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The Law of Tort Focusing on Negligence Towards Environmental Sustainability in Malaysia Within The Scope of Interest Approach

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Abstract: The law of tort focusing on negligence plays an important role towards environmental sustainability in Malaysia. The application on the law of tort focusing on negligence within the scope of interest approach to the area of environmental sustainability is largely in reply to the necessity of individual to protect his/her interests and rights against environmental pollution and harm. Therefore, this study will examine the application on the law of tort focusing on negligence in relation to interest approach and sustainability from Malaysian legal perspectives. Identify actions and cases which deal with interest approach as a tool in order to achieve environmental sustainability.

Key words: Law of tort, negligence, environmental sustainability, interest approach, environmental pollution

INTRODUCTION

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 private law and public law. Private law, also known as civil law, governs the relationship between an individual and another individual and as for public law governs the relationship between the state and the individual (Beatrix and Wu, 1991; Sulaiman and Razman, 2010).

Both above-mentioned laws play an important role towards environment sustainability and protection. The development of the law towards environment sustainability and protection is not solely based on private law alone anyway, public law has also made contribution to serve similar function towards environment sustainability and protection (Razman and Azlan, 2009; Razman *et al*., 2010a).

The criminal law is an example of public law. Criminal law is a law which states and explains all the acts and omissions which are considered criminal actions. Criminal law laid down all types of acts and omissions that constituted as offences done individuals against the states (Razman and Syahirah, 2001). The criminal law aims to combat and punish the criminals (Razman and Syahirah, 2001). In criminal law, the public prosecutor who will represent the state to prosecute the individuals that have been accused to commit criminals actions (Razman and Syahirah, 2001). There are two main elements of a crime, wrongful act known as actus reus and wrongful mind known as mens rea (Lee, 1998). Therefore, the public prosecutor is required to proof to the court of law both of elements beyond reasonable doubt (Lee, 1998; Razman and Syahirah, 2001). It is clearly that the criminal law is a law that regulating and governing of a state and an individual or group of individuals.

Next, an example of private law in is the law of tort focusing on negligence. Law of tort focusing on negligence is a law that laid down the responsibilities of an individual or group of individuals to ensure that the acts and omissions of their actions will not cause any harm and/or detrimental to other individual or other group of individuals (Sulaiman and Razman, 2010). Failure to comply with these responsibilities, the said individual or the said group of individuals who suffered injuries, damages and/or losses may bring the claim to the court of law against the party who fails to comply with those obligations (Razman *et al*., 2009a, 2010b). In private law which include the law of of negligence, the party that initiate the legal proceeding is known as Plaintiff and the

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other party that being sued known as the defendant (Razman and Syahirah, 2001). It is clearly that under the private law which include the law of of negligence, concerned with the law governs the relationship between individuals.

Therefore, this study examines the application of law of tort focusing on negligence with relation to the environment sustainability and protection from interest approach by identifying actions and cases which deal with the subject matters. This study is also identifying the relation between the law of tort focusing on negligence and the concept of sustainability as a means to enhance the environmental protection within the scope of interest approach.

THE INTEREST APPROACH

Based on Barrett (2003) and Hasenclever *et al.* (1997), there are two types of classification on the idea of interest approach namely the first group that emphasises on the international institutions and the second group which is less using the international institutions.

The first group emphasises on the international institutions effort to bring together states around the globe to realise the common interests that balance with benefits and costs involvement in creating environmental co-operations (Hasenclever *et al.*, 1997). The international institutions always ensure that all states will be benefited with the co-operation that being created in order to achieve joint gains and to reduce potential costs expenditure. Nevertheless, the international institutions are capable of making all states that are involved to notice the common interest in that particular environmental co-operations even when the elements that brought them in the first place being no longer effective (Hasenclever *et al.*, 1997). As for (Hasenclever *et al.*, 1997) this situation as co-operation under the umbrella of anarchy or utilitarian approach. In addition, Hasenclever *et al.* (1997) also regarded this approach as a game theory. Meanwhile, Keohane (1984) and Oye (1986) argued that the international institutions will not be able to fulfill the optimal outcomes of every member state for instance, in the position of the prisoner's dilemma game (Keohane, 1984; Oye, 1986). However, the international institutions may facilitate and smooth the progress of gaining common benefits by heartening reciprocity in the negotiation which treated others as you would like to be treated with upgrading level of communication and information. Therefore, the international institutions will able to persuade state response in order to maneuver results in the international environmental co-operations.

According to Barrett (2003), the second group is less using international institutions and the game-theory as vehicles to gain from the interest approach in the environmental co-operations. As for Barrett (2003), interest in environmental co-operations must be derived from individual state needs and capacity. Each individual state will calculate it own benefits and perceived costs that will be incurred. Interest of a state begins when a particular issue that is being raised has shown a lot of benefits to the said state (Barrett, 2003; Harris, 1991; Snidal, 1991). Finally, it is very important to bring in the interest approach in the negotiations of creating of the environmental co-operations, regardless, if the interest approach is using the first group theory or the second group ideas. The main purpose to build up the co-operations is to tackle consumer problems and subsequently able to achieve sustainability (Barrett, 2003; Harris, 1991; Snidal, 1991).

SUSTAINABILITY

Sustainability has been defined by the World Commission on Environment and Development as development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs. The above-said concept covers two essential scopes, i.e., environment and social aspects. This concept of sustainability has been highlighted in the 1992 United Nations Conference on Sustainable Development in Rio de Janeiro, as the results, Agenda 21 and Rio Declaration has been established. According to Sands (1995, 2003), Agenda 21 emphasises the following matters which include sustainable human settlement, population, consumption pattern, poverty and human health. On the other hand, Mensah (1996) stated that the Rio Declaration addresses on mankind entitlements and rights which include health and productive life.

Basically this concept of sustainability has been an element in the international legal framework since early as 1893. According to the case of United States of America v Great Britain in 1893 1 Moore's Int. Arb. Awards 755, well known as Pacific Fur Seals Arbitration where in this case the United States of America has stated that a right to make sure the appropriate and lawful use of seals and to protect them for the benefit of human beings from meaningless destruction (Razman *et al.*, 2009b, 2010c; Emrizal and Razman, 2010). Sands (1995) indicated that this concept of sustainable development is perhaps the greatest contemporary expression of environmental policy, commanding support and presented as a fundamental at the Rio Summit, Rio Declaration on Environment and Development in year 1992.

According to Article 33 of the Lome Convention 1989 states that 'in the framework of this convention, the protection and the enhancement of the environment and natural resources, the halting of deterioration of land and forests, the restoration of ecological balances, the preservation of natural resources and their rational exploitation are basic objectives that the African-Caribbean-Pacific (ACP) states concerned shall strive to achieve with community support with a view to bring an immediate improvement in the living conditions of their populations and to safeguarding those of future generations (Razman *et al*., 2009c; Emrizal and Razman, 2010).

THE LAW OF TORT FOCUSING ON NEGLIGENCE TOWARDS ENVIRONMENTAL SUSTAINABILITY IN MALAYSIA WITHIN THE SCOPE OF INTEREST APPROACH

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

Section 3 of the Civil Law Act, 1956 lays down that: 3 (1) save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:

- In West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956
- In Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December, 1951
- In Sarawak, apply the common law of England and the rules of equity, together with statues of general application, as administered or in force in England on the 12th day of December, 1949

Provided that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of states of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary. Based on the above-mentioned section 3 of the Civil Law Act, 1956, therefore, law of negligence in Malaysia is based and referred to the English law of negligence.

NEGLIGENCE

According to the definition given by Lord Wright in the case of Loghelly Iron and Coal v M'Mullan in 1934 AC 1, 25: Negligence means more than heedless or careless conduct, it properly connotes the complex concepts of duty, breach and damage thereby suffered by person to whom the duty owed.

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

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

DUTY OF CARE

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

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

Based on this neighbour principle, an individual is required to take reasonable care to avoid acts or omissions which the individual can reasonably foresee that would be likely to injure the individual's neighbour (Rogers, 1989). The neighbour refers to persons who are so closely and directly affected by the individual's act which the individual ought reasonably to have them in contemplation as being so affected when the individual is directing his mind to acts or omissions that are being called into question (Rogers, 1989). According to the case of Donoghue v Stevenson (1932) AC 562:

- Parties involved: Plaintiff/appellant-Donoghue, defendant/respondent-Stevenson
- The facts of the case: The defendant/respondent was a manufacturer of ginger beer. The ginger beer had been bottled in an opaque bottle. After that the ginger beer had been delivered and sold to a retailer. Later on, a friend of the Plaintiff/Appellant purchased the ginger beer from the above-mentioned retailer for the Plaintiff/Appellant as a gift. When the Plaintiff/Appellant had drank some of the ginger beer then she poured out of the balance of the said drink, at that moment she was shocked when a decomposed snail came out. Subsequently, she fell seriously ill

- The Plaintiff's/Appellant's Argument: The defendant/respondent as a manufacturer failed to ensure the safety of the consumer which consumed the product. As the result, the Plaintiff/Appellant suffered injuries
- The defendant's/respondent's argument: The Plaintiff/Appellant was not a contracting party; therefore, the plaintiff/appellant doesn't own the privity of the contract. As a result, the plaintiff/appellant has no right to commence her action in the said contract
- In addition, under the law of contract, in order for the plaintiff to take action against the defendant in the court, the plaintiff is required to prove to the court that all the essential elements of a contract have been fulfilled
- The House of Lords held that the appellant was entitled for the compensation even though there was no privity of contract between the respondent and the appellant but the respondent owed duty of care towards the appellant based on the neighbour principle where the respondent must ensure his neighbours, i.e., the consumer will not suffer injuries when the consumer consumed his product

BREACH OF DUTY OF CARE

Upon the establishment of the duty of care, next, the plaintiff is required to prove that the defendant has breach the duty of care. How is the plaintiff able to determine whether the defendant has been in breach the duty of care? The test of a reasonable man is the answer. At this stage, the plaintiff is required to prove to the court of law that the defendant's acts or omissions falls below the standard of care of a reasonable man.

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

CAUSATION

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

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

It is clear from Raja Azlan Shah FCJ judgment that:

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

In addition, the court of law in general will use a test that is known as but for test, in order to determine whether the damage was caused by the defendant's breach of duty. In the case of JEB Fasteners Ltd. v Marks Bloom and Co. (1983) 1 All ER 538:

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

A REASONABLY CLOSE CONNECTION BETWEEN THE DAMAGE AND THE BREACH OF DUTY

A reasonably close connection between the damage and the breach of duty is the final element under the law of negligence. The test for the above-said element is based on The Wagon Mound (No. 1) [1961] AC 388. In this case where the defendant used a vessel on which the defendant had negligently spilled a quantity of oil while

stopping at the Sydney Harbour and subsequently, the oil flowed to the docks where ships were under repairs. Only after 60 h from the spill, it caused fire and subsequently the fire caused damage to the docks where the ships were under repairs. At the Supreme Court of New South Wales, the Court gave decision in favour of the plaintiff (the owner of the dock) on the ground that the damage was the direct result of the defendant's action. On appeal to the Privy Council, it was held that the plaintiff must produce the evidences to the court that the type or kind of damage that he suffered must be foreseeable, in order to recover damages. Unfortunately, the plaintiff failed to prove that the damage by fire was not foreseeable because only after 60 h from the spill, it caused fire. Therefore, the privy council gave decision in favour of the defendant.

CONCLUSION

Based on the discussion, in order for an individual to take action under the law of tort focusing on negligence within the scope of interest approach towards environment sustainability in Malaysia, the individual is required to prove to the court of law the existence of duty of care in his legal action. He must also prove that there is a breach of the above-said duty and damage caused by the above-said breach of duty and lastly, there is a reasonably close connection between the damage and the breach of duty.

In addition, there are advantages and disadvantages associated with an action under law of tort focusing on negligence within the scope of interest approach towards environment sustainability. The advantages are firstly: there is no need to prove that the injured party (the plaintiff) and the party that caused the injury (the defendant) have a privity of contract and secondly, there is no requirement to demonstrate loss by other members of the public (Wolf and White, 1995).

As for the disadvantages, firstly, the courts have shown reluctance and refusal to award damages based on pure economic loss. Therefore, must be on personal injury or damage. Secondly, under the law of negligence, the burden of proof is great which caused difficulty for the injured party (the plaintiff) to prove a causal link between the defendant's actions and damage suffered by the plaintiff (Wolf and White, 1995).

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