WORKPLACE HAZARDS IN MANUFACTURING SECTOR: EMPLOYERS' RESPONSIBILITIES AND LIABILITIES

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Abstract

Occupational safety and health is often judged by the number injuries and fatalities sustained by employees. It is important that the resources that are utilized by OSH in the best manner to prevent injuries and fatalities in the workplace. Another measure of occupational safety is the cost associated with injuries and fatalities. The costs in insurance premiums, lost wages, and lost productivity create a substantial financial impact to businesses. In addition, the external costs of occupational injuries, illnesses and fatalities must also be considered.

The objective of this paper is to discuss the current position involving liabilities and responsibilities of the employer and employee in managing safety and health at work place. In addition, the paper analyses of the provisions of law, judicial decisions concerning occupational safety and health and the liabilities and responsibilities of all the parties involved. Further the role of government, Department of Occupational Safety and Health (DOSH) and National Institute of Occupational Safety and Health (NIOSH)) employer and employee were identified in managing occupational safety and health. The finding shows that the relevant parties including government is fully committed in providing safe and healthy work environment by drafting law, legislations and industrial code of practice as well as providing an enforcement system based on the provisions of Occupational Safety and Health Act (OSH) 1994.

Abstrak

Keselamatan dan kesihatan pekerjaan sering dinilai oleh jumlah kecederaan dan kematian yang dialami oleh pekerja. Ia adalah penting bahawa sumber-sumber yang digunakan oleh OSH dengan cara yang terbaik untuk mengelakkan kecederaan dan kematian di tempat kerja. Satu lagi langkah keselamatan pekerjaan adalah kos yang berkaitan dengan kecederaan dan kematian. Kos dalam premium insurans, kehilangan gaji dan kehilangan produktiviti mewujudkan kesan kewangan yang ketara kepada perniagaan. Di samping itu, kos-kos luaran akibat kecederaan pekerjaan, penyakit dan kematian juga perlu dipertimbangkan.

Objektif kajian ini adalah untuk membincangkan kedudukan semasa yang melibatkan liabiliti dan tanggungjawab majikan dan pekerja dalam mengurus keselamatan dan kesihatan di tempat kerja. Di samping itu, kajian ini menganalisis peruntukan undang-undang, keputusan kehakiman mengenai keselamatan dan kesihatan pekerjaan dan liabiliti dan tanggungjawab semua pihak yang terlibat. Seterusnya, peranan kerajaan, Jabatan Keselamatan dan Kesihatan Pekerjaan (DOSH) dan Institut Keselamatan dan Kesihatan Pekerjaan (NIOSH), majikan dan pekerja telah dikenal pasti dalam menguruskan keselamatan dan kesihatan pekerjaan. Hasil kajian menunjukkan bahawa pihak-pihak yang berkaitan termasuk kerajaan adalah komited sepenuhnya dalam menyediakan persekitaran kerja yang selamat dan sihat dengan menggubal undang-undang, perundangan dan kod amalan industri serta menyediakan sistem penguatkuasaan berdasarkan peruntukan-peruntukan Akta Keselamatan dan Kesihatan Pekerjaan (AKKP) 1994.

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CHAPTER ONE

INTRODUCTION

1.1 Background

Employment accidents happen frequently which cause injuries, permanent disability or loss of human lives. The number of work accidents worldwide, fatal and *non-fatal is 337million a year*[1]. In addition, employment accidents are likely to cause economic losses to the individuals and society as a whole. In the event death or injury of employees, his family will be dependent on the social security fund sponsored by government. The government also has to incur expenses in order to employ and train new employees.

Working in industries such as manufacturing and construction is well known as highly hazardous due to high rates of injuries, fatality and accidents. Workers are at risk due to exposure of various hazards which can result in illness, injury, disability or death. Generally, manufacturing sector view the safety practices as costs consumption and financial strain on the targeted profits. The need to improve such attitude can change a vision for the future which elevates occupational safety and health into a proper and management system.

Prior to OSH 1994, workers who suffered workplace injuries were required to be compensated with workers compensation. Workers compensation replaces income and pays for medical expenses in the event of an occupational injury or illness (Hammer &

[1] ILO, Safety in Numbers, Pointers for Global Safety Culture at Work, Geneva (2003)

Price 2001). However, workers compensation laws did not provide a means of being proactive to prevent accidents that led to worker injuries or require employers to take preventive measures.

1.2 Problem Statement

The Social Security Organisation of Malaysia[2] reported that the highest number of industrial accidents is in the manufacturing sector, followed by agriculture, forestry and fishing, construction and transportation. The number of death reported in manufacturing sector is increasing yearly. Vast and increasing industrialisation has contributed to high rate of industrial accidents, diseases and other occupational hazards.

For some employers, the responsibility to protect human life is not as important as other goals as the focus on profits to the exclusion of a safety and health working environment. To them, the amount of production required to cover costs associate with accidents at workplace can be substantial and may far outweigh the expense of providing a safety and health working environment. Shallow occupational safety and health management and policies, human factors and environmental factors are the key elements contributing to workplace accidents and injuries.

Today, occupational safety and health has become a crucial element in each and every organization regardless of its size and strict compliance of the statutory duties as well social duties of the organisation. In line with recent development, Datuk Ismail Abd.

[2] http://www.perkeso.gov.my//, Retrieved on 7th October 2013

Muttalib[3], Deputy Minister at Ministry of Human Resources, announced that DOSH will evaluate and draft standards of OSH on a regular basis to ensure that the standards set are applicable and relevant to the current situations.

1.3 Objectives of the Research

The objectives of the study are:

(i) To identify the aspects of occupational safety and health management that influences occupational safety and health practices of workplace such as manufacturing sectors;

(ii) To analyze and identify the role of employers, employees, contractors and other third parties in achieving optimum safety and health at workplace such as manufacturing sectors.

(iii) To suggest and recommend measures to be taken in order to increase the level of compliance, understanding, and knowledge on the requirements of the OSH 1994 in the manufacturing sector.

1.4 Research Questions

This study aims to explore the following questions:

i) What is the Extent of Liabilities of Employers in event of hazards/accidents?

[3]Utusan Malaysia; 10/10/2013

ii) The Responsibilities of Employers to ensure Safety and Health at Work place in Malaysia.

iii) Whether the law on Occupational Safety and Health is in harmony with the International Labour Organisation Conventions and Recommendations?

1.5 Research Methodology

For this study, qualitative research was conducted to identify the level of compliance on the requirements of the OSH 1994 in the manufacturing sectors. Qualitative research is a systematic, subjective approach to describe life experiences and give them meaning (Burns and Grove 2009). Qualitative studies allow the author to explore behaviors, perspectives, feelings, and experiences in depth, quality and complexity of a situation through a legal framework (Holloway and Wheeler 2002).

The methodology employed in this study is doctrinal research. It is also referred to as pure legal or conventional research and it is mainly library based study. In so far as this project paper is concerned, conventional or traditional research method is mainly concerned with stating, interpreting or clarifying the existing laws in Malaysia and United Kingdom. The analysis will be made with points drawn from sources which relate to defining the term income in relation to revenue law. This study will also utilize a comparative research method with other jurisdictions namely United Kingdom. The underlying purpose of this comparison is to search for similarity and variance to understand the issues better.

In any comparative legal study, the researcher may find the similarities and dissimilarities between two situations existing within the same legal system.[4] A comparative study may also involve a study of problem, issue or question in one legal system and a comparison with the position as it may exist in some other legal system such as nature, principles, effect, scope of a specific legal issue.[5]

Research for this paper will be undertaken using primary sources namely statutes mainly Health and Safety at Work etc. 1974 from United Kingdom, Occupational Safety and Health 1994 and judicial interpretations in the form of case laws. The research also uses secondary sources such as textbooks, articles, journals, documents from websites. This is a qualitative research.

1.5.1 Research design

The research design used in this study is qualitative analysis of various articles, the principles of Law of Torts and Occupational Safety and Health law, websites and analysis of case laws and legislations pertaining to Occupational Safety and Health and the effective prevention measures. Further legal research refers to systematic study of legal principles, concepts, rules, theories, doctrines, decided cases, legal institutions, legal disputes, legal problems, *lacuna,* issues, questions or a combination of some or all mentioned above. In order to achieve its objectives, this research made use of doctrinal legal research methodology. A doctrinal research deals with the detailed analysis of

[4] Anwarul, Yaqin. Legal Research and writing.*(* Kuala Lumpur: Malayan Law Journal, 2007)p.18
[5] Ibid p.19

existing legal doctrines, literature, statutes and case laws. It is mainly concerned with stating, interpreting or clarifying the existing law in certain jurisdictions. The researcher has to initially study the facts, principles, themes, concepts, relevant provisions and the laws on occupational safety and health.

1.5.2 Types of data

In so far as this project paper is concerned two types of data will be used that is primary sources and secondary sources. Primary data refers to statutes mainly Occupational Safety and Health Act 1994, Factory and Machineries Act 1967 from Malaysia, Health and Safety at Work etc. Act 1974 from United Kingdom and judicial interpretations in the form of case laws be it reported in journals or otherwise. The research also uses secondary sources such as textbooks, articles, journals, documents from websites and other library based information. The nature of this research is that of legal study. Legal research refers to systematic study of legal principles, concepts, rules, theories, doctrines, decided cases, legal institutions, legal disputes, legal problems, *lacuna*, issues, questions or a combination of some or all mentioned above. In this research qualitative method is employed in order to achieve its objectives through the use of doctrinal legal research methodology. A doctrinal research deals with the detailed analysis of existing legal doctrines, literature, statutes and case laws. It is mainly concerned with stating, interpreting or clarifying the existing law in certain jurisdictions.

1.5.3 Data collection method

The study in this research will be purely doctrinal legal research involving data collection style of both primary and secondary sources. The data gathered and presented here will be immensely valuable to the field of study and research design. The data will be derived from various sources such as website and library based materials such as books, journals, articles, legal doctrines, statutes, reports, previous thesis and dissertations and other relevant and related materials.

The process of data collection involved obtaining primary data from the legislations and precedents of case laws. Further data collection on level of participation of employers, employees and concerned parties are obtained from websites of Ministry of Human Resource, the Department of Occupational Safety and Health (DOSH), National Institute of Safety and Health (NIOSH) and Malaysian Society of Safety and Health (MSOSH).

The armchair method is used by the author in accessing the required information in the process of conducting the study. E-books, journals, newspaper clippings, judicial findings of both common law and local authorities which are readily available through the UUM Virtual Library been the main source for the author. Further, the author has had the liberty to access to the Perpustakaan Universiti Sains Malaysia. All the data obtained from the above sources were then critically being analysed by thorough reading to ensure all recurring information and variations are identified. (Holloway and Wheeler 2002).

1.5.4 Analysis of data

In this study, the research applies analytical and critical analysis. An analytical approach involves meticulous examination and evaluation of the materials involved so as to understand, explain and draw a conclusion. Critical approach is distinct from analytical approach in that in critical approach, the researcher examines and evaluates the materials meticulously, list down the discrepancies and shortcomings, gives own opinion as to why the researcher agrees or otherwise based rational grounds and supported by evidence and justifications. In this research both methods employed to examine the strength and discrepancies of occupational safety and health legislations. That being the case, the relevant provisions under the statute be it in Malaysia and other jurisdictions are analyzed and criticized.

1.6 Significance of the Study

It is hoped that this study that determined the most critical aspects of occupational safety and health law management such as the liabilities and responsibilities of employers, the training of employees and other parties concerned in health and safety management will be given utmost importance. Measures such as implementation of proper safety and health procedures, providing the relevant safety equipment and involvement of all the parties will provide some useful insight on the important aspects of safety management and instil better awareness to all occupiers and users in the workplace especially in manufacturing sectors to safeguard both their life and property at all material times.

1.7 Scope of the Study

The scope of study is to identity hazards and causes in manufacturing site and to enable safe and effective prevention and precautions methods to control and manage workplace hazards. Though the buildings such as factories and manufacturing site are provided with the most sophisticated occupational safety and health features, assurance of safety and health to building occupants is questionable and held in doubt. Workplace hazards occur as a result of "human factors", such as carelessness, negligence or simply a lack of proper occupational safety and health awareness. In response to this, compliance to occupational safety and health legislations has become an integral aspect in the daily operations of manufacturing buildings and the scope is limited to principles under the English Common Law and the statutes on OSH in Malaysia.

1.8 Limitation of the Study

The research was aimed to evaluate the liabilities and responsibilities of management and implementation of effective occupational safety and health at workplace in manufacturing sector. As the study is at master level with requirement of shorter study period and due to time constrain, field work and survey on the subject was not conducted and discussion regarding compensation to the injured workers is not highlighted in this research. The statistics of workplace accidents and injuries obtained from SOCSO were only until 2011 and was not able to obtain latest statistics on workplace accidents and injuries. Further binding authorities on the occupational safety and health law are primarily from the common law principles and English authorities with limited local authorities on the subject matter.

1.9 Summary

Chapter one of this study addressed the overall perspective of the study such as the research background, problem statement, objectives of the study, research questions, research methodology, significance and scope of the study, the limitation of the study as well as the general aspects regarding occupational safety and health that enables the researcher to answer all research objective and research questions. Whereas chapter two described the literature review and the legal framework of occupational safety and health related to the study. The findings are reached upon review and content analysis of both common law judicial decisions and local decided cases on the subject matter. Chapter three elaborates on the occupational safety and health management systems and the responsibilities of employees and their rights. This chapter also elaborates the relevant ILO conventions on occupational safety and health law and the fulfillment of ILO requirements by local legislations and practices.

Chapter four discusses the management process of risks and hazard analyzing and management's role in preventing and minimizing workplace accidents. The findings obtained are based the review of case laws, authorities and statutes. They are presented according to the contents analysis of primary and secondary sources of analysis techniques that are mentioned in the previous chapter. All findings are linked with the research objectives and questions. Finally in Chapter five, findings are presented together with the recommendations for better compliance of occupational safety and health law at workplace.

CHAPTER TWO

LEGAL FRAMEWORK OF OCCUPATIONAL SAFETY AND HEALTH IN MALAYSIA

2.1 Background

The rights and obligations of the employers and employees concerning safety and health at workplace is derived basically from common law, statutes, employment contract of service and international conventions. According to Annual Report 2011 of Social Security Organisation of Malaysia[6], there are a total of 59,987 cases of reported accidents in year 2011, an increase of 2,258 cases or 3.92% as compared to 57,639 cases of reported accidents in year 2010. A percentage of 58.58% of industrial accidents occurred in year 2011 whereas 41.42% were commuting accidents. Though the statistics show a decline of 515 cases or 1.45% industrial accidents in year 2011 as compared to number of 36,603 industrial accidents in year 2010, the number of industrial accidents reported is still at an alarming rate. On the route to become an industrialization nation, the aspect of occupational safety and health at workplace must not be at stake.

The country's expenditure in year 2011 for payments of benefits under SOSCO schemes[7] was RM1, 710.77 million, an increase of RM32.61 million or 1.94% as compared to RM1, 678.16 million in year 2010. A total of RM110.67 million was spent by SOSCO under Vocational & Rehabilitation Programs. These programs provide training and motivation to employees who were involved in workplace accident and immobilized for a period of time. The NIOSH Chairman, Tan Sri Lee Lam Thye

[6]SOCSO Annual Report 2011 (http://www.perkeso.gov.my//), Retrieved on 7th October 2013
[7] (i) Invalidity Pension Scheme (ii) Employment Injury Scheme under the Employees' Social Security Act, 1969

mentioned that taking safety measures at the work places actually benefited sides, the employers and the employees. To quote him,

> "*Minimum accidents involving workers means better quantity and quality of productivity and workers' safety, especially at their work places, has actually become one of the global issues today.*[8]"

2.1.1. Evolution of Occupational Safety and Health Law

Occupational safety and health law at workplace has been emphasized by Malaysian government as early as 120 years back. The development of occupational safety and health law at workplace in Malaysia can be categorized in six stages[9]:

i. Stage One : Era of Boiler Safety (before 1914);

ii. Stage Two : Era of Machinery Safety (1914 -1962);

iii. Stage Three : Era Industrial Safety (1962 -1970);

iv. Stage Four : Era of Industrial Safety and Health (1970 –1994);

v. Stage Five : Era of Occupational Safety and Health (after 1994).

vi. Stage Six : Era of OSHMP-2015

I. Era of Boiler Safety (before 1914)

Occupational safety law was first established in Malaysia in the year 1878, with appointment of Mr. William Givan as Machinery Inspector to inspect the safety aspect of steam boilers, used in tin mines and sugar factory. The first steam boiler law legislated is the Selangor Boiler Enactment 1892.

[8] Borneo Conference and Exhibition On Occupational Safety and Health (BOSH 2011) on 28/11/2011
[9] Jabatan Kesihatan dan Keselamatan Pekerjaan (1998) at http://www.dosh.gov.my; retrieved on 4/10/2013

II. Machinery Safety Era (1914 to 1952)

In the year 1932, the Machinery Enactment of 1932 replaced the Machinery Enactment of 1913 which require the registration and inspection of installation of machinery and were placed under the administration of the Mineral Department.

III. Industrial Safety Era (1953 to 1967)

In 1953, the Machinery Ordinance 1953 was introduced to cover all aspect of factory workers safety where machineries were being used. The main provisions of the ordinance provides for establishment of a Board of Inspectors with powers to conduct inspections and to approve certificates of fitness. In addition, all accidents to person or property relating to machinery must be notified and investigated. Inspectors are given powers to enter premises and to stop unsafe machineries. However, there were limited enforcement of regulations on the worker's health, safety and welfare of workers.

IV. Industrial Safety and Hygiene (1970 to 1994)

In the year 1970, the Factory and Machinery Act and eight regulations was legislated to provide minimum standard of safety, health and welfare of workers at workplace consisting of 5 employees or more and at premises which machinery were being used, including factories, building construction sites and works of engineering construction. Further, the act extends protection to workers whose workplace that doesn't use machinery. In this era, few important activities exist and sections such as the Anti-Pollution Section in the year 1971, Industrial Hygiene Section in the year 1980,

Petroleum Safety Section in the year 1985, introduction of special inspection activities to prevent major industrial accident, industrial safety and health activity exercises as recommended by International Labour Organisation in the year 1987 and Major Hazards Section in the year 1991 were formed. The Factory and Machinery Department was authorised to enforce provisions relating to transportation of petroleum using pipeline, petroleum distribution and its storage.

In December 1992, National Institute of Occupational Safety and Health (NIOSH) was established[10] and entrusted to conduct training and activities related to OSH, information pooling and dissemination, research and development in occupational safety and health.

V. Occupational Safety and Health Law Era (Post 1994)

In February 1994, the Occupational Safety and Health Act 1994 (Act 514) was gazetted to cover workers in all industries. Workers that are covered by Factory and Machinery Act 1967 consists only of 24% of the nation's total man power, while Occupational Safety and Health Act 1994 (OSH 1994) would cover 90% of the nation's total man power and would exempt those working on ships and in the armed forces[11]. The purpose of OSH 1994 is to promote and encourage occupational safety and health awareness among workers and the organisation and implementation of effective safety and health measures. The OSH 1994 complements any existing legislative such as the Factory and Machinery Act 1967 and in event of any conflicts; the provisions of OSH 1994 will

[10] http://www.dosh.gov.my (retrieved on 10/10/2013)
[11] Ibid (retrieved on 10/10/2013)

prevail. It also defines the general responsibilities and liabilities of employers, manufacturer, employees, self-employed workers, designers, importers.

VI. Occupational Safety and Health Master Plan (Era 2015)

In line with the stability and strengthening Malaysia as a contributor to the regional economy and the world economic community, a Master Plan Safety and Health 2015 (OSH-MP 15) was launched in year 2009 by Prime Minister of Malaysia, Dato'Seri Mohd Najib Tun Haji Abdul Razak and aimed to increase the level of knowledge and awareness on importance of OSH and in parallel with legal requirements provided under the Occupational Safety and Health Act, 1994. (OSH 1994). A national workshop on occupational safety and health information strategy development was organised by the Factory and Machinery Department, Asia-OSH and International Labour Organisation (ILO) on 26-28 April 1993[12] to transfer and dissemination of information relating to occupational safety and health practices.

As occupational health and safety is of vital importance to all employees, it is upon the employer to provide protection not only to the staffs but also to contractors, visitors and any other third parties at the employer's premises. An employer has to understand and acknowledge that effective health and safety management systems can save time and costs and further increase efficiency and production of the organization. It is generally known that work-related accidents and injuries can disrupt family life, create financial difficulties and other forms pressures to an employee.

[12] http://www.ilo.org/safety (retrieved on 17/10/2013)

2.2 The Significance of Occupational Safety and Health Law

There are various factors in the working environment that contribute to occurrence of accidents at workplace. Thus it has become pertinent upon the employer to provide a safe and healthy working environment at the organization. The impact of accidents at workplace affects the economy of nation at large, growth of the organizations and victims and their families specifically. Further, workplace accidents and injuries also have adverse impact and legal implications as well on all the parties involved. Therefore the concept of safe and healthy working environments is a fundamental aspect of each and every organization, including the manufacturing sector.

Managing employees' health and safety at work is a complex but interesting task, which some employers manage extremely well and others not so well. This duty of employer to his employee was first recognized and described in the leading case of *Wilsons & Clyde Coal Company Ltd* v *English* (1938) AC 57, Lord Wright at page 78 mentioned:

> *"…the obligation is threefold; the provision of a competent staff of men, adequate material and a proper system and effective supervision…"*

Mondy and Noe,[13] defines safety involves protecting human employees from injuries caused by work-related accidents, while health refers to the employees' freedom from illness and their general physical and mental well-being. Safety also can be defined as

[13] Raymond Wayne Mandy, Robert M. Noe and Shane R. Premaux, *Human Resource Management*, (8th ed.), Upper Saddle River: Prentice-Hall., 2002, p. 8.

the absence of risk to injury, whilst health is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity[14].

The Oxford Advance Learner's Dictionary defined safety as the state of being safe and protected from danger or harm or physical injury and health is defined as the condition of a person's body or mind. Both are closely interrelated. Health includes protection of the bodies and minds of people from illness resulting from the materials, processes or procedures used in the workplace and safety refers to the protection of people from physical injury. Any misadventures in these areas can seriously affect the organization's productivity as well as the employee's quality of work life.

Occupational safety and health of employees is an integral element in an organization. Employees are the most important asset of an organisation. In order to ensure the employees continue to be productive, safe and healthy workplace has to be provided. Employers have to ensure that the measures taken are able to prevent accidents and work-related diseases among the employees, the most valuable asset of the organization.

2.3 The Occupational Safety and Health Act, 1994 (OSH 1994)

The practice of occupational safety and health law in industries is regulated by the Occupational Safety and Health Act, 1994 (OSH 1994), its Regulations and Factories and Machinery (FMA) Act 1967 and Regulations there under. FMA 1967 is widely used by Department of Occupational Safety and Health (DOSH) to ensure the safety, health

[14] Constitution of World Health Organisation

and welfare of person at manufacturing sector. The regulations under FMA 1967 such as Regulations (Fencing of machinery & safety) 1983, Regulations (Mineral Dust) 1989, Regulations (Safety, Health & Welfare) 1970 provide guidelines on safety and health of workers in the manufacturing industries. However, FMA 1967 is restricted in operation as it is applicable to factory workers and safety aspects concerned with the machinery used in manufacturing industries.

For an occupier of a factory such as the employer or the employee, certain standards of safety, health and welfare is provided within the factory if the occupier of the premises had both physical possession and control over the area where his workmen carried out the work[15].

A "factory[16]" is defined as any premises or part of a premises, within the close or cartilage or precincts of the premises or part thereof persons are employed in manual labour in any process for or connected with or incidental to the making, altering, repairing, ornamenting, sorting, finishing, cleaning, washing, breaking, demolishing, constructing, reconstructing, fitting, refitting, adjusting or adapting of any article or part thereof. Further the said work is to be carried on by way of trade for the purpose of gain or incidentally to any business so carried on or in any premises or space where any building operations or works of engineering construction carried out[17]. However, factory

[15] Sec 3 of FMA,1967
[16] Sec 2 of FMA, 1967
[17] *Ho Teck Fah* v *Looi Wah T/A Looi Construction* (1981) 1 MLJ 162

does not include any premises used for the purpose of housing locomotives or vehicles where minor repairs are carried or where five or less persons carry on any work[18].

2.3.1 The Essentials of Occupational Safety and Health Act 1994 (OSH 1994)

The scope of OSH 1994 is more comprehensive and applicable to all sector including manufacturing, mining and quarrying, construction, agriculture, forestry and fishing, utilities (electricity, gas, water, and sanitary services), transports, storage and communications, wholesales and retails trades, hotel and restaurants, public services and statutory authorities[19]. It provides for the appointments of enforcement officers, establishment of National Council for Occupational Safety and Health, formation of policy and arrangement of measures to protect safety, health and welfare of people at work and others who might be endangered by the activities of people at work.

Every employer shall ensure so far as is practicable, the safety, health and welfare of the employees as stated in section 15 of OSH 1994. These duties of employers include:-

i) Provides adequate facilities and maintenance of plant and safe systems of work;
ii) Making arrangement the use or operation, handling, storage and transport of plant and substances do not risks to health;
iii) Provides training and supervision to employees;
iv) Place of work which is under control and maintenance of the means of access to and egress are safe;

[18] Sec 2 (1) (i),(ii) of FMA, 1967
[19] First Schedule of OSH 1994

v) To provide extra protection for the disabled[20];

vi) A duty of care under tort recognized as Vicarious liability;

Section 3(1) of OSH 1994, defines "practicable" as being practicable having regard to the severity of the hazard or risk, notice of and any way of removing or mitigating such hazard or risk, the availability and suitability of ways to remove or mitigate the hazard or risk and the cost of so doing.

The phrase “reasonably practicable” established a formula that determined whether the employer has discharge his duty of care to his employee or other persons under his control. In *Edwards* v *National Coal Board* (1949) 1 KB 704, the Court of Appeal found that the Defendant i.e. the employer failed to discharge their standard duty of care to provide a safe working condition as reasonably practicable.

In the above case, a coal miner who was the Defendant’s employee was killed while underground by a fall of a considerable portion of the side of the roadway along which he was walking. The issue considered was whether the Defendants had discharged their obligations of section 49[21] and section 102(8)[22] of the Coal Mines Act, 1911.

In *Singapore Transport Supply Services Pte Ltd.* v *Wee Peng Whatt & Ors* (1978) 2 MLJ 234**,** it was held that the employer was under duty to take reasonable care for the safety of his workmen. Where the task was such as to call the laying down of a system

[20] Sec 1(1)of UK Disability Discrimination Act,1995(DDA)
[21] Sec 49 of Coal Mines Act, 1911
[22] The owner of a mine shall be liable to an action for damages for breach of statutory duty…non-compliance of any provision of the Act…it was not reasonably practicable to avoid or prevent the breach.

or mode of working in the interest of safety, it was the employer's duty to use reasonable skill and care to ensure a safe system of work is provided.

An employer has a duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition to ensure the safety of the workers using and handling the equipments such as machineries, tools and storage and transportation facilities that are safe and without health risk.

In *Smith* v *Baker* (1891) AC 325, it was held that although the plaintiff knew of the risk and continued to work, there was no evidence that he had voluntarily undertaken to run the risks of injury. In this case, the plaintiff was injured while working when a crane moved rocks over his head and a stone fell on him. The plaintiff complained the incident to the employer but no action taken by the employer. The employers pleaded *volenti non fit injuria* which was rejected by the Court.

The defence of *volenti non fit injuria* is also referred to as 'voluntary assumption of risk'. Thus to plead the defence of assumption of risk, a person who willing takes a risks has to know the nature and the extent of the risks. However it is not enough to escape liability as the act of willingly taking the risks may be result of a choice between options and not of indifference towards the risks[23].

In *Toronto Power Co.* v *Paskwa* (1915) AC 734; the plaintiff's husband was killed by the falling of a block from a travelling crane while in employment of the Defendants.

[23]C. Peter; Atiyah's Accidents, Compensation and the Law (7th Ed.) Cambridge University Press, (2006) at p.63

The jury found that the accident was due to negligence of the Defendants in failing to install proper safety appliances and to employ competent signalman. Thus, the duty to provide proper plant to an employee falls upon the employer himself and cannot be delegated to his servants or agents. Although he is not bound to adopt all the latest improvements and appliances, he has to practice reasonable care to install appliances which is safe to use.

In *Manlio Vasta* v *Inter Ocean Salvage & Towage Sdn. Bhd.* (1954) MLJ 261, the plaintiff was injured while performing diving operation for the defendant. It was held that the defendant company failed to provide safe and proper system of work, as they did not provide a second diver at the scene and also negligent in that through their agent or agents who were responsible for unreasonable delay in bringing the plaintiff to the chamber after the accident.

This duty of reasonable care a statutory duty of the employer under section 15 of OSH 1994 also extends to the duty to provide information, instruction, training and supervision to ensure that all activities, including the operation of machineries and handling of toxic substances, are carried out safely and without health risk to the employee.

In *Thompson* v *Smiths Ship-Repairers (North Shields) Ltd.* (1984) 1 All ER 881; Mustill J mentioned that:

> *"…the conduct of the reasonable and prudent employer, taking positive thought for safety of his workers in the light of what he knows or ought to know…He must weigh up the risk in terms of the likelihood of injury*

> *occurring and the potential consequences if it does, he must balance against this the effectiveness of the precautions that can be taken…If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent…"*

Failure of the employer to obtain and provide sufficient information and instructions to ensure all activities are carried out safely and without health risks will impose liability on the employer for breach of duty of care to his employees. Therefore, it is upon the employer to be up-to-date on information and knowledge regarding occupational safety and health at his organization and under an obligation to give prompt notification to the employees.

Under section 16 OSH 1994, employers with more than five employees, have to formulate a written policy on OSH matters which has to be informed to the employees. A penalty for failure to comply will be imposed under Section 19 OSH 1994. However, there is exception to this requirement which is applicable to self-employed and employers with less than five employees[24].

In *Osborne* v *Bill Taylor of Huyton* (1982) IRLR 17**,** the court held that the Exemption Regulations 1995 is applicable based on the number of employees employed at the material time at the employer's premise. Therefore, the employer was exempted from complying with the requirement of Section 16 of OSH 1994.

[24] Regulation 2 of Occupational Safety and Health (General Policy Statements)(Exemption)Regulations 1995. For self employed and employers with five and less employees are exempted from this requirement

Facts of the case: The Defendants were instructed to have a written safety policy which they failed to do so. The defendants were convicted for offence under OSH 1994. However the Defendants pleaded that they were exempted under Regulations 1995 as though the company have 31 business premises but the particular business premise had only two employees and a part-timer at the material time.

Further, an employer with 40 or more employees must establish an OSH committee[25], with adequate and equal representation from the management and the workers. Among the committee's functions are to review OSH measures undertaken, conduct inspection on the workplace, investigate possible hazards, accidents, near-misses and to recommend corrective action through consultation and cooperation. For high risk industries such as construction, ship building, gas, a safety and health officer has to be appointed at the workplace[26].

2.3.2 The Supporting Statutory Elements of OSH

The regulations under OSH 1994 provide guidance and foundation to enhance occupational safety and health obligations. Employers Safety and Health General Policy Statement (Exception) Regulation 1995, OSH (Control of Industrial Major Accident Hazards) Regulations 1996 (CIMAH), Notification of accident, dangerous occurrence, occupational poisoning and occupational disease (NADOOPOD)[27] Regulations 2004, OSH (Use and Standards of Exposure of Chemicals Hazardous to Health) Regulations

[25] Section 30 of OSH 1994
[26] Section 29 of OSH 1994
[27] Regulation 29 of NADOOPOD 2004 & Part II of NADOOPOD 2004

2000 (USECHH) are guidelines to regulate standards of safety and health law at workplace and to ensure the safety of workers is given the utmost priority by employers. Safety and Health Committee Regulations 1996 and Safety and Health Officer Regulations 1997 provide information to employers and advice, investigate, report and review occurrence, potential hazards OSH standards at workplace.

In the event of any accidents which occurred or likely to occur at workplace, the employer shall notify the occupational safety and health office of any accident as stated in section 32 of OSH 1994. Section 14 of Factories and Machinery Act 1967 (FMA 1967) impliedly place the duty upon the employer to attach machinery which is free from defect and suitable for the purpose and shall be properly maintained. Further, section 15 of FMA 1967[28] provides that every dangerous part of machinery shall be fenced in order to protect the employee.

A Designer/Manufacturer/Supplier[29] has the responsibility to ensure that machineries or substances supplied are safe and without health risks when properly used and it is safely installed. Necessary testing of machineries or substances supplied have to conducted on regular basis. The end users have to be provided sufficient information and training to ensure the safe use of machineries or substances supplied. Steps have to be taken to minimize any risk to safety or health that may arise from machineries and substances supplied as provided under Section 20 of OSH 1994.

[28] Factory Machinery Act (Fencing of Machinery and Safety) Regulations, 1970
[29] Part VI (sec 20 – sec.23) of OSH 1994

Meanwhile, the Occupational Safety & Health (Use & Standards of Exposure of Chemical Hazardous to Health) USECHH Regulations 2000 states that the employers shall control chemicals hazardous to health through the provided control measures such as elimination of chemicals hazardous to health from the place of work, substitution of less hazardous chemicals for chemicals hazardous to health, total enclosure of the process and handling systems, isolation of the work to control the emission of chemicals hazardous to health, modification of the process parameters and adoption of safe work systems and practices that eliminate or minimize the risk to health.

The ILO has convened numerous Conventions and Recommendations concerning the protection of workers for Occupational Safety and Health at workplace. Conventions such as The Protection of Workers' Health Recommendation, 1953, the Occupational Health Services Recommendation, 1959, the Radiation Protection Convention and Recommendation, 1960, the Guarding of Machinery Convention and Recommendation, 1963 and other Conventions which provides guidelines and measures for efficient occupational safety and health practices. In addition, ILO Conventions No. 155 and 187 provides for adaption of a coherent national occupational safety and health policy, action to be taken by governments and promoting a preventative safety and healthy culture and progressively achieving a safe and healthy working environment.

2.3.3 The Department Guidelines on OSH at Workplace

OSH 1994 provides for appointment of Officers by the Ministry of Human Resources to the Department of Safety and Health (DOSH) which includes Director General of

Department of Safety and Health (DOSH), Assistant Director General and OSH Officers. Subsequently, National Council for Occupational Safety and Health (NCOSH) was formed to ensure occupational safety and health of the workers. In addition, National Institute of Safety and Health (NIOSH)[30], was accredited by the government to conduct courses and training[31] on occupational safety and health. NIOSH also conducts certificate courses such as Certificate for Safety and Health Officer Program, Occupational Health Nurse Certificate Program, Occupational Health Doctor and Industrial Hygiene Technician and Chemical Health Risk Assessment.

DOSH, NCOSH and NIOSH are the backbone and the national stimulator in activities related to occupational safety and health in our country. Malaysian Society for Occupational Safety and Health (MSOSH) is a non-profit organization which is actively involved in promoting occupational safety and health.

OSH 1994 provides for formation and procedures for protection of safety and health and welfare of employees and other party from risks arising from employment, industrial procedures[32], investigation and enforcement[33]. Regulations regarding occupational safety and health and guidelines are formulated on tripartite discussion involving NCOSH, DOSH with cooperation of employer, employees and union.

[30]Regulation 6(3), Occupational Safety and Health (Safety and Health Officer), Regulations 1997
[31]Courses conducted by NIOSH: Understanding and Implementing OSH and its Regulations, Emergency Preparedness and Response Plan, Occupational Safety and Health Management System, Occupational Safety and Health Auditing, Ergonomics in the Office and Safety in the Use of Chemicals.
[32] Part X, OSH 1994
[33] Part XI, OSH 1994

2.4 Occupational Illness or Diseases and Occupational Injuries

Occupational illness or disease, as well as occupational accidents are not defined directly in any Act or regulation. Occupational illness or disease is defined by DOSH Occupational Safety and Health Committee as a disease caused by or arising from the activities and environmental factors in the workplace[34]. Occupational health was called industrial medicine[35] but with increasing technology and growth of industries, it was changed to occupational health and the term 'workplace health management' is often used today. Section 2 of the Employees' Social Security Act 1969 defines the term 'employment injury' as injury including those caused by accidents or disease. The ILO estimates that globally some 2.2 million people have work-related accidents every year, whereas deaths due to work-related accidents and illnesses represent 3.9% of all deaths and 15% of the world's population suffers a minor or major occupational accident or work-related disease in one year.

Occupational illness or disease and occupational injury are inevitable phenomenon that occurs in the world of work every day. Work-related injuries can occurred due to years of neglect or poor practice in doing repetitive tasks in prolonged fashion and the effects of the injuries can be very far-reaching. To improve the standards of safety and health at work, the employee must be educated on a routine basis in promoting safety and health at workplace[36].

[34] Colin Nicholas and Anne Wangel, Safety at work in Malaysia: An Anthology of Current Research, KL: Institut Pengajian Tinggi Universiti Malaya, 1991, p. 133.
[35]Joan Lewis & Greta Thornbory, Employment law and occupational health: A practical handbook. West Sunset: Wiley-Blackwell, 2006, p. 98.
[36]Ray Boylston Jr., Managing Safety and Health Programs, New York: Van Nostrand Reinhold, 1990, p. 3.

2.5 The Corporate Liability of Employers

Generally, under common law, a corporation could not be convicted of any crime due to non existence of a human body and inability to commit crime. For example manslaughter is a crime which by its very nature can be committed by a natural person.

The company has limited capacity to operate according to its objects in the memorandum of association and resolutions of its directors and shareholders. The liability of a corporation is founded essentially on vicarious liability according to whether or not the employees are seen acting on its behalf. However, it has to be determined whether the employee was acting within the course and scope of his or employment when the critical act or omission occurred. The company's liability is usually extensive and determined by the judicial interpretations only.

The concept of corporate immunity was broken down by the decision of *R* v *Great North of England Railway Co.* (1946) 9 QB 315**.** The company was convicted of obstructing a highway when building a railway. The company was under a statutory duty not to cause such an obstruction. The company did not escape liability by arguing that the obstruction had been caused by its agents.

In *Canadian Pacific Railway Co.* v *Lockhart* (1942) AC 591; an employee used an uninsured car for the purpose of going about his work for the company against express prohibition of the company. The Privy Council decided that a breach of express prohibition by the corporation did not exclude the company from liability for injuries

suffered by the respondent. Essentially the means of transport was incidental to the execution of what the employee was employed to do.

The next major development was the principle of "identification" as explained by Lord Denning in *HL Bolton (Engineering)Co. Ltd.* v *TJ Graham & Sons Ltd.* (1957) 1 QB 15**;**

> *"A company may in many ways be likened to a human body. It has brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from centre…Others are directors and manager who represents the directing mind and will of the company and control what is does. The state of mind of the managers is the state of mind of the company and is treated by the law as such."*

In *Northern Strip Mining Co. Ltd.* (1965)[37], a welder-burner was drowned when a railway bridge collapsed while the company demolishing it. The company was charged with manslaughter.

An organization would be found guilty of corporate killing if a management failure of the corporation is the cause or one of the causes of someone's death and the failure conduct well below that reasonably expected of the corporation in the circumstances. If the activities managed or organized in a manner that the health and safety of employees or other parties are not protected, the management will be held liable and upon conviction, a fine will be imposed[38].

[37]Brenda Barrett & Richard Howells; Cases & Materials on Occupational Health and Safety Law, Cavendish Publishing Ltd.(1995) at p.215
[38] Part XII, OSH 1994

2.5.1 Doctrine of 'Common Employment'

In early days, the employers were protected from legal action under doctrine of common employment. The doctrine excludes the employer from any liability for the negligence of fellow employees with whom he was engaged in a common employment, the risks of employment is one which the employee agreed to accept.

In *Priestley* v *Fowler* (1837) 3 M & W 1, Lord Abinger CB:

> *"...from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried ,or to make the master liable for any damage to the servant, arising from any vice or imperfection, unknown to the master..."*[39],

The doctrine of common employment was upheld in *Hutchinson* v *York, Newcastle And Berwick Railway Co.* (1850) 5 Exch 343. Alderson B stated that a master is not responsible if an injury to a servant resulted from the negligence of another servant while all of them are engaged in common service. The servant who knows the injury due to negligence of his fellow-servant and not of his master is deemed to agree to the risk that would arise from his own acts and also of his fellow-servant.

The Employers Liability Act, 1880 provided partial remedy to workmen but the amount of damages was limited to three years wages. In 1897, first Workmen's Compensation Act introduced a new form of liability. The workman will eligible for compensation automatically when met with accident in the course of employment and incapacitated for

[39] John Munkman, Employer's Liability at Common Law (Tenth Ed.) Butterworths, London (1985) p.5

work. However, a workman had to make a choice[40] in the event of any injury claims. He will be precluded from making a claim at common law if he accepted any payments under Workmen's Compensation Act[41].

Gradually the court introduced non-delegable duties of employers and the contributory negligence of employees being treated with leniency. The nature of liabilities and duties of employers varies whereby employer will be liable irrespective of any fault of their own, while in another situation, it is necessary to prove the employer has been in breach of duty.

In *Cook* v *Square D Ltd*. (1992) ICR 262; the Court of Appeal held that the employers had a duty that could not be delegated, to take all reasonable care to ensure the safety of the employee whilst he was working overseas.

It is primary liability of employer to ensure that the contractors or agents employed are competent to carry out the tasks given and if the agent is acting under explicit instructions of the employer, then the responsibility cannot be denied[42]. Section 1(3) of the Law Reform (Personal Injuries) Act, 1948[43] integrated the employer's primary liability and vicarious liability into a single general duty. Therefore, an employer either personally or through his agents or employees owes a duty of care for safety of his workmen and other employees.

[40] Section 29 of Workmen's Compensation Act 1925 (UK)
[41] *Young* v *Bristol Aeroplane Co. Ltd*. (1946) AC 163
[42] *Wilsons & Clyde Coal Company Ltd* v *English* (1938) AC 57
[43] John Munkman, Employer's Liability at Common Law (Tenth Ed.) Butterworths, London (1985) p.1

The first element of negligence is the legal duty of care. This concerns the relationship between the defendant and the claimant where there is an obligation upon the defendant to take proper care to avoid causing injury to the plaintiff in all the circumstances of the case. To establish a duty of care, the claimant has to show that either he was within the 'special relationship' with the Defendant or whether outside of these relationships, according to the principles developed by case law.

Lord Wright in of *Lochgelly Iron & Coal Co.* v *McMullan* (1934) AC 1;

> "*In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owed."*

2.5.2 Duty of Care

In English tort law, an individual may owe a duty of care to another, to ensure that they do not suffer any unreasonable harm or loss. If such a duty is found to be breached, a legal liability is imposed upon the tortfeasor to compensate the victim for any losses they incur. Initially the duty of care of an individual to a stranger was only found from contractual dealings or agreements. However, the doctrine duty of care significantly developed in the case of *Donoghue* v *Stevenson* (1932) 1 AC 562 where a woman succeeded in establishing a manufacturer of ginger beer owed her a duty of care, where it had been negligently produced. Following this, the concept of duty of care had expanded into a coherent judicial test to claim negligence.

A duty of care arises where one individual or group undertake activities which could reasonably harm another, either physically, mentally, or economically. Where an individual has not created a situation which may cause harm, no duty of care exists to warn others of dangerous situations or prevent harm occurring to them; such acts are known as pure omissions, and liability may only arise where a prior special relationship exists to necessitate them.

There are a number of distinct and recognisable situations in which the courts acknowledge the existence of a duty of care such as a duty of care owed by a road-user to another, an employer to the employee, a manufacturer to his consumer, a doctor to patient and solicitor to client.

Thus, under this principle, an employer is liable to his employee in the event of any personal injuries sustained in the course of the employment and liable to pay damages to his employees for any accident occurred in the course of employment. The employee is acting in the course of his employment whenever he is doing the employer's work. He may be doing it negligently instead of diligently or fraudulently instead honesty nevertheless; the employer is still liable for the employee's acts.

A wrongful act is deemed to have been done by a servant in the course of employment[44] if a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some act authorised by the master.

[44] H.A. Muhammad Altaf; The Close-Connection Test: Future Determinant of Vicarious Liability (2003) 1 CLJ 15i

In *Century Insurance Co. Ltd.* v *Northern Ireland Road Transport Board* (1932) 1 AC 562, the employer was held liable on the ground that smoking while delivering petrol in bulk was negligence in the discharge duty of delivery.

It can be summarised that an employer may incur liability under the two circumstances:-

a) Any accident occurred due to own act or default, such as failing to provide a safe method of work for any dangerous operations to be carried out. This will be personal liability of the employer.

b) When a workman injures another co-worker in course of employment for example while operating machinery carelessly will incur vicarious liability of the employer.

Further, the employer has an obligation to select competent fellow employees and a correlative duty to give proper instructions in the use of equipments. In *Smith* v *Crossley Bros Ltd.* (1951) Current Law Year Book (1947-51) 6831; the Plaintiff, an apprentice under employment of the Defendant was seriously injured due to a practical joke played upon him by fellow apprentices. The Court of Appeal held the Defendants were not liable to the Plaintiff in negligence because the injury has occurred through an act of willful misbehaviour which the employer (Defendants) could not reasonably have foreseen.

In the case of *Gelau Anak Paeng* v *Lim Phek San* (1986) 1 MLJ 271; the Judge was of opinion that the defendant (employer) must have knowledge that the work of cleaning

the rollers with a piece of cloth with the engine on, contained a considerable element of danger. Yet, the defendant did not take any precaution to protect the employees. Therefore, the employer breached his duty of care to reasonable steps to protect his workers.

Employer also owes a duty to ensure that other people's employees are adequately instructed and if required, trained before permitted to carry work on his premises[45]. In the event, the employee knows or can foresee that acts done by employees might cause physical or psychiatric harm to a fellow employee, the employer has breached his duty of care to take steps to prevent those acts when it was in his power to do so.

2.5.3 The 'neighbor' Principle

The common law position regarding liability of strict categories of negligence significantly changed after *Donoghue* v *Stevenson* (1932) 1 AC 562**.** It was established that a duty of care applied despite no prior relationship or interaction and was not constrained by privity of contract and that a claimant could recover damages for negligence against the manufacturer in absence of any contract between them.

The manufacturer was under a general duty to take reasonable care in their actions or omissions, so as not to cause harm to others proximate to them as the type of harm which occurred was foreseeable through the negligence of the manufacturer and was liable on the basis that a 'neighbour principle' to ensure reasonable care was taken in the production of their products. As stated by Lord Atkin:

[45] Section 2(2)(a) of Health & Safety at Work Act, 1974

> *"…The (moral) rule that you are to love your neighbour becomes in law, 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 closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question..."*

The case of *Donoghue v. Stevenson* lay down or settled four main principles of law[46]:-

a) The decision settled that negligence as a tort or civil wrong that not is dependent on component of other torts and could be actionable in any circumstances in which one person suffered personal injury or physical property damage as a direct, close and foreseeable result of the act or omission of another. The injured party does not have to rely on special relationships to prove their cases.

b) Initially, a contractual relationship has to exist to establish breach of duty among the parties to the contract. However after *Donoghue*, plaintiffs need not sought to any contract they could for suing in tort for damages and not restricted to terms of contracts they have entered into.

c) The actual decision in *Donoghue v. Stevenson*, or the ratio decidendi, related to the imposition of liability on manufacturers under certain narrow (by today's standards) conditions. In the words of Lord Atkin:

[46] Heuston, Professor R.F.V., "An Overview of the Law of Negligence: 60 Years After Mrs. Donoghue's Visit to Paisley" in *Donoghue v. Stevenson and the Modern Law of Negligence: The Paisley Papers*, (1991), University of British Columbia, Vancouver, p.57, 60-68.

> *"... a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care…"*

In *Anns* v *Merton London Borough Council* (1977) 2 All ER 492, the neighbour principle was adopted in a formal test for negligence. The case involved the negligent construction of a block of marionettes, commissioned by the Merton London Borough Council. The flats, finished in 1972, had poorly constructed foundations, resulting in sloping of floors, and cracks in the walls. The lessees of the marionettes sued the council in negligence, alleging a duty of care existed for the building to be properly constructed and in a usable state.

The test established by Lord Wilberforce imposed a prima facie duty of care where a sufficient relationship of proximity or neighbourhood exists between the alleged wrongdoer and the person who has suffered damage, such that carelessness on the part of the former is likely to cause damage to the latter and there are no considerations which may reduce or limit the scope.

Following the establishment of the two stage test for a duty of care, there was a marked judicial retreat from the test, which was widely seen as being too inclusive and being too easily applicable to cases which might be contrary to public policy. The test was formally overruled in the case of *Murphy* v *Brentwood District Council* (1990) 2 All ER 908, where the House of Lords depart from the 'Anns' test. A large criticism of the Anns

test had been that it combined the test for proximity of relationship with foreseeability of harm. Whereas Lord Atkin's neighbour principle emphasised a need for both a proximate relationship, as well as a foreseeability of harm, the Anns test did not make such a clear distinction. The resounding test attempts to reconcile the need for a control device, proximity of relationship, with foreseeability of harm.

Lord Oliver's speech in *Caparo Industries Plc* v *Dickman* (1990) 1 All ER 568, surmises the test for a duty of care:

a) The harm which occurred must be a reasonable foreseeable result of the defendant's conduct;
b) A sufficient relationship of proximity or neighbourhood exists between the alleged wrongdoer and the person who has suffered damage;
c) It is fair, just and reasonable to impose liability.

In reintroducing the need for proximity as a central control device, it has been stated that these three stages are 'ingredients' of liability, rather than tests in their own right. For example, liability can arise between complete strangers, where positive acts involving foreseeable physical harm occur; where negligent omissions and misstatements occur however, it is necessary to show a proximate relationship, as well as a foreseeability of harm.

It has been established at common law that those who attempt rescue are owed a duty of care by those who create dangerous situations, in which it is foreseeable rescuers may intervene. This duty is applicable to professional rescuers, such as doctors or lifeguards

as much as ordinary individuals. The basis for this liability was first recognised in *Haynes* v *Harwood* (1935) 1 KB 146. Here, a child who threw a stone at a horse, causing it to bolt, was liable to a policeman who attempted to stop it subsequently, and was injured. The duty was confirmed in *Baker* v. *T E Hopkins & Son Ltd*. (1959) 1 WLR 966 by Wilmer LJ's statement:

> *"Assuming the rescuer not to have acted unreasonably, therefore, it seems to me that he must normally belong to the class of persons who ought to be within the contemplation of the wrongdoer as being closely and directly affected by the latter's act".*

The duty of care owed to a rescuer is separate from that owed to those he is rescuing. Where individuals trespassed onto a railway line, putting themselves in danger, they were not owed a duty of care. However, the stationmaster who attempted rescue and was fatally injured was owed a duty of care, as it was foreseeable he would attempt a rescue. Equally, a duty of care may arise where an individual imperils himself, and a rescuer is injured, despite the individual clearly owing himself no duty of care.

Generally, no duty of care may arise in relation to pure omissions, acts which if taken would minimise or prevent harm to another individual. There are circumstances in which an individual may be liable for omissions, where a prior special relationship exists and such relationship may be imposed by statute. Occupiers' Liability Act for example impose a duty of care upon occupiers of land and properties to protect in as far as is reasonable others from harm. In other cases, a relationship may be inferred or imposed based on the need to protect an individual from third parties.

In *Stansbie* v *Troman* (1948) 1 All ER 599; a decorator failed to secure a household he was decorating, resulting in a burglary while he was absent; it was found that he owed a duty to the household owner to adequately secure the premises in his absence. An authority or service may equally owe a duty of care to individuals to protect them from harm. Authorities have also been found liable for failing to protect against the risks of third parties, in certain circumstances. An education authority was found to owe a duty of care to motorists to protect against the risk of young children in a public road; a driver was injured when forced to swerve, after a four year old child escaped and ran into the path of oncoming traffic[47].

A duty of care will also apply to an omission if a dangerous act was committed by a third party on the defendant's property which he knew about or should have known about, and he did not take reasonable steps to avert damage to neighbouring properties[48].

2.5.4 Psychiatric Harm

The duty of care owed to protect others from psychiatric harm is different to that owed for physical harm, with additional control devices and distinctions present in order to limit liability. A successful claim for psychiatric harm must result from a sudden shock and the victim must be of ordinary fortitude and mental strength, and not especially susceptible to the harm in question. Whilst a prima facie duty of care is imposed for physical harm where the criteria of proximity, foreseeability and policy are fulfilled, liability for psychiatric harm rests upon an individual's connection to a traumatising

[47] C. Peter: Atiyah's Accidents, Compensation And the Law (7th Ed.), Cambridge University Press (2006)
[48] *Rylands* v *Fletcher*(1868) 100 SJ 659

event; those not physically endangered may not be owed a duty of care unless they can fulfill several relational criteria.

The decision of *Page* v. *Smith* (1996) 3 All ER 272**,** established liability for psychiatric harm where an individual is endangered physically. Victims in this category are known as primary victims and are automatically owed a duty of care, as explained by Lord Lloyd:

> *"Once it is established that the defendant is under a duty of care to avoid causing personal injury to the plaintiff, it matters not whether the injury in fact sustained is physical, psychiatric or both".*

For psychiatric harm that focuses on secondary victims and for the recovery for witnessing the injury and harm of others, it has been established that there must be a close tie of 'love and affection' between the primary victim, and the secondary victim witnessing the traumatic event as decided in the case of *Alcock* v. *Chief Constable Of South Yorkshire* (1991) 4 All ER 907 for imposing liability,. Additionally, the cause of the harm must be close and proximate to the shocking event in question, and it must be witnessed by the means of the victim's senses, and not via some form of communication.

2.5.5 Pure Economic Loss

Negligence which causes no physical or psychiatric harm, but causes economic loss to an individual or organisation is termed pure economic loss. The duty of care may be owed to protect against the economic loss of others is difficult to establish as the bounds of such liability are potentially unforeseeable.

The development of pure economic loss stems from the case of *Hedley Byrne & Co. Ltd.* v *Heller & Partners Ltd* (1964) AC 465, where it was first recognised that a duty of care may arise not to cause economic loss to others through negligent misstatements. Hedley Byrne, an advertising agency, approached Heller & Partners for a credit check on a third company, Easipower Ltd, before carrying out advertising orders on their behalf. Heller & Partners reported that Easipower Ltd was credit-worthy, and in reliance on this statement, Hedley Byrne placed advertising orders for them. When subsequently Easipower Ltd was declared bankrupt, Hedley Byrne took legal action against Heller & Partners, alleging they had been owed a duty of care when consulting for a credit reference. Whilst Hedley Byrne did not succeed in their claim, the House of Lords recognised that such a duty may be owed, where a relationship of reliance exists between two parties.

2.6 Vicarious Liabilities of Employers

The English law of tort law imposes strict liability on employers for the wrongdoings of their employees. Generally, an employer will be held liable for any tort committed while an employee is conducting their duties. This liability has expanded in recent years where an action is closely connected with an employee's duties, an employer can be found vicariously liable. The term vicarious liability is described as the instance one party will held responsible for the misconduct of another even though the liable party has not committed any wrong.

The concept of vicarious liability initially arose from employer employee relationship and the torts committed in the course of employment. From this relationship, an employer ought to be held responsible for any wrong committed by its employee in the course of their employment. Although the employer might not be aware of the wrongful actions of the employee or acted out of the scope of employment, the employer may nonetheless incur liability. When the risks inherent to a party's enterprise materialize and cause harm, liability will be imposed on that party[49]

In order to establish vicarious liability, the relationship between wrongdoer and employer has to be sufficiently close and the wrong committed connected to the wrongdoer's assigned tasks and 'materialization' of the risks created by the enterprise. The key factor in determining when employer is vicariously liable is whether the employee was acting in the course of employment or given tasks by the employer.

In *Nahlas* v *Pier House Management* (1984) 270 EG 328**,** the employer was found to be vicariously liable for theft because the management company was negligent in hiring an ex thief as porter to manage their block of luxury flats. An occupant's flat was robbed of expensive jewellery when the flat's keys were entrusted to the porter. The defendant management company was held not to be negligent in requiring keys to be deposited with the porter but incur liability by failing to check his background as thoroughly if he can be entrusted to handle money.

[49]*K.L.B* v *British Columbia* (2003) SCC 51

The main policies underlying the vicarious liability are fair compensation to the victim and the deterrence of future harm. As, liability in context of employment arises at the employer's enterprise which creates the risks, holding the employer liable will deter future harm as the employer is in the position to reduce accidents and any intentional wrongs by effective management and constant supervision of the employees. An employer will be liable for torts committed by an employee in the course of employment and even if the act of the employee carried out in a negligent manner[50]. However, when an employee was doing his job in an unauthorised manner or in a way expressly forbidden by the employer, the courts often has to determine what exactly the phrase 'in the course of employment' and there is no definitive test.

Under the legal doctrine referred to as "respondent superior[51]", an employer is legally responsible for the actions of its employees. However, this rule is applicable only if the employee is acting within the course and scope of employment and was doing his job, carrying out company business, or otherwise acting on the employer's behalf when the incident took place. Respondent superior is the notion that a master/servant relationship exists between the employer and the employee and the employee acting as the employer's agent[52].

The purpose of this rule is fairly simple, that is to hold employers responsible for the costs of doing business, including the costs of employee carelessness or misconduct. If

[50] *Century Insurance Co. Ltd.* v *Northern Island Road Transport Board* (1942)AC 509

[51] Latin for "Let the superior answer": *Dealing With Problem Employees A Legal Guide*, by Amy DelPo and Lisa Guerin (Nolo) and *The Essential Guide to Workplace Investigations*, by Lisa Guerin (Nolo).

[52] Steve Kaufer, Corporate Liability: Sharing the Blame for Workplace Violence (retrieved on 15/10/2013)

the injury caused by the employee is simply one of the risks of the business, the employer will have to bear the responsibility.

Therefore, an employer will be vicariously liable for an employee's tort when:

- the employee has carried out an authorised act in a careless way;
- the employer has allowed the employee to do an unlawful act;
- the employee carried out authorised act in an unauthorised way;
- the employee has carried out an act that had been expressly forbidden but was for the benefit of the employer;

The courts have used several different tests in the process of determining whether someone can be classified as an employee or not. The courts look at all the factors and circumstances before reaching a decision on the employment status such as who has control over the way that the work is carried out by the person instructed to do so. If the employer sets out how the work is to be done and when it is to be done by, the courts are more likely to consider the person carrying out the work to be an employee. If on the other hand, if the person carrying out the work independently determines how and when it should be done, that person would be more likely to be classed as an independent contractor.

A person who has the power to control another may be liable for failure to exercise it. Parents and school authorities for example, are under a duty to control young children and students. In the event, the child or student did a wrongful act and if the parent or

school authority is shown to have been negligent in carrying out their responsibilities, the parent or school authorities will be liable for any injuries arose from the wrongful act of the child.

Negligent hiring occurs when, prior to hiring, the employer knew or should have known that a particular applicant was not fit for the job. Failure to adequately screen applicants results in a liability for the employer. Negligent retention occurs when an employer becomes aware of an employee's unsuitability or should be aware of it and fails to act on that knowledge.

In an early negligent retention case, *Carr* v *William Crowell Co*. (1946)[53], the court ruled that the employer would be held responsible for another employee's intentional action that arose from the workplace. An employee attacked another worker with a hammer, an act the court ruled was not personal malice, because the victim and attacker were strangers outside of work and the injury was a result and in the course of employment.

In *Wilson* v *Clarica Life Insurance Co*.(2002) BCCA 502, the insurance company was held liable for its own negligence in hiring Dennis even though the previous employer has notify the defendants of Dennis's questionable financial conduct. The failure of insurance company to investigate Dennis's alleged improper conduct was a negligent

[53] Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer's Need to Know About Juvenile Misdeeds and an Employee's Need to Keep Them Secret*, (1992): http://digitalcommons.law.wustl.edu/urbanlaw/vol41/iss1/2 (retrieved on 30/11/2013)

act. The client suffered loss due negligent retention of Dennis who subsequently misappropriated funds from the clients, although Dennis was an independent contractor.

Employers are liable for torts committed by their employees, but not for those committed by independent contractors. Independent contractors include, for example, plumbers or electricians hired by a householder and they are usually responsible for their own torts. Therefore, in terms of vicarious liability, it is essential to establish exactly who is classed as an 'employee'.

Integration test is another test to determine whether the person's work is an integral part of the business. The conditions inconsistent with a contract for service may include, such as the ability to hire own employees and pay salary, provide own tools and materials. The courts will also consider how and when someone is paid, whether it is a lump sum for a job or a monthly salary.

A person who employs an independent contractor will not usually be responsible for any tortious acts committed by the contractor. Occasionally, however, liability may be imposed on the person who employed the independent contractor if he is in breach of a duty that he owes to the claimant, for example if the person has not checked the competency of the independent contractor to undertake the work.

An employer owes a duty of care that cannot be delegated to another whereby it is commonly termed 'non-delegable'. It is still a question of law in each case as to whether a duty can be delegated or not. Although the work may be carried out by an independent

contractor, responsibility still lays with the person who employed the contractor. For example, a duty of care cannot be delegated in the event an employer takes on an independent contractor to carry out work that is inherently dangerous. In the circumstances, the employer will owe a duty to those who might be injured by such work.

2.6.1 Liabilities of Third Parties, Suppliers and Contractors

In the course of industry, very often, several employers with their workmen, engaged on a common task or working on the same premises or at the same vicinity. There may be a principal employer and several sub-contractors. In this context, there might be other persons than the workman's immediate employer and his fellow workmen.

In the case of *Peabody Donation Fund (Governors)* v *Sir Lindsay Parkinson Ltd* (1984) 3 WLR 953, Lord Keith mentioned:

> "*The true question in each case is whether the particular defendant owed to a particular plaintiff a duty of care...a relationship of proximity must exist...the scope of duty must depend on all circumstances of the case*."

Thus, the principal employer's responsibility towards men not employed by him and working in his premises will not be the same as to his own employees. The key factor in establishing duty of care was the reliance placed by one person on another and this is applicable where a plant or machinery supplied or designed by a third party. Generally, third parties are not in the same close relationship to a workman as his own employer who has the authority to control over his work. If the third party has a direct interest in

the work carry out, naturally his responsibility will be greater and less onerous than the duty of a supplier of a plant or equipment.

In *Membery* v *Great Western Rail Co.* (1899) 14 App Case 179; an independent contractor engaged to carry out shunting operations in their yard sustained injury and he alleged the company was negligent in not providing assistants. The court held that there was no fault in the plant or the premises and the plaintiff's injuries was due to the way he performed the job. Lord Herschel suggested that the duty of the occupiers, third party arises under three situations:-

(i) machinery, appliances or tackle which are provided for workman's use;

(ii) the conditions of their premises;

(iii) Any dangerous activities carried out in the course of their business.

Although liabilities may attach other persons besides the occupiers[54] of the premises such as the manufacturers and repairers of the plant and suppliers of the materials used in a factory, the above situations is well suited to all of them. In general a third party, unlike an employer, is under no positive obligation to establish a safe method of work even if the work done in his premises and for his benefit. However, if a third party such as building owner, safety consultant or architect intervenes in the control of operations or assumes responsibility for the method of carrying out the works; he owes a duty of care similar of an employer depending to the extent of his involvement.

[54] Liability of occupier of premises is governed by the Occupiers Liability Act, 1957

In *R* v *Swan Hunter Shipbuilders Ltd. & Anor* (1982) IRLR 403*;* a fire broke out on board of a ship which was under construction by Swan Hunter Ltd. The fire was intense because the atmosphere inside the vessel had become oxygen enriched and eight men were killed. The oxygen escaped from a hose left by an employee of sub-contractors. Swan Hunter Ltd. distributed a book of rules to their own employees for the safe use of oxygen equipment, but failed to distribute the same subcontractors' employees except on request. Swan Hunter Ltd. was prosecuted under HWSA, 1974 for failure to provide information and instruction to persons other than their own employees.

The Court of Appeal held that if it was necessary to provide to persons other than his employees with information and instruction as to the potential danger, then he was under a duty to provide such information and instruction, so far as was reasonably practicable[55].

In *Mc Ardle* v *Andmac Roofing Co.* (1967) 1 All ER 583,[56] the occupier or building owner who was coordinating the activities of sub-contractors was liable for failure to allocate safety responsibilities when the operations of one sub-contractor endangered the workmen of another. The court treated the duty as one arising from the fact of supervision and control and created by a dangerous activity initiated through sub-contractors. They failed to instruct safety matters and provide equipment for the sub-contractors.

[55] Section 2(2)(a) &Section 3(1) of HSWA, 1974
[56] *Kealey* v *Heard (*1983) 1 All ER 973

The manufacturer owes a duty of care for the safety of the ultimate user of his products. The products which are sealed and packed proved the manufacturer deliberately establish a direct and immediate relationship with the consumer and owed them a duty of care as established by the 'neighbour principle'. The suppliers of materials, tools or machinery for use in a manufacturing process who is aware of the nature of process owe a high duty of care as employer in assessing and eliminating the risk, give adequate warnings of any risks and stop supplying the materials if it become evident that the materials, tools or machinery are too dangerous to be used.

In *Davie* v *New Merton Board Mills & Anor* (1959) AC 604, the House of Lords held that the employers had discharged their personal duty to take reasonable care by purchasing a tool from a reputable source. The employer has no means of discovering the latent defect of the tool. Similarly, the manufacturer will not be held liable if the tool not used in the provided method and gives rise to danger which cannot be expected by him.

However, the duty or care of manufacturer arises where there is a defect in a particular tool of article, which the customer or user cannot see it and will be dangerous to use it. Suppliers of materials for use or manufacturing process who are aware of the nature of the process owe a duty of care as the employer in assessing and eliminating the risks. The manufacturers should give warning of any risks arising in the usage of the materials.

In *Wright* v *Dunlop Rubber Co. Ltd & ICI Ltd.* (1972) 13 KIR 255, the plaintiff claimed that he contracted bladder cancer as a result of being exposed to Nonox S[57] manufactured by second defendants and sold to first defendants. When it discovered that this chemical caused bladder cancer among the first defendants' employees, Dunlop stopped using Nonox S and ICI stopped making it. Only in 1966, the plaintiff was diagnosed as suffering from the disease. It was held that in addition to the liability of the manufacturer, the employer was liable in negligence for failing to institute the necessary tests quickly enough that in year 1960. Therefore the employer has failed in his common law duty to take reasonable care[58].

In *R* v *Mara (*1987) IRLR 154; an employee of International Stores was electrocuted while using the polisher or scrubber which was seriously defective. Mara was prosecuted and convicted for offence of consenting or conniving to a breach by his company of section 31 of the Health and Safety at Work Act 1974 and fined £200.

In *R* v *Associated Octel Company Ltd.* (1994) IRLR 540, the Court of Appeal held that the employer (Octel Company) was liable under section 3(1) of HSWA 1974 when a visiting contractor caused an accident by failing to follow the permit to work procedure required by the 'safety case' at a major hazards installation, even though the employer's own employees were not at the site.

[57] 'a chemical containing carcinogenic substances which was added to rubber to prevent rotting'
[58]Control of Substances Hazardous to Health Regulations,1988 (COSHH) was introduced later

Generally, it can be said that employers will not be liable for the wrongful acts of independent contractors. However, a principal is jointly and severally liable with the agent for any wrong committed by the agent when the agent is acting within the scope of the actual or usual authority[59] and dealing with the principal's legal rights. There are circumstances in which employers may incur liability for wrongful acts their employees, agents, independent contractors and other third parties but by being alert to the potential dangers and taking proactive prevention measures, the risks of liability can be minimized and reduced to a lesser degree.

[59] Fridman, Law of Agency 7th Ed.(Toronto;Butterworths,1996) at p.315

CHAPTER 3

OCCUPATIONAL SAFETY AND HEALTH LAW MANAGEMENT SYSTEMS

3.1 Introduction

The employer owes liability due to breach of statutory duties under civil and criminal liability for losses suffered by employees such as providing competent fellow workers, safe equipment and safe system of work. Therefore, employer must take appropriate measures to achieve harmonization of safe working conditions and improving production and employees' fundamental rights and needs as regards to workplace risks and steps to eliminate or reduce the risks. Thus, strict compliance of the legislations and fulfilment of requirements of ILO conventions by all is crucial to ensure occupational safety and health at workplace.

3.2 The Employees' Rights and Responsibilities

Basically, employees are entitled to fundamental rights such as right to know, social security, participate in health and safety initiatives and right to refuse dangerous work. Employees have a right to receive the training needed to do their job safely. Workplace hazards identified through orientation, day-to-day operations, entire facility inspections, daily pre-use inspections of tools, equipment and machinery, reporting mechanisms for sub-standard working conditions has to be made known to employees. Policies on Safe work, procedures and codes of practice, as outlined by both the legislation and the

internal company standards to enable the duties assigned carried out accordingly. In addition, emergency procedures and evacuation, first aid legislation and first aid procedures, accidents reporting and investigation procedures at the workplace or manufacturing site is explained to the employees to prevent any accident.

All employees have a right to participate in resolving health and safety concerns and in identifying and controlling workplace hazards. An effective mechanism to address health and safety concerns is through a company's Joint Health Safety Committee (JHSC) whereby employees are given responsibility to report accidents to Inspectors when a loss of life or injury occurs or in the event of any property damage in the workplace[60].

3.2.1 The Social Security System

Social security schemes are designed to protect the individuals and their families against a sudden fall in living standards in the event of old age and contingencies such as unemployment, disability, sickness, incapacitation, death and retirement. Generally, social security provides[61] short term coverage such as unemployment and minor sickness and long term coverage such as death, retirement or incapacitation due to accidents, sickness or disease. Social security refers to "an insurance system for human beings, without discrimination and in all situations of their lives, aimed at protecting the members of society against any contingencies during their life time such as health,

[60] Section 31 of FMA,1967
[61] Soh Chee Seng, PhD; *Social Security Organisation,2002* (retrieved on 12/10/2013)

retirement, employment injures, invalidity, unemployment and death.[62]" Presently there are four government social schemes under Employees' Social Security Act, 1969 (ESSA) and Employees Provident Fund Act, 1951 (EPF) provided for the employees.

Under The Social Security Organisation (SOSCO), the Employment Injury Insurance scheme provides an employee with protection for industrial accidents, occupational diseases and commuting accidents. Benefits provided are Medical Benefit, Temporary Disablement Benefit, Permanent Disablement Benefit, Constant Attendance Allowance, Dependant's Benefit, Funeral Benefit, Rehabilitation Benefit and Education Benefit.

SOCSO's Invalidity Pension Scheme provides an employee with 24-hour coverage in the event of invalidity or death resulting from whatever cause. Benefits provided are Invalidity Pension, Invalidity Grant, Constant Attendance Allowance, Survivors Pension, Funeral Benefit, Rehabilitation Benefit and Education Benefit.

The EPF provides for withdrawal schemes for medical, housing and trust funds even prior to retirement age to cater to the present-day needs of society. In addition, the EPF provides Physical or Mental Incapacitation Withdrawal Scheme for members who are disabled from continuing to work.

Since 1st April 1993, foreign workers who are not permanent residents of Malaysia are covered under the Workmen's Compensation Act 1952. This Act aims to assist workmen who injured in the course of their employment. The employer compensates the

[62] Article 23 of UN declaration of Human Rights; ILO Convention No.102

injured workman or his dependants. Since 1st November 1996, the Foreign Workers Compensation Scheme was established under the Workmen's Compensation Act 1952 which include 24-hour daily coverage, ex-gratia payment for injuries leading to death, a compensation payment if a worker dies or if he is permanently disabled and a repatriation cost in the event of death or permanent disablement.

In *Liang Jee Keng* v *Yik Kee Restaurant Sdn. Bhd.* (1991) 1 CLJ 1327, the plaintiff, a waiter at the defendant's restaurant, was injured whilst cleaning the meat mincing machine. He filed a suit against the defendant for damages for the injuries suffered which he alleged arose out of the negligence of the defendant. He contended that the defendant failed to provide a safe system of work and that there had been breaches of the Factories and Machinery Act 1967 and the Factories and Machinery (Fencing of Machinery & Safety) Regulations 1970.

As the plaintiff had sustained employment injury in the course of his employment, the question considered by the court was whether the plaintiff, at the time of the accident was an 'insured person' as defined under s. 2(11) of the Employees' Social Security Act 1969. The court held that the plaintiff was caught by s. 31 of Employees' Social Security Act 1969 and thus precluded from making any claim for compensation or damages against the defendant under any other law for the time being in force, including the common law, in respect of the employment injury sustained by him[63].

[63] an employee or his dependents will not be able to claim any compensation under any other law for an employment injury except for motor vehicle injury under Part IV of Road Transport Act 1987

For any failure of the employer to pay the contributions in respect of the employees as required under s. 7 of Employees' Social Security Act, 1969 and Regulation 32 Employees' Social Security (General) Regulations, 1971, the employer is punishable under s. 94(a) of the Act.

In *Melewar Corporation Bhd.* v *Abu Osman* (1994) 2 ILR 807**,** the Industrial Court noted:

> "*In law, an employer owes a contractual obligation to his employees, female or otherwise to ensure that he provides a safe and conducive working environment in which they can function…the employer would be in breach of a fundamental and essential term of the contracts of employment existing between the employer and his employees, if he failed to take steps to put a stop to acts…that the employer had by his repudiatory breach, constructively dismissed them from their employment*".

Employees have a right to refuse work they believe may be dangerous to their health or safety, or to that of others. Employees who are not issued nor have proper and adequate personal protective equipment, on-the-job-training, clear understanding of their job procedures or placed in a hazardous workplace situation can exercise their legal right to refuse the task at hand. The employee is to report immediately the condition or situation of concern to their supervisor or to the company's Joint Health Safety Committee. The right to refuse work that is unsafe for the worker or the environment has been shown to be a powerful tool for workers in protecting themselves, as well as asserting their rights and opinions.

An employee is under an obligation to take reasonable care and precautions and to co-operate with the employer. Section 24 of OSH 1994 states the general duties of an employee which includes:-

(i) To take reasonable care for the safety and health of himself at work;

(ii) To co-operate with the employer and other person in discharge of duty or requirement imposed on employee;

(i) To wear protective equipment or clothing[64] provided by the employer;

(iv) To comply with instruction on occupational safety and health instituted by the employer or any relevant Act.

In *Hamzah D494 & Ors* v *Wan Hanafi Bin Wan Ali* (1975) 1 MLJ 203, it was held that employees are responsible to take reasonable care for safety and health of himself and extravagant precautions. They must have regards both to the probability of injury resulting and to the probable seriousness of the injury. Further an employer who has provided protection and adequate and proper instruction on usage of safety equipments and machines will be absolved from liability. He will not be liable if it can be proved that the breach of statutory duty did not cause the accident[65].

[64] Section 24(1) (c) of OSH 1994
[65] *Govalan* v *KL-Kepong Amalgamated* (1981) 1 MLJ 29

In *Ng Cheng Ho* v *Tan Ek Seng & Anor* (1969) 2 MLJ 106**,** the Court of Appeal held:

> "…t*he employee had not only failed to allege what was the defect in the system but also failed to prove any defect in the system provided by the employer…on the employee's own admission; the accident would not have occurred had he adhered to the system provided*".

Section 24(2) of OSH 1994 imposes a fine of RM1, 000 or imprisonment not exceeding three months or both to those who contravenes with the above provision.

In addition to the statutory duty, the employee is under obligation to practice good workplace procedures in accordance with the requirements and rules of the employer. Good and systematic methods of housekeeping can help to prevent or reduce accidents at workplace including fire accidents and occurrence.

In *R* v *Board of Trustee of the Science Museum* (1992) 3 All ER 853; The Court of Appeal, Criminal Division dismissed an appeal by the Board of Trustees of the Science Museum against conviction for failing to discharge the duty imposed upon it by HSWA s.3 (1), when they exposed members of the public to risks to their health from Legionella Pneumophila. The word 'risks' in s.3 (1) HSW Act, 1974 implied the idea of potential danger. The phrase 'risk to health' conveys the idea of a possibility of danger and is not restricted to 'actual danger'.

Employee must report instantly to the relevant authorities of any spotted electrical hazards or any hazards for the matter[66]. Employees should never attempt electrical

[66] Section 8(1) of Fire Services Act 1988

repairs unless he is qualified and authorized by the employer[67].Although, there are a number of duties on the employer relating to safety and health of the workers, there is no specific law which emphasis the requirement of providing qualified medical or nursing staff at the place of work. Under the Health and Safety (First Aid) Regulations 1981[68], employer must provide adequate and appropriate first-aid equipment and facilities to the employees. Further, the employer has to ensure that adequately qualified and trained persons and certified by the competent authority[69] to render first aid to the employees in event of any emergency.

Regulation 15(1) of by Occupational Safety & Health (Use & Standards of Exposure of Chemical Hazardous to Health) Regulations 2000 (USECHH 2000) provides methods to control chemicals hazardous to health through the provided control measures such as elimination of chemicals hazardous to health from the place of work, substitution of less hazardous chemicals for chemicals hazardous to health, total enclosure of the process and handling systems, isolation of the work to control the emission of chemicals hazardous to health, modification of the process parameters, application of engineering control equipment, adoption of safe work systems and practices that eliminate or minimize the risk to health and approved personal protective equipment.

[67] Section 58 of Fire Services Act, 1988; fine not exceeding RM5,000 or three years imprisonment or both
[68] Diana Kloss, Occupational Health Law;5th Ed. Wiley-Blackwell (2010) at p. 29-30
[69] NIOSH fully accredited to train and certify a qualified first-aider

3.2.2 Personal Protective Equipment

Apart from OSH 1994, FMA 1967 and Regulations made there under stipulates the provision of PPE for protection against hazardous substances such as chemical substances. In *Mariasusai s/o Suminder* v *Nam Hong Trading Co. Ltd. & Anor* (1975) 2 MLJ 271, the Defendant was held to be fully liable at common law for negligence in not providing the adequate safeguards which caused injuries to the Plaintiff.

Personal Protective Equipment such as safety glasses, aprons, gloves etc. specially designed to protect employees from particular hazards or risks to health or safety. The use of PPE which represents the safe–person approach offers protection to the wearer. PPE should be used only when there is no feasible or practical way to enclose a process, provide local exhaust, or apply other control measures and not be used as an alternative to other proper controls methods[70]. Failure to provide such essential protective equipment will render the employer liable under common law and a breach of statutory duties of the employer.

In *Abdul Rahim B. Mohamad* v *Kejuruteraan Besi & Pembinaan Zaman* (1998) 4 MLJ 323**,** the court found that the defendant failed to comply his common law and statutory obligations[71] to ensure the safety and welfare of his employees while carrying out the work and the accident occurred due negligence of the defendant. Further, the plaintiff ought to know that by remaining on the scaffolding when it was being pushed and was

[70] Global Strategy on Occupational Safety and Health: Conclusion adopted by the ILO Conference at its 91th Session,2003: http://www.ilo.org/public/English/protection/safework/globalstar

[71] Reg.74(1),77(3)(c),85(1) and 88(1) of Factories and Machinery Building Operations and Works of Engineering Construction (safety) Regulations 1986

exposing himself to unnecessary risk if the scaffolding should collapse. There was contributory negligence and breach on his part.

In the case of *Mohamed Fahmi Hassan* v *Swissco Pte Ltd. & Government of Republic of Iraqi* (1986) 1 MLJ 461, the plaintiff was seriously injured when during the course of loading three oil drums from 'Sea Supply' onto to larger vessel named '14 Ramadhan', one oil drum fell on him. The plaintiff became quadriplegic and completely dependent on others for all his personal needs. The Judge held:

> "*…it is not a safe system of work to use can hook to load oil drums outside quiet waters. Instead net sling should have been used…The Defendants should have foreseen that there was likelihood of mishandling and the danger of the oil drum(s) may fall. Therefore, the Defendants are wholly to blame*".

According to Wentz,[72] the type of protections needed by the employees at the workplace are the protection of the head, face and eyes, ears, hands, arms and body, respiratory system and protection from falls. Therefore, it is the duty of the employer to supervise and put instruction or prohibition notices to ensure workers are aware of the proper methods and ways of doing certain jobs and are able to avoid any injuries.

In *Berry* v *Stone Maganese Marine Ltd.* Managerial Law, Vol. 12 Issue: 1, pp.13 - 35 (1971), the employer was held liable and he should have alerted the employee as to the risks that arise and insisted the ear defenders to be worn. The employee would not be obvious as to the seriousness of the potential injury and risks occurring when the employee chose not to wear ear defenders provided while working in a dangerously high

[72] Charles A. Wentz, *Safety, Health and Environmental Protection*, Boston: McGraw Hill, 1998, p. 402-426.

level of noise. He suffered loss hearing due to carelessness. Thus the duty of employer went beyond simply providing the defenders.

3.4 The ILO Conventions on Occupational Safety and Health Law

The ILO estimation show that non-fatal occupational accidents have increased to 337 million per year and the number of fatal occupational accidents and diseases is about 2.31 million per year[73]. Creating a safe and healthy working environment will contribute to prevent human suffering and economic loss and will benefits the society and the government as a whole. ILO's notion of Decent Work is a global objective to obtain productive working conditions of freedom, equality, security and dignity. Thus, occupational safety and health is the core element of Decent Work and for better OSH standards globally as mentioned in Convention 187. Convention 187 aims at promoting a preventative safety and health culture and progressively achieving a safe and healthy working environment.

Any national policy on safety and health have to be developed in accordance with the principles of Article 4 of the Occupational Safety and Health Convention, 1981 (No. 155). National systems shall provide the infrastructure for implementing national policy and programs on occupational safety and health and ensuring the laws and regulations to be in compliance of principles set out in relevant ILO instruments.

[73]www.ilo.org/public/English/protection/safework/globalstar (retrieved on 2/10/2013)

Occupational Safety and Health Convention, 1981 (No. 155) provides for the adoption of a coherent national occupational safety and health policy, as well as action to be taken by governments and within enterprises to promote occupational safety and health and to improve working conditions by taking into consideration national conditions and practice. The Protocol calls for the establishment and the periodic review of requirements and procedures for the recording and notification of occupational accidents and diseases.

Occupational Health Services Convention, 1985 (No. 161) provides for the establishment of enterprise-level occupational health services which are entrusted with essentially preventive functions and which are responsible for advising the employer, the workers and their representatives in the enterprise on maintaining a safe and healthy working environment. ILO Safety Management System, (ILO-OSH) 2001 provides adequate tools and mechanisms for enterprises to develop a sustainable safety and health culture and for continual improvement of working environment[74].

In 1998, the International Occupational Hygiene Association (IOHA) under instruction of ILO conducted a comparative study of standards management systems of safety and health which borne the 2001 ILO Directives. These directives are not mandatory and compliment existing national laws and regulations. Its objectives are to motive members to apply suitable principles and methods of OSH and continuing improvement on management system of OSH in organizations.

[74]Phil Hughes and Ed Ferret, *Introduction to International Health and Safety at Work,* 2010, Amsterdam: Elsevier

OHSAS 18001 issued by the British Standards of Institution and published in year 1999 constitute the integration of OSH requirement with quality requirements (ISO 9000) and environmental management requirement (ISO 14000). OHSAS 18001's objectives are to minimize occupational risk to employees and other agents, improve business performance and assist organizations in establishment of a responsible business policy on OSH law.

ILO conventions 102 (1952) provides guidance for implementation of social security for workers which includes protection against risks of injury, sickness and invalidity. ILO Vocational Rehabilitation (Disabled) Recommendation, 1955, provides that appropriate measures taken to create job opportunity for the disabled in the open labour market, including financial incentives to employers to encourage them to provide training and subsequent employment for them, as well as to make reasonable adaptations to workplaces, job design, tools, machinery and work organization to facilitate such training and employment. For example, under SOSCO, RTW[75] program provide training and motivation to workers unable to work after a certain injury or accident at workplace.

In year 2012, the theme of the ILO, "Green Jobs: Safety & Health in Promoting a Green Economy" coincided with Malaysia's Vision 2020 of achieving high income through application of scientific and technological progress. Generally, local legislations fulfil the requirements set out by ILO conventions on OSH. In addition to OSH 1994, FMA 1967, OSH Regulations and other statues, DOSH[76] Guidelines on safety and health law

[75]Return to Work (RTW): As from January 2010,a case manager appointed to assist and provide counseling to insured persons to be able to return to work after employment Injury or granted invalidity pensions.
[76] http://www.dosh.gov.my (retrieved on 10/10/2013)

matters are issued as and when required. However there are ample room for improvements on OSH legislations.

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3.5 The Management Leadership and Employee Involvement

An effective management of occupational safety and health will be able to improve the risk profile of the company and increase productivity. It is pertinent for the employer to lay out its aims and objectives on managing safety and health at workplace and the services and systems implemented for the benefits of all involved. Employers should comply with the safety and health measures to be taken regarding hazards or risks to safety and health from hazardous ambient factors at work, including appropriate standards, codes and guidelines as prescribed, approved or recognized by the competent authority. It is the duty of employer to provide adequate training and supervision to ensure employees are performing their tasks competently.

The employer has a duty of care to provide competent fellow employees[77] and it is the responsibility of employer to ensure that employees do not create danger to fellow employee by their actions or carelessness in carrying out the given tasks. Any employee who are known to represent any form of danger or injury to fellow colleague can be dismissed by the employer to safe guard the other employees.

[77] *Hawkins* v *Ross Castings Ltd*. (1970)

In *Hudson* v *Ridge Manufacturing Co. Ltd.* (1957) 2 QB 348, the employer was held to be liable for Hudson's injury when he failed to ensure his safety by not removing the colleague when it was obvious that he was a danger to his fellow employees as he has a reputation for playing pranks. Hudson's wrist was broken when the colleague wrestled him to the ground on pretext of a practical joke.

In order to decide the suitable occupational safety and health support applicable to the company, an assessment of the risks to employees, agency workers and contractors at workplace have to be conducted by the employer which will provide an overview of specialized occupational safety and health needed by the employees, agency workers and contractors.

3.5.1 Duty to Provide Safe Workplace and Tools

Employers should provide and maintain workplaces, plant, equipment, tools and machinery and organize work so as to eliminate or control hazards at work and be consistent with national laws and regulations. A safe system of work is a method of doing a job which eliminates identified hazards, controls and plans to achieve completion of work with minimum risks.[78] A safe system of work is "the integration of men, machinery and materials in the correct environment to provide the safest possible working conditions in a particular working area[79]."

[78]Sue Cox, Tom Cox, '*Managing the work Environment: The design of sate work,' Safety System and people* (1996) p.262

[79]Jeremy Stranks,' *Principles of Accidents Prevention': A Manager's Guide to Health and Safety at Work* (4th Ed.) (1995),p.42

In the case of *Ng Kim Cheng* v *Naigai Nitto Singapore Pte. Ltd. & Anor* (1991) 2 MLJ 296: it was held inter alia that:

> 3*)"…at the material time the breaks of the forklift were defective and not 'in an efficient working order and in good repair', the first Defendant was in breach of the statutory duty as result of which the plaintiff sustained injuries.*
>
> *4) At common law, an employer is under a duty to use reasonable care to provide, among other things, safe plant and appliances for the use by its employee and to maintain them in proper condition.*
>
> *6) The first Defendant was also in breach of its duty to take reasonable care to provide a safe system of work…the first defendant ought to have had the forklift tested before it was allowed to be used. Therefore, there was a failure on the part of the first defendant to provide adequate and proper supervision and checking of the maintenance of the forklift."*

In *Ann Ee Siong* v *Kim Taw Electric Sawmill Co. (Pte) Ltd.* (1980) 1 MLJ 1979, it was held the Defendant company had a duty to provide a safe system of work. There has been a breach of that duty and that resulted in the accident and caused injuries to the driver. In the above case, the driver was unloading timber logs from the lorry to nearby site. The lorry was parked lopsided at the roadside and the constant vibration due to vehicles passing caused the timber los rolled and fell upon the driver and was injured.

In *Kian Huat Lorry Transport* v *Kamardin Bin Adnan & Anor* (1980) 1 MLJ 280, the plaintiff in the case sustained personal injuries during the course of employment by 1st Defendants. At the material time, plaintiff was unloading bales of rubber from a lorry into a lighter by using mobile crane owned by 2nd Defendants. During the process of lifting the net with the bales of rubber to the lighter, the net containing bales of rubber

burst above the Plaintiff and rubber bales fell down. One of the bales bounced and hit the Plaintiff's leg and caused injuries to him. The court held that it was the responsibility of the crane driver and his attendant to provide and to ensure a safe crane operation including all paraphernalia[80] that was part and parcel of such safe operation. The second Defendant was to ensure the net to hold the bales of rubber to be lifted by the crane was in good working condition. Therefore, the Defendants are negligent and liability apportioned equally.

The employer has a duty to make sure that his premises are safe and the equipments provided are reasonably safe to be use by the employees. All machinery and tools used by the employee must be reasonably safe for usage and will not create any harm to the employee. In *Bradford* v *Robinson Rentals* (1967) 1 All ER 267; a van driver was required to make long journey during extremely cold weather but the heater in the van was broken. The employer insisted the driver to make the journey and he suffered frostbite. The employer was liable in failing to provide safe plant and equipment.

Accidents at workplace occurred because the necessary equipment not available or unsafe improvised method to operate the machines. An employer will be liable for failing to provide sufficient plant to carry out the tasks. When the employer purchases new equipment or a second hand such as hand tools from a supplier or manufacturer, thorough checking has to be done to identify any defects. The performance of the employer's duty cannot be delegated to the manufacturer, the employer will vicariously

[80]All equipments attached to the goods

liable for negligence of any person to whom entrusted the performance of his duty to provide plant[81].

3.5.2 Safety and Health Programs

Employers should set out in writing their respective programs and arrangements, as part of their general policy[82] of occupational safety and health law and the various responsibilities under these arrangements and communicated to the employees.

In the process of taking preventive and protective measures, the employer should address the hazardous factor or risk as provided under hierarchy of controls. Elimination of the hazardous factor or risk, substituting the hazardous factor or risk at source, minimize the hazardous factor or risk by means that include the design of safe work systems and in the event as the hazardous factor or risk remains, provide personal protective equipment, including appropriate clothing, at no cost to the workers and implement administrative control to ensure its use; having regard to what is reasonable, practicable and feasible and the exercise of due diligence.

An employee or person shall not operate or cause or permit to be operated any machinery in respect of which a certificate of fitness is prescribed, unless there is in force in relation to the operation of the machinery, a valid certificate of fitness issued under the Act[83]. In the case of any contravention of the requirement, a notice in writing

[81] *Davie* v *New Merton Board Mills Ltd.* (1959) AC 604
[82] Section 16 of OSH 1994
[83] Sec 19(1),(2) & (3) of FMA, 1967

prohibiting the operation of the machinery or render the machinery inoperative until such time as a valid certificate of fitness is issued in the forms by an Inspector.

Further, in accordance with national legislations, employers should make regular surveillance of the working environment and where necessary occupational health surveillance, provide adequate and competent supervision of work and work practices and the application and use of appropriate control measures and the periodic review of their effectiveness and conduct appropriate and periodic education and training to workers and, where appropriate, to workers' representatives, on issues relating to hazardous ambient factors.

It is the responsibility of Employers to prepare record to deal with accidents, dangerous occurrences and incidents which may involve hazards or risks to safety and health from hazardous factors. The employer has to make arrangements to eliminate or control any damage to the safety and health of workers and thereby to the public and the environment.

CHAPTER FOUR

RISKS/HAZARD ASSESSMENT AT WORKPLACE

4.0 Introduction

Injuries and accidents at workplace can be both physically and psychologically damaging. The first step in reducing the likelihood of an accident is hazard identification. Hazard identification is identifying all situations or events that could cause injury or illness. The process of eliminating or minimising workplace hazards needs a systematic approach. It is essential to try and anticipate all possible hazards at the workplace known as the *'what if?'* approach[84].

Hazard can be defined as a source or potential source of human injuries, ill health or disease. Anything which might cause injury or ill health to anyone at or near a workplace is a hazard. While some hazards are fairly obvious and easy to identify, others are not, for example exposure to noise, chemicals or radiation. Basically hazards are classified into five different types.

(i) **Physical** includes floors, stairs, work platforms, steps, ladders, fire, falling objects, slippery surfaces, manual handling (lifting, pushing, pulling), excessively loud and prolonged noise, vibration, heat and cold, radiation, poor lighting, ventilation and quality of air.

[84]Brenda Barrett & Richard Howells, Cases & Materials on Occupational Health and Safety Law;Cavendish Publishing Limited;(1995)

(ii) **Mechanical and/or electrical** includes electricity, machinery, equipment, pressure vessels, dangerous goods, forklifts, cranes, hoists.

(iii) C**hemical** includes chemical substances such as acids or poisons and those that could lead to fire or explosion, cleaning agents, dusts and fumes from various processes such as welding.

(iv) **Biological hazard** includes bacteria, viruses, mould, mildew, insects, vermin and animals.

(v) **Psychosocial environment** includes workplace stressors arising from a variety of sources.

4.1.1 The Risks Analysis

There are many methods which are can be used for identifying hazards. Employer has to review the workers' compensation data and statistics on injury and illness records and check the incidence, mechanism and agency of injury and the cost to the organisation. The additional information will be able to alert the organisation to the presence of any hazards in the future. Further, any latest information on trends and developments in workplace health and safety from available sources such as the internet or OHS publications for reference of the employees or OSH officer, Committee has to complied and documented as reference. The potential impact of new work practices or equipments introduced has to be reviewed regularly to ensure that the new work practices or

equipment introduced into the workplace in line with legislative requirements especially OSH legislations.

In terms of the duties to ensure health and safety ‘so far as is reasonably practicable’ ("SFAIRP") and duties to reduce risks ‘as low as is reasonably practicable’ ("ALARP") are determined by the court based on the particular term cited in the relevant legislation. In the case of *Edwards* v *The National Coal Board*, the Court of Appeal held that:-

> *"... in every case, it is the risk that has to be weighed against the measures necessary to eliminate the risk. The greater the risk, no doubt, the less will be the weight to be given to the factor of cost…and ‘‘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 one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other…if it be shown that…the risk being insignificant in relation to the sacrifice - the defendants discharge the onus on them."*

Thus, determining that risks have been reduced ALARP involves an assessment of the risk to be avoided, of the sacrifice (in money, time and trouble) involved in taking measures to avoid that risk, and a comparison of the two. This process can involve varying degrees of rigour which will depend on the nature of the hazard, the extent of the risk and the control measures to be adopted. The more systematic the approach, the more rigorous and more transparent it is to the regulator and other interested parties. In any given workplace there would be a large number of hazards which duty-holders could address. The risk will be not only to the duty-holders' employees but may also affect other workers and members of the public, including the local community which would be affected by an accident or incident such as an explosion on site[85].

[85] The Bhopal Tragedy in India

Risk should be assessed in relation to a hypothetical person, eg. the person most exposed to the hazard, or a person living at some fixed point or with some assumed pattern of life, such as a person who is in good health and works exactly forty hours a week with the hazard or a child present continuously in a house sited at the closest point to a major hazard. The actual persons who are to be exposed to the risk will have to be considered when the control measures determined via risk assessment are applied in practice because these measures may need to be adapted to meet the particular abilities of these persons such as ability to understand instructions.

The Employer has to conduct regular and systematic investigation of workplace incidents and 'near misses' reports can identify sources of the hazards contributing to an incident and will be able to evaluate the health and safety system at the organization. The process[86] of notification and reporting of accidents and dangerous occurrence arising out of or in connection with work has to be made promptly to enable the enforcing authorities to identify the sources of the risks and accidents and investigate the causes of accidents and injuries[87]. Consultation with employees, health and safety representatives and OSH Committee members will be able to provide valuable information about hazards and any future occurrence can be prevented or minimized.

In *General Cleaning Contractors* v *Christmas* (1953) AC 180; the employer was held to be liable as he was aware of the danger and hazard and yet continued to send its employees to work in that situation. The employee Christmas was working as window

[86] Part II of NADOOPOD 2004
[87] Adnan Trakic;ILO's Contributions in Improving Working Conditions-An Analytical Approach,(2010)3 MLJ xlii

cleaner for a window cleaning contractor. Although the firm provided safety belts for its employees but on one of the building, there was no place to attach the belts. The firm was aware of the situation but did not take any steps to ratify it. While cleaning windows on that building, a defective window sash fell onto Christmas's finger and he fell to the ground and suffered injuries. He sued the employer for failing to provide a safe place of work.

4.2 Duty to Provide Extra Protection to the Disabled

The term disabled[88] person refers to an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment. Employer has a duty to provide extra protection for the disabled employee. Under the Sex Discrimination Act/Race Relations Act and Disability Discrimination Act 1995, it is illegal to discriminate on grounds of gender, race or disability. Employer must obtain consultation of professional such doctors when appointing or handling employees with disability.

In *London Borough of Hammersmith & Fulham* v *Farnsworth* (2000) IRLR 69, an application for job as a residential social worker was rejected on the ground the applicant had history of serious depression and the occupational physician advised the employer that she likely to higher sickness absence.

Employers' and workers' organisations should adopt a policy for the promotion of training and suitable employment of disabled persons on an equal footing with other

[88] Article 1 of ILO Vocational Rehabilitation and Employment Convention (No. 159)

workers and should contribute to the formulation of policies concerning the organisation and development of vocational rehabilitation services, as well as to carry out research and propose legislation in this field.

Vocational rehabilitation services[89] in both urban and rural areas and in remote communities be organised and operated with the fullest possible community participation, in particular with that of the representative of employers', workers' and disabled persons' organisation. Community participation in the organisation of vocational rehabilitation services for disabled persons should be facilitated by carefully planned public information measures with the aims of informing the disabled persons about their rights and opportunities in the employment field, to overcome any prejudice, misinformation and attitudes unfavourable to the employment of disabled persons and their integration or reintegration into society[90].

Under ILO Vocational Rehabilitation (Disabled) Recommendation, 1955, employer is advised to take appropriate measures to create job opportunities on the open labour market, including financial incentives to employers to encourage them to provide training and subsequent employment for disabled persons, as well as to make reasonable adaptations to workplaces, job design, tools, machinery and work organization to facilitate such training and employment.

Japan has introduced a systematic mechanism to cater for the employment of disable persons in open labour market as early as in 1960s through the Physically Disabled

[89] Return To Work(RTW) under SOCSO rehabilitation programs
[90] ILO Vocational Rehabilitation and Employment Recommendation (No. 168)

Persons Employment Promotion Law (referred to as Promotion Law) and implemented by quota system, on-the-job adjustment scheme, financial assistance system and vocational guidance and placement.

Under the quota system[91], all employers are to employ a number of physically, intellectually or mentally disabled persons according to the formula stipulated under the Promotion Law. In addition, employers are to submit annual report on the status of employment of physically, intellectually or mentally disabled persons to the Public Employment Security Office (PESO). Any company which fails to satisfy the quota rate will be penalized and a levy will be imposed.

4.3 Ergonomics at Workplace

The employer has responsibility to provide for a proper workplace and workstation layout. In the technology era, most of the manual work has been replaced by machines and computers. These modern jobs often require repetition of simple operations or monitoring the production process. Despite progress in technology, the machinery and equipment designed are still not suitable to human structure and ability as people's ability to withstand physical or mental stress varies.

Workers often suffer from musculoskeletal disorders which include low back pain (related to manual lifting), cumulative trauma disorder to tendons, such as tendinitis and

[91] Fumitaka Furuoka, Bearice Lim, Khairul Hanim Pazim and Roslinah Mahmud; "Employment Situation of Person with Disabilities: Case Study of United States, Japan and Malaysia"; www.researchersworld.com Journal of Arts, Science & Commerce, Vol II, Issue 4 Oct 2011(retrieved on 10/7/2013)

bursitis, or nerve disorder conditions, such as neuritis and carpal tunnel syndrome. Low back pain injuries are generally attributed to manual handling of objects, including lifting, lowering, pushing, pulling, carrying, bending, reaching, and twisting actions. On the other hand, cumulative trauma disorders are attributed to repetitive handling of tools, repetitive motions of the upper extremities which often result in arm, elbow, shoulder and hand and wrist injuries.

The employer must identify types of injuries or illnesses foreseeable from exposure to the hazards and prevention action and steps has to taken to protect the employees from any injuries or harm and make assessment of the risks to the health and safety of his employees while they are at work. Thus, the employer to comply with the requirements and prohibitions imposed by or under the relevant statutory provisions.[92]

Therefore, an effective ergonomics program which include elements such as Management commitment and employee participation, Job hazard analysis which identifies jobs problem and risk associated with them, controlling ergonomics risk, MSDs management and training and education has to be provided and employees encouraged to participate in the ergonomics program and in decisions affecting their safety and health.

Further, it is a statutory duty on the employer to ensure that the working posture and position of the employee free of any risks. The workstations of the employees have to

[92] Regulation 3(1) of the Management of Health and Safety at Work Regulations 1992

meet the minimum requirement set by the legislations.[93] In addition, the personal characteristics of employees exposed to the risk (colour blindness or hearing impairment) has to be reviewed and taken into evaluation when arranging and planning the working environment and place.

In *Qualcast (Wolverhampton) Ltd.* v Haynes (1959) AC 743, an employee was injured when he was splashed on the leg with molten metal. The employer has provided him with protective spats but the employee failed to use it. Therefore the employer is not liable because by providing the spats to the employees; he has done all that was reasonable in the circumstances. However, when the risk which is being protected against would not be obvious to the employee or where the potential injury would be serious, the employer might have an additional duty to insist and ensure that the employee uses the safety equipments provided.

In addition, employees must also exercise some responsibility for their own safety. Employers are not under a duty to provide constant reminders to staffs about the risks involved in carrying out their tasks. In Smith v *Scott Bowyers Ltd.* (1986); the employer was held not liable for the injuries to his employee as he was not under a duty to inspect the wellington boots supplied every day to see if it needs replacement. Therefore, the plaintiff as an employee has to take some responsibility for own safety by ensuring that the wellington boots were safe to be used for the work purpose.

[93] Health and Safety (Display Screen Equipment) Regulations 1992

4.4 The Occupational Safety and Health Culture

The UK Health and Safety Executives (HSE) believes that the effective management of safety and health is vital to the employee well-being and has a role to play in enhancing the reputation of businesses as well as helping them achieve high performance teams and financially beneficial to business[94]. Therefore, safety and health culture should be the foundation and framework of occupational safety and health by educating employees through safety training and establish an accountability system that shows leadership in all aspects of occupational safety and health.

The employer has to evaluate the likelihood, or the chance of each of the situations or events actually occurring as:

(i) Very likely (exposed to hazard continuously),

(ii) Likely (exposed to hazard occasionally),

(iii) Unlikely (could happen but only rarely)

(iv) Highly unlikely (could happen, but probably never will).

Upon identifying the situations or the consequences, the next step is to act efficiently and promptly on the findings. The possible conclusions and actions to be taken can be drawn from employer's risk assessment process will be able to provide solutions and preventative methods to ensure safety and health of the employees.

[94] Phil Hughes and Ed Ferrett, *Introduction to International Health and Safety at Work,* 2010, Amsterdam: Elsevier,

In order to resolve and overcome risks that are not significant now and not likely to increase in future, current assessment and record assessment details to be recorded for future reference and review assessment. The employees has to be provided induction courses and ongoing training to create and instil awareness to follow safe working procedures will help to upgrade the level understanding of occupational safety and health at workplace

For Risks that are significant but already effectively controlled and likely could increase in the future, it is the responsibility of employer to determine precautions to maintain controls and minimise chances of higher exposure occurring, Any additional measures for regaining control if a high risk event occurs has to be determined and introduced despite precautions and further ensure that if monitoring or health surveillance is required to check effectiveness of controls such as getting the advice and consultation of the relevant authorities.

4.4.1 Fault Tree Analysis (FTA)

There are few methods to use and adopted to assist the employer to identify and take necessary precautions to protect and reduce the exposure to risks to the employees. Analysis such as the Fault Tree Analysis (FTA) can be conducted to identify the accrual problem that causes hazards. FTA is a graphical representation of the major faults or critical failures associated with a product, the causes for the faults, and potential countermeasures and used to identify areas of concern for new product design or for improvement of existing products. It also helps identify corrective actions to correct or

mitigate problems. FTA is also useful in designing new products/services or in dealing with identified problems in existing products/services. In the quality planning process, the analysis can be used to optimize process features and goals and to design for critical factors and human error.

As part of process improvement and identifying critical failures or "faults" related to the component using FTA method will provide guidance to the employer, manufacturer, designer and engineer to create and use risk free tools and equipments. Failure Mode and Effect Analysis is a good way to identify faults during quality planning. Upon identification of the Hazards, the control measures by 'hierarchy of controls'. The best way to control a hazard is to eliminate it by way of removing the hazard. If it is not possible, substitute or modify the hazard by replacing it with something less hazardous. Another control measure is to isolate the hazard by physically removing it from the workplace.

Further, an employer can adopt engineering methods to control the hazard at its source. Tools and equipment can be redesigned, thoroughly checked by the competent authorities before approved for usage and to close off the source of a hazard. The management can draft strategies by way of administrative controls[95] to ensure the health and safety of employees. Administrative procedures can reduce exposure to hazardous equipment and processes by limiting the time of exposure for example by job rotation or varying the time when a particular process is carried out.

[95] ILO Convention No. 174 – Prevention of major Industrial Accidents

Any equipment has to be repaired or replaced promptly to reduce injures and accidents the workplace. Failure on part of the employer to repair or replace will render him liable in the event of any mishaps or injures. Liability is clear when the employer upon notification of defective equipment or machine but failed to remedy it.

In *Clarke* v *Holmes* (1862) 7 H & N 937, the plaintiff employed to oil a machine. The fencing broke and it was reported to the employer. The employer failed to carry out any repairs to the machine, he was held liable for accident to the plaintiff.

Machine manufacturers and designers frequently produce machinery which places the operator under considerable stress, either through the design and location of controls or badly designed displays. It is required that the employer comply with the specifications to minimize ergonomics hazards and eventually avoid injuries such the musculoskeletal disorders. If it is not possible to eliminate the hazard, substitute it with something preferably of a lesser risk which will still perform the same task in a satisfactory manner. For example, substitute a hazardous chemical with a less dangerous one, replace telephone handsets with headsets where there is frequent use of telephone and substitute a less hazardous material to control a vapour hazard and substitute a smaller package or container to reduce the risk of manual handling injuries such as back strain.

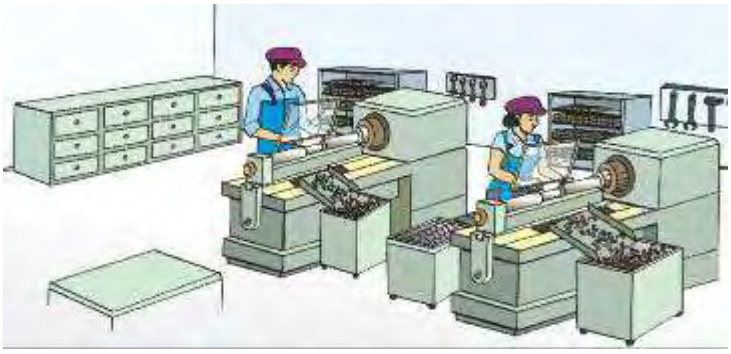

Figure 1.1: A shop floor after removal of all unnecessary items. All tools and parts are stored on shelves & racks.

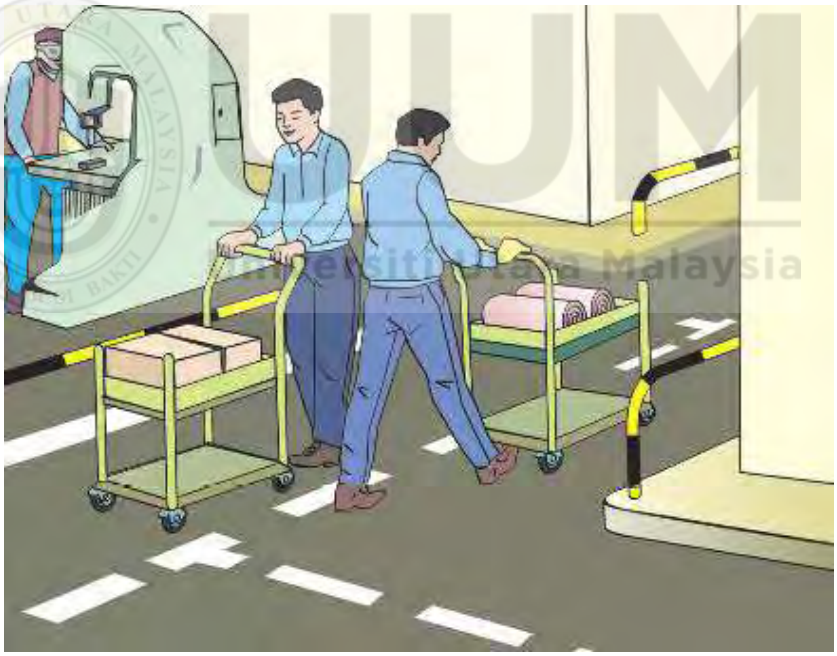

Figure 1.2: Tools provided to carry or transport materials

4.5 Hazard Control (HAZOP)

In order to control the hazard, modification or **c**hange of the plant or system of work will be to reduce hazards. For example, redesign the plant to reduce the noise levels, using lift trolley to reducing bending while lifting and installation of forced ventilation in photography darkrooms to remove vapours.

4.5.1 Isolation of the Hazard

Isolation of the problem away from staff by using separate, purpose built rooms, barricades, or sound barriers moves the hazardous process away from the main work area to a site where emissions can be controlled. For example, isolate and store chemicals properly by using a fume cupboard, isolate copying equipment and other machinery in soundproof rooms to reduce fumes and noise and use security measures to protect staff.

4.5.2 Engineering Controls

In the event a hazard cannot be eliminated, a substitution has to make to eliminate it, reduce the chance of hazardous contact. Redesign equipment, work processes or tools to reduce or eliminate the risk. For example, ensure proper machine guarding is in place[96] , use anti-glare screens on computer VDUs[97]. Employers are required to evaluate health and safety at workstations with particular reference to eyesight, physical difficulties and

[96] Factories Machinery Act (Fencing of Machinery) Regulations. 1972
[97] display screen equipment; Safety, Health and Welfare at Work (General Application)Regulations 2007

mental stress. The employer needs to carry out an analysis of individual workstations and a competent person with the necessary skills, training and experience and actively engaged in completing a physical risk assessment/analysis of the individual workstation.

4.5.3 'Back-up' Controls

Back-up control should not be relied upon as the primary method to control risk until all options to eliminate the hazard or minimise the risk have been exhausted. However it can be should be used as the initial control phase while elimination or minimisation is being evaluated and applied.

In addition, administrative controls can be implemented to increase the level of understanding and compliance among the employees and other third party on the premises or workplace. By providing training, job rotation, maintenance of plant and equipment, limitation of exposure time, provision of written work procedures to the employee, safety and health can increased and injures and workplace accidents can be reduced. For example, regular maintenance of the plant and equipment, re-design jobs, team lifting and staff rotation will be able to limit the exposure period to a hazard at workplace. The employer has responsibility to train and educate staff to identify and assessment of risks, use methods of control, legislative requirements, implement safe manual handling techniques and safe usage of mechanical aids and equipments.

Personal protective equipment (PPE) should be used as a last resort and as a short term solutions. PPE protects an employee's body from hazards and must be provided free of

charge and maintained by the employer. Employees have a responsibility to use PPE in accordance with their training and safe usage requirements and utilize PPE provided such as wearing earplugs in noisy area, wearing eye protection when working with hazardous chemicals and to wear gloves to protect against infection.

Effective hazard control involves human, financial and physical resources to the employer. Hazard control should be selected controls from the hierarchy table. In many cases, a combination of controls is used to reduce the level of risk. Reducing risk to an acceptable minimum will ensure optimum risk reduction for all.

Risk management programs are cyclical; the process of successfully controlling workplace hazards does not stop. Systematic monitoring and reviews must be implemented because of the potential for new hazards to be introduced into a workplace. These hazards can be due to the use of new technology, equipment or substances, the introduction of new work practices or procedures, a change in work environment (moving to a different office, staff reduction) and the introduction of new staff with different skill or levels of knowledge.

4.6 Safety and Health Training

Visible management support, involvement and participation in the safety and health program, assign supervisors safety and health responsibility with the authority to perform their duties, empower employees and involve them in the safety and health program. Hold them accountable and develop safety and health policy, set annual goals

and program review. Ensure that formal safety and health surveys are conducted and document job hazard analysis (JHA). It is important to develop a self-inspection program and conduct formal and informal workplace safety and health inspections. A system for tracking, reporting, and investigating near misses, accidents/incidents and injuries and/or illnesses can provide crucial information which enable to prevent or reduce any future hazards and accidents.

Every employer should established, implement and maintain an occupational safety and health management system and shall be in accordance with the requirement of the relevant Malaysian Standard or with any other equivalent Occupational Safety and Health Management System approved by Director General of DOSH.

Section 29 of Occupational Safety and Health Act 1994, Occupational Safety and Health (Safety and Health Officer) Order 1997 provides that

> "…*every contractor of any building operation and works of engineering construction when the total contract price of the project exceeds twenty million Ringgit Malaysia, they shall employ a safety and health officer. The main contractor of a worksite shall appoint a part time site safety supervisor who should spend at least fifteen hours per week exclusively on safety supervision and on promoting the safe conduct of work generally within the site*[98]".

Every main contractor, contractor and sub-contractor shall develop a safety and health manual that has provision for safe guarding the safety and health of the public and his employees. The employer has a general duty to educate workers who are exposed or likely to be exposed to a controlled product on the job.

[98] Reg.25, Building Operations And Works of Engineering Construction (Safety) Regulations, 1986

The employer should inform the workers any other hazard information that the employer is or ought to be aware of. If a controlled product is produced in the workplace, the employer should reveal all hazard information of which the employer is aware, or "ought to be aware". For the purpose of interpreting what information the employer "ought to be aware of", the employer should know about the publications and computerized information available from the Department of Occupational Health and Safety, publications available from industry or trade associations and publications from the Ministry of Human Resource.

The law[99] requires that the employer to educate "a worker exposed or likely to be exposed" to a controlled product and its safe usage. The phrase "a worker exposed or likely to be exposed" is open to interpretation and may cause problems for the workplace parties and for regulators when determining the actual number of workers to be educated. Employees must be educated and given adequate training to handle situations such as emergency and emergency evacuation.

After a worker has completed the education program, there should be follow-up. The worker has understood the training material and is able to put into practice, on the job, what he has learned. It is left to the individual employer to devise the means to ascertain that a worker has been properly trained. For example, the employer may ask the worker to take some form of written or oral test, or to participate in a practical demonstration.

[99]ssection 42(1) of HSWA,1974

4.6.1 Fire Safety Programs

A comprehensive fire safety program should have assessment, planning, awareness, prevention and response plan. An effective way to develop, implement and maintain a comprehensive safety program is to establish a cross-functional safety committee. This committee will be responsible to draft and plan a disaster preparedness plan to inform the employees, contractors and third party the necessary measures to undertake in case of a emergency at the workplace.

Proper housekeeping of any categories of sources of fire is very crucial to prevent fire hazards. The correct and proper procedures for storage of the materials according to categories such as paper, cardboards, flammable items such as electrical products and chemicals are to be followed strictly and at all times. Any unwanted or unused materials are to be disposed according the guidelines and proper methods and on regular basis. Prevention item such as fire- rated doors, fire resistant doors; fire extinguishers are to be installed according to the specifications.[100]

In addition, Fire Protection Systems such as automatic fire alarm systems have to be installed to notify the building occupants of a fire emergency. Employees or selected persons have to be given regular practical training of handling and usage of portable Fire Extinguisher and its types and categories.

[100] Fire (Designated Premises) Order 1998

An emergency response plan, procedures for emergency medical treatment should be made after consultation with the competent authorities, workers' representatives and other relevant bodies to provide medical surveillance and preventive health care for the employees. The management and the special committee have to conduct weekly inspection, operation and maintenance of fire safety equipment at the building. In the event of any renovations or repair works to be done, the contractors and the employees be given explanation on the safety measures and steps to be followed and implemented during the repair or any renovation process within the premises.

The review must take place in consultation with the joint health and safety committee and/or the worker health and safety representative, if any. The requirement for a review of the education program does not necessarily mean the retraining of workers. The review is meant to identify whether the education program needs to be updated and/or retraining of workers are necessary.

In the case of *Putra Perdana Construction Sdn. Bhd.* v *Ami Insurans Bhd & Ors* (2004) 8 CLJ 539; it was held that the plaintiff had been in clear breach of Condition 29 of the Insurance policy taken from the Defendants. The evidence indicated that there were inadequate fire extinguishers at the building, that the same were not inspected regularly and that there was no regular clearance of waste/inflammable materials from the site. The plaintiff had also failed to obtain the hot-work-permit-system under the policy mandated to minimize fire risk. Thus, there had been breach of Condition 29 of the Insurance policy. The breaches here were not 'technical' in nature and therefore the

defendants, in repudiating their liability, could not have breached the BNM Guidelines. The defendants had therefore lawfully repudiated liability under the policy.

4.6.2 Emergency Response Program

Diagram 2- Overall view of elements within an Emergency Response Program (ERP)

OSH requires an emergency response program to have at the following components such as emergency escape procedures and routes, reporting fires and emergencies, critical "shutdown" procedures, employee headcount procedures and rescue and medical procedures and adequate assistance and support for the disabled employees in the event of an emergency.

CHAPTER FIVE

FINDINGS AND RECOMMENDATIONS

5.0 Conclusion

This chapter provides conclusion and make recommendation based on findings in this study. Based on the discussion above, it can be noted that level of legal compliance under OSH 1994 and other legislations among the manufacturing sector is satisfactory. However, the management and workers can contribute more effectively in nurturing safety and health working culture in the manufacturing sector. There are avenues for improvements in occupational safety and health measures to be taken in order to increase further the level of compliance, understanding and knowledge among the employees, employers and other parties involved.

As discussed earlier, the rights and obligations of employers and employees with regards to occupational safety and health can be derived from four primary sources. These sources are common Law duties and obligations, statutory duties, the terms and conditions contained in an employment contract of service and ILO Conventions and Recommendations.

Common law duties and statutory duties are vital in perspective of employment law in view that statues have been enacted to provide safe and healthy work environments and also to provide protection to employees from exploitation by employers who are prepared to negotiate on safety aspects in order to increase productivity. In *Ready Mix Concrete (South East) Ltd.* v *Minister of Pensions and National Insurance (*1968) 2 QB

497; Mackenna J states a contract of service exists when the following conditions fulfilled:-

i) The servant agrees in consideration of wage or other remuneration, to provide his own work and skill in performance of service for his master;

ii) He expressly or impliedly agrees to be subjected to the other's control in the performance of the service;

iii) The other provisions of the contract are consistent with its being a contract of service.

Under the contract of service, a man is employed as part of the business; whereas under a contract for service, his work although done for the business, is not integrated into it but is only accessory to it[101]. In the course of this performance of service, both parties have obligation to each other to ensure that all the legal requirements and rules are adhered to. Among these, the employer has to provide adequate facilities and maintenance of plant and safe systems[102] of work, ensuring that usage or operation of work do not pose risks to health, provides training and supervision to employees and extra protection to disabled employees and owes a duty of care under tort to the employee.

[101]Lord Denning in Stevenson Jordan and Harrison Ltd v. McDonald and Evans (1969) 2 QB 173,
[102]Groves v Wimborne (Lord) [1898] 2 QB 402; injuries caused by a breach by his employers of their duty under s10(1)(c) of the Factory and Workshop Act 1901

The employees in return have to take reasonable care for the safety and health at workplace, to co-operate with the employer and other person in discharge of duty or requirement imposed on employee[103], to wear protective equipment or clothing provided by the employer and to comply with instruction on occupational safety and health instituted by the employer or any relevant Act.

5.1 Effective Management in Occupational Safety and Health Law

The importance of an effective workplace safety and health program cannot be over emphasized. There are many benefits from such a program including increased productivity, improved employee morale, reduced absenteeism and illness, and reduced workers' compensation rates. Despite sophisticated safety and health regulations in most countries, high rates of injury and fatality persist. The procedures intended to prevent such accidents are usually mandated by the appropriate occupational safety authority in each country (Gee and Saito, 1997). Scholars and professionals within any industry recognize that regulations and legislation by themselves are not enough to bring about the desired goal of zero accidents and incidents on workplace sites especially high risks such as manufacturing and construction.*[104]*

At first glance, many safety and health legislative and regulatory frameworks are prescriptive[105]. Additionally, these standards and regulations tend to support the

[103]Section 24(1) (b) of OSHA 1994

[104]Monahan, Genevieve Louise, M.S.: Cultural knowledge of women in the construction industry related to occupational health and safety, The University of Arizona, 1988

[105]The prescriptive approach is concerned with enforced conformity to the law, regulations and rules and act in accordance with all applicable rules and standards that usually represent minimum requirements, technology or changes in working procedures.

traditional command-and-control, deemed-to-comply, or prescriptive approach of addressing unsafe conditions, existing and potential hazards while placing little, if any, emphasis on addressing unsafe worker behaviour. Simply providing and enforcing prescriptive rules and procedures not sufficient to foster safe behaviour in the workplace (Reason, 1998). Legislative frameworks have to effectively address the work environment and procedures. It is the role of management to interpret how the provisions of such frameworks will be enacted relative to working practices.

Safety and health regulations have been subjected to major revisions during the last three decades. In some cases, new legislative and regulatory approaches have entirely replaced existing regulations and legislation. The emphasis of these new pieces of legislation in Europe, the United Kingdom and New Zealand, for example, has been on individuals and their duties. Additionally, they represent a noticeable departure from previous prescriptive approaches (Coble and Haupt, 1999; 2000). They have been based on principles designed specifically to increase awareness of the problems associated with safety and health issues.

According to Clinard and Yeager (1980) corporate crime is "any act committed by corporations that is punished by the state, regardless of whether it is punished under administrative, civil, or criminal law." Violations of OSH laws include infractions of both worker health and worker safety. Firms can be cited for relatively minor violations, like failure to post safety instructions and failure to maintain records on health and safety. On the other end, firms are cited for lack of safety equipment, poor electrical

wiring, and any worker illnesses, injuries, or deaths[106]. Further, criminal liability is imposed upon employer who failed to comply with the statutory requirement of OSH, 1994[107] and FMA, 1967[108].

However, in an international environment where no uniformly accepted international safety and health standards currently exist, it is extremely difficult for safety and health practitioners to ensure that they create workplaces that are safe for their workers. Consequently, workers are forced to interpret the compliance requirements of legislation, implement construction practices, and use construction materials with which they are unfamiliar. Increasing economic globalization necessitates the international harmonization and necessitates the development of regulatory standards and requirements critical to competition and economic efficiency (Office of Management and Budget 1996).

5.2 Recommendations

There is a lot of medium can be approached in introducing OSH and the best element to use is to approach safety and health through the Social Security Organization (SOCSO), DOSH and NIOSH. The Social Security Organization is an organization set up to administer, enforce and implement the Employees' Social Security Act, 1969 and the Employees' Social Security (General) Regulations 1971. The Social Security Organization provides social security protection by social insurance including medical

[106] Section 31 of FMA 1967
[107] Section 19 of OSHA 1994; a fine not exceeding RM50,000 or imprisonment not exceeding 2 years.
[108] Section 51 of FMA, 1967

and cash benefits, provision of artificial aids and rehabilitation to employees to reduce the sufferings and to provide financial guarantees and protection to the family. SOCSO is a medium where the employee will get medical insurance and cash benefits from the accident. These bodies can be use as a medium to introduce safety and health to the employee which it will give benefits to them and help them to improve the safety awareness in employee.

Additionally, DOSH impose to all the manger and senior manager to have the Safety and Health certificate before they start a business because if there is accident occur in the workplace but the organization does not implement safety and health in the organization, it will be the companies fault whereby it is their responsibility to maintain the welfare of their workers. It is obviously that the business is all about money but the company has to remember that their employee is the asset of the company. Without employee there will be no production of outcomes.

The other ways to improve the ways of carrying out OSH is by reduce the cost of training whereby to those who already had the OSH certificate, they have to renew every six month to make sure that the safety knowledge is up to date. This approach will help to increase the importance of safety in workplace and at the same time it will be able to reduce the level of accident in the organization.

5.2.1 Public Policy on Occupational Safety and Health Law

Public policy such as federal and state policies will be able to encourage or enhance workers' participation in decision-making. This will add a rich source of new ideas, as well as helping to prevent risk shifting from the environment to the worker and consider workers as important stakeholders in decisions inside and outside the workplace. Adequate training program is required for workers engaged in any hazardous activities and the workers have right to refuse unsafe work.

Both the employers and employees should be encouraged to reduce workplace hazards by developing mandatory safety and health standards & enforce them by inspections, employer assistance and imposing citations, penalties or both. In addition, cooperative programs, partnerships and alliances can be set-up.

5.2.2 Unions and Representatives

Unions play very important role in any issues related in the workplace and able convey the message effectively to the employees. Thus active involvement of union can improve the safety of the work environment for union members, while increasing the strength of the union. Unions, therefore, should develop and organize OSH Management System programs to maximize workers' involvement and greater integration in occupational safety and health. In order to achieve, joint sessions of health and safety and rep to be held to develop common outlooks and knowledge base to better integrate health and safety approaches in the workplace.

5.2.3 Training and Programs

Lack of training limited the degree of participation of workers' in occupational safety and health programs. Relevant training programs for workers are needed to enable them to fully participate in decision-making. Cross-training of health and safety and environmental representatives, where they exist, or providing environmental training for health and safety union representatives will provide benefits to both the workers and the environment. Integrated training programs that combine occupational safety and health and environmental health approaches for management, professionals and labor will help build better more integrated prevention programs.

The effective OSH Training will contribute towards making the employees competent in health and safety, avoid the financial costs of accidents and occupational ill health, will reduce damage of products, lost production and de-motivated staff. The management must ensure that employees understand the hazards to which they may expose and how to prevent harm to themselves and others from exposure to these hazards, so that employees accept and follow established safety and health protections. This will help to the increase of awareness and compliance towards the aspects of safety and health aspects in the organization.

5.2.4 Additional Legal Protection

Accidents that lead to occupational injuries and fatalities are a result of a combination of many factors. These factors converge at the same time with the victim, causing an injury or fatality. These same factors could also converge at another time and create a "near-

miss" incident but are not recognized as an event that could cause injury. In essence, OSH and OSH compliance are one piece of the puzzle. A number of legislations provide employees legal protection to workers for getting involved in safety and health matters. For example, under Section 11(c) of the HSWA, 1974, employees have rights to voice concerns to an employer, union, any other government agency, or others about job safety or health hazards, filing safety or health grievances, participating in a workplace safety and health committee or in union activities concerning job safety and health and refusing to work when a dangerous situation threatens death or serious injury where the employee unable to obtain a correction of the dangerous conditions.

5.2.5 Employees' Rewards Program

Rewards for safety performance are no different from rewards for performance in any other area where management asks for performance from the employees and can increase the employees' commitment towards safety and health at work. It can include financial reward and all the things that motivate the employees, recognition, chance for advancement, increased pay etc and this incentive system must have a good structure, fair and applicable to all employees. Then, it can increase their level of awareness, responsibility and compliance towards safety and health working procedure and thus inculcate the acculturation of safety and health working culture among them.

5.3 Future Research

The concept of liability and responsibility of employers is often subjective and needs interpretation of the legislations by the court. A clear distinction cannot be drawn to categorize the situation where and when the employer's liability arises. It can be seen from the courts' decisions and established principles, one cannot determine the extent of liability that the court will impose on the employer.

Any wrongdoing, malice or fraud will not negate the employer's vicarious liability[109]. An employer will be held liable for tortious acts of his employees[110]. On the other hand, there are instances where the courts very carefully divide sets of circumstances to identify whether employer's liability exists in given situations. Therefore, thorough analyzing of each arising situation is necessary in enforcing the general duties, liabilities and responsibility of employers in issues of occupational safety and health at workplace.

Further research is needed in compliance of occupational safety and health law of the employees, employers and third party at various work sites. It would also be interesting to analyze in more depth the self-care activities workmen in manufacturing have for health promotion and treating injuries. Further examination of their attitudes toward health care providers and options for treatment from traditional and non-traditional sources would be useful in planning safety and health services for the workmen.

[109] *Lloyd* v *Grace, Smith & Co*. (1912) AC 591
[110] *Barwick* v *English Joint Stock Bank* (1967) L.R.2 Exch. 259

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