks at the manufacturing sector, this chapter will look at its profile in more detail.

2.2 Its Profile

According to Crouch (1996), Malaysia is among the third world countries that have experienced extraordinary economic changes during the last thirty years which have made it into a more modernised and wealthier country. The Malaysian economy has diversified considerably from the time when rubber and tin were the economic pillars of the colonial economy. The attainment of independence almost fifty years ago heralded the beginning of the economic development in the country. From independence in 1957, the economy has been growing steadily and as the economy expanded, its composition changed as well. Industrialization through import substitution in the 1960s was followed by an emphasis on manufactured exports in the 1970s and the launching of heavy industries in the 1980s.

Despite the financial crisis in 1997, which to some extent affected the economic goals of the country, Malaysia was able to achieve an average economic growth rate of 7.0 per cent per annum for the period 1991-2000 as targeted under the Second Outline Perspective Plan (Economic Planning Unit, 2001a). The impetus for the strong growth

of the country's economy during the decade came from the private sector, in contrast to the high level of public sector involvement in the economy in the 1980s. This was in keeping with the government strategy to promote the private sector as the engine of growth. In this context, the manufacturing sector continued to act as the main stimulus to the growth of the Malaysian economy with its annual growth of 10.4 per cent during the Second Outline Perspective Plan period between 1991-2000.

Table 2.1
Growth of Manufacturing Industries (1995-2000)

Industry	***Value Added (RM million in 1987 prices)***		***Share of Value Added (%)***		***Average Annual Growth Rate 1996-2000 (%)***
	1995	***2000***	***1995***	***2000***	
Resourced-Based	**21,814**	**29,939**	**48.3**	**42.9**	**6.5**
a. Vegetables, Animal Oils & Fats	1,203	2,222	2.7	3.2	13.1
b. Other Food Processing, Beverages & Tobacco	3,504	4,724	7.8	6.8	6.2
c. Wood & Wood Products	3,030	3,196	6.7	4.6	1.1
d. Paper & Paper Products	1,888	2,802	4.2	4.0	8.2
e. Industrial Chemical & Fertilizer	2,581	3,495	5.7	5.0	6.3
f. Other Chemical & Plastic Products	2,613	3,528	5.8	5.0	6.2
g. Petroleum Products	2,477	4,252	5.5	6.1	11.4
h. Rubber Processing & Products	1,549	1,853	3.4	2.7	3.6
i. Non-Metallic Mineral Product	2,969	3,867	6.6	5.5	5.4
Non-Resourced-Based	**22,206**	**38,439**	**49.4**	**55.0**	**11.5**
a. Textile, Wearing Apparel & Leather	2,311	2,451	5.1	3.5	1.2
b. Basic Metal Industry	513	1,049	1.1	1.5	15.4
c. Metal Products	1,551	3,182	3.4	4.6	15.5
d. Manufacture of Machinery Except Electrical	2,675	3,434	5.9	4.9	5.1
e. Electronics	10,288	19,460	22.8	27.9	13.6
f. Electrical Machinery	832	1,507	1.8	2.2	12.6
g. Transport Equipment	4,136	7,356	9.2	10.5	12.2
Others	**1,055**	**1,489**	**2.3**	**2.1**	**7.1**
Total	**45,175**	**69,867**	**100.0**	**100.0**	**9.1**
% in GDP			**27.1**	**33.4**	

Source: Eighth Malaysia Plan Report 2001

In another economic report which was also published in 2001, the Eighth Malaysia Plan Report (8MP Report), it was stated that various measures were implemented by the government to consolidate and strengthen the competitiveness of the manufacturing sector during the Seventh Malaysia Plan (7MP) period from 1996 to 2000 (Economic Planning Unit, 2001b). Although output was affected during the economic slowdown in 1998, with the sector registering a contraction of 13.4 per cent, the overall performance of the manufacturing sector recovered strongly in 1999. The sector grew by 13.5 per cent in 1999 and 21.0 per cent in 2000, in line with the rapid growth in demand for manufactured goods. With the favourable performance of the sector, its share to Gross Domestic Product (GDP) rose from 27.1 per cent in 1995 to 33.4 per cent in 2000 as shown in Table 2.1.

More evidence about the satisfactory performance of the manufacturing sector could be seen despite the economic slowdown in 1998, when the Malaysian Industrial Development Authority (MIDA) reported that about 3,908 new manufacturing projects were approved in the country between 1996-2000 during the 7MP period (Table 2.2). This has brought about a total investment amounting to RM136.9 billion. Subsequently, another 2,651 new projects were also given the go ahead between 2001-2003 resulting in investment of more than RM70 billion (Table 2.2).

Table 2.2
Approved Manufacturing Projects by State (1996-2003)

State	*Number of Projects*		*l Employments Created*		*Investment (RM million)*	
	1996-2000 *	*2001-2003* **	*1996-2000* *	*2001-2003* **	*1996-2000* *	*2001-2003* **
More Developed States	**3,109**	**2,220**	**299,161**	**190,737**	**79,862.2**	**48,615.4**
Johore	857	601	76,253	52,801	19,775.2	6,752.9
Melaka	164	63	24,700	14,829	6,750.2	8,083.9
Negeri Sembilan	165	114	13,775	8,864	6,200.1	4,921.8
Perak	259	159	29,508	13,711	6,283.4	4,242.2
Pulau Pinang	519	371	62,625	38,007	16,592.6	8,158.6
Selangor	1,051	847	87,017	58,867	23,479.5	14,727.6
Wilayah Persekutuan Kuala Lumpur	97	65	5,283	3,658	853.6	1728.4
Less Developed States	**796**	**431**	**108,261**	**40,629**	**44,845.2**	**26,371.9**
Kedah	233	166	34,393	16,089	12,214.6	2,110
Kelantan	44	23	4,143	1,057	543.1	2,434
Pahang	116	52	13,248	5,771	10,405.7	1,541.3
Perlis	13	10	1,372	394	1,575.0	51.1
Sabah	130	66	16,111	5,411	3,757.4	5313
Sarawak	181	96	30,166	10,778	15,338.9	9,682.1
Terengganu	79	18	8,828	1,129	13,225.1	5,240.4
MALAYSIA	**3,908**	**2651**	**407,422**	**231,259**	**136,994.4**	**74,987.3**

Source : * Eighth Malaysia Plan Report (2001)

**** Malaysia Industrial Development Authority Report 2002-2004**

The expansion of this manufacturing sector contributed significantly to the employment creation during the 7MP period and the subsequent years. During the 7MP period, about 407,422 new jobs were created (Table 2.2) in the sector which meant that employment have expanded at a rate of 4.8 per cent per annum, faster than the target of 3.4 per cent. As a result, a total of 2,558,300 people were employed in the sector in 2000 compared with 2,027,500 in 1995 (Economic Planning Unit, 2001b). Additionally, the new projects approved between 2001-2003 have also created more than 250,000 new employments (Table 2.2).

The manufacturing sector is targeted to grow by 8.9 per cent per annum during the 8MP period, contributing 35.8 per cent to the share of GDP by 2005. The growth of the sector will be export-led, with export of manufactures projected to grow by 8.9 per cent per annum, accounting for 89 per cent of the nation's export earnings by 2005 (Economic Planning Unit, 2001b)[1].

Therefore it can be seen from the above exposition that since the manufacturing sector has been performing well previously (even despite the financial crisis in 1997) and is expected to perform equally well in more years to come, the country has every intention to place the manufacturing sector in the front role in leading the country's economic growth. This is not surprising as understandably every country would definitely reinforce its strength as a strategy to achieve a more promising economic growth in future. With the manufacturing sector outstanding as one of the country's strong economic performers, Malaysia is confident that it could fulfill the country's dream of securing the status of a developed nation by the year 2020.

While the government's strategy is logical, the safety of the workers while working in that sector should not be taken lightly. This is because reports released by the Malaysian Social Security Organisation revealed that workers in the manufacturing sector suffered the highest number of occupational accidents almost every year, as compared to workers from other sectors. This is clearly illustrated in Table 2.3.

If this situation is allowed to continue without any effort to try at least to reduce it, if not to prevent it, then the researchers are convinced that the high performance of the

[1] In the Ninth Malaysian Plan Report which was launched on the 31st of March 2006, it was reported that the manufacturing sector have registered an average annual growth rate of 4.1% during the 8MP period between 2001-2005. This was despite the contraction of the manufacturing sector by 5.9% in 2001, and the downturn in the electrical and electronics industry. The manufacturing sector contributed 31.4% to GDP, 80.5% to the total exports and 28.7% to total employment in 2005 (Economic Planning Unit, 2006).

manufacturing sector will not continue for long. It is submitted that the present satisfactory performance of the sector does not necessarily foretell similar exceptional performance in the future. This achievement could be jeopardised if proper action on workers' safety at work is not given adequate attention.

Table 2.3
Number of occupational accidents reported (1997-2004)

INDUSTRY	1997	1998	1999	2000	2001	2002	2003	2004
Agriculture, Forestry and fishing	23,296	12,678	12,753	11,893	12,421	9,456	6,947	5,677
Mining and Quarrying	760	739	756	626	573	545	536	533
Manufacturing	36,668	37,261	40,730	41,331	35,642	33,523	29,780	26,690
Electricity, gas, water and sanitary services	364	3753	592	537	442	516	510	496
Construction	3510	979	4747	4873	4593	5015	4,654	4,445
Trading	9235	12,986	14,685	15,452	13,774	13,685	13,395	12,948
Transportation	3245	4050	4462	4778	4382	4439	4,104	4,151
Financial Institution	363	700	627	687	602	567	572	605
Services	3723	5294	5987	6581	5950	5924	5,617	5,295
Public Services	5125	7078	6735	8248	7487	8140	7,743	8,325
Total	**86,289**	**85,518**	**92,074**	**95,006**	**85,866**	**81,810**	**73,858**	**69,165**

Source : Malaysian Social Security Organisation Annual Reports 1998 -2005

It can be seen from the earlier discussion that the manufacturing sector has the potential of contributing further to the country's economic growth. This will definitely offer a wide range of job opportunities in the sector for all categories of workers. In addition to this expansion, there will also be an increasing adoption of new technologies which means that more sophisticated machines will be used at the workplace. This in turn will require the workers to be more competent in their work at all times. Thus the importance of ensuring the safety of the workers should be given priority by all quarters in order to avoid more occupational accidents from happening in the manufacturing sector.

2.3 Summary

Since independence almost fifty years ago, the Malaysian economy has been growing steadily and the manufacturing sector has contributed significantly to its economic development. Although its economic development progress has been impeded by several obstacles such as the economic recession in mid-1980s and the Asian financial crisis in 1997, its pragmatic approach and constant fine-tuning of the economic policy has enabled it to come out of the ordeal and become more resilient. Unfortunately, however, the economic growth in Malaysia was tainted by a high level of occupational accidents in the manufacturing sector. Although the situations have improved gradually, the number of occupational accidents in the sector is still alarming and much more can be done to overcome the situation. One of the ways is by having a legislative framework. As this study looks at the legal aspect of the OSH, the next chapter will look at the literature review on OSH legislations.

CHAPTER THREE

LITERATURE REVIEW

3.1 Introduction

Generally studies on OSH are not very keen in doing research on legislations, hence the lack of literature on this issue. However, many parties have begin to realise that man at work is not a machine but a member of a society, with its network of human relations for which the legislative system provides the model (Parmeggiani, 1992; Wedderburn, 1996; Barret and James, 1988; James, 1992). Moreover, the development of practising OSH would be unthinkable in many countries without the existence of a legislative system (Parmeggiani, 1992). The purpose of the law is to secure a safe and healthy working environment. This chapter will therefore highlight methods and objectives of OSH legislations in several countries before looking at the role of state in establishing OSH legislations. It further highlights some aspects of OSH legislation with particular reference to the UK law as the Malaysian OSH legislation is based on the English law to a certain extent.

3.2 Methods and objectives of OSH legislations

According to Parmeggiani (1992), the ILO Protection of Workers' Health Recommendation 1953 (No.97) covers two basic methods of protecting the safety and health of workers in the workplace. They are the technical measures for

hazard control in connection with working premises, workplace environment and equipment, including personal protective equipment, on one hand, and medical surveillance of the individual worker on the other hand. These means of protection are not presented as alternatives and both are recommended for incorporation in national legislation.

It is traditional, however, in some countries, particularly in Europe, to emphasise the diagnostic and clinical aspects of health protection, whereas in other countries, such as the United States, the trend in legislation has always been towards engineering control to reduce the level of occupational exposure to toxic material and harmful physical agents (James,1992). In the first approach, the intention is to protect the individual, but in some cases it may be too late to do so effectively. In the second approach, health protection is organised technically, but the individual may get overlooked. Thus, both these methods should be used together as far as possible (James, 1992).

Scandinavian countries such as Norway and Sweden have adopted both approaches (Wedderburn, 1996). For example, the preamble of Norwegian Act No.4 of 4 February 1977, states that the purpose of the Act is to –

1. ensure a working environment that provides workers with complete safety against physical and mental hazards and with a standard of technical protection, occupational hygiene and welfare corresponding at all times to the technological and social progress of society;
2. ensure safe working conditions and a meaningful employment situation for the individual worker;

3. provide a basis on which undertakings can themselves solve their working environment problems in co-operation with the occupational organisations and subject to supervision and guidance from the public authorities.

The Swedish Act of 1977 states that working conditions are to be adapted to human physical and mental aptitudes; an effort is to be made to arrange the work in such a way that an employee can himself influence his work situation (Wedderburn, 1996).

Thus, some national law-makers have not hesitated to fix as the operational target for workers' health protection, the 'physical, mental and social well-being' that the World Health Organisation and ILO jointly proposed fifty years ago as the aim of occupational health. As far as international instruments are concerned, the same aim is to some extent reflected in ILO Convention No. 155, where health in relation to work means not only the absence of disease or infirmity, but also includes the physical and mental elements affecting health that are directly related to safety and hygiene at work (Parmeggiani, 1992).

In other countries, the aim of OSH has been defined in more objective and pragmatic terms especially in the legislation (Brown, 2002). For instance, the United States Occupational Safety and Health Act of 1970 stipulates that –

> " the Secretary of Labour, in promulgating standards dealing with toxic materials or harmful physical agents ….. shall set the standard which most adequately assures, to the extent feasible, on the basis of the best

> available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure of the hazards dealt with by such standard for the period of his working life".

Apart from the developments in some of the Scandinavian countries mentioned above, the last step to extend the scope of OSH legislation has recently been taken in several countries. Leaving aside the socialist countries where participation in labour is the basis of the entire society and consequently labour legislation applies in principle to every worker in the country without exception, before the mid-1960's the protective legislation had covered only part of the working population (Parmeggiani, 1992). However, a number of the new OSH Acts passed in industrial countries during the forty years have deleted any limiting provision as regards their scope. This principle of universal protection has now been endorsed at the international level, as can be seen from Article 3 of Convention No. 155 which states:

a. the term 'branches of economic activity' covers all branches in which workers are employed, including the public service;

b. the term 'workers' cover all employed persons, including public employee;

c. the term 'workplace' covers all places where workers need to be or to go by reason of their work and which are under the direct control of the employer

A national policy of protection by legislation is thus extended to every worker, and the objective nature of this policy is made clear in Article 4, paragraph 2, of the same Convention, which stress that :

"The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment".

3.3 The Role of State

The role of the state and its competence in OSH has been one of the traditional pillars of social protection since the beginning of the nineteenth century (Brown, 2002). In modern times its role has been recognised as increasingly necessary on account of the growing complexity of occupational safety and health problems, and this has become evident in the enactment of statutory instruments and their enforcement.

However, because of the principle of prior consultation with employers' and workers' organisation which is the bedrock of the ILO's tripartite structure, established over half a century ago, and which nowadays are widely applied at the national level, the State's competence is not absolute (Parmeggiani, 1992). In USA, for example, the principle of prior consultation was strongly reaffirmed and implemented when the Federal OSH Act was drafted (Brown, 2002). This country has a long tradition of standards and rules established on a voluntary basis by specialised technical non-governmental bodies, such as the American Standards Institute and the National Fire Protection Association. In

the beginning, these provisions were incorporated into the United States federal legislations and as “consensus standards”, i.e. approved by industry, employers’ organisations, and in some instances, consumers’ association and workers’ organisations (Brown, 2002). After some time, the National Institute of OSH began to issue its own recommendations, and consensus for these was sought by a procedure involving the publication by the Occupational Safety and Health Administration, in the Federal Register, of its intention to propose, amend or repeal a standard.

In the UK, the body responsible for preparing safety and health regulations and approved codes of practices is the Health and Safety Commission, which includes persons with experience in the fields of industrial management, trade unionism, medicine, education and local government (Barrett and James, 1988).

In Sweden, tripartism developed in the form of co-operation between employers and workers under the state supervision. Typical of this is the approach of the Work Environment Commission which revised and updated the Workers’ Protection Act, since replaced by the Working Environment Act (Parmeggiani, 1992). The basic philosophy followed is that the State cannot shelve its responsibility for workers’ health and safety by leaving this entirely to the agreements between the social partners.

However, there are great disparities between countries as regards the degree of state intervention in this area (Parmeggiani, 1992).

A clear stand on the question was taken in 1972 by the Committee on Safety and Health at Work (Robens Committee), established in the United Kingdom to make recommendations to Parliament concerning OSH organisations. One of the main points made in the Committee's report states that "The primary responsibility for doing something about the present levels of occupational accidents and disease lies with those who create the risks and those who work with them" (Roben's Committee Report). The report warns against the tendency to rely too much on government regulations and not enough on voluntary efforts and individual responsibility. It states further that the first step taken to redress the balance should be to reduce the burden of legislation, which should not concern itself too much with circumstantial details, but rather aims to shape attitudes and create the infrastructure for a better organisation of OSH by industry's own effort. The Robens report was the basis for restructuring and modernising the national organisation of OSH in the UK and for developing a flexible system of standards in the form of codes of practice (James, 1992). The legislation, which specifies responsibilities, is supplemented by rules contained in the codes of practice adopted after tripartite discussion.

In contrast to the pragmatism of the UK, law-making in France and Belgium traditionally takes the form of detailed regulations, full of technical provisions, often supplemented by circular letters or directives for their application (Parmeggiani, 1992).

Many countries follow the UK example, others the French. In addition, there are countries, whole legislation alternates between general principles and detailed provisions, which raised difficulties in its enforcement (Parmeggiani, 1992).

The type of legislation adopted is important from the point of view of enforcement: the less detailed it is, the greater the technical knowledge demanded of the labour inspectorate or other enforcement authority (Gray and Scholz, 1993). Furthermore, legislation which merely states objectives places a burden on small and medium-sized enterprises, which are predominant in every country. It is therefore supplemented by other provisions, as in the United States where appendices to the legislation set forth methods of compliance as non-mandatory guidance for implementation (Brown, 2002).

The competent authority for OSH is the Ministry of Labour in some countries, or the Ministry of Health in others. In general, the competence lies with the Ministry of Labour in those countries which have a long tradition of worker protection at the workplace; this has the advantage of bringing together under one authority, both the technical and the medical aspects of occupational safety and health in a coherent unit, better integrated and better able to deal with problems arising in individual enterprises (Parmeggiani, 1992). If however, the Ministry of Health is the competent authority, this ensures better dovetailing of occupational medicine into the field of public health as a whole (Parmeggiani, 1992).

The national differences are reflected in the activities of the ILO and the WHO, which are the two United Nations specialised agencies concerned with workers' health. Although their final objectives are the same they cover somewhat different fields and use different but complementary methods. Nevertheless, a new trend has become apparent in recent years, namely the progressive integration of occupational safety activities with those of occupational health (Parmeggiani, 1992). Following the ILO principle that workers' safety and health are inseparable, the OSH Convention 1981 (No. 155) imposes on ratifying States the obligation to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment (Parmeggiani, 1992).

In line with this trend, responsibilities have been reallocated among government departments and public authorities in the United States, the United Kingdom and Italy. In the first two countries, the limitation resulting from a rigid choice of alternative-Ministry of Labour or Ministry of Health- have been wholly or partially avoided. In the United States, the responsibility for the protection of workers' health is now jointly shared between the OSH Administration, which draws up regulations and the NIOSH, which investigates hazards and proposes preventive measures to ensure maximum protection of safety and health (Brown, 2002). In the United Kingdom, many statutory powers formerly exercised by several different ministries have been transferred to a single body enjoying full operational autonomy, the Health and Safety Commission (HSC), while the inspection duties formerly carried by a

number of separate authorities are now the responsibility of the Health and Safety Executive (HSE) (James, 1992).

3.4 The UK Law under the Health and Safety at Work Act 1974 (HASAWA)

HASAWA forms the central core of the UK's statutory system for OSH (Barrett and James, 1988). Passed in 1974, its introduction received widespread support and was seen by many to provide the means through which significant improvements in health and safety standard could be achieved (James, 1992). A major purpose of the legislation was to increase awareness of health and safety issues and to encourage high levels of participation by employees. The Act was novel in that it contained no detailed regulatory standards, but instead it contained very broad and general duties that covered virtually every contingency relating to OSH (Barrets and Howells, 1997). Extensive powers were vested to the Secretary of State to make regulations (Section 15 HASAWA), including power to revoke any of the earlier legislations which was still intact. The Act established a new tripartite Health and Safety Commision (HSC) and a Health and Safety Executive (HSE). Their task is to encourage research and training about safety, disseminate advice and information and (HSE) to administer and enforce the safety laws. The HSC may publish Codes of Practices, which do not create offences but are taken into account in criminal cases so as to put the burden of proof on the employer, if he is in default (Section 17 HASAWA).

The overriding duties begin by stating the duty of the employer to ensure the health, safety and welfare of all his employees [Section 2(1) HASAWA)] and extend to the employer's plant, system of work, handling and transport of substance, provision of training, workplaces and access, and the working environment [Section 2(2) HASAWA)]. He also owes a similar duty to others coming on to his workplace [Section 3 HASAWA]. However, there are three features of great importance. First, the employer's duty here, as elsewhere in the HASAWA, is to comply, as far as reasonably practicable. This is in contrast with many duties in the previous legislation (eg. The Factories Act 1961) which are strict duties making him liable even if he is not negligent. Secondly, breaches of their duties in the HASAWA do not create statutory torts in civil law [Section 47 HASAWA], although they are criminal offences. Thirdly, the employer must normally be someone employing an 'employee' in the strict sense.

One of the major strategies of the HASAWA was to provide an umbrella enforcement and policy development organisation – the Health and Safety Executive – to provide greater cohesion. Enforcement is undertaken by the following:

1. The Health and Safety Executive (HSE)
2. Agents appointed to enforce on the HSE's behalf, eg.
    - Pipelines Inspectorate
    - UK Atomic Energy Authority
    - National Radiological Protection Board

- Various government departments

3. Local Authorities

Local authorities have responsibilities for health and safety in shops, offices, warehouses, hotels and catering premises. Following the Enforcement Authority Regulations 1989, local authorities now have responsibility for most sport, leisure and consumer activities, churches and for health and safety aspects of care and treatment of animals (vets, kennels, etc). Environmental health officers carry out the enforcement. Workers on government sponsored training schemes, for example, have their own special regulations.

Where inspection is concerned, inspectors have the following powers:

- To enter premises at any reasonable time, or at any time if they have reason to believe a dangerous situation exist; a right to enter with a police officer if the anticipate obstruction
- To carry out examinations, take measurements, photographs and samples
- To arrange for the testing of dismantling of any article or substance which has or is likely to cause harm
- To question relevant people
- To inspect or take copies of books or documents hich are required to be kept by law
- To demand appropriate facilities and assistance

In enforcing the Act, if an inspector is of the opinion that a person:

a) is contravening one or more of the relevant statutory provisions, or

b) has contravened one or more of these provisions in circumstances that make it likely that the contravention will continue or be repeated….' he or she may serve an improvement notices.

The range of possible subjects for an improvement notice is wide. Typical ones include upgrading safety guards, improving ventilation, lighting or the storage of equipment. Mostly notices relate to equipment and buildings but they can cover any statutory duty, for example, to provide a safety policy or better safety notices or information or risk assessment (Barrett and Howells, 1997). Inspectors can refer person to a relevant Code of Practice, but can also offer alternative ways of meeting the law's demands. Building which are too cold or damp could be improved, for example, by better heating, or by better ventilation and/or decoration (Barrett and Howell, 1997).

Besides serving an improvement notice, the enforcement officer can also serve a prohibition notice to any wrongdoer under the Act. This is clearly a wider and more dramatic power. The prohibition notice takes two forms – deferred prohibition and immediate prohibition [Section 22(2)]. A deferred notice will specify what must be remedied and by what time. It will prevent an activity or use of premises if not remedies. An immediate notice which can be imposed where the risk of personal injury is imminent, prevents use-of-equipment, the building or the whole organisation from the moment it is served.

Prohibition notices can also be served even when there is no breach of statute or risk to health or safety is the central issue. For example, where the rate of accidents is high in some industries such as the construction, notices can be served to prevent work. Information regarding notices has to be given by inspectors to safety representatives.

Persons affected can appeal to an industrial tribunal against both an improvement and/or prohibition notice. Improvement notices are suspended during the period until the appeal is heard; while prohibition notices continue to be operative during this period.

In case of non-compliance to the notices, the person concerned can be prosecuted or fined. If there is a contravention of a prohibition notice, for example, by continuing to use a highly dangerous substance, there is a possibility of the employer being imprisoned. Additionally, contravention of an improvement notice or prohibition notice can lead to the imposition by a court of a fine up to 100 GBP for each day on which the contravention continued [Section 33(5) HASAWA).

Breaking safety legislations has always been a matter for criminal law in the UK. (Leighton, 1991) and there is no suggestion or likelihood it will be decriminalised. Prosecutions can be made after an inspection, accident or as mentioned above, for non-compliance with a statutory notice. Companies, partnerships or named individuals can be prosecuted including employees. However, although there are potentially effective mechanisms in the HASAWA 1974, it must not be forgotten that in serious situations where death

or injury occurred, organisations and/or individuals can also be charged with ordinary crimes such as manslaughter (Barretts and Howells, 1997). If the breach of safety rules and standards is such as to indicate recklessness regarding human life, the law sees no reason to hive off unlawful deaths caused by work from other kinds of deaths, such as those in motor accidents, and so prosecution for manslaughter can occur (James, 1992).

Where breach of safety laws leads to death or injury to employees or to others, for example, passengers or users of leisure facilities, victims can make claims for compensation in the law of negligence or for breach of statutory duty. According to Leighton (1991) that it remains the case that civil remedies are seen as having a major role to play in enforcing safety legislation. The adverse publicity, expense and time needed to defend claims, as well as the payment of compensation (albeit paid by insurance companies) are seen as vital sanctions.

According to Olsen (1993), the 1980s have seen no major repeal or extension of the Act, save for new arrangements in reporting of accidents with the Notification of Accidents and Dangerous Occurrences Regulations (NADOR) in 1980, replaced by the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR) in 1986. The HASAWA remains the centre-piece of UK safety legislation producing new regulations, guidelines and codes of practices, usually in response to the new EC Directives. Drake (1993) have argued that the post-HASAWA experience has involved something of a return to a concern with specific hazards and standards in the

legal regulation of safety, within the framework of self-regulation and legal accountability. This development includes the Control of Substances Hazardous to Health (CoSHH) Regulation of 1989, which demand conformity with highly technical exposure and monitoring specifications in the control of chemical and other materials. In addition CoSHH regulation require management to update and continuously monitor the passage of all substances through the workplace, and through each stage of the production process, with particular attention given to the potential hazards that might result from the storage and handling procedures, and the consequences of breakdown in safety system.

3.5 Summary

This chapter has featured the literature review pertaining to the development of OSH legislations. It begins by highlighting the methods and objectives of OSH legislations adopted in some countries such as the US and Europe. The discussion then turns to the role of the state which has been one of the traditional pillars in social protection. Subsequently some aspects of the UK law relating to OSH were elucidated. The next chapter will look at the findings of this study.

CHAPTER FOUR

ANALYSIS OF FINDINGS

4.1 Introduction

This study aims to gain an understanding on the law on occupational safety and health at workplaces in the Malaysian manufacturing sector. This chapter will provide a detailed account of the findings obtained in relation to the objectives of the study that is to

a. provide a review the historical background of the implementation of laws relating to safety and health in Malaysia;
b. identify the relevant legislations enacted under the manufacturing industry; and
c. analyze the extent of the employer's duties and liabilities towards workers' safety at work.

4.2 Findings of Study

4.2.1 Review of the Historical Background of the Implementation of Laws Relating to Safety at Work in Malaysia

In the early state of the country's development, the economic structure depended heavily on agricultural and mining based activity (Jomo and Tan, 1999). The growth of these sectors created various hazards for workers. The Perak Boiler Enactment 1890 was the first legislation in the country to address industrial

safety issues (Malaysian Trade Union Congress, 2000). These pieces of legislation mandated the compulsory inspections of boilers by the Mines Department inspectors before their operation. Boilers, at that time, were mainly used to generate power in the tin mining activities, especially to operate gravel pumps which were the key machinery used in the process of winning tin ores. They (boilers) were recognized as “time bombs” if they were not properly designed, constructed, operated and maintained (Che Man,1996). The legislation was enacted in recognition of the boiler’s potential risk to the workers and the industry. Because there were also tin mining activities in other locations, other states namely Selangor, Negeri Sembilan and Pahang soon followed suit to enact similar boiler rules.

The emergence of tin mining activities induced the growth of ancillary industries such as foundries and engineering workshops. These industries introduced additional hazards to the workplace which led to the enactment of another legislation entitled the Machinery Ordinance 1913. The Ordinance superseded all the Boiler Enactments enforced earlier. It contained provisions to ensure the safety of machinery including boilers and combustion engines, in order to prevent occurrence of industrial accidents. The Ordinance was updated in 1932 (known as Machinery Enactment 1932) with additional provisions on registration and inspection of machinery installation. Responsibility to enforce the Enactment was on the machinery inspectors from the Machinery Branch of the Department of Mines.

In 1953, another legislation was enacted known as the Machinery Ordinance 1953 which superseded all previous legislations related to industrial safety and was enforced in all the other states of Malaya (as Malaysia was then known) under the jurisdiction of the Machinery Department, Ministry of Labour (Malaysian Trade Union Congress, 2000). Four regulations were enacted under this Ordinance to reinforce its implementation. They were the Electric Passenger and Goods Lift 1953, Safety and Health Welfare 1953, Engine Drivers and Engineers 1957 and Transmission Machinery 1959.

In the 1960s, the government implemented a policy to move towards industrialization. More and more factories were set up as a consequence of economic development. This resulted in an increasing number of workers in the manufacturing sector in industries such as electronics, chemical and minerals, and in later years, the textile and automobile industries (Jomo and Tan, 1999). With rapid industrialization and the drawing into the industrial labour force of rural, semi-rural and other new industrial workers, it was foreseen that the workers would face various occupational hazards and occupational accident rates would tend to escalate. In order to manage safety and health problems associated with manufacturing industries, the Factory and Machinery Act (FMA) was then enacted in 1967 to supersede the Machinery Ordinance 1953. It was enforced by the Factories and Machinery Department which was previously known as the Machinery Department (Malaysian Trade Union Congress, 2000). The FMA

contained provisions to prevent occurrence of occupational accidents and diseases in factories as well as to regulate the use of machinery such as gas cylinders, elevators, mobile and stationary cranes which could pose a danger to the public. Since industrialization has brought about an array of diverse economic sectors, it was felt that the Machinery Ordinance was no longer adequate in protecting potential OSH problems that might arise in all the economic sectors (Parliamentary Debates, 1967a). The Machinery Ordinance was only enforceable in places where machinery was used and the safety and health provisions of the Ordinance and its regulations were aimed at ensuring protection of workers from mechanical and other hazards solely in connection with the use of such machinery. This left the people who worked at places where no machinery was involved unprotected. The FMA filled this gap and extended the scope of the existing safety and health legislation to cover all aspects of industrial safety and health in all work places defined as factories (Parliamentary Debates, 1967a). This means that all premises in which persons were employed in manual labour processes by way of trade for the purpose of gain, irrespective of whether machinery was used or not, were also protected (Parliamentary Debates 1967b).

As the government placed considerable importance on the question of safety and health of the workers especially in the context of the increasing tempo of industrial growth in the country, a number of Regulations were also introduced in 1970 to further strengthen the FMA 1967. These included the Fencing of

Machinery and Safety Regulations; Notification, Certificate of Fitness and Inspection Regulations, Steam Boiler and Unfired Pressure Vessel Regulations; and Persons-In-Charge Regulations. All of these regulations were primarily targeted at addressing safety problems. Provision of first aid and welfare facilities such as drinking water, toilets and washing facilities was included in the Safety, Health and Welfare Regulation 1970. From 1984 to 1989, four other pieces of regulations addressing specific health hazards in the workplace such as lead, asbestos, noise and mineral dust were added to the list. Provisions for assessing exposure at the workplace; establishing permissible exposure level; control measures including medical and health surveillance provisions; competence and training programmes were common within all these Regulations (Hassan, 2001). In total there were seventeen Regulations enacted under the FMA. For the next three decades after its commencement, this FMA and its Regulations became the cornerstone for occupational safety and health improvement in this country (Bahari, 2002). Under the FMA structure, the Government became the main director of safety and health matters, as most responsibilities were placed upon the government's shoulders (Parliamentary Debates, 1993). As Government agents, the Factory Inspectors were expected to inspect the relevant machinery and notify the employers of any existing defects. Employers had minimal responsibilities, even at their own organisations.

Although the FMA was an improvement over earlier pieces of legislation, it had some important limitations. Among them was the fact that it only encompassed

‘factories’ and after more than twenty five years of its introduction, only 25 percent of the 7.8 million workforce in the country were covered under the Act (Parliamentary Debates, 1993). The majority of the national workforce, such as those in agriculture, forestry, fishing, construction, finance and public services were not protected by FMA. However, statistics showed that workers from some of these unprotected sectors, especially from the agriculture and forestry, suffered high rates of occupational accidents and deaths from the year 1985 to 1989 (Parliamentary Debates, 1993). Between 38% to 50% of the total occupational accidents during that period involved workers from these two sectors alone. In addition, the construction sector also recorded a high level of accidents in its industry (Laxman, 1995). It was believed that one of the reasons for this unsatisfactory condition was due to the absence of the relevant protective legislation (Parliamentary Debates 1993).

Apart from the above reasons, the FMA also contained weaknesses in particular in its approach (Che Man, 1996). It was based on the traditional ‘checklist’ system whereby it identified hazards and stipulated measures to overcome them. The system became very prescriptive requiring promulgation of detailed technical regulations to control hazards from new processes or chemical substances whenever they were introduced to the industry (Laxman, 1995). With the rapid rate of economic growth in the country, promulgation of these regulations always lagged far behind the

Table 4.1. List of some of the regulations made under the FMA 1967.

Regulations	Year
Certificate of Competency-Examination	1970
Electric Passenger and Good Lift	1970
Fencing of Machinery and Safety	1970
Notification of Fitness and Inspections	1970
Person-In-Charge	1970
Safety, Health & Welfare	1970
Steam Boiler & Unfired Pressure Vessel	1970
Administration	1970
Compounding of Offences	1978
Compoundable Offences	1978
Lead	1984
Asbestos Process	1986
Building Operations and Works of Engineering Construction (Safety)	1986
Noise Exposure	1989
Mineral Dust	1989

Source: Department of Safety and Health

introduction of new process and technology. Besides that, it also depended on command and control approaches and improvement was heavily dependant on the effectiveness of enforcement agencies (Malaysian Trade Union Congress, 2000). Realising that it was not possible to continue with the existing structure as Malaysia was moving fast towards becoming an industrialized state by the

year 2020, another legislation was enacted in 1994 known as the Occupational Safety and Health Act (OSHA 1994).

This long planned and awaited Act is relatively a much more modernized and updated law on OSH compared to its predecessor, the FMA 1967 (Malaysian Trade Union Congress, 2000). The introduction of a comprehensive OSHA 1994 was in response to the need to cover a wider employee base and newer hazards introduced in the workplace such as exposure to chemical substances, toxic substances, carcinogenic substances, neurotoxic chemicals, infectious biological agents, as well as hazardous tools and equipment which have been directly linked to workplace injuries and illness. A number of incidents that occurred locally and abroad had also prompted the Ministry of Human Resources to undertake serious initiatives that would promote safety and health in the workplace in Malaysia. It began pushing for stiffer penalties against employers who failed to safeguard their workers following the Bright Sparklers' factory explosion in Sungai Buloh on May 7, 1991 which killed 22 workers (cited in Laxman, 1995). Other incidents which expedited the enactment of OSHA 1994 included the tragedy involving the Union Carbide workers in Bhopal, India 1984, the Chernobyl nuclear power disaster in Russia in 1986 and the explosion of the LPG factory in Mexico city in 1994 which sacrificed the lives of 2000 people (Laxman, 1995). All these calamities brought about the realization that similar catastrophes could take place in Malaysia, and hence there was a need to have a better law to monitor the OSH condition in this country.

4.2.2 Identification of the Relevant Laws Enacted Under the Manufacturing Sector

4.2.2.1 Occupational Safety & Health Act 1994

At present the main Act that deals with safety and health in the manufacturing sector is the Occupational Safety and Health Act 1994 which was officially enforced in February 1994. It was welcome by many quarters as they felt that it was about time that Malaysia adopted a more comprehensive approach in dealing with accidents at the work place where all related parties must participate in this effort. Placing the main burden on the government (as under FMA) seemed to be an unwise strategy as the rate of accidents remain stubbornly high in the work place. Statistic released by the Ministry of Human Resources showed that in 1991, a total of 127,367 industrial accidents were reported of which 603 were fatal and in 1992, 778 workers died in accidents at work which totaled up to 124,503 incidents.

a. Objectives and scope

The main objectives of this Act as stated in Section 4 are

a. to secure the safety, health and welfare of persons at work against risks to safety or health arising out of the activities of persons at work;

b. to protect persons at a place of work other than persons at work against risk to safety or health arising out of the activities of persons at work;

c. to promote an occupational environment for persons at work which is adapted to their physiological and psychological needs;

d. to provide the means whereby the associated occupational safety and health legislation may be progressively replaced by a system of regulations and approved industry codes of practices operating in combination with the provisions of the Act designed to maintain or improve the standards of safety and health.

Briefly this means that the Act aims at safeguarding almost everybody at any place of work be it the employees themselves or any other persons besides the employees. The phrase “person at a place of work other than persons at work”(Section 4b) appears to include licensees, invitees or visitors.

A licensee is a person who enters on premises by the permission of the occupier granted expressly or impliedly in a matter in which the occupier himself has no interest. This is in contradistinction to an invitee, who at common law is a person who enters a premises in which the occupier has some pecuniary or material interest. Examples of invitees include sales agents who are being specially invited to demonstrate their products in which the owner of the premises are interested to purchase (like the computers) or people who are invited to a particular ceremony in conjunction with a particular events like a company’s open day to publicise the company’s business to the public. Whereas a licensee may include people who come to an organization to collect donations or to introduce their latest product (without being invited).

A visitor is a person appointed to visit or inquire into any irregularities arising in a corporation. This category of people may include the authorities from a particular government department like the Department of Safety and Health to visit any accident sites in an organization to inspect and investigate the cause of accidents or an officer from the Environmental Department to investigate any pollution committed by a certain organization.

OSHA also encompasses a broader scope when the provisions made it applicable to industries specified in the First Schedule. This includes a wide range of categories such as the manufacturing sector; mining and quarrying; construction; agriculture, forestry and fishing; utilities (electricity, gas, water and sanitary services); transport, storage and communication, wholesale and retail trades; hotel and restaurants; finance, insurance, real estate and business services; public services and statutory authorities.

Thus the coverage includes almost everybody leaving only those working on board ships who are governed by the Merchant Shipping Ordinance 1952 and the Merchant Shipping Ordinance 1960 (Sabah and Sarawak) and the armed forces.
The application of the Act also extends to all employers, employees, self-employed persons, manufacturers, designers and suppliers who are given specific duties to promote a better place to work in.

This is one of the aspects which makes OSHA a better legislation compared to FMA because it realizes and acknowledges the fact that everybody requires a safe and healthy work place irrespective from which industries they come from. Workers will be happier, more contented and probably will be more loyal (stay longer) in an organization which takes pain in ensuring that their (workers) safety is well taken care of throughout their daily working activities. Employers, self-employed persons, designers, manufacturers and designers are compulsorily urge to come together and contribute to a safer place to work. This extensive approach is hoped to achieve its ultimate goal in creating a healthy and safe working culture among all employers and employees.

b. Duties of employers and self-employed persons

Section 15 of the Act provides the general duties of employers and self-employed persons. It states that "it shall be the duty of every employer and every self-employed person to ensure, so far as is practicable, the safety, health and welfare at work of all his employees".

Who is an employer?

Before discussing in detail the duties of employers and self-employed persons, let us look at the definition of an employer. Section 2 of the Act defines an employer as the immediate employer or the principal employer or both.

A principal employer is further defined as the owner of an industry or the person with whom an employee has entered into a contract of service and includes-

i. a manager, agent or person responsible for the payment of salary or wages to an employee;
ii. the occupier of a place of work;
iii. the legal representative of a deceased owner or occupier; and
iv. any government in Malaysia, department of any such government, local authority or statutory body.

An immediate employer in relation to employees employed by or through him, means a person who has undertaken the execution at the place of work where the principal employer is carrying on his trade, business, profession, vocation, occupation or calling, or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the trade, business, profession, vocation, occupation or calling of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such trade, business, profession, vocation, occupation or calling, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer.

The vast meaning attached to the definitions subsume a far reaching situations which catch any parties in various circumstances to come under the category of

an employer. It is submitted that a wide meaning given to the word "employer" is to fulfill its obligation to the society as a social based legislation which needs to protect as many workers as possible. The definitions also take into consideration the way businesses are being done today. Some modern styles of businesses involve a lot of people from different disciplines and companies to come and work together under the same roof or at the same site to complete a certain undertaking.

One example is the retail outlets in shopping complexes which are being managed or controlled by some persons. The controllers or managers of the buildings(shopping complexes) can be regarded as the principal employers since they control the place of work (see the definitions of "occupier" and "place or work" which should be read together with the definition of "principal employer"). The tenants or the owner of the outlets can be regarded as immediate employers as the employ some people as employees. Similarly in the construction industry whereby different types of work are assigned to different people or companies. The main contractor can be regarded as the principal employer while the sub-contractor can be regarded as the immediate employer.

Who is a self-employed person?

A self-employed person is defined as an individual who works for gain or reward otherwise than under a contract of employment/service, whether or not he himself employs others (Section 2). In a layman's term, he is his own boss

regardless whether he has his own workers or not. To prove that a person is a self-employed person, he must show that no contract of employment/service exist between him and the other party.

c. Extent of the employer's and self-employed person's duties

The law compels both employer and self-employed person to implement and maintain safety system at the work places. The word "shall" in Section 15(1) connotes a mandatory duty on the part of both parties to do so. The duties as mentioned in Section 15(2) include in particular:

a. the provision and maintenance of plant and systems of work that are, so far as is practicable, safe and without risks to health;

b. the making of arrangements for ensuring, so far as is practicable, safety and absence of risks to health in connection with the use of operation, handling, storage and transport of plant and substances;

c. the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is practicable, the safety and health at work of his employees;

d. so far as is practicable, as regards any place of work under the control of the employer or self-employed person, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of the means of access to and egress from it that are safe and without such risks;

e. the provision and maintenance of a working environment for his employees that is, so far as is practicable, safe, without risks to health, and adequate as regards facilities for their welfare at work.

d. Particular matters related to the duty

The phrase " at work"

The duty normally applies only so long as the employee is 'at work' as defined in Section 15(1). However, it is wrong to imply that the employers duty towards safety at the workplace is only limited to the times when the employees are working. Instead the obligation stands throughout the whole time as decided by the court in Bolton Metropolitan Borough Council v Malrod Installations Ltd (1993). It was held in this case that there could be criminal liability for failing to observe safety legislations even though at the time in question no worker was present or at risk. The employers are under the obligation to ensure that the workplace, its plant and equipment are safe, at all times, regardless of whether employees are present or not. A breach will occur when an employer provides unsafe plant and equipment to be used. The law requires that the workplace is prepared and maintained in such a way as to 'protect the employee who comes to work tomorrow' (per Tudor LJ in the same case). Thus the law will be broken if unsafe equipment is at a workplace in a circumstances where it might be used, even though no one is using it.

The phrase "so far as is practicable"

Looking closely at the duties imposed by the Act to the employer and self-employed person, it will be noted that the duties are itemized in very general terms. They apply to every workplace within Malaysia. Both employer and self-employed person are expected to perform all the duties "so far as is practicable" (the requirements are qualified by such words in every paragraph). What is the meaning of this phrase? This phrase has not been judicially considered by the local courts as yet but reference can be made to Section 3 to further understand it. Section 3 states that "practicable means practicable having regard to the severity of the hazard or risk in question; the state of knowledge about the hazard or risk and any way of removing or mitigating the hazard or risk; the availability and suitability of ways to remove or mitigate the hazard or risk; and the cost of removing or mitigating the hazard or risk".. This means that the law does not demand the employer and self-employed person to execute their duties in a ludicrous manner. Enough if they can exercise their duties in a reasonably way as implied under Section 3.

For example, an employer can be regarded as acting practicably if he considers the points stated below:

- Does the required standards with respect to safety and risk to health being applied to the existing plant?
- Is updated good practice taken into consideration when installing a new plant?

- Are systems of work safe? Thorough inspections of the entire operations will ensure that danger of injury or injury to health is reduced. Special system of work such as “permit to work system” may be adapted in this process.
- Is the work environment regularly monitored to ensure that, where known health hazards are present, protection conforms to current health standards, including medical surveillance of workers?
- Is monitoring also carried out to check the adequacy of control measures?
- Are safety equipments regularly inspected? All equipments and appliances for safety and health must be regularly inspected and maintained.
- Risk to health from the use, storage and transportation of substances must be minimized, To achieve this goal, all necessary precautions must be taken in the proper use and handling of potentially dangerous substances likely to cause risk to health. Expert advice can be sought on the correct labeling of substances, and the suitability of containers and handling devices. All storage and transport arrangements should be strictly supervised and kept under review.

Since it is submitted that the law requires the employer and self-employed person to act reasonably, many quarters wonder why OSHA did not use the same phrase as being used in the English Health and Safety at Work Act 1974 since it followed the English Act to a certain extent The phrase used in OSHA is “so far as is practicable” while the phrase used in the English Act is “so far as reasonably practicable”.

The English courts had the chance to interpret this phrase in a number of occasions (although under different Acts but using the same phrase). For example in *Edwards v National Coal Board* (1949)1 KB 704, the court considered the phrase in relation to the Coal Mines Act 1911. Asquith LJ stated:

> *"Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on the scale, and the sacrifice in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them - the risk being insignificant in relation to the sacrifice - the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner a point of time anterior to the accident"*.

This means that the employer must weigh, on one hand, the time, trouble and expense, etc. of meeting that duty against the risks involved and the nature of the obligation on the other hand. Also the duty can only be performed against the background of the current knowledge. However, in *Marshall v Gotham* (1954) AC 360, it was suggested that a precaution which was practicable would not lightly be held to be unreasonable. In other words, a duty or obligation must be performed or carried out unless it would be unreasonable to do so. In this case, a

worker died when he was hit by a fallen roof due to a landslide. The landslide was due to an undetected geological movement. Lord Reid in his decision said:

" If a precaution is practicable, it must be taken unless in the whole circumstances that would be unreasonable. As men's life may be at stake, it should not be held lightly that to take a practicable precaution is unreasonable".

A wider meaning of 'instruction' in Section 15(2)(c)

In *Boyle v Kodak Ltd* (1969), the court decided that the word 'instruction' has two meanings. It means both to teach and to order. Thus the employer and self-employed person must either teach or order the safety performance of all the working activities at the workplace. The protection is in context to the relationship between an employer or self-employed persons towards its employees. However a careful analysis of the subsection shows that this duty to provide information, instruction, training and supervision applies not only to the employees (to enable them to protect themselves) but also the anybody who might by their conduct endanger the employees. This was confirmed by the Court of Appeal in:

R v Swan Hunter Shipbuilders Ltd. (1981)ICR 831: There was a fire on HMS Glasgow which was under construction in Swan Hunter's yard where eight men were killed. The fire started during welding operations by contractors. The fire, which started in confined space in the well of

the ship, was particularly intense because the atmosphere was oxygen enriched. The dangers of using oxygen in poorly ventilated spaces were well known to Swan Hunter and their safety officer had drawn up a 'Blue Book' of instructions for users of fuel and oxygen. Copies of this book were distributed to Swan Hunter's own employees but not to employees of other companies working together with Swan Hunter's own men. At the trial, Swan Hunter was found guilty for failing to provide information to Telemeter employees. They appealed against the conviction.

The court considered the application of Section 2(2)(c) of the Health and Safety at Work Act 1974 (which is similar to Section 15(2)(c) of OSHA) to these facts. Swan Hunter had, on trial, submitted that they were not obliged under section 2(2)(c) to provide information or instruction to any workers other than their own employees. The trial judge had ruled against this submission and the main ground of the appeal was that, as a matter of law, the judge was wrong. It was submitted for Swan Hunter that an employer had no right to instruct those employed by others and that therefore the duty to provide information, instruction and training could not extent to those employed by other undertakings. The Court of Appeal nevertheless upheld the ruling of the trial judge that there was a strict duty to provide a safe system of work for an employer's own employees, and if fulfilling the duty involved information and instruction being given to persons other then the employer's own employees, then the employer was under a duty to provide such information and instruction.

e. Safety and Health policy

OSHA also requires both employer and self-employed person to prepare a written statement of the safety and health policy and revise it as often as possible. As specified in Section 16:

"Except in such cases as may be prescribed, it shall be the duty of every employer and every self-employed person to prepare and as often as may be appropriate, revise a written statement of his general policy with respect of the safety and health at work of his employees and the organization and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all his employees".

All employers and self-employed persons employing more than five employees are required to have safety policies [Occupational Safety and Health (Employers' Safety and Health General Policy Statements) (Exception) Regulations 1995].

In *Osborne v Bill Taylor of Huyton Ltd*. (1982) IRLR 17, the defendant company was served with an improvement notice requiring them to prepare a written safety policy. Subsequently when they were charged with an offence of ignoring the notice, they argued that they were within the exception regulations. The company owned and controlled 31 betting shops but at the shop which was the subject of the notice, they employed only two full-time and one part-time member of staff. The justices accepted that the betting shop was a distinct place of work and fell under the exception regulation. On appeal, it was held that the

justices had correctly applied the regulations in that the test was not how many employees were on the payroll but how many were at work at any one time; provided no more than five workers worked at one time an undertaking was exempted.

No specific guideline is provided by the Act as to how the policy should be formulated. Thus the employer and self-employed person are free to use their own creativity in preparing one. This job is not a difficult one but many parties to whom this responsibility is put upon them, especially the self-employed person, fail to comply with this requirement. Perhaps they are not aware of this provision or if they do, they do not have the expertise or experience to formulate one. This should not be an excuse as it can be done by getting some advise from any relevant department like the Department of Safety and Health, Ministry of Human Resource or samples can be obtained from companies which have one. Any person who contravenes this provision is guilty of an offence and on conviction can be fined up to a maximum of RM50,000 or can be imprisoned for a term not exceeding two years or both.

OSHA requires the policy to be brought to the attention of all the employees. No guideline is being provided as to how this should be done but different companies have different ways of doing it. Some companies posted the safety policy at strategic places in the organizations using big clear words while other companies circulate one copy to each of their workers or provide them with one

when they first register for work. If the employees do not understand the language used in the policy, appropriate steps must be taken to highlight the policy to them. The employers are obliged to revise the policy within a reasonable time and a period of one year seems to be suitable to do so to allow them to take into account any suggestions that are made by anyone at the organisations to improve the policy.

f. Duties to persons other then their employees

Section 17 imposes a duty on "every employer and every self-employed person, while conducting his undertaking, in such a manner as to ensure, so far as is practicable, that he and other persons not being his employees, who may be affected thereby are not exposed to risks to their safety or health". The essential information on such aspects of the manner in which they conduct their undertaking must be conveyed to these persons to avoid them from being affected by such risks.

For example, if a manufacturing company is being visited by a group of university students who wish to get a closer look or a hands on knowledge of the related subjects that are being taught to them, the company should brief them on the safety aspect before touring the intended areas. The company should also provide the students with proper personal protective equipments to avoid itself from any legal liabilities in case of any mishaps happening. Notices posted at any conspicuous places are not only meant for the workers alone but also such

visitors as well. In short, any specific safety procedures that should be followed by the workers must also be applied to the students. By this way the employers have fulfilled their obligation under this section in protecting other persons besides their own employees.

Another example would be a self-employed person who owns a workshop or a restaurant. He has not fulfilled his duties if he does not take proper care in informing his customers who send their cars for repair or who come to get a taste of the delicacies offered in the restaurant respectively, of the hazards and risk that might arise in his workshop or restaurant. He should take the necessary steps to bring to their (customers) attention of the potential danger that is incidental to his business. He need not approach every customer personally to warn them of the danger as it is not practical but a clear and visible notice would be adequate to highlight the hazard and risk that might exist.

In *R v Mara* (1987) IRLR 154, the Court of Appeal considered the meaning of the phrase 'conduct his undertaking'. Mr. Mara was the director of a cleaning company under contract with a high-street store. The cleaning work involved the use of certain electrical cleaning appliances including a polisher/scrubber. To avoid from interfering with the client's daily routine, it was agreed that the loading bay would be cleaned by the clients themselves but using the contractor's equipment. The prosecution arose because one of the client's employees was electrocuted by the contractor's defective polisher/scrubber. Mr. Mara was convicted. The issue on appeal was whether the use of the defective

equipment by the employee at the store in the particular circumstances could be said to relate to the conduct of Mr. Mara's undertaking, since the accident occurred on a day when he had no contractual duty to clean the premises. The Court of Appeal upheld the conviction. In their view, the employees at the shop were persons who might be affected by the conduct of Mara's undertaking and the court could not accept the argument that the duty was only applicable when the undertaking was actively being carried on.

g. Duties of an occupier of a place of work

An occupier in relation to a place of work means a person who has the management control of the place or work (Section 2 OSHA). This includes any person, who by virtue of any contract or lease, has been entrusted to maintain and repair the place of work or any means of access thereto or egress therefrom; and to prevent any risk or danger to safety and health that may arise from the use of any plant or substance in the place of work[Section 18(2)] Section 18 places the duty upon the occupier of a place of work to have due regard to the safety of persons who are not the occupier's employee, who use the (non-domestic) premises as a place of work or a place where they use plant or substances provided for their use there.

Section 18(1) states that "an occupier of non-domestic premises which has been made available to persons, not being his employees, as a place of work, or as a place where they may use a plant or substance provided for their use there, shall take such measures as are practicable to ensure that the premises, all means of access thereto and egress therefrom available for use by persons using the

premises, and any plant or substance in the premises or provided for use there, is or are safe and without risks to health".

It should be stressed however that the liability in respect of plant or substances is expressly limited to liability for plant and substances provided for the use of the visitors. Plant has been defined in Section 2 to include any machinery, equipment, appliances, implement or tool, any component thereof and anything fitted or connected thereto; whereas substances means any natural or artificial substance, whether in solid or liquid form or in the form of a gas or vapour or any combination thereof.

The House of Lord considered the implication of this section in relation to visiting workers in *Mailer v Austin Rover Group plc*..(1989)2All ER 1087. In this case the respondent (Austin Rover), had premises containing a spray painting booth where a large sump was located beneath it to collect excess paint and thinners during painting operations. The booth contained a piped supply of highly flammable thinners for use in painting. A contractor was employed by the respondent to clean the booth when there was no production. Some conditions were specified to the contractor to ensure the safety of the whole process. It was required that nobody should be in the sump when anyone was working in the booth above, that the contractor's employees should used their own supply of thinners and not the piped supply thinner, the thinner used in the cleaning should not be sent into the sump and that only a flameproof electric lamp should be

taken into the sump. All these safety provisions were not abided. A flash fire occurred and a man in the sump was killed. The respondents were prosecuted for failure to take such measures as were reasonable for them to take to ensure so far as was reasonably practicable that the sump and piped thinners were safe and without risks to health. The House of Lords held that once it was proven in a prosecution that premises which had been made available by a controller were unsafe and constituted a risk to health, the onus lay on the respondent to show that, weighing the risk to health against the means, including the cost of eliminating the risk, it was not reasonably practicable for him to take these measures. However, if the premises were not a reasonably foreseeable cause of danger to persons using the premises in a manner or in circumstances which might reasonably be expected to occur, it was not reasonable to require any further measures to be taken to guard against unknown and unexpected events which might endanger their safety.

Since it was not reasonable for the respondents to take measures to make the spray painting booth and sump safe against the unanticipated misuses of those premises by the contractor's employees the House of Lords acquitted the respondents. The reasoning of their Lordships was interesting. They were of the opinion that the starting point was that the premises should be absolutely safe so that if they proved to be unsafe, regardless of the way in which they had been used, the burden shifted to the controller, who might then escape liability by establishing that it was not foreseeable that the premises would be used in the

manner in which they had been use and/or it was not incumbent on him to have done more to make the premises safe. In deciding the extent of the duty , the court had to bear in mind the double qualification on the controller's duty. The law only requires the controller to do only what was reasonable for someone in his position to do to ensure so far as was reasonably practicable that the premises were safe.

h. Duties of designers, manufacturers and suppliers

One of the beauties of OSHA is that it places responsibilities of safety not only onto the employers and self-employed persons but also on the designers, manufacturers, importers and suppliers as well to ensure that only safe plants and substances are provided at the work place. This means that the level of safety of the plants and substances are being safeguarded right at the beginning from the stage when the plants and substances are being designed and formulated until it is being supplied by the supplier to be used by the workers.

Section 21 of OSHA imposed on any person who formulates, manufactures, imports or supplies any substance for the use at work

a. to ensure, so far as is practicable, that the plant is so designed and constructed as to be safe and without risks to health when properly used;
b. to carry out or arrange for the carrying out of such testing and examinations as may be necessary for the performance of the duty imposed on him;
c. to take such steps as are necessary to secure that there will be available in connection with the use of the plant at work, adequate information about the

> use for which it is designed and has been tested, and about any conditions necessary to ensure that, when put to that use, it will be safe and without risk to health;

There is also a duty on manufacturers and suppliers (but not importers) to carry out or arrange for the carrying out of any necessary research with a view to the discovery and, so far as is practicable, the elimination or minimization of any risk to safety or health to which the design or plant may give rise.

Similar obligations are placed upon persons who designs, manufactures, imports and supplies any plant for use of work under Section 20 of OSHA. Only another duty is added under this section that is as regards to the erection and installation of the plant. The person in charge of this job must make sure, so far as is practicable, that nothing about the way in which it is erected or installed makes it unsafe or a risk to health when properly used.

A plant or substance is regarded as properly used when it is used according to the relevant information and advice relating to its use which has been made available by a person by whom it was designed, manufactured, imported and supplied[(Section 22(5)] If the information provided is disregarded by the users and an accident occurs, then the relevant party may not be considered to contravene his duty under this section.

Section 22(2) provides that all the above duties only extend to things done in the course of a trade, business or undertaking (whether for profit or not), and to matters within a person's control.

i. Duties of employees

An employee means a person who is employed for wages under a contract of service on or in connection with the work of an industry to which the Act applies and -

a. who is directly employed by the principal employer on any work of, in incidental or preliminary to or connected with the work of, the industry , whether such work is done by the employee at the place of work or elsewhere;

b. who is employed by or through an immediate employer at the place of work of the industry or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the industry or which is preliminary to the work carried on in or incidental to the purpose of the industry; or

c. whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service.

The Act did not leave the duty to maintain and implement safety at the work place to be carried out by the employers, self employed persons, manufacturers, designers, importers and suppliers alone. The main focus of the Act that is the

employees themselves are also obliged to take care of their own safety and well-being. It is not right to urge other people to give priority to the workers' safety and not force the workers themselves to have due regards to their own safety. Thus, Section 24 is incorporated to emphasis the fact that this duty is the responsibility of everyone including the workers as well.

The section explains that it shall be the duty of every employee while at work -

a. to take reasonable care for the safety and health of himself and of other persons who may be affected by his acts or omissions at work;
b. to co-operate with his employer or any other person in the discharge of any duty or requirement imposed on the employer or that other person by the Act of any other regulation;
c. to wear or use at all times any protective equipment or clothing provided by the employer for the purpose of preventing risks to his safety and health; and
d. to comply with any instruction or measure on occupational safety and health instituted by his employer or any other person by or under the Act or any other regulation.

This section therefore stress the importance of the employees to be reasonably careful of his own safety as well as to foresee the safety of other people who is likely to be affected by his acts or omissions at work. It also compel the workers to cooperate and comply with any instructions and orders given by their employers or any authorized persons for their own sake. Any person who

contravenes this provision shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding RM1,000 or to imprisonment for a term not exceeding three months or both.

j. Safety and Health Officers

Some occupiers of a place of work are required to employ a competent person to act as a safety and health officer(SHO) whose duties is exclusively for the purpose of ensuring that the undertaking where he is attached to observe all the regulations for the promotion of a safe conduct of work at the work place(Section 29 OSHA).

The law necessitates employers from the following industries to have their own SHOs -

a. any building operation where the total contract price of the project exceeds RM20 million (building operation means the construction, structural alterations, repair or maintenance of a building including repointing, redecoration and external cleaning of the structure, the demolition of a building, and the preparation for and the laying of foundation of an intended building);

b. any work of engineering construction where the total contract price of the project exceeds RM20million (work of engineering construction means the construction of any railway line or siding, and the construction, structural alteration or repair including repointing, and repairing or the demolition of any dock, harbour, inland navigation, tunnel, bridge, viaduct and waterworks).

c. any ship building employing at the peak of the work more than 100 employees;

d. any gas processing activity or petrochemical industries employing more than 100 employees;

e. any chemical and allied industry employing more than 100 employees;

f. any boiler and pressure vessel manufacturing activity employing more than 100 employees;

g. any metal industry where there is canning or stamping or blanking or shearing or bending operations and employing more than 100 employees;

h. any wood working industry where there is cutting or sawing or planning or moulding or sanding or peeling or any combination of the above,and employing more than 100 employees;

i. any cement manufacturing activity employing more than 100 employees; and

j. any other manufacturing activity other than the manufacturing activity specified in (f) to (i) employing more than 500 employees.

The preceeding paragraph is mentioned in the Occupational Safety and Health(Safety and Health Officer) Order 1997. It implies that the recruitment of SHO are essential in many undertakings which involve heavy and dangerous activities in order to secure the well-being of the workers and everyone at the work area. It is vital for the employers to have someone whose full time job is to handle any tasks relating to this matter as the law prescribes heavy

responsibilities on the SHO shoulders to make sure that this job is being carried out as specified.

The Occupational Safety and Health (Safety and Health Officer) Regulation 1997 states that it shall be the duty of a SHO -

a. to advise the employer or any person in charge of a place of work on the measures to be taken in the interests of the safety and health of the persons employed in the place of work;

b. to inspect the place of work to determine whether any machinery, plant, equipment, substance, appliance or process or any description of manual labour used in the place of work, is of such nature liable to cause bodily injury to any persons working in the place of work;

c. to investigate any accident, near-miss accident, dangerous occurance, occupational poisoning or occupational disease which has happened in the place of work;

d. to assist the employer or the safety and health committee, if any, in organising and implementing occupational safety and health programme at the place of work;

e. to become secretary to the safety and health committee, if any;

f. to assist the safety and health committee in any inspection of the place of work for the purpose of checking the effectiveness and efficacy of any measures taken;

g. to collect, analyse and maintain statistics on any accident, dangerous, occurance, occupational poisoning and occupational disease which have occured at the place of work;

h. to assist any officer (from the Department of Safety and Health or other related departments) in carrying out his duty;

i. to carry out any other instruction made by the employer or any person in charge of the place of work on any matters pertaining to safety and health of the place of work.

There are complaints being made by those who are assigned as SHOs that they are made to tackle other matters as well beside this major responsibility. The employers must realise that this duty is not of secondary importance but one which demands the fullest concentration and commitment from the person involved. If the SHOs are required to handle other assignments, it is likely that they are not able to perform the best as they could to ensure that the provisions of the law are being complied with by the employers. Thus the employers must understand the reasoning behind the enactment and enforcement of OSHA and cooperate with the government effort in trying to create a secured area safe from any danger and harm to everyone. In fact the law places an added obligation on the employers to provide the SHO with adequate facilities including training equipment and appropriate information to enable the safety and health officer to conduct his duties properly. As the subject of safety and health has a wide spectrum, the employers must also permit the SHO to attend any continuous education program such as seminars, courses or conferences to enhance his

knowledge on occupational safety and health. This is necessary to allow them to keep abreast with the latest information that can help them to perform the job well.

It is no doubt that looking from the duties prescribed by the law, the duties of SHO is a demanding and taxing job. Hence, to qualify for the job, the person must be knowledgeable in this field for without the necessary exposure he will not be able to assist the organisation in preventing any undesirable incidents. A person is qualified to become a SHO if he either holds a diploma in occupational safety and health or any equivalent testimonial from any professional body of institution as approved by the Ministry of Human Resource on the recommendation of the Director-General of Safety and Health; or has successfully completed a course of training in occupational safety and health and passed an examination for that course or the equivalent thereof, approved by the Ministry of Human Resource on the recommendation of the Director-General of Safety and Health, and has a minimum of three years experience in occupational and health; or has been working in the area of occupational and health at least for a period of ten years. SHOs must register their status with the Director-General of Safety and Health and must be renewed annually upon showing proof that he/she has attended any continous education programme at least once in a year.

The obligation of a SHO also includes a monthly duty of submitting a report pertaining to his activities to the employer. This report shall contain inter alia the following particulars -

a. any action to be taken by the employer in order to comply with the requirement of the law;

b. method of establishing and maintaining a safe and healthy working condition in the place of work;

c. the number and types of accident, near-misses accident, dangerous occurance, occupational poisoning or occupational disease which have occured in the place of work including the number of persons injurred either incurring lost-time injury or no lost-time injury (near-misses accident means any accident at a place of work which has the potential of causing injury to any person or damage to any property while lost-time injury means an injury which prevents any worker from performing normal work and leads to a permanent or temporary incapacity of work);

d. any machinery, plant, equipment, appliance, substance or process or any description of manual labour used in the place of work which is of nature liable to cause bodily injury to any person working in the place of work;

e. any machinery, plant, equipment, appliance or any personal protective equipment required for the purpose of minimising any such risk;

f. recommend any alteration tobe made to the structure or layout of the place of work in the interests of the safety and health of the persons employed;

g. any work related to safety and health which has been carried out by any persons, or group of persons, engaged by the employer in order to promote safety and health in the place of work;

This report must be brought to the attention of the employer before the tenth of a preceding month and the employer or person in charge of a place of work must act immediately by discussing it with the SHO to determine the necessary measures to be taken. It must be remembered that these monthly reports must be kept in good condition for a period of at least ten years for the purpose of inspection or investigation if circumstances requires

k. Safety and Health Committee

One fundamental aspect of a good safety management is to have the involvement of both the employers and employees to participate actively in this area. The law recognises this fact and incorporates Section 30 in OSHA. This section compels every employer with more than 40 employees or as directed by the Director-General of Safety and Health to establish a safety and health committee at the place of work. The composition of the committee consist of a chairman, a secretary and representatives of both the employer and the employees. The employer himself or his authorised manager shall be the chairman and the secretary shall be the person who is employed as the safety and health officer at the place of work. Where no SHO is available at the work place (because it does not fall under the category of industries which need to employ one), the chairman must appoint one of them as the secretary by ballot.

l. Post-scripts on OSHA

As mentioned earlier the introduction of a comprehensive Occupational Safety and Health Act (OSHA) 1994 was in response to the need to cover a wider employee base and newer hazards introduced in the workplace. Developed countries such as Japan had enacted such legislation in 1972, United Kingdom in 1974 (the Health and Safety At Work Act 1974), United State of America in 1970 (the Occupational Health & Safety Act 1970) and in Sweden and Norway, the Act was called Internal Control Regulation. The OSHA 1994 is enforced by the Department of Occupational Safety and Health (DOSH) (previously known as Factory and Machinery Department. The name was changed to reflect changes in coverage) under the Ministry of Human Resources.

The Act was derived from the philosophy of the Roben's Commission and Health & Safety At Work Act 1974 in UK, emphasizing on self-regulation and duties of employer, employee and designer/manufacturer. The employer's duties include the provision of a safe system of work, training, maintenance of work environment and arrangement for minimizing the risks at low as reasonably practicable. In short, the responsibility on OSH is made to rest on those who create the risks (employers) and those who work with the risk (employees).

The Act is referred as a reflexive-type of Act which was less prescriptive, cover all workers except those in armed forces and those who work aboard ship (which

were covered by other legislations). The Act also emphasis on duties of care by individual thus empowering the participation of all person in OSH.

Under the OSH Act 1994, National Council for Occupational Safety and Health was established. This Council comprised of 15 council members with tripartite representation from Government, employers, employees and OSH professionals (with at least one woman member). The legislation also contains provision for formulating regulations and Code of Practices (COPs), which indicates “what should be done” and thus assist the employer to comply with the Act.

4.2.2.2 Regulations/Guidelines and Code of Practice under OSHA 1994

A series of regulations have been introduced under OSHA 1994. The emphasis of these regulations has been on establishing mechanism to implement OSH in workplaces. Workplaces with five or more workers are required to formulate a Safety and Health Policy. The Safety and Health Committee Regulations 1996 requires establishments with 40 workers and above to establish a safety and health committee. The committee is required to meet at least once in every three months, with the functions to identify hazards at the workplace, institute control measures, investigate incident and conducting audit.

In terms of representation in the committee, workplace with less than 100 workers will need to have at least two representatives each for workers and management respectively. However, workplaces with more than 100 workers

will need to have a minimum of four representatives each for workers and management.

The Safety and Health Officer Regulations provide for specific industries to have a Safety and Health Officer (SHO). A SHO is an individual who has attended training in National Institute of Occupational Safety and Health (NIOSH) or other accredited training bodies and has passed the examination conducted by NIOSH and registered with DOSH.

The Control of Industrial Major Accident Hazards (CIMAH) Regulations 1996 was enacted in response indirectly to the Bhopal incident in India in 1984 and the Sungai Buluh firecracker factory tragedy in Malaysia which has killed 23 workers in 1992.

The Classification, Packaging and Labeling (CPL) Regulations 1997 and Use and Standard of Exposure of Chemical Hazardous to Health (USECHH) Regulations 2000 were specific for controlling chemicals at the workplace. The CPL regulation required proper packaging and labeling of chemicals by the supplier including the label giving risk phrases. The USECHH regulation includes the provision of chemical health risk assessor (CHRA), occupational health doctor (OHD) and industrial hygiene technician to perform their respective roles in assessing the health risk from chemical exposure. In particular, the chemical health risk assessment includes having a list of all chemicals, assessing workers exposure to these risks, deciding on acceptability of risks and control measures that exist are reviewed. If risks are found to be

unacceptable, action needs to be taken. This regulation leads to increased training needs, which was offered by NIOSH. Guideline on Chemical Health Risk Assessment has also been issued.

Table 4.2 showed the regulations made under OSHA 1994. Guidelines and Code of Practices which have been issued by DOSH under the OSHA 1994 are shown in **Table 4.3**.

Table 4.2. The regulation made under OSHA 1994.

Regulation	Year
Employer's Safety and Health General Policy Statement (Exception)	1995
Control of Industrial Major Accident Hazards	1996
Safety and Health Committee	1996
Classification, Packaging, and Labelling of Hazardous Chemicals	1997
Safety and Health Officer	1997
Safety and Health Officer Order	1997
Prohibition of Use of Substance	1999
Use and Standards of Exposure of Chemicals Hazardous to Health	2000
Notification of Accident, Dangerous Occurrence, Occupational Poisoning and Occupational Disease	2004

Source: Dept. of Safety and Health, Malaysia

Table 4.3. Guidelines and Code of Practices made under OSHA 1994

Regulation	Year
Guidelines for Public Safety and Health at Construction Site	1994
Guidelines on First Aid Facilities in the Workplace	1996
Guidelines on Occupational Safety and Health in the Office	1996
Guidelines for the Classification of Hazardous Chemicals	1997
Guidelines for Labelling of Hazardous Chemicals	1997
Guidelines for the Formulation of a Chemical Safety Data Sheet	1997
Guidelines on Control of Exposure to Dust in the Wood Processing Industry	1998
Guidelines on Safety and Health in the Wood Processing Industry	1998
Guidelines on Reduction of Exposure to Noise in the Wood Processing Industry	1998
Guidelines on Occupational Safety and Health in Tunnel Construction	1998
Guidelines for the Preparation of Demonstration of Safe Operation Document (Storage of Liquified Petroleum Gas in Cylinder)	2001
Guidelines on Medical Surveillance	2001
Approved Code of Practice for Safe Working in a Confined Space	2001
Approved Code of Practice on HIV/AIDS in Workplace.	2001
Guidance for the Prevention of Stress and Violence at the Workplace	2001
Code of Practice on Prevention and Management of HIV/AIDS at the Workplace	2001
Guidelines on Occupational Safety and Health for Standing at Work	2002
Guidelines on Occupational Safety and Health in Agriculture	2002

Source: Department of Safety and Health, Malaysia

4.2.3 Analysis of the Extent of the Employer's Duties and Liabilities on Workers' Safety under the Common Law

It should be explained that employer's duty towards the safety of his workers does not only arise under the statute but also under the common law. This section will highlight the findings of objective (c) in this study i.e. to analyse the extent of the employer's duties and liabilities on workers' safety under the common law.

4.2.3.1 Introduction

Employer's duty to provide a safe system of work has been implied by the law as early as in the nineteenth century. According to Selwyn(1993), this is undoubtedly the most important aspect of the employer's duty which is implied by law i.e. to take reasonable care to ensure the safety of his employees. This common law duty is primarily found in the tort of negligence and in particular in the area of employer's liability. Even though much of the common law duties have been superseded by statute such as the Factories and Machineries Act 1967 and Occupational Safety and Health Act 1994, it is still important to explain these duties as some of the statutory provisions are based on the decisions made under the common law. With the introduction of the common law duties in this chapter readers will be able to understand the reasons behind the existence of some of the statutory provisions.

4.2.3.2 Employer's Duty on Safety at Work

In *Smith v Baker (Charles) & Sons(1891)*AC 325, Lord Herschell commented

that, ”It is quite clear, that the contract between employer and employee involves on the part of the former the duty of taking reasonable care to provide appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer’s negligence and the creation or enhancement of danger thereby engendered”.

This case clearly shows that in an employer-employee relationship, the employer has the duty to protect the employees’ safety at work at all times. Employers who expose their employees to any danger at work is in breach of his contract of employment and any violation of this duty will give rise to any civil action by the injured employees to claim for damages. As mentioned earlier, this duty as implied by the law stems from the law of negligence which requires everyone to ensure that his activities do not cause any damage or injury to any person or property. This duty is derived from the general duty owed to one’s neighbour as laid down by Lord Atkin in *Donoghue v Stevenson*(1932)AC 562.

In *Donoghue v Stevenson*, the plaintiff and her friend went to a café and ordered a bottle of ginger-beer manufactured by the defendant. The bottle containing the ginger-beer was opaque and was supplied by the café’s owner. The plaintiff drank the gingerbeer in a glass and when it is nearly empty, the plaintiff’s friend poured the remaining gingerbeer in the plaintiff’s glass. She suffered a shock

when a decomposed snail came out from the bottle and became ill. She took action against the manufacturer of the gingerbeer claiming that the latter was negligent in ensuring that his product was safe for drinking. As a manufacturer, he owed a duty of care to all his ultimate consumers, including the plaintiff, that there was no injurious element in his product. The House of Lords agreed with the plaintiff's argument and held that the defendant had failed to take reasonable care in ensuring the cleanliness and safety of his product and was therefore liable to pay damages to the plaintiff.

Lord Atkin enunciated the famous neighbour's principle in this case when he states, " The rule that you are to love your neighbour, becomes in law that you must not injure your neighbour; and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or ommision which are called in question'.

This famous neighbour principle is therefore applicable in many situations where it is likely that a person can foresee that the result of his actions or omissions can cause any harm to anybody. It undoubtedly includes the relationship between an employer and employee as the employer, who owns and manages an

organization can certainly foresee any acts or omissions that can be harmful to his employees. Thus the employer definitely has a duty of care towards his employees to ensure that the workplace is out of any dangerous elements.

4.2.3.3 Extent of the Duty

The standard of care which is expected to be performed by the employer is a practical one as pointed out by Lord Oaksey in *Paris v Stepney Borough Council* (1951) AC 376, that is 'the care which an ordinary prudent employer would take in all circumstances'.. The law does not require the employer to give a total assurance that an employee will not be injured but it is enough if he undertakes to take some reasonable care in foreseeable circumstances which could result in harmful effects. If an employer has taken some positive actions to avoid any undesirable consequences from happening, he will not be liable for any injury suffered by the employees.

This can be seen in the case of *Vinnyey v Star Paper Mills* (1965) 1 All ER 175 where the court held that the plaintiff who was injured when he slipped on a slippery floor while cleaning it was not liable for negligent. The facts showed that the foreman has given clear instructions and proper equipment for the plaintiff to carry out the work safely. Moreover it could not be foreseen that such a simple task as cleaning a slippery floor could pose a great danger to anybody. A similar decision was made in the case of *Lazarus v Firestone Tyre and Rubber Co. Ltd.* (1963) Times 2, where the plaintiff fell when he was

rushing to the canteen with the other staff. The court held that this is not the kind of behaviour which grown people could be protected against. The employer-employee relationship should no be made equivalent to a teacher-schoolchildren relationship or that of a nurse and imbecile child. These two cases also emphasized the fact that it is important for the employees to look after themselves at the work place and not blamed the employer for whatever incidents that happen.

The employer's duty to take reasonable care not to expose the employees to any danger at work is a personal one and cannot be delegated to another person. In *Wilson & Clyde Coal Co. v English* (1938) AC 57, the employer employed a colliery agent to be in charge of the safety of the mine. However, the court held that the employer was liable for the unsafe system that arise in the mine. Thus assigning the job to another person does not absolve the employer from any liabilities and is not a defence if action is taken against them.

The law also stresses that this duty is owed by the employer to each employee as an individual and not to them collectively. This means that employers must be sensitive to the needs of every individual employee and provide the appropriate standard of care for employees who are, for example young or inexperience or illiterate or handicap.

A case on point is the case of *Paris v Stepney Borough Council* (1951) AC 376.

In this case the plaintiff was employed to handle the general work in preparing vehicles for service, dismantling, etc. He was not provided with any goggles for the job as it was not custommary to do so. The plaintiff had only one eye and he lost another eye when a metal splinter entered into his good eye while performing his task. The plaintiff took action against the defendant, his employer for failing to take reasonable care in providing any goggles. It was held that the defendant has breached his duty of care towards the plaintiff. Even though it was not a practice to provide any safety equipment for those workers who perform such duty, the law requires the employer to be more cautious in treating their employees individually especially as in this case where the risk of injury is higher to the plaintiff due to his condition.

Also in the case of *James v Hepworth & Grandage Ltd*.(1968) ! QB 94, the court held that the employer has a higher duty of care to employees who have poor command of English to notify them of the danger at the work place and the safety precautions that needed to be taken. Here, the employer recruited an employee without knowing that he was unable to read English. A large clear notice was put up informing employees that they should wear spats for their personal protection. The plaintiff was injured while doing his duty because he did not wear any spat and took action against the employer. His claim failed because the court felt that the employer has taken reasonable steps to notify the employee of the safety precaution. The fault is on the plaintiff himself as he did not comply with the procedures even though he had observed that other workers

wore the spats while working. The court was of the opinion that the even if the plaintiff could not understand the notice that was being posted he could have enquired about it. His failure to do so meant that even if explanation was given to him, he would not have worn it either. This decision is important because it applies to this country as Malaysia recruits many foreign workers who are unable to understand the national language or even the English language. Thus employers must be more prudent and careful when hiring foreign workers in their organisations.

What if the employer is ignorant of the danger? Can he be held liable? It is submitted that an employer can escape liability if he is ignorant of the danger and could not be expected to know in the light of the current knowledge or did not foresee the danger and could not be expected to foresee it. In *Down v Dudley, Coles Long Ltd*,(1969), the court held that the employer was not liable when the employee became partially deaf as a result of the noise of the cartridge-assisted hammer gun which was used at work. The current state of medical knowledge at that time did not allow the employer to know that the use of that equipment is dangerous to the hearing if no safety precaution is provided. However the employer has the duty to take immediate reasonable steps to protect his employees if any danger is discovered subsequently. This is explained in the case of *Stokes v GKN Ltd*. (1968)1 WLR 1776, where Swanwick J elaborated

a. the employer must take positive steps to ensure the safety of his employees in the light of the knowledge which he has or ought to have

b. the employer is entitled to follow current recognised practice unless in the light of common sense or new knowledge this is clearly unsound

c. where there is developing knowledge, he must keep reasonably abreast with it, and not be too slow in applying it

d. if he has greater than average knowledge of the risk, he must take more than average precautions

e. he must weigh up the risk (in terms of the likelihood of injury and possible consequences) against the effectiveness of the precautions needed to meet the risk, and the cost and inconvenience.

Applying these test, an employer is regarded as negligent if he fails to perform according to the standard as expected from a reasonable and prudent employer. On the other hand, if he carries out all such steps as are reasonably practicable, he will not be liable at common law. This was decided in the case of *Darby v GKN Screws and Fasteners Ltd*. (1986) ICR 1.

a. The Three-fold Nature of the duty

Although all the cases point to the existance of one general duty of care of the employer, this duty can be sub-divided into three different headings.

i. Equipment

An employer has the duty to ensure that all tools, machinery, plant etc.that are used by the empoyees in the course of their work are in good condition and are

reasonably safe. Failure by the employer to do so will constitute a breach of duty of care towards his employees. Hence, if a cook is burnt in the hotel kitchen while using a defective fryer, he can take action against his employer for damages. Thus employers must be very prudent in purchasing any equipment to be used at work to avoid any liablity from arising. If the employer knows of any defect in any equipment used at work, he must take proper action like sending it for repair or withdraw it from circulation. In *Close v Steel Co. Wales* (1962) AC 367, the employer was held liable because he did not do anything despite knowing that the machines used in the factory were dangerous as it had the tendency to throw flying objects while operating. Similarly in *Taylor v Rover Car. Co.* (1966)2 All ER 181, the court held that the employer had not discharge his duty to take reasonable care when an employee sue the employer for the injury he suffered after being struck by a chisel. Similar incident happened in the past when a chisel shattered but did not hurt anyone. The employer did not take any positive action to remedy the defective chisel.

ii. System of work

There is a duty to provide a safe system of work for everyone at work including the layout, the training, supervision, the provision of warning, protective clothing, special instruction and methods of work adopted. All these matters are the employers' responsibilities which must be carried out prudently. In *Barcock v Brighton Corpn.*. (1949)1 KB 339, the plaintiff was employed at an electricity sub-station. He was injured while operating a specific testing method which was

unsafe. The employer was held liable. However, if the employer provides clear instructions which the employee fails to abide, the employer will not be held liable. In *Charlton v Forrest Printing Ink Co. Ltd* (1980) IRLR 331, a senior employee was assigned to collect the firm's monthly wages from the bank each Friday. The company instructed him to have a variety of collection procedures to avoid any repeated robbery from happening while in the course of collecting money from the bank as in the past. The company encouraged the senior employee to use different tactics like using taxis instead of private cars, going at different times and by different routes. This instruction was not followed. The robber managed to detect his consistent pattern of collecting money from the bank and he suffered injuries in an attack. The High Court found in favour of the plaintiff saying that the employer was negligent in not providing a professional safety fiim but this was not accepted by the Appeal Court who reversed the judgement. The Court of Appeal was of the opinion the employer has acted reasonably in trying to minimise the occurance of any repeated mishaps by giving the appropriate instructions. Even though it was suggested that the employer should use the service of professional safety firm, the facts showed that it was not a normal practice for small firms such as the defendant's to do so.

Generally, the higher the danger is in an organisation, the higher the need for safety precautions. The lower the danger is, the lower the degree of responsibility on the part of the employer. The question as to what extent is the employer responsible to perform his duty is a difficult one especially if the employer has

provided the employees with the necessary safety equipments. It is obvious that if employers fail to provide any necessary safety precautions he will be liable for it. But what is the position if safety precautions are supplied? Is it adequate for the employers to just passively provide the equipments without any further effort? Or should the employers act proactively in ensuring that his employee abide to his instruction like strictly implementing the rules and punish them if they ignore the rules? Selwyn(1993) submittted that this situation can be divided into 4 propositions.

i. If the risk is an obvious one, and the injury resulting from the failure to use the precautions is not likely to be serious, then the employer's duty is a passive one of merely providing the precautions, informing the employees and leaving it to them to decide for themselves whether or not to use them. In *Qualcast(Wolverhampton) Ltd. v Haynes* (1959) AC 743, the employer provided spats to the employees. An experienced employee who did not wear the spat was injured when his leg was splashed with mollten metal. The employer escaped liability as the court decided that the potential of injury is not a serious one.

ii. If the risk is that of a serious injury, then the duty of the employer is a higher one of doing all he can to ensure that the employee will use the safety precautions which are provided. In *Nolan v Dental Manufacturing Co.*. (1958)2 All ER 449, a toolsetter was injured when a chip flew off a

grinding wheel. It was held that the employer should have insisted that protective goggles were worn because of the seriousness of the injury should any incident occur.

ii. If the risk is an insidious one, or one the seriousness of which the employees would not readily appreciate because they are unaware of it, then again, it is the duty of the employer to do all he can by way of propaganda, constant reminders, exhortations, etc. to try to make them use the precautions. In *Berry v Stone Manganese* (1971)12 KIR 13, the plaintiff was working in an environment where the noise levels were dangerously high. Ear muffs had been provided but no effort was made to ensure their use. It was held that as the workers would not readily appreciate the danger of injury to their hearing if they did not use the ear muffs, the employers were liable, as they had failed to take proper measures to convince them of the importance of using the equipment.

iv. When the employer has done all that needs to be done like providing the necessary protective equipments, demonstrating the correct ways of wearing it, explaining the risk involved in failing to use it, constantly reminding them, until he can do no more, then he is absolved from any liability.

c. Staff

If an employer engages an incompetent person, whose actions injure another employee, the employer will be liable for failing to take reasonable care in selecting the employee's colleagues. In *Hudson v Ridge Manufacturing Co*.. (1957) QB 348, an employee who liked and enjoyed committing practical jokes went a bit too far with his act and injured his fellow employee. The court held the employer liable because despite due warning, he did not take any action to dispense the worker who was not only a menace to himself but also to the rest at work. On the other hand a different decision was upheld in the case of *Coddington v International Harvester Co of Great Britain Ltd*.. (1969)6 KIR 146, although the facts are quite similar. Here, an employee, X made a joke by kicking a tin of burning thinner which cause severe injuries to the plaintiff. The employer was held not liable because there was nothing in the past which showed that X has the habit of making practical joke to his colleagues and can endanger them.

4.2.3.4 Defences to Common Law Action of Negligence

The duty of care of employers at work requires the employer to act reasonably and not to guarantee absolutely that accidents will not happen. It is difficult and impossible to give complete assurance that everything is well taken care of and accident will never takes place. Thus if accidents happen, the employers may rely on the following defences.

a. Employers not negligent

If the employer has taken all reasonable steps that are expected to be taken, then he can deny any action of negligence. In *Latimer v AEC Ltd*.. (1953) AC 643, a heavy rainfall resulted in the factory floor which was oily to become slippery. Sand and sawdust was spread on the affected area as instructed by the management but was not enough to cover the whole area. Plaintiff slipped on the untreated part and was injured. After looking at the whole facts of the case the court held that the employer was not liable because they had acted reasonably in trying to minimize the danger associated with the situation. Another alternative would be to close down the whole factory, which would be very unreasonable in the circumstances.

In *Brown v Rolls Royce Ltd*.. (1960) 1 All ER 577, the use of an industrial oil at the workplace has resulted in the plaintiff being contracted with dermatitis. The chief medical officer of the company did not advice on the use of a barrier cream as he felt that it was ineffective. He came up with his own preventive methods which decrease the occurance of dermatitis in the factory. The court held that the employer was not liable as they had done correctly and reasonably in relying on the advice of their own competent staff .

However, the situation will be different if the company has no expertise in such field. Not all companies can afford to employ medical officers and thus what they can do is to keep abreast with the latest updates of anything that is relevant to their companies' interest. In *Graham v CWS* (1957)All ER 654, the plaintiff worked in a furniture workshop where he suffered dermatitis due to the working

condition which used electric sanding machine. This machine gave off a quantity of fine wood dust which deposited on his skin. No general precaution was taken against this as the manager had received all the information which are commonly circulated in the trade. They did not know of the danger or ought they to have known. They were held not liable because they had taken all reasonable steps to be informed of the updated knowledge of the matters relevant to their trade.

b. Employee's own fault

Not all accidents are the fault of the employer's mismanagement or negligence. Some accidents happen as a result of the employee's own fault and if this can be proven, the employer will not be liable. This can be seen in two cases to be illustrated here.

In *Jones v Lionite Specialist Ltd*. (1961) 10 Sol Jo 1082, a worker who was addicted to a chemical vapour in a tank was found dead. It was discovered that he liked the smell of the chemical vapour so much that he went to the tank one weekend to enjoy the smell but have fallen into it instead. The employers were not liable. Similarly in *Brophy v Bradford* (1955)3 All ER 577, a lorry driver was found dead inside a boiler house, having been overcome by the fumes. As a driver he has no reasons to be there and the employer never expects his presence there. The employer was also held not liable.

c. Contributory negligence

Sometimes the occurance of accidents are due to the employee's fault as well as the fault of another party. If this is the case then it can be said that the employees also contribute to the incident and is partly to be blamed. In such instances the damages will be reduced to the extent the court thinks fit, having regard to the claimant's share in the responsibility for the damage. This defence has been raised in a number of cases successfully when the employers were able to show that both parties' action has caused the accidents.

d. Volenti non fit injuria

This is a latin phrase which means that no wrong is done to one who consents. Thus if a plaintff has agreed to assuming the risk or injury then he has no cause of action if he suffers any injury. To be successful in this defence the employer must prove two elements that is (i) that the plaintiff has full knowledge of the nature and extent of the risk or injury (mere knowledge is not sufficient) and (ii) he has given his free consent to bear the risk voluntarily. It is not easy to prove these two elements which makes it understandable that this defence rarely succeeds in employment cases.

In *Smith v Charles Baker & Sons* (1891)AC 325, the plaintiff worked in a place where heavy stones were lifted over his head. The workers had raised this matter to their employer explaining of the risk and their fear of the situation but nothing was done. One day the plaintiff was injured when some stones fell on him. The employer sought to rely on the defence of volenti but was not accepted by the court. The plaintiff could not be said to have volunteered in assuming the risk

because he did not know when the stones would be passing the area above his workplace.

In *Bowater v Rowley Rigs Corporation* (1944) KB 476, the defendant employer instructed the plaintiff employee to take out a horse known by the former to be wild and dangerous. The plaintiff was subsequently injured when the horse bolted and caused the plaintiff to be thrown off the cart. The defence of volenti was rejected since the plaintiff protested to the order showing that he did not perform the duty voluntarily. He had no choice but to proceed with the work after the employer insisted him to do so. In this case it was further held that for this defence to be applicable, the defendant must show that the worker has the option in choosing whether to do the job or not. He must not be subject to any restrictions, coercion or duress which negate the element of voluntariness.

In *Kanagasabapathy v Narsingham*(1979) 2 MLJ 69, the plaintiff who was working with the defendant was required to climb twenty-five coconut trees twice in a day. The plaintiff complained to the defendant several times about the danger of his job as the trees were slippery due to the mossy growth and rain. He fell down from a tree one day and injured himself. The court held that the defendant was liable for negligence because he failed to provide a reasonably safe system of work. He could not rely on this defence because the facts showed that even though the plaintiff was aware of the risk he did not voluntarily consent to assuming the risk.

However, this defence can be raised in situations which involved specialized employees like stunt artistes where ‘danger money’ are paid to them which

implies that there is a special risk which cannot be guarded against. But nevertheless it is still essential for the employers to provide safety precautions when the employees perform the stunt act.

4.3 Summary

This chapter highlights the findings of this study. The first part of the chapter reviews the historical background of the implementation of laws relating to safety at work in Malaysia which is the first objective of this study. The next part identifies the laws enacted under the manufacturing sector where particular attention is paid to the main Act, OSHA 1994. Subsequently the extent of the employers' duties and liabilities under the common law, which is the last objective, is discussed.

CHAPTER FIVE

CONCLUSION

5.1 Introduction

This chapter will conclude this study and make recommendations for future research.

5.2 Conclusion of Study

As mentioned earlier, the manufacturing sector in Malaysia has played a significant role in the Malaysian industrial development. It provides impetus for the strong growth of the country's economic growth with its annual growth of 10.4 per cent during the Second Outline Perspective Plan period during between 1991-2000 [(Economic Planning Unit, 2001(a)]. However, a sound and safe working environment did not complement the strong economic growth of the manufacturing sector, when the statistics by SOCSO showed that workers in the manufacturing sector suffered the highest number of occupational accidents every year compared to the other sectors (SOCSO Annual Report 1995-2004). Because of this scenario, the government has intervened by enacting some legislation, the primary one being the Occupational Safety and Health Act, which, was enforced in 1994 (OSHA 1994). Its introduction received widespread support and was seen by many to provide the means through which significant improvements in health and safety standard could be achieved (Hassan, 2001).

Following the UK system, Malaysia has adopted a pragmatist approach in dealing with the problem. Like HASAWA, OSHA 1994 provides a platform for restructuring and modernising the national organisation of OSH in Malaysia. It gives protection to more workers in the country compared to its predecessor, the FMA 1967. Since the main legislation (OSHA 1994) that specifies responsibilities is general in nature, it is supplemented by regulations, guidelines and codes of practice that were continuously formulated until now.

Because OSH legislation is introduced a bit later in Malaysia compared to other countries, especially the developing ones, Malaysia has got the advantage of learning from previous experience faced by other countries. Therefore in protecting the workers, Malaysia has adopted the two basic methods suggested by the ILO Protection of Workers' Health Recommendation 1953 (No.97). They are the technical measures for hazard control in connection with working premises, workplace environment and equipment; and the medical surveillance method.

Unfortunately, although efforts have been stepped up to rectify the unsafe and unhealthy environment at work, many occupational accidents still befall on the Malaysian workforce. This study did not look at the reason why the number of occupational accidents in the manufacturing sector is stubbornly high. However, it is worthwhile for the Malaysian employers to be aware that as bosses, they have a common law duty towards the safety of the workers, which should not be taken lightly. Selwyn (1993) undoubtedly think that this is the most important duty of an employer and should be carried out with the highest level of care.

This study has achieved its objective when Section 4.2.1 reviewed the historical background of the implementation of laws relating to safety at work in Malaysia. The second objective have also been achieved when Section 4.2.2 identified the relevant Acts pertaining to safety and elaborated some of them. The third objective have also been achieved when analysis of the extent of the employers' duties and liabilities was discussed in Section 4.2.3.

5.3 Recommendation for Future Research

This study is a qualitative study that looks at OSH matters strictly from the legal perspective, hence the main reference to the primary Act and cited cases from the legal journals. This study is not intended to deal with the social issues that might arise from the implementation and enforcement of the law. However, it is admitted that occasionally the introduction of any law in any society are met with various hardships and predicaments from both parties who enforce the law, and those who are governed by them. Therefore it would be interesting to carry out studies from this context. Thus, it is recommended that future research look at some social aspects of the law on OSH as stated below:

a. problems and difficulties encountered by the enforcement authorities in carrying out their duties
b. problems and difficulties encountered by the Safety and Health Officers in the manufacturing or other sectors in discharging their duties
c. problems and difficulties encountered by the Safety and Health Committee in the manufacturing or other sectors in exercising their duties

d. the implementation of any Regulations, Guidelines and Codes of Practice under OSHA in any sector and/or any state.

e. the extent of the awareness and understanding of the employers related to their common law duties and liabilities, where safety of their workers at work is concerned.

A qualitative or quantitative method or combination of both methods could be employed to all these suggested research.

5.4 Concluding Remarks

This study only looked at OSH issues strictly from the legal point of view. Although it is examined from a narrow perspective, it stills adds to the shortage of literature review especially where the legal aspect is concerned. However, it could provide as a starting point to future and further rigorous research that would help Malaysia creates better working places for the benefit of all her workforces.

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