The Occupational Safety and Health Law in Malaysia: The Way Forward

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Abstract

The Occupational Safety and Health Law is an important aspect of industrialisation. Malaysia had recognized its importance by enacting Ordinances way back before it obtained its independence. Changes were made to the Ordinances and the Acts to suit the needs of the growing nation. Starting with a very prescriptive and technical Ordinances and Statute, Malaysia subsequently adopted a Statute that emphasises on self-regulation, consultation and cooperation between the relevant parties with the introduction of the Occupational Safety and Health Act 1994. This article was aimed to look at the existing legal frame work which governs the occupational safety and health law in Malaysia, its problems and how Malaysia can move forward in the future.

I. Introduction

When an accident at the workplace happens, the media will have a field day covering it. Some examples of reported work-related deaths are due to gas leakage,[1] death due to accidents at the construction sites,[2] or death due to falling objects.[3] Media coverage and statistics show that the number of accidents at the workplace is still high. The high dependency on foreign workers does not help the situation since these workers are not skilled workers. Hence it is important to look at the legal framework which governs the occupational safety and health law in Malaysia and see how this legal framework helps to overcome this problem. It is impossible to eradicate accidents at the workplace totally but it is hoped that Malaysia would be able to minimise these accidents in the

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[1] 12 August 2009, Ammonia leakage resulted in faulty refrigeration killing a store manager and 5 other workers in Selangor.

[2] *Death at work site: Company director charged*, The Star, 17 December 2003, pg 18.

[3] Dr Liew Boon Horn died when his car was hit by a 720 kg concrete from a building which was under construction at Plaza Damas, *Contractor has a bad record*, The Star, 4 January 2006, pg 7.

future. In order to do that, we have to look at how the present legal framework can be reviewed and rethought to enable Malaysia to move forward.

II. Historical Perspective

The Federation of the Malay States obtained its independence[4] on 31st August 1957 and Malaysia was formed on 16th September 1963, comprising of the Federation of the Malays Sates, Sabah, Sarawak and Singapore.[5] The primary agenda at the time was to unite the various ethnic groups in the Federation in order to enjoy political stability. At the same time, efforts were made to improve the country's economy. This had resulted in the introduction of machineries and factories in Malaysia in the push for industrialisation. The opening up of factories and usage of these machineries on a large scale required some mode of regulatory regime on the part of the government in order to ensure the safety and health of those who worked in the factories and worksites.

Even prior to the Independence, the Federation of Malay States had legislated a few enactments to cater for the need of ensuring the safety and health of the people who worked with machineries in the factories. Machinery Ordinance 1953[6] was enacted for the Federated Malay States and similarly, the Labour Protection Ordinance[7] for Sarawak and Machinery Ordinance[8] for Sabah. All these ordinances were replaced by the Factories and Machinery Act 1967[9] which came into force on the 1st of February 1970 in the Peninsular of Malaysia and on the 1st of July 1980 in Sabah and Sarawak.[10] After 24 years of being the only statute that dealt with the occupational safety and health law in Malaysia, the government introduced another Act, known as the Occupational Safety and Health Act 1994.[11]

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[4] Hereinafter referred to as "the Independence".
[5] Singapore left Malaysia in 1965.
[6] The ordinance came into force on the 30th April 1953.
[7] Cap 115, came into force in 1935.
[8] No 4 of Cap 75, and came into force on 2 December 1920.
[9] Act 139.
[10] PU(B) 321/80.
[11] Act 514.

III. Occupational Safety and Health Law in Malaysia

A. *Common Law*

Before the introduction of the two main Acts, the occupational safety and health law is governed mainly by the common law. The common law states that it is the implied duty of the employer to provide a safe system of work for his employees while working under a contract of employment.[12] This duty is personal and non-delegable.[13] The employer can delegate such duty to be carried out by a third party but the employer could not escape liability if the duty which was delegated, was not properly performed, resulted in injuries to the employees.[14] The scope of the duty comprises of three aspects—employing efficient workers,[15] sufficient equipment and materials,[16] and an effective and comprehensive supervision.[17] The employer must fulfil the standard of care exercised by a reasonable employer, who takes a positive thought for the safety of his workers in light of what he knows or ought to know and he must keep reasonably abreast with the development in his industry.[18] The employer is allowed to follow any accepted practices in his industry unless it is shown to be otherwise in light of newer development.

The common law duty to provide a safe system of work by the employer was accepted as the obligation which must be carried out by the employer by virtue of section 3 of the Civil Law Act 1956.[19] The court in the case of *Tan Chong Seng v Yang Kam Hah*[20] held that the employer was in breach of such duty when he allowed his employees to determine how the work should be carried out, without any supervision, which resulted in the employees injuries.

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[12] *Paris v Stepney Borough Council*, [1951] AC 367; *General Cleaning Contractors Ltd v Christmas* [1953] AC 180.

[13] *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] 1 IRLR 334; *Cook v Square D Ltd* [1959] 2 QB 57.

[14] *McDermid v Nash Dreging & Reclamation Co Ltd* [1987] 1 IRLR 334.

[15] Glass McHugh Douglas, *The Liability of Employers*, 2nd ed. (1979), pp 49-50.

[16] *Cole v De Trafford (No 2)* [1918] 2 KB 523 and *General Cleaning Contractors v Christmas* [1953] AC 180.

[17] *Wilsons and Clyde Coal Co v English* [1938] AC 57.

[18] *Stokes v GKN (Bolts and Nuts) Ltd* [1968] 1 WLR 1776.

[19] Act 67 and the case of *Jamil bin Harun v Yang Kamsiah* [1984] 1 MLJ 217.

[20] [1970] 1 MLJ 175, see also *Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govindasamy* [1982] 2 MLJ 232 (FC).

Failure to provide safety equipment to the employees is also considered as a breach to such duty.[21] The court in the case of *Mat Jusoh v Syarikat Jaya Seberang Takir Sdn Bhd*[22] echoed the position taken by the common law when it held that the duty to provide a safe system of work encompasses the employment of efficient workers, providing sufficient materials and equipment and effective and comprehensive supervision.

The employer's duty to provide a safe system of work will only be scrutinized when an accident has taken place and the employees are injured. The court would then determine whether the employer had fulfilled his obligation as required by the law. Until and unless an accident happens, the system of work practised by the employer is deemed to be safe. No accident or injury is equivalent to a safe system of work. This may not be true but without any accidents, it is difficult to say otherwise. Thus the common law system does not discuss any preventive measures which must be introduced to prevent accidents from happening. Due to this weakness, the government felt that it was important for Malaysia to have its own written provisions for a safe system of work, which emphasises more on prevention. Aside from this, the need to have a written provision on a safe system of work was also contributed by the fact that the remedy in common law is not available to a wider group of workers. However with the introduction of the Employees' Social Security Act 1969[23] the status quo has changed. The Act was introduced to pay compensation to workers who are injured in the course of their employment, without them having to prove who is at fault. As long as they are covered by the Act, the injuries are injuries defined in the Act, they should be eligible to receive the compensation. The amount of compensation would be determined according to the nature of the injuries. The compensation should be paid within a short period of time after the accident. With this approach, section 31 of the Employees' Social Security Act 1969 bars any employee who falls under the purview of the Act or his dependents from bringing other similar claims under

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[21] *Mariasusai s/o Suminder v Nam Hong Trading Co Ltd & Anor* [1975] 2 MLJ 271 and *Chang Fah Lin v United Engineers (M) Sdn Bhd* [1978] 2 MLJ 259.

[22] [1982] 2 MLJ 71.

[23] Act 4. Section 1(2) provides that the Act is applicable throughout Malaysia to workers who are earning less than RM 3,000 a month as provided in section 2(5) and paragraph (a) of the First Schedule.

any other law, including a claim in common law.[24] In 2006, there were 5,454,799 active employees registered under the Act.[25]

B. *Factories And Machinery Act 1967*

The Factories And Machinery Act 1967[26] was introduced to cater for the basic requirements for the occupational health and the industrialization. When this Act was enacted, Malaysia started to introduce factories and machineries as part of industrialization. Factories and machineries are used in manufacturing sectors such as chemical and mineral based industries, microelectronics, constructions, textile as well as in the automobile industry. The emphasis of the Act is on the establishment of factories and the use of machineries in those factories. As such the Act was prescriptive and technical in nature. For example, section 10 of the Act prescribes the provisions which govern the physical aspect of a factory,[27] whilst section 36 requires the approval of the Inspector before any machinery can be installed in a factory. The same requirement must also be complied with if the machine is to be moved, altered or added.[28] The nature of the Act requires the Inspector to play an active role in ensuring the place of work is safe. This obligation can be seen throughout the Act which requires the Inspector to approve or to inspect everything that is taking place in the factory or with the machinery. In 2006, the Act was amended to allow the appointment of a licensed person to perform any of the functions specified in the Act.[29] It is hoped that with these appointments, the workload of the Inspector could be lightened and more premises could be inspected to ensure compliance with the Act. Aside from inspecting and providing approval, the Inspector is also responsible for issuing a certificate of fitness for certain machinery.[30] He will also issue special orders pertaining to the usage of certain

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[24] *Che Noh bin Yacob v Seng Hin Rubber (M) Sdn Bhd* [1982] 1 MLJ 81; *Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269; and *Liang Jee Keng v Yik Kee Restaurant Sdn Bhd* [2002] 2 MLJ 650.

[25] www.perkeso.gov.my. Retrieved on 5 March 2010.

[26] Act 139. The Act came into force in Peninsular Malaysia on 1st February 1970, in Sabah and Sarawak on the 1st of July 1980, PU(B) 321/80.

[27] *Inter alia* the foundations, floors and roofs shall be of sufficient strength, all floors, working levels, decks and passages must be safely constructed, providing safe access, goods and articles must be stored safely.

[28] Section 39 of Factories And Machinery Act 1967.

[29] Section 7D of Factories And Machinery Act 1967.

[30] Section 19 of Factories And Machinery Act 1967.

machinery[31] and accept notifications of accidents, dangerous occurrences and dangerous diseases.[32] Once the said notification is accepted, the Inspector will commence preliminary investigation and enquiries before making the appropriate orders.[33]

The employer and the employee need not be proactively involved in the occupational safety and health issues at the workplace. As long as they follow all the instructions given by the Inspector, they are adhering to the law. For example, the duties of the employer who is also an occupier would include keeping the factory clean, provide sufficient ventilation of fresh air, maintaining the correct temperature, providing suitable lightning and sanitary conveniences.[34] The employer must provide for personal protective clothing and appliances for workers who are exposed to a wet or dusty process, noise or heat or any poisonous or corrosive substance, in accordance with the guidelines provided by the Minister.[35] While the requirement for the workers' welfare can be seen in the duties of the employer to provide a first aid kit, drinking water, toilets and washing facility.[36] This is further enhanced with the introduction of provisions on specific health hazards in the workplace such as asbestos, lead, mineral dust and noise.[37] These provisions enable the exposure to the harmful substance to be measured, establish the permissible exposure level and introduce control measures such as medical and health surveillance.

The duty of the employees can be seen in section 20 of the Act which provides that they cannot wilfully interfere with or misuse any of the appliances in the factory which are provided as part of the safety, health and welfare infrastructure. The employees must also use the appliances which are provided for their safety, health and welfare. The employees also have a duty not to

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[31] Section 27 of Factories And Machinery Act 1967.
[32] Section 31 of Factories And Machinery Act 1967.
[33] Section 33 of Factories And Machinery Act 1967.
[34] Section 21 and 22 of the Factories And Machinery Act 1967.
[35] Section 24 of the Factories And Machinery Ac 1967.
[36] Section 25 of the Factories And Machinery Act 1967 and Factories And Machinery (Safety, Health and Welfare) Regulations 1970.
[37] Factories And Machinery (Asbestos Process) Regulations 1986, Factories And Machinery (Lead) Regulations 1984, Factories And Machinery (Noise Exposure) Regulations 1989, Factories And Machinery (Mineral Dust) Regulations 1989.

wilfully and without reasonable cause act in any manner which may cause bodily injury to himself or other person or damage to any machinery or other property.

Overall the Act was based on a traditional checklist system whereby the hazards are identified and measures to overcome them are stipulated. The Act further depends very much on the command and control approach thus relying heavily on its enforcement officers, i.e. the Inspectors. This approach has not allowed the Act to be fully maximized due to shortage in manpower, the increase of the numbers of factories registered under the Act and the increase in the usage of machineries. A more comprehensive Act which requires a more proactive involvement of the employer and his employees is needed to be introduced and this was seen in the Occupational Safety and Health Act 1994.

C. *Occupational Safety and Health Act 1994*[38]

In 1992, there were 132,983 occupational accidents in Malaysia.[39] In 1993, there was an increase to 134,549 cases.[40] The increase in the number of occupational accidents forced the government to rethink and review the occupational safety and health law in Malaysia. Even though we have the Factories And Machinery Act 1967, it failed in its effort to ensure safety at the workplace. Its scope is limited and its approach is outdated. Thus, the government introduced a much more comprehensive Act not only to fulfil the current needs but also to be in line with the recommendations of the International Labour Organisation (ILO). Malaysia is not a signatory to the Convention 155 Occupational Safety and Health 1981, but the spirit of the said convention can be found in the new Act. The Act is known as the Occupational Safety and Health Act 1994. This Act is enforced by the Department of Occupational Safety and Health (DOSH), which was the same department that handled the enforcement of the Factories And Machinery Act 1967. With the name change, the department now is responsible for the enforcement of both Acts. This is

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[38] Act 514, and the Act came in to force on the 24th February 1994.

[39] Foo Chek Lee, *Effectiveness of Safety Management System-The Malaysian Perspective*, pg 2. www.mbam.org.my/resources/images/article1.pdf. Retrieved 27 April 2002.

[40] *Ibid.*

because when the new Act was introduced, the Factories And Machinery Act 1967 was not repealed. Thus now in Malaysia we have two written statutes on occupational safety and health, if there is any conflict between the two, the provisions of the Occupational Safety and Health Act 1994 will prevail.[41]

The Occupational Safety and Health Act 1994 was derived from the philosophy of Roben's Commission on Health and Safety at Work Act 1974 (UK). The said philosophy emphasises on self-regulation, consultation and cooperation between the employer, employee and designer, manufacturer, supplier and the government. The Act believes that the person who created the risk (that is the employer) and the person who must work with the risk (that is the employee) must be involved in ensuring the place of work is safe. They will be the best people to know what is needed to be done in order to minimize or eradicate the risk at the workplace. Thus this Act had transferred the burden of ensuring that the place of work is safe from being the responsibility of the enforcement agency (DOSH) to the employer and the employee. With this approach the Act became less prescriptive and more reflective-type.

The Act is wider in its application whereby it covers all employees[42] in the industry[43] within the public and private sectors. Thus for some industries such as manufacturing, mining, quarrying and construction, they would have to comply with both this Act and the Factories And Machinery Act 1967. The wider coverage given by this Act had addressed one of the setbacks faced by the Factories And Machinery Act 1967.

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[41] Section 2 of the Occupational Safety and Health Act 1994.

[42] Section 3(1) defines employee to include those who are employed for wages under a contract of service on or in connection with the work of the industry and those who are employed on any work which is accidental to the industry; those who are employed on work which is ordinarily part of the work of the industry; those whose services are lent or let on hire temporarily to the principal employer.

[43] Section 3(1) defines industry as to means public services, statutory authorities or any of the economic activities listed in the First Schedule. The industries include manufacturing, mining and quarrying, construction, agriculture, forestry and fishing, utilities, transport, storage, communication, wholesale and retail trades, hotels, restaurants, finance, insurance, real estate, business services, public services and statutory authorities.

The philosophy on consultation can be seen with the establishment of National Council for Occupational Safety and Health.[44] This Council is comprised of 15 council members with tripartite representation from Government, employers, employees and Occupational Safety and Health professionals (with at least one female member).[45] The power of the Council is to do all the things necessary to carry out the objectives of the Act including making recommendations for changes to the Act, to improve the administration and enforcement of the Act, to foster a co-operative consultative relations between the management and labour on safety, health and welfare at the workplace.[46]

The cooperation between the employer and his employees can be seen in the establishment of the Safety and Health Committee. This committee must be formed by any establishment with 40 workers and above.[47] The committee is required to meet at least once in every three months, with the functions to identify hazards at the workplace, institute control measures, and investigate incident and conducting audit. The employee who is a committee member and exercises his function as a committee member is protected by the law from dismissal.[48] However, an employer has so many other ways to terminate the employee's contract of employment without resorting to the fact that he is a committee member as grounds for termination.[49] Thus this will indirectly affect the degree of the willingness of the employee to become a member in the committee.

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[44] Section 8 of the Occupational Safety and Health Act 1994.

[45] Section 9 of the Occupational Safety and Health Act 1994.

[46] Section 11 of the Occupational Safety and Health Act 1994. The Council had organized '*Kempen Bulan Kesedaran Keselamatan dan Kesihatan Pekerjaan*' once every 2 years, distributing posters, stickers, organized seminars for the management of the companies and other activities in collaboration with DOSH. http://www.mohr.gov.my/mengenai/mengenai.htm. Retrieved 23 November 2005.

[47] Section 30 of the Occupational Safety and Occupational Safety and Health (Safety and Health Committee) Regulations 1996. In relation to the terms of representation, workplace with less than 100 workers will need to have at least two representatives each for workers and management respectively. However, workplaces with more than 100 workers will need to have a minimum of four representatives each for workers and management.

[48] Section 27 of the Occupational Safety and Health Act 1994.

[49] For example, termination with notice as required by the contract of employment.

The cooperation between the employer and the employee is further strengthened with the duties which must be fulfilled under the Act. Employers must safeguard so far as is practicable, the health, safety and welfare of the employees.[50] This applies in particular to the provision and maintenance of a safe plant and system of work. This includes the safety in the use, handling, storage and transport of plant and substance. The employer has the duty to provide the necessary information, instruction, training and supervision in safe practices pertaining to the operation of its organization.

The Act also imposes a duty on the employee in ensuring the workplace is safe. As an employee, it is his duty to take reasonable care at work for his safety and the safety of others.[51] An employee who takes reasonable care for his safety will indirectly ensure that his co-employees will also be safe. The use of the word "reasonable" allows the duty to be based on an objective test. The Act also stipulates the need for the employee to cooperate with his co-workers, use personal protective equipment or clothing provided by his employer, and to comply with the instructions given by the employer. The employees are prohibited from interfering or misuse anything which is provided in the interest of safety, health and welfare at the workplace.[52] On the other hand, the employer is not allowed to charge the employees for any equipment which he provides in compliance with this Act.[53]

The Act does not limit the cooperation between the employer and his employees only but also extend it to cover the relationship between them and other parties such as manufacturers, designers and suppliers.[54] The manufacturers, designers and the suppliers must ensure so far as practicable that the plant[55] is safely designed and constructed. They must also carry out testing from time to time, to do research in order to minimize the risk, to distribute adequate information pertaining to the plant, and if it involved any

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[50] Section 15 of the Occupational Safety and Health Act 1994.
[51] Section 24 of the Occupational Safety and Health Act 1994.
[52] Section 25 of the Occupational Safety and Health Act 1994.
[53] Section 26 of the Occupational Safety and Health Act 1994.
[54] Section 20 of the Occupational Safety and Health Act 1994.
[55] Section 3(1) of the Occupational Safety and Health Act 1994 defines 'plant' to include machinery, equipment, appliance, implement or tool, any component thereof and anything fitted, connected or appurtenant thereto.

installation, to install it safely. The same duty is also extended to the usage of substance in the workplace.[56]

The third philosophy of the Act is self-regulation. This approach requires the employer to be self-regulated. The employer is given the freedom to decide what the safety measures are necessary for his organization. In order to be able to do this, the employer must evaluate his operation, understand the risks and find ways to minimize or to eradicate the risks. This approach can be seen where the Act imposes a duty on an employer to formulate a safety and health policy.[57] Another important element of self-regulation can be seen in the provision on Industry Codes of Practice.[58] The Code of Practice can be approved by the Minister as a guideline to the employer in those industries. The industry can initiate the formulation of the Code of Practice and it must be reviewed from time to time.[59] However, the Act does not make it compulsory for the employer to comply with the Code of Practice but at the same time the Code of Practice shall be admissible as evidence in any proceedings for non-compliance of the provisions of this Act.[60] The other feature of self-regulation can be found in the provision that requires an employer to appoint a safety officer in a specific industry.[61]

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[56] Section 21 of the Occupational Safety and Health Act 1994.

[57] Section 16 of the Occupational Safety and Health Act 1994 and Occupational Safety and Health (Employer's Safety and Health General Policy Statements) (Exception) Regulations 1995. The requirement to formulate this policy is impose on employer with more than 5 employees.

[58] Section 37 of the Occupational Safety and Health Act 1994.

[59] An example of the Code of Practice will be the Code of Practice for HIV and AIDs in the workplace.

[60] Section 38 of the Occupational Safety and Health Act 1994.

[61] Section 29 of the Occupational Safety and Health Act 1994 and Occupational Safety and Health (safety and Health Officer) Regulations 1997. A safety officer must be employed where the contract exceeds twenty million ringgit, any ship building, gas processing activity, petrochemical industry, chemical and allied industry with more than hundred employees, metal industry, wood industry and cement with more than five hundreds employees.

IV. The Way Forward

With the presence of not one but two legislations on occupational safety and health law in Malaysia, the statistics has shown that the rate of accidents had decreased from 10.3 cases for every one thousand workers in 2000 to 5.62 cases in 2006.[62] In 2008, the rate is further reduced to 4.2 cases for every one thousand workers.[63] Based on these figures, it cannot be denied that both the statutes have been successful in reducing employment accidents. However, reducing the accidents should not be the only concern for both statutes. The statutes must also address other issues which are associated with occupational safety and health in order for them to move forward, to become more comprehensive in handling occupational safety and health issues in Malaysia. Amongst the other issues that need to be addressed are:

A. *Sexual Harassment at the Workplace*

The definition of occupational safety and health should be widened to include sexual harassment and violence at the workplace.

Sexual harassment came into the limelight when the Ministry of Human Resources launched the Code of Practice on the Prevention of Sexual Harassment in the Workplace in 1999. The Minister[64] stated that there were 42% to 70% of female employees who had experienced sexual harassment at the workplace.[65] Sexual harassment can also result in absenteeism, employee turnover, low morale and low productivity,[66] the same results which can be seen if an employment injury took place. The employee who was injured will be absent from work, there will be stoppage of work due to the need for an investigation; employee turnover will take place if the injury repeats itself and this will affect the morale and productivity of the employees. Thus, safety at work must also be extended to cover a place of work that is free from sexual

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[62] *Kadar kemalangan pekerja di Malaysia menurun*, Utusan Malaysia, 14 November 2006, pg 25.

[63] Annual Report 2008.

[64] Yang Berhormat Dato' Lim Ah Lek.

[65] Yang Berhormat Dato' Lim Ah Lek, Human Resources Minister, at the launching of *Bengkel Kebangsaan Gangguan Seksual di Tempat Kerja* on the 1st March 1999.

[66] Freada Klein, The 1988 Working Women Sexual Harassment Survey.

harassment. With this approach, sexual harassment at the workplace will no longer be viewed as a problem that only affects female workers. Sexual harassment can also happen to a male worker as is proven in the case of *Varitronix (M) Sdn Bhd v R. Thandavanaiker P Raman*.[67]

B. *Workplace Violence*

Workplace violence is another issue that needs to be addressed. UK Health and Safety Executive (HSE) defines violence as "Any incident, in which a person is abused, threatened or assaulted in circumstances relating to their work." Workplace violence involves varying degrees of severity, including physical and non-physical assaults. If it involves physical assaults, then normally this will fall within the scope of misconducts as provided by the company's manuals or regulations. It will be treated as such. Hence the normal procedure of domestic inquiry will be held before the said employee is dismissed subsequent to the finding of guilt. The problem lies with the non-physical assaults which may involve threat or abuse such as name calling, shouting, screaming or staring. The effects of violence in the workplace are also similar to employment injuries because it affects the employees' morale, motivation and performance. This will lead to absenteeism, low productivity and high turnover.[68] This problem may not be prominent now but it is something that may one day become serious. So it would be good if preventive measures are put in place to address the problem.

C. *The Autonomy to the Employer*

The Occupational Safety and Health 1994 gives the employer autonomy in carrying out his duties under the Act. The employer is given the freedom to formulate the occupational safety and health policy for his organization. In order to do this effectively, the employer must review and evaluate its own operation, to identify the risks, the seriousness of the risks and the preventive measures which must be taken to minimize or eradicate the risks. This freedom

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[67] [2004] 3 ILR 893.

[68] For further reading please refer to Dr Faridahwati Mohd Shamsudin & Rohana Abdul Rahman, *Workplace Violence in Malaysia and the Relevance of OSHA 1994*, Malaysian Management Review, 41(1) at pg 1.

is not fully appreciated by the employer, bearing in mind that the Factories And Machinery Act 1967 never allowed the employer to think or make any decision for himself pertaining to the safety issue at his workplace. The employer especially those in the small and medium industries will not be able to fulfil the said requirement in comparison with the multi-national companies. The new Act should be commended for trying to introduce this autonomy to the employer, but the culture, and the previous Act did not quite prepare the employer for that task in order to fulfil the objective of the new Act. Thus the autonomy given to the employer has failed to make the employer realise that whether a place of work is safe or not depends very much on him as he is the person who is in control of it. DOSH must be more proactive in creating awareness and explaining to the employers that they have this autonomy and thus must be responsible in exercising it. It is sincerely hoped that one day all the employers in their respective and specific sectors, will work together to be self-regulated. They will be the ones who set the standards for safety and health at the work place. By being self-regulated, the government's role vide DOSH will be further minimised. The employers will be able to initiate any other changes that they think necessary pertaining to safety at work in the future. Since they are the persons who create the risks, thus they will also be the best persons to minimize or eradicate the risks.

The autonomy given by the Occupational Safety and Health Act 1994 also does not produce the impact as expected by the legislature because of the segregation between the issues on safety at work and also compensation for employment injury. The occupational safety and health is being monitored by the Occupational Safety and Health Department (DOSH) while the compensation is handled by the Employees' Social Security Organisation (SOCSO), which has been created by the Employees' Social Security Act 1969.[69] Under this kind of arrangement, if there was an accident at the workplace, DOSH will investigate the accident and issue an improvement notice or a prohibition notice to the employer.[70] The employer needs to comply with the notice before he is allowed to continue his operation. At the same time, the employer will notify SOCSO of the accident and compensation would

[69] Act 4.

[70] Section 48 of the Occupational Safety and Health Act 1994.

then be payable to the injured employee. Both the employer and the employee contribute monthly payments to SOCSO. The compensation is paid based on the no fault principle. The injured employee need not prove that the employer was at fault before he can be compensated. The employee is prohibited by the law from claiming any other compensation including under common law from his employer for the said injury.[71] Thus, the employer is not worried; in the event of an accident, his employee will be compensated, and the compensation is paid by another agency. The fact that the employee is prohibited from bringing a claim under common law further allows the employer to be complacent. He will not be liable to pay additional compensation even if he has breached any of the statutory provisions under either Occupational Safety and Health Act 1994 or the Factories And Machinery Act 1967. He may be liable under the statutes but not to his employee. Even though he is given the autonomy to decide the safety precautions that needs to be adopted by his organization, he did not exercise such right for the fact that he will not suffer any additional monetary loss *vis-à-vis* his employee. If this autonomy is fully appreciated by the employer, the employment injuries could be minimised because he knows and understands the importance of being self-regulated.

D. *The Standard of Care under the Two Legislations*

The two statutes impose different standards of care for the employer in carrying out their duties. The Factories And Machinery Act 1967 provides for three standards, that are "so far as reasonably practicable",[72] the use of the word "shall..." followed by what the employer must do[73] and "so far as practicable".[74] For the second standard, the courts interpret it to mean an absolute duty which must be fulfilled by the employer.[75] The standard of "so far as practicable" should be considered to be higher than what is required by common law

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[71] Section 31 of the Employees' Social Security Act 1969 and the case of *Che Noh Yacob v Seng Heng Rubber (M) Sdn Bhd* [1982] 1 MLJ 80; *Sambu Pernas Construction v Pithchakkaran* [1982] 1 MLJ 269.

[72] Section 10(1) (c) of the Factories And Machinery Act 1967.

[73] Sections 11, 31 or 37 of the Factories And Machinery Act 1967.

[74] Section 22(1) (c) (i) of the Factories And Machinery Act 1967.

[75] This can be seen in the case of *Ong Beng How v Guan Seng Sawmill (Pte) Ltd* [1979]1 MLJ 8; *Wee Bian Hock v Keppel Shipyard (Pte) Ltd* [1979] 1 MLJ 13 and *Chong Eng chye v Almagated Lumber Sdn Bhd* [1982] 2 MLJ 48.

because of the fact that there is no element of reasonableness. While the phrase "so far as reasonably practicable" will have the same meaning as what is provided by the common law. With the difference in the standards throughout the Act, it is not easy for the employer to understand the required duties. The Act should be amended in order to make it consistent and easier for the employer to understand.

The Occupational Safety and Health Act 1994, on the other hand, uses "so far as practicable" as the standard for the employer in carrying out his duties. The word "practicable" means practicable having regard to – (a) the severity of the hazard or risk in question; (b) the state of knowledge about the hazard or risk and any way of removing or mitigating the hazard or risk; (c) the availability and the suitability of ways to remove or mitigate the hazard or risk; and (d) the cost of removing or mitigating the hazard or risk.[76] Thus the question is whether the standard is similar to what we have under the Factories And Machinery Act 1967 which uses "so far as practicable" too. The only difference is that the Factories And Machinery Act 1967 did not define the meaning of practicable, but the new Act did. Thus, by looking at the standard and the definition given in the Act, it seems to indicate that the standard is not as high as the standard under the Factories And Machinery Act 1967. This is because even though the element of reasonableness is missing from the phrase, the definition of practicable forces the court to consider those factors in determining whether what the employer did was so far practicable or not. Since the factors to be considered includes the cost and there is no element of reasonableness, the court need not take into account as to what other reasonable employer who is in the same league as this employer would have done. As no comparison is required, therefore whether what is practicable depended very much on the subjectivity of the employer. This has made the standard under the Occupational Safety and Health Act 1994 lower than what is provided for under the Factories And Machinery Act 1994. This observation does not seem to be in line with the reasoning that the Occupational Safety and Health Act 1994 is the latest Act and it is to be given priority. The situation becomes more complicated with the fact that the court has yet to be given a chance to interpret the meaning of the said phrase, not because there was no prosecution

[76] Section 3(1) of the Occupational Safety and Health Act 1994.

but because the employer who was prosecuted had pleaded guilty.[77] As the foremost and the latest statute on occupational safety and health law in Malaysia, the standard in the Occupational Safety and Health Act 1994 should be interpreted as to require a higher standard. The court should be given an opportunity to determine the standard. Sadly to say, this is not so yet. Pleading guilty allowed the case to be settled quickly and imposing a fine[78] allowed the government to collect the money. It did not at the end of the day benefit the employer and the employee. The two groups who are involved directly with the risks are still in the dark as to what the standard is. Without knowing what the standard is, how could the employers be expected to know what they have done is enough to protect their employees? So the uncertainty persists but this should not be the case.

E. *The Enforcement and Incentive*

DOSH is the agency which is responsible in enforcing both the Factories And Machinery Act 1967 and the Occupational Safety and Health Act 1994. The agency's role will be visible once an accident takes place. It will conduct an investigation to determine the cause before issuing an improvement notice or a prohibiting notice.[79] After the employer had complied with the requirement of the notice, the employer is allowed to continue with its operation as usual. Since the agency's involvement is only seen after the accident had taken place, it is important for the agency to inform the public as to what action it had taken against the employer. This is important because when an accident takes place, the media will give it a wide coverage; everybody who is anybody will give statements and suggestions. After a while, nobody remembers as to what had happened and life goes on until the next accident happens. Due to this the public was under the perception that DOSH did not do much in enforcing the Act.[80] To move forward DOSH must make changes in its approach of handling the media coverage after an accident takes place. It is important for DOSH to

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[77] Syarikat Hualon Corp (M) Sdn Bhd, *Landmark case in factory safety*, The Star, 28 October 2003, pg 10.

[78] Section 19 of the Occupational Safety and Health Act 1994 stipulates the fine not exceeding RM 50,000 for a breach of duty on the part of the employer under section 15, 16, 17 or 18.

[79] Section 48 of the Occupational Safety and Health Act 1994.

[80] *Urgent need for DOSH to beef up enforcement*, The Sun, 5 June 2001, pg 13.

inform the public as to what action had been taken pertaining to the accident. The information must be communicated to the public, so that the perception that DOSH is not doing enough can be rebutted. Making all the information public will also allow other employers in the same or similar industries or organization to take note and make the necessary changes in ensuring the workplace is safe. This will also create transparency and accountability.

F. *Safety at Work as Part of a Work Culture*

Even though all the employers understand that occupational safety and health at the workplace is important but not all of them could appreciate it if it cannot be shown how it will benefit them financially. The employer needs to invest money in order to make his place of work safe by making certain changes to the physical aspect of his premises, buying certain equipment for protection against the risk. This investment will only be done if the employer believes that he will benefit from it. In our culture where benefits are measured by ringgit and cents, asking the employers to invest in safety measures will not be easy. This is particularly so if the employer is a small or medium size industry where any extra money should be set aside as part of the capital. Thus the safety and health aspect will be neglected by this category of employers particularly if his employees are already covered by SOCSO in case of any injury. Thus he does not see the need to invest in this aspect of his business.

It is important to change the mindset of these employers. It is important to inculcate in them that making their workplace safe will benefit them in the long run because it will be more economical bearing in mind that all the expenses that they have to incur when an accident takes place. For example, when an accident takes place, the place of work will be closed when an investigation is carried out which, would in turn, affect the company's productivity. Once the investigation is concluded, DOSH may ask the employer to make certain changes as part of the improvement or to stop the employer from using the relevant method of production or machinery. Thus, the employer needs to spend some money to comply with the order. At the same time, since the injured employee is on medical leave, the employer needs to get another employee to take over the job. Indirectly, money needs to be spent; albeit it is hidden, but it is interrelated to the accident.

If an employer can be made to realize that it is cheaper to make an investment before an accident takes place, then maybe setting requirements that the place of work is safe will not be so difficult. Thus it is important for the government and its agencies to accord recognition to those employers who have willingly invested their money in this aspect of their business. Maybe this can be shown vide, for example, the priority given to them in awarding government tenders, in obtaining financial assistance to expand their business and in getting certain tax exemptions. Without any reward or recognition, these employers will not be willing to do more than what they are doing now because of the lack of incentive.

V. Conclusion

Malaysia is certainly on the right track in her efforts to create a safe system of work for its workers by enacting the Factories And Machinery Act 1967 and the Occupational Safety and Health Act 1994. The provisions of the latest Act signalled the readiness of the government to allow the employers to decide for themselves as to the safety measures required for their organizations. A more significant role must be played by the employer and the employee in ensuring that the place of work is safe. In order for them to play this role effectively, they must understand and appreciate their respective roles. The freedom to decide will only be meaningful if it is accompanied with the appreciation of the nature and the consequences of such a decision. Without such an understanding, the legislative objective to move forward as was envisaged in 1994 with the introduction of the Occupational Safety and Health Act 1994 will not materialise.