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The Legal Approach on Occupational Safety, Health and Environmental Management: Focusing on the Law of Private Nuisance and International Labour Organisation (ILO) Decent Work Agenda

[1]Muhammad Rizal Razman, [2]Abdul Samad Hadi, [3]Jamaluddin Md. Jahi,
[4]Kadir Arifin, [4]Kadaruddin Aiyub, [4]Azahan Awang, [4]A. Hadi Harman Shah,
[2]Ahmad Fariz Mohamed and [2]Shaharuddin Idrus
[1]Faculty of Science and Technology,
School of Environmental and Natural Resources Sciences (PPSSSA),
Kebangsaan Malaysia University, 43600 UKM Bangi, Selangor, Malaysia
[2]Institute for Environment and Development (LESTARI),
[3]Institute of the Malay World and Civilization (ATMA), 43600 UKM Bangi, Selangor, Malaysia
[4]Faculty of Social Science and Humanities,
School of Social, Development and Environmental Studies (PPSPP),
Kebangsaan Malaysia University, 43600 UKM Bangi, Selangor, Malaysia

Abstract: The law of private nuisance plays an important role in the occupational safety, health and environmental management. The used of the law of private nuisance to the area of the occupational safety, health and environmental management is largely in reply to the necessity of every each employee to protect his or her rights and interests on the safety health and environment at the work place. The above-mentioned protection, in a way, fit in the International Labour Organisation (ILO) Decent Work Agenda elements. Therefore, this study will examine the used of the law of private nuisance in relation to the occupational safety health and environmental management from Malaysian legal perspectives, identify actions and cases, which deal with the occupational safety, health and environment at the work place. Finally, discuss the law of private nuisance as a tool to protect employees on the safety, health and environment at the work place in Malaysia in accordance to International Labour Organisation (ILO) Decent Work Agenda.

Key words: The law of private nuisance, occupational safety and health, environmental management, International Labour Organisation (ILO) Decent Work Agenda

INTRODUCTION

Malaysian economic growth in the year 1996-2000 with an average of 4.7% annually surpassed the targeted annual growth of 3.0%. The actual Growth Domestic Product (GDP) between the period of the year 1996-1997 is 8,7% per annum, before having experienced a negative growth at 7.4% in the year 1998. The Malaysian government's efforts to build up the economic from its downturn (Asian financial crisis) in mid 1998 is successful and as the result the country's economy growth at 7.2% from 1999-2000. The income per capita that suffered badly in the year 1998 has shown positive tone, by increasing even higher than the amount before the economic crisis to RM 13,359 in 2000. The financial policy, which has been introduced in the year 1998, helps to stimulate the country's economic growth and at the same time managed to control inflation. In addition, the unemployment rate maintained low as 3.1% (Kadir *et al*., 2002).

Manufacturing, construction and services has performed extremely well before the economic crisis. Example, the construction sector has been developed rapidly at 13.4% per annum between the period of the year 1996-1997. Unfortunately, the construction sector had shrunk by 23 and 5.6% in 1998 and 1999, respectively. Nevertheless, the actions made by the government managed to help the survival of the said sectors. As the result the said sectors not only contribute to the Malaysian GDP, but also created job opportunities in Malaysia. During the period of the year 1996-1999 the total overall number of workers in all industrial sectors in

Corresponding Author: Muhammad Rizal Razman, Faculty of Science and Technology,
School of Environmental and Natural Resources Sciences (PPSSSA), Kebangsaan Malaysia University,
43600 UKM Bangi, Selangor, Malaysia

Malaysia estimated at 8.5 million. However, these sectors need a form of systematic management, especially in controlling the accident problems at workplace. As been reported by SOCSO 1993-1998, total accident is a nightmare to employees. As an example, total fatal accident in 1993 and 1998 are 653 and 1,046 cases, respectively. These figures are critical, if overall total accident and those accidents involving lost of ability are taken into consideration (Kadir and Jamaluddin, 2001; Kadir *et al*., 2002).

LAW AND OCCUPATIONAL SAFETY, HEALTH AND ENVIRONMENTAL MANAGEMENT IN MALAYSIA

Based on the above discussion, clearly shown the need of the good occupational safety, health and environmental management at the work place. The occupational safety, health and environmental management can be divided into 2 parts. The first part is the occupational safety, health and environmental management through non-legal approaches and the second part is the occupational safety, health and environmental management through legal means (Jamaluddin, 1993a; Kadir and Jamaluddin, 2001).

The occupational safety, health and environmental management through non-legal approaches can be done through education, research, monitoring, public policies, guidelines and development plans (Jamaluddin, 1993b, 2001; Kadir and Jamaluddin, 2001). On the other hands, the occupational safety, health and environmental management through legal approaches can be classified into two classifications. There are occupational safety, health and environmental management through public law and occupational safety, health and environmental management through private law (Razman and Syahirah, 2001; Razman, 2001, 2002; Kadir *et al*., 2002).

Law governs the relationship of the individuals with the State and also with one and another. An easy approach to examine how it operates in the legal system is to classify it in the light of its relationships (Beatrix and Wu, 1991). Law may be classified into two parts. There are Public Law and Private Law. Public law governs the relationship between the State and the individual and as for private law, also known as civil law, governs the relationship between an individual and another individual (Beatrix and Wu, 1991).

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

Law of tort consist 4 types of areas. There are law of trespass, law of negligence, law of public nuisance and law of private nuisance. As for this study is concerned, this study deals with the law of private nuisance as a tool for occupational safety, health and environmental management in Malaysia.

LAW OF PRIVATE NUISANCE AND OCCUPATIONAL SAFETY, HEALTH AND ENVIRONMENTAL MANAGEMENT IN MALAYSIA

There is no specific statute in Malaysia governs the law of private nuisance. In this situation, when there is no specific statute governs the particular private law, therefore, Civil Law Act, 1956 (Revised 1972) will take place. According to the section 3 of the Civil Law Act, 1956 (Revised 1972) stated that:

- Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
  - In West Malaysia or any part thereof, apply the common law of England and rules of equity as administered in England on the 7th day of April, 1956
  - In Sabah, apply the common law of England and rules of equity, together statutes of general application, as administered or enforced in England on the 1st day of December, 1951
  - In Sarawak, apply the common law of England and rules of equity, together statutes of general application, as administered or enforced in England on the 12th day of December, 1949

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

Based on the section 3 of the Civil Law Act, 1956 (Revised 1972), it is clearly that in the event, where there is no specific statute governs a particular private law, the common law, rules of equity and statutes of general application, as administered or enforced in England shall be applied so far only as the circumstances of States of Malaysia and their respective inhabitants permits and

subject to such qualifications as local circumstances render necessary (Wu, 1987; Razman and Syahirah, 2001). Therefore, the law of private nuisance in Malaysia is based on the English law of private nuisance.

PRIVATE NUISANCE

According to the definition given by Lord Scott in the case of Read and Lyons and Co. Ltd. (1945) K.B. 216, 236 defined private nuisance in following words:

> Private nuisance as unlawful interference with a person's use or enjoyment of land or some right over or in connection with it.

In addition, Ball and Bell (1995) further explained the above-mentioned definition illustrates the essential difference between private nuisance and other law of torts, such as, law of negligence and law of trespass, in which the protection afforded is directed towards controlling proprietary interests rather than the control of an individual's activity and conduct. This law of private nuisance, which gives the protection of proprietary interests may provide a general helpful to the members of the public as a means to protect environment.

REASONABLENESS

In the situation, where the injured party (the plaintiff) intents to take legal action against the polluter (the defendant) based on the law of private nuisance, the plaintiff is required first of all, to establish to the court that the defendant failed to use his land reasonably.

The above-mentioned principle is based on the case of Saunders Clark and Grosvenor Mansions Company Limited and D'Alles-Sandry (1900) 2 Ch.D. 373. According to Buckley J. in the case of Saunders Clark v Grosvenor Mansions Company Limited and D'Alles-Sandry (1900) mentioned that:

> The court must consider, whether the defendant is using his property reasonably or not. If he is using it reasonably, there is nothing, which at law can be considered a nuisance but if he is not using reasonably… then the plaintiff is entitled to relief.

Thus, the plaintiff's legal action against defendant based on the law of private nuisance, the court will determine the matter by using the balance between the reasonableness of defendant's conduct and its impact upon the plaintiff's ownership rights. In assessing the balance, the court will ensure the following factors, which include:

- Locality
- Duration
- Sensitivity on the part of the plaintiff
- Intention of the defendant
- The utility of the defendant's activity (Wolf and White 1995)

Locality: Locality is the first factor to determine the reasonableness of the defendant's activity and conduct. Thus, the case of St. Helens Smelting Co. and Tipping (1865) 11 HLC 642 explains the matter. According to the case of St. Helens Smelting Co. and Tipping (1865) 11 HLC 642.

Parties' involved: St. Helens Smelting Co. as the Appellants/Defendants and Mr. Tipping as the Respondent/Plaintiff. Fact of the case: Mr. Tipping the Respondent/Plaintiff obtained a piece of land situated at the St. Helens. Later, Mr. Tipping the Respondent/Plaintiff used the above-mentioned land for agricultural purposes. St. Helens was an industrial area. Moreover, nearby Mr. Tipping's land, the Appellants/Defendants conducted works dealing with copper smelting. The works on copper smelting had caused damages Mr. Tipping's agricultural works. Therefore, Mr. Tipping took legal action against St. Helens Smelting Co. based on the law of private nuisance. On earlier part, the Court gave decision to Mr. Tipping the Respondent/Plaintiff. Later St. Helens Smelting Co. the Appellants/Defendants appealed to the House of Lords.

Court's decision: The House of Lords drew the distinction between a private nuisance, which causes actual damage to the property and a private nuisance, which causes personal discomfort. In order to determine whether a personal discomfort can be considered under legal action based on the law of private nuisance, it is very essential to take into consideration the factor of locality. However, on the other hand, the factor of locality is not taken into account in the event of a private nuisance, which causes actual damage to the property. Therefore, in this case Mr. Tipping the Respondent/ Plaintiff able to prove to the House of Lords that this case based on a private nuisance, which causes actual damage to the property, where the factor of locality is not taken into account. Thus, Mr. Tipping the Respondent/Plaintiff, therefore, managed to recover the above-mentioned damages.

In dealing with the factor of locality, it is best to refer the quotation made by Lord Thesiger in the case of Sturges and Bridgman (1889) 11Ch.D. 852, 865. Based on the case of Sturges and Bridgman (1889) 11Ch.D. 852, 865, Lord Thesiger mentioned, What would be nuisance in

Belgrave Square would not necessarily be so in Bermondsey. Therefore, an interference that may be permissible and it is may not be considered as nuisance in one place but the interference may not be permissible and it is may be considered as nuisance in another place (Rogers, 1989).

However, the above-mentioned authority does not give an absolute freedom to anyone, who is in the location of industrial estate to emit and cause pollution in which, causing other individual's personal discomfort or an individual has been given planning permission by the authority to conduct an activity that may causing other individual's personal discomfort. Thus, if an injured party able to show to the court that, the polluter in the area of industrial estate or the individual that obtained the planning permission failed to comply statutory requirements and act unreasonably, therefore, the court will allow the legal action under the law of private nuisance based on the personal discomfort. There are two cases that highlighted the above-mentioned principles. Rushmer v Polsue and Alfieri (1906) Ch.D. 234 and Gillingham BC v CV Medway (Chatham) Dock (1992) 3 WLR 449.

Duration: The second factor that will be taken into consideration under the law of private nuisance is the duration of the interference made by the defendant. The plaintiff is required to prove to the court that the duration of the interference caused by the defendant that is not considered as temporary basis in nature.

According to the case Harrison v Southwark and Vauxhall Water Company (1891) 2 Ch.D. 409: Fact of the case:- The Southwark and Vauxhall Water Company as the defendants conduct an activity in a piece of land. The said land was next to Mr. Harrison's land that was the plaintiff. The activity was concerned about pumping water from a shaft. The activity had caused noise to Mr. Harrison.

As the result of the said noise, Mr. Harrison took legal action against the Southwark and Vauxhall Water Company under the law of private nuisance. Court gave decision to the defendants on the ground that the plaintiff failed to establish the second factor under the law of private nuisance is the duration. The duration of the interference caused by the defendants in this case was not permanent in nature but only temporary in nature. Therefore, the court refused to accept the action made by the plaintiff. In addition, in this case, Vaughan Williams J. mentioned that ... for instance, a man who pulls down his house for the purpose of building a new one no doubt causes considerable inconvenience to his next door neighbours during the process of demolition but he is not responsible as for a nuisance, if he uses all reasonable skill and care to avoid annoyance to his neighbour by works of demolition. Nor is he liable to an action, even though the noise and dust and consequent annoyance be such as would constitute a nuisance if the same.....had been created in sheer wantonness or in the execution of works for a purpose involving a permanent continuance of noise and dust.

The sensitivity of the plaintiff: The third factor in the law of private nuisance that the court will take into account is the sensitivity of the plaintiff. If the plaintiff failed to prove to the court that his sensitivity is a normal one, therefore, the court will reject the plaintiff's legal action under law of private nuisance. The above-mentioned matter has been discussed in the following cases: Robinson v Kilvert (1881) 41 Ch.D. 88 and Health v Brighton Corporation (1908) 98 L.T. 718.

According to the case of Robinson and Kilvert (1881) 41 Ch.D. 88, fact of the case the plaintiff was a tenant. The plaintiff had occupied the upper part of defendant's building. The plaintiff had used the upper part of the building as a paper storage. At the same time, the defendant had conducted an activity that required the lower part of the building in the environment of dry and hot. Unfortunately, the defendant's activity had caused damage to papers belong to plaintiff, which had been kept at the upper part of the said building. Later, the plaintiff took legal action against the defendant under the law of private nuisance.

The court gave decision favour to the defendant and refused to the legal action made by plaintiff under the law of private nuisance. The court gave decision as such because papers that belong to the plaintiff was having extra sensitivity, if compared to normal and ordinary type of paper. From the evidences that being tender to the court, the court satisfied that the defendant's activity would not caused damage to normal and ordinary paper. In addition, the plaintiff failed to inform to the defendant on the existence of the extra ordinary sensitive paper in the upper part of the said building.

Meanwhile, based on the case of Health v Brighton Corporation (1908) 98 L.T. 718; the plaintiff was the priest of a church. The plaintiff took legal action against the defendant under the law of private nuisance. The reason the plaintiff took the action because the defendant's activity had caused a loud noise to the church, which under the administration of the plaintiff. The court gave decision favour to the defendant and refused to accept the plaintiff's action. The court held that the plaintiff failed to prove to the court the following matters. The plaintiff failed to prove that the loud noise caused by the defendant had interrupted the church activities and the attendance of the public to the said church.

Intention of the defendant: The fourth factor that court will take into the consideration in legal action made under the law of private nuisance is the intention of the defendant. The plaintiff is required to show to the court that the defendant's action has an element of malice. This element of malice will be considered as the defendant's action is unreasonable. The above-said principle is based on the following cases. There are Christie and Davey (1893) 1 Ch.D. 316 and Hollywood Silver Fox Farm Ltd. v Emmett (1936) 2 K.B. 468.

Based on the case of Christie v Davey (1893) 1 Ch.D. 316, the fact of the case, the plaintiff was a music teacher. The plaintiff had conducted music lessons in the plaintiff's house. The defendant was plaintiff's neighbour, who stayed next door to the plaintiff. Defendant's house was being separated by a piece of wall. The plaintiff took legal action against the defendant under the law of private nuisance. The action was being taken by the plaintiff on the ground that the defendant had caused interference, when the plaintiff conducted music lessons by creating unreasonable noise.

The court gave decision favour to the plaintiff. This is because the defendant had caused the unreasonable noise with the intention of malice. In other words, the defendant purposely created unreasonable noise in order to disturb the plaintiff. In addition, North J. mentioned that If what has taken place had occurred between two sets of persons both perfectly innocent, I should have taken an entirely different view of the case.

Next case, the Hollywood Silver Fox Farm Ltd. v Emmett (1936) 2 K.B. 468; the fact of the case, the plaintiffs used the land for breeding silver foxes. On the other hand, the defendant, who was a person owned a land nearby to the plaintiffs' land. The plaintiff took legal action against the defendant under the law of private nuisance. The legal action was being taken by the plaintiff on the ground that the defendant had purposely caused guns shoot on the defendant's own land. The guns shoot that caused by the defendant had disturbed the plaintiffs' silver foxes during breeding period.

The court gave decision favour to the plaintiff. This is because the defendant had caused the guns shoot with the intention of malice. In other words, the defendant purposely caused guns shoot in order to disturb the plaintiffs' silver foxes during breeding period. In this case, Macnaghten J. mentioned that the female silver foxes are highly nervous during breeding period and a lot of damage was created as the result of the defendant's activity in which with the intention of malice.

The utility of the defendant's activity: The final factor that court will take into the account in legal action made under the law of private nuisance is the utility of the defendant's activity. The plaintiff is required to prove to the court that the defendant's activity that caused interference to the plaintiff is not utility advantage and benefit to other public members. In addition, based on Hughes (1992), in the event, where the defendant is carrying out activities that give a general benefit to the members of public, the private nuisance will be considered reasonable.

EXAMPLES OF ACTIONS UNDER THE LAW OF PRIVATE NUISANCE ON OCCUPATIONAL SAFETY, HEALTH AND ENVIRONMENTAL MANAGEMENT IN MALAYSIA

There are a number of cases that has been brought forward to the Court of Law on Occupational Safety, Health and environmental management under the law of private nuisance. Among the leading cases in Malaysia, there are Pacific Engineering Limited v Haji Ahmad Rice Mill Limited (1966) 2 MLJ 142 and Chan Jen Chiat v Allied Granite Industries Sdn Bhd (1994) 3 MLJ 495.

According to the case of Pacific Engineering Limited v Haji Ahmad Rice Mill Limited (1966) 2 MLJ 142. The defendants had conducted an activity dealing with burning rice husks on defendants' land. The defendants activity had caused interference to plaintiffs' personal comfort. The plaintiffs' personal discomfort, which, was caused by rice husks, dust, smoke and ash, came from the defendants' activity. Therefore, the plaintiffs took legal action under the law of private nuisance. The plaintiffs' argument, the plaintiffs mentioned that the defendants' activity, which, burning rice husks on their land, bringing and permitting rice husks to be remained on the defendants' land, the rice husks to such amount and in such way as to caused a danger from fire to plaintiffs' property and the rice husks, itselves may caused discomfort to plaintiffs' workers, contractors and visitors. The defendants' argument; the defendants stated that their activity on their land was noxious in the sense of being injurious to health.

In addition, the defendants' added that the plaintiffs claims were based on abnormal sensitivity, which the plaintiffs are not entitle for the actions under the law of private nuisance. The court gave decision to the plaintiffs because the plaintiffs able to show to the court that the evidences of the injury to the plaintiffs and interference to the plaintiffs' comfort. In addition, it is sufficient enough for the plaintiffs to show the court on the interference with plaintiffs comfort only and it is not necessary for the plaintiffs to show the court that the interference should be noxious in nature that caused injury to health.

Next, based on the case of Chan Jen Chiat v Allied Granite Industries Sdn Bhd (1994) 3 MLJ 495. The defendants had conducted an activity in dealing with the construction of a factory on the defendants' land. The defendants' activity had caused pollution to the water that flow through the defendants' land. The said water had been used by the plaintiff as source of water for fishery and horticulture purposes. In addition, the defendants' activity also had caused interference to plaintiff's flow of water. Therefore, the plaintiffs took legal action under the law of private nuisance.The plaintiff's argument, the plaintiff mentioned that the defendants' activity, which dealing with construction of a factory on their land, had caused interference to the flow of the water as well as polluting the said water. Therefore, the said activity had caused private nuisance to the plaintiff who operates fishery and horticulture business nearby the neighbourhoods. The defendants' argument; the defendants stated that their activity on their land was only temporary basis. In other words the said activity was not permanent in nature. Therefore, the defendants' were carrying out the said activity in reasonable and proper manner.

The court gave decision to the plaintiff because the plaintiff able to show to the court that the evidences of the injury to the plaintiff and interference to the plaintiff's business permanent in nature. The defendants' activity had caused pollution to the water that flow through the defendants' land, which the said water had been used by the plaintiff for fishery and horticulture purposes and in addition, the defendants' activity also had caused interference to plaintiff's flow of water.

CONCLUSION

Based on the above discussion, in the event, when an individual suffers injury or damage, the said individual may take legal action against the wrong doer under law of private nuisance. Under the law of private nuisance, the court will determine the matter by using the balance between the reasonableness of defendant's conduct and its impact upon the plaintiff's ownership rights. In assessing the balance, the court will ensure the following factors, which include; locality, duration, sensitivity on the part of the plaintiff, intention of the defendant and the utility of the defendant's activity (Wolf and White, 1995). These factors have reflected the protection towards the employees, which fit in two elements of International Labour Organisation (ILO) Decent Work Agenda i.e., social protection and fundamental rights in order to ensure economics and social progress.

In addition, Ball and Bell (1995) mentioned that the foundation for the law of private nuisance is the balance between competing rights of neighbours to utilize their asset as they wish. It must be emphasized that not all interference can be considered as a private nuisance. Therefore, in order legal action can be taken under the law of private nuisance, the plaintiff must establish that the interference is an unreasonable interference with an occupier's (that refer to the employer) interest in the beneficial use of his land. This approach reflects fair and equality towards both employers and also employees in the name of justice.

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