IN THE HIGH COURT OF MALAYA SITTING AT MUAR,
[CIVIL APPEAL NO. JB-12A-4-08/2019]

BETWEEN

RASHIDAH BINTI ABD GHANI (NO. K/P: XXXXXX-XX-XXXX) (as the Administrator of the Estate of the Deceased ROHAIZAD BIN NAIM) ... APPELLANT

AND

SJ CLASSIC INDUSTRIES SDN BHD (Company No.: 0434775H) ... RESPONDENT

IN THE SESSIONS COURT IN BATU PAHAT
IN THE STATE OF JOHORE DARUL TAKZIM, MALAYSIA
SUIT NO. : JC-A53-06-10/2018

BETWEEN

RASHIDAH BINTI ABD GHANI (NO. K/P: XXXXXX-XX-XXXX) (as the Administrator of the Estate of the Deceased ROHAIZAD BIN NAIM) ... PLAINTIFF

AND

SJ CLASSIC INDUSTRIES SDN BHD (Company No. : 0434775H) ... DEFENDANT

GROUNDS OF JUDGMENT

[1] INTRODUCTION

This is an appeal against the decision of the Learned Sessions Court Judge that allowed the application to strike out the Writ of Summons and the Statement of Claim, pursuant to Order 18 Rule 19 Rules of Court 2012, given on 16 July 2019 with cost of RM2,000-00.

The Appellant / Plaintiff (acting as the administrator of the estate of Rohaizad bin Naim who is the deceased husband and beneficiary of the deceased) also filed a Writ of Summons and Statement of Claim against the Respondent / Defendant for accident that led to the death of the deceased husband and was seeking for the following order:

a. Specific damages amounting to RM11,945-00.

b. General damages for herself as a dependant of the deceased husband and all other dependants of the deceased husband.

c. Bereavement amounting to RM10,000-00 pursuant to section 7(3A) Civil Law Act 1956.

d. Interest of 5% per annum on the sums awarded.

e. Cost.

f. Other reliefs that the Court deems fit and proper.

The Cause Papers are as follows:

i. Notice of Appeal (Enclosure 1).

ii. Sessions Court Record of Appeal (Enclosure 4).

iii. Supplementary Record of Appeal (Enclosure 6).

iv. Supplementary Record of Appeal (Enclosure 8).

[2] BACKGROUND FACTS

The Appellant / Plaintiff is a Malaysian citizen, a married women with children aged 10 – 13 years old and has her address for service at Parit Mantan, Mukim Empat, Simpang Kiri, 83000 Batu Pahat, Johor. She is claiming on behalf of the estate.

The Deceased husband Rohaizad bin Naim ("the Deceased") was married to the Appellant / Plaintiff and he worked as an employee of the Respondent / Defendant when he died in an incident in the Respondent / Defendant's factory ("the said factory") on 23 August 2017. He was a machine operator at the said factory and his job scope includes to supervise the process of rolling steel cables into bobbins (Hugh Spools) properly and to lodge a complaint should there be any difficulties in spooling the steel cables / wire to the relevant person-in-charge.

The Deceased was an insured worker with the Respondent's factory pursuant to Employee Social Security Act 1969 ("SOCSO Act"). The Respondent paid the SOCSO contributions every month and hence he was covered under the SOCSO Act 1969.

The Appellant received the compensation from Social Security Organisation or its acronym "SOCSO" (the Malay term is "Pertubuhan Keselamatan Social" or its acronym "PERKESO") and now decided to sue the Respondent for negligence.

The Respondent / Defendant made an application vide a Notice of Application to strike out the Writ and the Claims on the grounds as follows:

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(d) it is otherwise an abuse of the process of the Court.

This is premised on the provision of section 31 **EMPLOYEES' SOCIAL SECURITY ACT 1969** which stipulates,

> ***An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person, or from any other person who is the servant of the employer, any compensation or damages under any other law for the time being in force in respect of an employment injury sustained as an employee under this Act:***
>
> > ***Provided that the prohibition in this section shall not apply to any claim arising from motor vehicle accidents where the employer or the servant of the employer is required to be insured against Third Party Risks under Part IV of the Road Transport Act 1987 [Act 333].***

The Learned Sessions Court Judge allowed the application to strike out on the basis that section 31 estopped any further action of the Writ of Summons and the Statement of Claims of the Appellant.

The Appellant is suing on the basis of negligence on the part of the respondent in not making sure safety measures are in place.

[3] THE ISSUE IN THIS APPEAL

There is only one issue which is **"does section 31 Employees Social Security Act 1969 debar the Appellant from taking other actions based on tort and the Civil Law Act 1956"**

The Learned Sessions Court Judge ruled that section 31 has been fulfilled and hence the Appellant is debarred from making the claims. The pre requisites of section 31 are as follows:

i. The Claimant / Plaintiff is either an insured person or his dependants.

ii. The employer has fulfilled his obligations by paying the contributions to the Social Security Organisation pursuant to the Employees Social Security Act 1969.

iii. They are not entitle to receive or recover any compensation or damages under any other law for the time being in force in respect of an employment injury sustained as an employee.

iv. The damages or compensation that the Claimant seek are either from the employer of the insured person, or from any other person who is the servant of the employer.

Let us deal with the preliminaries first.

"Employment injury" is defined under section 2 Employees Social Security Act 1969 as "**means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment in an industry to which this Act applies;"**

The word "**means**" imports a very definitive and restrictive interpretation. It is exhaustive and must be taken literally except where such literal interpretation would lead to absurdity or defeat the very purpose of the Act.

In *WEALTHY GROWTH SDN BHD v. TRIBUNAL TUNTUTAN PEMBELI RUMAH & ANOR* [2020] 1 AMR 947, the High Court elucidate on this issue of interpretation and explained, *inter alia*,

> ***[56] Ordinarily, in the jurisprudence of interpretation, "means" is an exhaustive definition, meaning that whatever***

that follows the word "means" is considered the description of the word that it seeks to define.

Further down in the judgment, it has been explained,

[58] "Includes" on the other hand, is a non-exhaustive definition. The non-exhaustive description is one that is not limited by the words stated in the definition, but rather it indicates the attributes of the word, so defined.

[59] These attributes can either be conjunctively linked (as in the use of the conjunction "and") or disjunctively linked (as in the use of the conjunction "or").

[60] Anything which has these attributes (depending on the conjunction used in the definition) would be within the perimeter of the word so defined.

[61] Hence, the definition of such a word can be broadened to include other things with the same attributes.

Hence, the term "**employment injury**" means

i. a personal injury to an employee.

ii. the injury was caused by accident or an occupational disease.

iii. the accident or an occupational disease arose from or in the course of his employment in an industry.

iv. Employees Social Security Act 1969 applies to that industry.

To interpret the meanings of the words in SOCSO Act 1969, I look at the case of *MARTHY KUTHAN v. RAMA KARUPIAH & ORS.* [1989] 2

CLJ Rep 104, where his Lordship Justice Peh Swee Chin has this to say,

> *The golden rule for construing statutes and all written instruments was stated by Lord Wensleydale in GREY v. PERSON, [1857] 6 HLC 61, 106 as follows:*
>
> > ***In construing wills and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of instrument, in which case. the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency...***
>
> ***The golden rule means in effect the literal rule that plain ordinary meaning of the words ought to be given to the words.***
>
> ***First, the grammatical and ordinary sense of the words does not say at all that, in respect of "an employment injury " within the purview of the Act, if an employee sues, not the employer, but some third party, the third party cannot claim contribution against his employer on ground of vicarious liability.***
>
> ***Again, would such grammatical and ordinary sense of the words of said s. 31 of the Act, give rise to an absurdity? There is no such absurdity as the Act is, to quote the explanatory note of Act, " an Act to provide certain benefits to employees in case of invalidity and employment injury including occupational diseases and to make provision for certain other matters in connection thereto ". It, by no means, codifies all the law of master and servant, or the common law as to any***

right to claim contribution. The intention of the legislature is to be known, by the words used in a statute.

I have gone through the rest of the Act, it would appear that adopting the ordinary sense of the words of the said s. 31 does not also give rise to any inconsistency with the rest of the Act.

It is clear from the wordings that the injury on the employee is caused by accident or occupational disease arising from employment in the industry.

Now in Malaysia, every workplace is also govern by a law named OCCUPATIONAL SAFETY AND HEALTH ACT 1994 (Act 514) (also known as "OSHA") which is for the purpose of securing the safety, health and welfare of persons at work, for protecting others against risks to safety or health in connection with the activities of persons at work, to establish the National Council for Occupational Safety and Health, and for matters connected therewith. (see Preamble)

Section 1 of OSHA stipulates as follows:

1 Short title and application

(1) This Act may be cited as the Occupational Safety and Health Act 1994.

(2) ***Subject to subsection (3), this Act shall apply throughout Malaysia to the industries specified in the First Schedule.***

(3) Nothing in this Act shall apply to work on board ships governed by the Merchant Shipping Ordinance 1952 [Ord. No. 70 of 1952], the Merchant Shipping Ordinance 1960 of Sabah [Sabah Ord. No. 11 of 1960] or Sarawak [Sarawak Ord. No. 2 of 1960] or the armed forces.

OSHA applies to all industries in Malaysia as specified in the First Schedule **except** for work on board ships governed by the Merchant Shipping Ordinance 1952 [Ord. No. 70 of 1952], the Merchant Shipping Ordinance 1960 of Sabah [Sabah Ord. No. 11 of 1960] or Sarawak [Sarawak Ord. No. 2 of 1960] or the armed forces.

The First Schedule is reproduced below for easy reference.

FIRST SCHEDULE

[Subsection 1(2)]

1. Manufacturing

2. Mining and Quarrying

3. Construction

4. Agriculture, Forestry and Fishing

5. Utilities:

(a) Electricity;

(b) Gas;

(c) Water; and

(d) Sanitary Services

6. Transport, Storage and Communication

7. Wholesale and Retail Trades

8. Hotels and Restaurants

9. Finance, Insurance, Real Estate and Business Services

10. Public Services and Statutory Authorities

For the purpose of this case, it is in the "1. Manufacturing" industry and hence applicable for our consideration.

In *LIAN ANN LORRY TRANSPORT & FORWARDING SDN BHD v. GOVINDASAMY PALANIMUTHU* [1982] CLJ 173, the Respondent was injured at work whilst being employed on a daily basis. The Appellant claimed that the Respondent being insured under the Employees' Social Security Act 1969 (the Act) was not entitled to damages under common law. The trial judge ruled that s. 31 of the Act was not applicable to the case and awarded damages to the Respondent. The Appellant appealed and the Federal Court ruled that,

> *a) Definition of "employee".*
>
> *The first constituent element of the definition of "insured person" requires us to determine whether the respondent was at the time of the accident an employee. For this purpose we have to refer to item (5) of section 2 of the Act which defines this term as follows;*
>
> > ***(5) 'employee' means any person who is employed for wages under a contract of service or apprenticeship with an employer; whether the contract is expressed or implied or is oral or in writing, on or in connection with the work of an industry to which this Act applies and:-***
> >
> > > ***(i) who is directly employed by the principal employ on any work of, or incidental or preliminary to or connected with the work of, the industry, whether such work is done by the employee on the premises of the industry or elsewhere; or***
> > >
> > > ***(ii) who is employed by or through an immediate employer on the premises of the industry or under***

> ***the supervision of the principal employer or his agent on work which is ordinarily part of the work of the industry or which is preliminary to the work carried on in or incidental to the purpose of the industry; or***
>
> ***(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire entered into a contract of service,***
>
> ***but does not include a person of the descriptions specified in the First Schedule.***
>
> *Paragraph (1) of this Schedule describes one such person to be "any person whose wages exceed five hundred dollars a month." This means that such person is excluded from the definition of "employee."*

Further down in the learned judgment,

> ***We feel therefore bound to conclude that the respondent was an employee because a contract of service could be implied from the circumstance of his employment in that he was employed as part of the appellants' business organisation and that he was not excluded from the definition because there met evidence to show that as a fact he earned more than RM500.00 a month. A possibility that he might have earned more than this sum is not sufficient to exclude him from the definition. Every positive possibility is always accompanied by a negative possibility.***
>
> *(b) Contributions payable.*

> *Although the respondent is an employee, he is still not an insured person unless the second constituent element of the description is established in that at the time of the accident contributions in respect of him were payable under the Act. This question requires us to study the scheme introduced by the Act.*
>
> *...*
>
> ***On this evidence it is clear that the respondent, being a new-comer, was not even considered by the appellants to be a proper employee because he lacked permanency. It would appear that according to the practice of the appellants, it took about three to four months before they decided to give permanency to their employees' service. This is clear from the evidence of the lorry attendant (PW 3) employed by the appellants. This witness said that he began to contribute to SOCSO only 3 to 4 months after he had worked with the appellants.***
>
> ***Further it is also implicit from the evidence of DW' 2 that on the date of the accident the respondent was not registered as a contributor and therefore not an insured person. (See his letter P16 dated September 27, 1980). That being the case there could not be at the time of the accident, ie, 23.3.1978, contributions payable in respect of him to the Organisation. Therefore he was not an insured person and as such could not be deprived by section 31 of the Act of the benefits under the common law.***

The issue in *LIAN ANN LORRY TRANSPORT & FORWARDING SDN BHD* (*supra*) was different in that the Respondent was not yet an insured person during the time of the injury suffered.

There are obligations on the part of employers with the industries enumerated under First Schedule of OSHA. They are as enumerated under section 15 which reads as follows

> ***15 General duties of employers and self-employed persons to their employees***
>
> *(1)* ***It shall be the duty of every employer and every self-employed person to ensure, so far as is practicable, the safety, health and welfare to work of all his employees.***
>
> *(2) Without prejudice to the generality of subsection (1), the matters to which the duty extends include in particular-*
>
> > ***(a) the provision and maintenance of plant and systems of work that are, so far as is practicable, safe and without risks to health;***
> >
> > ***(b) the making of arrangements for ensuring, so far as is practicable, safety and absence of risks to health in connection with the use or operation, handling, storage and transport of plant and substances;***
> >
> > ***(c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is practicable, the safety and health at work of his employees;***
> >
> > ***(d) so far as is practicable, as regards any place of work under the control of the employer or self-employed person, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of the means of access to and egress from it that are safe and without such risks;***

> ***(e) the provision and maintenance of a working environment for his employees that is, so far as is practicable, safe, without risks to health, and adequate as regards facilities for their welfare at work.***
>
> *(3) For the purposes of subsections (1) and (2)-*
>
> *(a)"employee" includes* ***an independent contractor engaged by an employer or a self-employed person and any employee of the independent contractor; and***
>
> *(b) the duties of an employer or a self-employed person under subsections (1) and (2) extend to such an independent contractor and the independent contractor's employees in relation to matters over which the employer or self-employed person-*
>
> *(i) has control; or*
>
> *(ii) would have had control but for any agreement between the employer or self-employed person and the independent contractor to the contrary.*

In short, the following are the general duties (but not limited to because of other provisions in OSHA as well as under Common Law of Tort).

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

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

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

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

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

(f) to prepare and as often as may be appropriate revise a written statement of his general policy with respect to the safety and health at work of his employees and the organization and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees.

The bird's eye view of the above in items (a) – (f) are that:

i. The employer owes a duty of care towards the employees.

ii. Reasonable measures must be put in place both in the policy(s) and/or operation(s) as well as anything that would be relevant to ensure safety standards as given by the authorities which in the current case the National Council for Occupational Safety and Health and the Department of Occupational Safety and Health known by its acronym DOSH.

iii. Breach of that duty may result in prosecution which includes (but not restricted to) offences under section 19 or 51 OSHA.

iv. There are many defences that may be put up including statutory defence among others, as provided by section 55 OSHA.

v. Successful prosecution that resulted in conviction may also entail compensations pursuant to (among others) Section 426 Criminal Procedure Code.

The Court must read both the laws together and come to a harmonious construction.

Coming back to section 31 of SOCSO Act 1969, the key phrase is "**accident or an occupational disease**". The estoppel operates from employment injury which is defined as "**injury arising from accidents or occupational disease that arose from or in the course of his employment in an industry.**"

"Accident" is defined in Cambridge English Dictionary (Cambridge University Press 2020) as **"something bad that happens that is not expected or intended and that often damages something or injures someone"**

The synonym in the same Dictionary for the word "accident" are **"mishap, mischance, misfortune, misadventure, death by misadventure,"** among others.

In the same dictionary, "**occupational hazard**" is defined as "**a danger that is connected with doing a particular job".**

Disease is one of the hazard in life. Hence "occupational disease" is a species of the genus "occupational hazard" meaning **"a disease (or diseases) that is connected with doing a particular job."**

Under section 2, OSHA, the term "**employee**" means

> ***"a person who is employed for wages under a contract of service on or in connection with the work of an industry to which this Act applies and-***
>
> > ***(a) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the industry, whether such work is done by the employee at the place of work or elsewhere;***
> >
> > ***(b) who is employed by or through an immediate employer at the place of work of the industry or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the industry or which is preliminary to the work carried on in or incidental to the purpose of the industry; or***
> >
> > ***(c) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;***

It is important to note that "accidents" are "things which are that is not expected or intended". An example of this is, a typhoon swept through an Industrial Area, which resulted in many heavy objects flying through the air (which they would not ordinarily do under normal circumstances) and caused severe damage on properties and injuries upon workers. The typhoon is beyond the control of the factory owner nor is it expected to be of such magnitude.

The Social Security Law for employees protects both the employees by providing compulsory coverage and protection (akin to an insurance policy) in cases of injuries or deaths. The law equally protects the employer by giving a shield against any suit or claims for

the injuries or deaths that happened within the working area dan time of the factory.

SOCSO contributions will allow the Employees Social Security Organisation to pool resources for the protection coverage of all employees that is within the Act.

If the injury does not arise from accident or an occupational disease, then section 31 Employees Social Security Act 1969 does not apply.

OSHA created a statutory duty of care of employers to their employees by virtue of section 15 OSHA which are (and I am repeating this):

> (a) the provision and maintenance of plant and systems of work that are, so far as is practicable, safe and without risks to health;
>
> (b) the making of arrangements for ensuring, so far as is practicable, safety and absence of risks to health in connection with the use or operation, handling, storage and transport of plant and substances;
>
> (c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is practicable, the safety and health at work of his employees;
>
> (d) so far as is practicable, as regards any place of work under the control of the employer or self-employed person, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of the means of access to and egress from it that are safe and without such risks;
>
> (e) the provision and maintenance of a working environment for his employees that is, so far as is practicable, safe, without risks

to health, and adequate as regards facilities for their welfare at work.

By virtue of section 15, the "neighbour principle" enunciated by Lord Atkin in *DONOGHUE v. STEVENSON* [1932] UKHL 100 which was said in these words'

> *"At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.* ***But acts or omissions which any moral code would censure cannot, in a practical world, be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour;*** *and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be –* ***persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."***

Section 15 OSHA literally put the neighbour principle into statutory law. It fits in the category of **"persons who are so closely and directly affected by my act that I ought reasonably to have them in**

contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Now, to use section 31 SOCSO Act 1969 as a shield or estoppel against the claims of not only a tortious claim for negligence but a statutory requirement to protect and have in contemplation by people who are so close and directly affected by the act(s) of the employers at the work place when directing the mind on their acts or omissions, is stretching section 31 SOCSO Act a little too far. It will render section 15 OSHA as ineffective, futile, superfluous or useless.

This in turn render the whole purpose of OSHA which is An Act to make further provisions for securing the safety, health and welfare of persons at work, for protecting others against risks to safety or health in connection with the activities of persons at work, to establish the National Council for Occupational Safety and Health, and for matters connected therewith, otiose.

I don't think that is the intention of legislature when enacting section 31 SOCSO Act 1969.

Another piece of legislature that would be rendered of no effect by that overstretching section 31 SOCSO Act is the FACTORIES AND MACHINERY ACT 1967 ("FMA") which is An Act to provide for the control of factories with respect to matters relating to the safety, health and welfare of persons therein, the registration and inspection of machinery and for matters connected therewith.

Section 10, FMA provides for the issue of safety and I reproduced for the ease of reference

10 Provisions relating to safety, etc.

Without prejudice to any law with respect to local authorities, in respect of any factory, the following provisions relating to safety shall apply-

(a) foundations and floors shall be of sufficient strength to sustain the loads for which they are designed; and no foundation or floor shall be overloaded;

(b) roofs shall be of sufficient strength to carry where necessary suspended loads;

(c) all floors, working levels, platforms, decks, stair-ways, passages, gangways, ladders and steps shall be of safe construction so as to prevent a risk of persons falling, and structurally sound so as to prevent a risk of collapse, and shall be properly maintained and kept, as far as reasonably practicable, free from any loose material and in a non-slippery condition;

(d) such means as are reasonably practicable shall be provided, maintained, and used so as to ensure safe access to any place at which any person has at any time to work;

(e) every opening, sump, pit or fixed vessel in a floor, or working level shall be securely covered or securely fenced so as to prevent risk of persons falling; and

(f) all goods, articles and substances which are stored or stacked shall be so placed or stacked-

(a) in such manner as will best ensure stability and prevent any collapse of the goods, articles or substances or their supports; and

(b) in such a manner as not to interfere with the adequate distribution of light, adequate ventilation, proper operation of machinery, the unobstructed use of passageways or gang-ways and the efficient functioning or use of fire-fighting equipment.

Section 1, FMA provides for the issue of exposure to dangerous substances and I reproduced it for the ease of reference

11 Persons exposed to explosive, inflammable, etc., substances

In every factory in which persons are exposed to risk of bodily injury from explosive, inflammable, poisonous or corrosive substances or ionising radiations, such measures as may be prescribed shall be taken as will eliminate the risk.

Section 12, FMA provides for the issue of heavy load and I reproduced it for the ease of reference

12 Lifting of weights

No person shall be employed to lift, carry or move any load so heavy as to be likely to cause bodily injury to him.

Section 13, FMA provides for the issue of precaution and protective measures against fire and I reproduced it for the ease of reference

13 Provisions against fire

Without prejudice to any law with respect to local authorities, in every factory there shall be taken such precautions against fire, and there shall be provided and maintained, such means

of escape in case of fire other than means of exit in ordinary use, and such means of extinguishing fire as may be prescribed.

Section 14, FMA provides for the issue of safe and proper construction of machines and their parts and proper maintenance and I reproduced it for the ease of reference

14 Construction of machinery

All machinery and every part thereof including all fittings and attachments shall be of sound construction and sound material free from defect and suitable for the purpose and shall be properly maintained.

Section 15, FMA provides for the issue of secure fencing of dangerous machines and I reproduced it for the ease of reference

15 Dangerous parts of machinery

Every dangerous part of any machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on or entering into the premises as it would be if securely fenced:

Provided that so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard the requirements of this section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming or being brought into contact with that part.

Section 16, FMA provides for the issue of projecting parts and material from machines which must be fenced away from people and I reproduced it for the ease of reference

16 Projecting material

In respect of such machinery as may be prescribed, any part of any material carried by that machinery while it is working thereon which projects beyond any part of the machinery shall be effectively fenced unless it is in such a position as to be safe to any person employed or working on or entering into the premises.

Section 17, FMA provides for the issue of compliance with regulations for machines for hire or sale and I reproduced it for the ease of reference

17 Machinery for hire or sale must comply with regulations

No person shall sell or let on hire any machinery other than transmission machinery which does not comply with any regulations made under this Act applicable to the machinery.

Section 18, FMA provides for the issue of the manufacture, repair and installation of machinery in accordance with regulations and I reproduced it for the ease of reference

18 *Machinery manufactured or repaired must comply with regulations*

(1) No person shall manufacture, repair or install machinery in such a manner that it does not comply with the provisions of this Act and any regulations made thereunder applicable to such machinery.

(2) No person shall import any machinery other than transmission machinery which does not comply with any regulations made under this Act applicable to such machinery.

Section 22, FMA provides for the issue of public health in factories and I reproduced it for the ease of reference

22 Provisions relating to health

(1) Without prejudice to any law relating to public health, in respect of any factory the following provisions relating to health of persons shall apply-

(a) every factory shall be kept in a clean state and free from offensive effluvia arising from any drain, sanitary convenience or other source and shall be cleaned at such times and by such methods as may be prescribed and these methods may include lime-washing or colour washing, painting, varnishing, disinfecting or deodorising;

(b) the maximum number of persons employed at any one time in any work-room in any factory shall be such that the amount of cubic metre of space and the superficial metre of floor area allowed in the work-room for each such person are not less than the amount of cubic metre of space and the superficial metre of floor area prescribed either generally or for the particular class of work carried on in the workroom;

(c) (i) ***effective and suitable provision shall be made for securing and maintaining adequate ventilation by the circulation of fresh air in every part of a factory and for rendering harmless, so far as practicable, all gases, fumes, dust and other impurities that may be injurious to health arising in the course of any process or work carried on in a factory;***

(ii) the Minister may prescribe a standard of adequate ventilation and the means by which the standard may be achieved, for factories or for any class or description of factory or parts thereof;

(d) (i) ***effective and suitable provision shall be made for securing and maintaining such temperature as will ensure to any person employed in a factory reasonable conditions of comfort and prevention from bodily injury;***

(ii) the Minister may for factories or for any class of factory or parts thereof prescribe a standard of reasonable temperature and prohibit the use of any methods of maintaining a reasonable temperature which in his opinion are likely to be injurious to the persons employed and direct that thermometers shall be provided and maintained in such places and positions as may be specified;

(e) (i) ***effective provision shall be made for securing and maintaining sufficient and suitable lighting, whether natural or artificial, in every part of a factory in which persons are working or passing;***

(ii) the Minister may prescribe a standard of sufficient and suitable lighting for factories or for any class or description of factory or parts thereof or for any process; and

(f) ***sufficient and suitable sanitary conveniences as may be prescribed, shall be provided and maintained for the use of persons in a factory.***

(2) (a) Whenever it appears to an Inspector that any process in any factory is likely to affect adversely the health of any person employed therein or the public he shall report the circumstances in writing to the Chief Inspector who may thereupon carry out such investigations as he may consider necessary.

(b) Where the Chief Inspector is satisfied-

(i) that such a process is likely to affect adversely the health of any person employed in the factory or the public; and

(ii) that the process can be modified or means provided to reduce the possibility of injury to the health of such person or the public as aforesaid,

he shall, after considering any representations made by the occupier of the factory, order that the process be modified in such manner or that such means be provided as he may direct to reduce the possibility of injury to the health of that person or the public.

(c) Any person aggrieved by an order made under paragraph (b) may within twenty-one days of the receipt thereof appeal to the Minister who shall make such order thereon as he deems fit.

(d) Where the Chief Inspector is satisfied -

(i) that such a process is likely to affect adversely the health of any person employed in the factory or the public; and

(ii) that the process cannot be modified or means provided to reduce the possibility of injury to the health of such person or the public as aforesaid,

he shall report the circumstances in writing to the Minister.

(e) The Minister may upon receipt of the report either-

(i) make such regulations controlling or prohibiting the use of the process as he may consider reasonable; or

(ii) after considering any representations made by any person likely to be affected thereby by writing under his hand prohibit the carrying out of the process either absolutely or conditionally or the use of any material or substance in connection therewith.

(f) For the purpose of enabling any occupier of a factory or other person to make representations in respect of a proposed order or prohibition under paragraph (b) or (e) the Chief Inspector or the Minister as the case may be, shall cause to be served on the occupier or other person a notice specifying the period within which such representations may be made and containing such particulars as the Chief Inspector or the Minister as the case may be considers adequate in the circumstances.

(3) An Inspector may require any person employed in any factory in which any of the diseases named in the Third Schedule has occurred, or is likely to occur, to be medically examined.

Section 50, FMA provides for the issue of offences for contravention of the requirements of the Act and I reproduced it for the ease of reference

50 Offences

(1) Subject to subsections (2) to (4) where the occupier of a factory contravenes this Act he shall be guilty of an offence.

(2) Where the contravention as aforesaid is one in respect of which the owner is by or under this Act made responsible the owner shall be guilty of an offence.

(3) Notwithstanding subsections (1) and (2) whenever it is proved to the satisfaction of a court that a contravention of this Act, has been committed by any person other than the occupier or owner of the factory or machinery in respect of which the contravention has been committed, the owner or occupier as the case may be shall also be held to be liable for that contravention, and to the penalty provided therefor, unless he shall prove to the satisfaction of the court that the same was committed without his knowledge or consent and that he had taken all reasonable means to prevent the same and to ensure the observance of this Act:

Provided that nothing contained in this section shall be deemed to exempt such first mentioned person from liability in respect of any penalty provided by this Act for any contravention proved to have been committed by him.

(4) If the occupier or owner of a factory or machinery avails himself of any exception allowed by or under this Act and fails to comply with any of the conditions attached to the exception, he shall be guilty of an offence.

Likewise, to use section 31 SOCSO Act 1969 as a shield or estoppel against contravention of FMA in respect of not only the quasi criminal aspect of the law but also the statutory duty of care as in the

case of OSHA and would likewise render FMA as ineffective, futile, superfluous or useless.

It is the view of this Court that if any provision of OSHA or FMA has been contravened, the offender has not only committed offence(s) under the 2 statutes, but the offender shall also be liable in tort and the mere registration with SOCSO and paying monthly contribution dutifully does not absolve the offender from being liable if it is proven, on the balance of probabilities, for the breach of that duty of care although this time, a statutory duty of care.

In the words of *Lord Atkins in Donoghue* (*supra*) that "**the rule that you are to love your neighbour becomes in law, you must not injure your neighbour**".

In *RAMLI SAMAD v. PACIFIC & ORIENT INSURANCE CO SDN BHD* [2010] 1 CLJ 970, the appellant sustained severe injuries when a gas tank fell on him from his employer's motor lorry that was driven by his co-employee. He commenced a negligence action against both his employer and co-employee for damages in the sessions court. When it transpired that the appellant was a contributor under the Employees' Social Security Act 1969 ('the SOCSO Act'), both the employer and the employee amended their defence alleging that the appellant's claim was barred by s. 31 of the same Act ('s. 31'). The appellant then withdrew his action against the employer but maintained his action against his co-employee. The appellant managed to obtain an interlocutory judgment against the co-employee as a result of the co-employee's non-appearance on the day of the hearing. Damages were then assessed and a judgment sum was entered against the co-employee. The judgment sum was then given to the respondent herein (the employer's insurers) for payment but the respondent refused to make the payment. The appellant then brought a recovery action against the respondent under s. 96(1) of the Road Traffic Act 1969

('RTA'). The appellant's claim was dismissed by the sessions judge on the ground that his action was barred against the employer and co-employee by virtue of an amendment to s. 31 ('the amended s. 31') by the Employees Social Security (Amendment) Act 1992 (Act A814). The amendment had been made retrospective and included the appellant's claim. The appellant's appeal to the High Court was dismissed on similar grounds as that of the sessions court but with an addition that since the judgment in the initial action was not against the employer as the insured, the recovery action could not be maintained against the respondent. The appellant now appealed on the following three grounds: (1) that s. 31 did not prohibit the appellant's claim for common law damages; (2) the interlocutory judgment was obtained against his co-employee before the amended s. 31 came into effect and therefore based on the case of *Tan Peng Loh v. Lee Aik Fong & Anor*, the appellant was not prohibited from recovering the judgment sum against the co-employee; and (3) the employer and the co-employee had amended their defences to include s. 31 and as the respondent assumed the role of employer and co-employee, the same line of defence could not be raised again by virtue of the doctrine of *res judicata*.

The Court of Appeal held that, *inter alia*,

> ***By virtue of s. 31 before the relevant amendment, the appellant was barred from suing the employer. The appellant had no choice but to withdraw his action against the employer. With the withdrawal of the action by the appellant against the employer, the co-employee was driving the motor lorry on his own and not as a servant or agent of the employer.***

However the Court of Appeal held a different view in *RAJENDIRAN MANICKAM & ANOR v. PALMAMIDE SDN BHD & ANOR* [2020] 9 CLJ 510, the appeal herein concerned an interpretation of the relevant

provisions of the Employees' Social Security Act 1969 ('SOCSO Act') and amendments to the SOCSO Act with respect to whether an employee who is injured in the course of his employment in a workplace accident can claim under the SOCSO Act and thereafter bring a further claim under common law under the tort of negligence or occupier's liability. The employees ('plaintiffs') suffered severe burns as a result of an explosion and fire resulting from welding works done in another part of the factory by the employers' ('defendants') contractor; they claimed the factory should be shut down when the electrical repairs were being done for the safety of the workers. Whilst both the plaintiffs received compensation from the SOCSO Board for the days when they could not work as they were on medical leave, the first plaintiff who worked in the maintenance department of the second defendant had also received compensation for future loss of income as he was now certified as unfit to work. The second plaintiff continued to work for the first defendant as a factory operator but was only able to do light duties. There was no compensation made for the injuries sustained and for pain and suffering and the loss of amenities. The plaintiffs claimed for damages for negligence, breach of statutory duties and occupiers' liability arising out of the injuries they sustained. The defendants applied under O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012 to strike out the plaintiffs' claim. The Sessions Court Judge decided that the matter should proceed to trial and dismissed the defendants' application to strike out the plaintiffs' claim for damages under common law including a claim for aggravated and exemplary damages for what was alleged as the employers' gross negligence in providing for a safe place of work for their employees. On appeal, the High Court Judge was of the view that the single issue was whether a claim under the SOCSO Act debarred any further claim under common law. The High Court Judge held that s. 31 of the SOCSO Act expressly barred an insured person from recovering any further compensation or

damages under any law from the employer if he had already received compensation under the Act. The High Court therefore struck out the plaintiffs' claim. Hence, the plaintiffs appealed. The issues that arose were (i) whether the plaintiffs being employees who had sustained injuries in a factory arising not from their work is said to have sustained 'employment injuries'; and (ii) whether s. 31 of the SOCSO Act barred a common law claim in light of s. 28A of the Civil Law Act 1956 and the repeal of s. 42 of the SOCSO Act. The Court of Appeal held that, *inter alia*,

> ***[37] "Employment injury" is of course a species and subset of "personal injury" as defined in s. 2(6) of the Socso Act and the written law in relation to the payment of any benefit or compensation would be by and large the Socso Act since the Workmen's Compensation Act 1952 has very limited utility.***
>
> ***[38] Whether or not Parliament had intended s. 28A(1)(c) Civil Law Act 1956 (Act 67) to apply to an "employment injury" is a matter which should be more fully argued at the trial in the Sessions Court where it may finally land up in the Court of Appeal, being the final court of appeal for a matter emanating in the Sessions Court.***
>
> ***[39] This would be a proper case where the trial judge should, as rightly decided by her, proceed with the trial as was done in Abdul Rahim Mohamad v. Kejuruteraan Besi Dan Pembinaan Zaman Kini [1999] 5 CLJ 85; [1998] 4 MLJ 323, though the High Court there was of the view that the plaintiff was precluded from making his claim under common law as he was within the meaning of an "insured person" under the Socso Act and as such his claim should be under Socso Act as the injury was an "employment injury" even though the employer***

had not so registered the plaintiff with the Socso Board or made contribution under the Act.

[40] The meaning of "insured person" as modified by a subsequent amendment to the Socso Act was considered in Liang Jee Keng v. Yik Kee Restaurant Sdn Bhd [2002] 2 CLJ 750; [2002] 2 MLJ 650 where it was held as follows:

> ***... 'insured person' as defined under s. 2(11) of the SOCSO Act. The present s. 2(11) of the SOCSO Act defines:***
>
> > ***'insured person' means a person who is or was an employee in respect of whom contributions are, were or could be payable under this Act, notwithstanding that such industry or employee was not so registered, so long as the industry was one to which this Act applies.***
>
> ***The present provision of s. 31 was introduced into the SOCSO Act vide an amendment Act A675/87 which came into effect on 1 July 1987. Prior to that amendment, the previous provision of s. 31 read:***
>
> > ***'insured person' means a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is, by reason thereof, entitled to any benefits provided by this Act. Comparing the present and the previous definitions, it is obvious that the present definitions of an 'insured person' is much more wider than the previous one. It covers an employee in respect of whom contributions 'could be payable' under the Act. It also covers employee who was not so***

> ***registered under the SOCSO Act, so long as the relevant industry was one to which the SOCSO Act applies. In other words, even though the said employee was not registered with the SOCSO office at the time of the accident and no contributions are or were paid under the Act, the employee is still considered as an 'insured person' if the contributions 'could be payable' under the Act, so long as the industry was one to which the SOCSO Act applies.***

Further in the learned judgment, his Lordship said this,

> ***[41] The plaintiffs' claim may be weak but that is no justification for striking out in limine when yet another attempt is made by testing the limits of the law where in a case of a social piece of legislation, any ambiguity has to be resolved in favour of the injured employee.***
>
> ***[42] We dare not say the plaintiffs' claims are completely hopeless and a total non-starter. This is certainly not a plain and obvious case where the plaintiffs' claim should be struck out. A smoldering wick should not be snuffed out at this stage in as much as a bruised reed may yet blossom in the days ahead.***
>
> ***[43] We unanimously agreed that the matter should be sent back to the Sessions Court for trial and that the order of the High Court striking out the plaintiffs' claim be set aside with costs in the cause.***

Since there are conflicting decisions of the Court of Appeal, this Court must look further to decide on the issue at hand. In *YOUNG v.*

BRISTOL AEROPLANE CO LTD [1944] KB 718 the English Court of Appeal held that, through Lord Greene MR:

> ***"The Court of Appeal is bound to follow its own decisions and those of courts of co-ordinate jurisdiction, and the ' full ' court is in the same position in this respect as a division of the court consisting of three members. The only exceptions to this rule are:-***
>
> ***(1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow;***
>
> ***(2) the court is bound to refuse to follow a decision on its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords;***
>
> ***(3) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, e.g., where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court."***

Further down in his Lordship's judgment

> ***'Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam.***

We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts.'

In *DALIP BHAGWAN SINGH v. PUBLIC PROSECUTOR* [1997] 4 CLJ 645

The rule of judicial precedent in relation to the House of Lords was stated in LONDON TRAMWAYS v. LONDON COUNTY COUNCIL [1898] AC 375 ***that it was bound by its own previous decision in the interests of finality and certainty of the law, but a previous decision could be questioned by the House when it conflicted with another decision of the House or when it was made per incuriam, and that the correction of error was normally dependent on the legislative process.***

However, in 1966, Lord Gardiner LC made the following statement on behalf of himself and all the Lords of Appeal in Ordinary commonly known as the "Practice Statement (Judicial Precedent) 1966" which is set out below:

> *LORD GARDINER LC:* ***Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases.***
>
> ***It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.***

> ***Their Lordship nevertheless recognise that too rigid an adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.***
>
> ***They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.***
>
> ***In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the need especially for certainty as to the criminal law.***
>
> ***This announcement is not intended to affect the use of precedent elsewhere than in this House.***

I have perused over the authorities on this subject of section 31 Employees Social Security Act 1969 Act since the early days of the Act and I found that previous decisions on section 31 Employees Social Security Act 1969 did not discuss on the Occupational and Safety Health Act 1994 and the Factories and Machinery Act 1967.

In resolving conflicting interpretation of laws, the Court is entitled to deploy the 5 main principles of the 'Doctrine of Harmonious Construction'-

i. The courts must avoid a 'head of clash' of contradictory provisions and they must construe the contradictory provisions so as to harmonize them.

ii. When it is not possible to completely reconcile the differences in contradictory provisions, the court must

interpret them in such a way so as to give effect to both provisions as much as possible.

iii. Courts must keep in mind that the interpretation which reduces one provision to a useless standing is against the essence of 'Harmonious Construction'.

iv. To harmonize the provisions is not to render them fruitless or destroy any statutory provision.

v. The provision of one section cannot be used to render useless the other provision, unless the court, despite all its efforts, finds a way to reconcile the differences.

I am aware that in most circumstances the doctrine is used for interpreting different provisions of the same law but it is equally applicable for different Acts of Parliament that concern the same subject matter. In our instant case, it is the issue on safety and health of employees and the liability (and responsibility) of employers in providing a safe working environment. Hence in that context, I am reading Employees Social Security Act 1969 and the Occupational Safety and Health Act 1994.

I fully agree with the reasoning of their Lordships in ***RAJENDIRAN MANICKAM & ANOR*** (*supra*) that "**The plaintiffs' claim may be weak but that is no justification for striking out *in limine* when yet another attempt is made by testing the limits of the law where in a case of a social piece of legislation, any ambiguity has to be resolved in favour of the injured employee.**"

In the Federal Court in *TAN PENG LOH v. LEE AIK FONG & ANOR* [1981] CLJ 96 (Rep) ruled that in a claim by one employee against another a fellow-employee, in a case when Employees' Social

Security Act 1969 applied, the right to claim damages from the fellow-employee at common law remained unaffected by the said Act.

[4] CONCLUSION

At this stage, I do not think that the Writ should be struck out without the benefit of a full trial.

I have perused over the Grounds of Judgment of the Learned Sessions Court Judge, the Cause Papers and Written Submissions of Parties and I have also heard the oral submissions.

I found that the Learned Sessions Court Judge did not discuss the issue on the same points that I did. I found that the basis to allow the Striking Out of the Writ Action a little too early in the day. At the risk of repeating their Lordships' words in **RAJENDIRAN MANICKAM & ANOR** (supra) that "**The plaintiffs' claim may be weak but that is no justification for striking out *in limine* when yet another attempt is made by testing the limits of the law where in a case of a social piece of legislation, any ambiguity has to be resolved in favour of the injured employee."**

This is certainly not a plain and obvious case where the Appellant / Plaintiff's claim should be struck out. A smoldering wick should not be snuffed out at this stage in as much as a bruised reed may yet blossom in the days ahead.

I therefore, allow the appeal with cost. I set aside the Order of the Learned Sessions Court Judge and remitted the case to the Sessions Court for the continuation of the proceedings until its final conclusion.

I am, of course, reminded that the decision I am making is entirely on the interpretation of the law and does not influence me in any way in respect of the pleadings, claims and evidence to be adduced.

Parties are to prove or otherwise the case in accordance with law.

Dated at Muar in the State of Johore this 29th November 2020.

(AWG ARMADAJAYA AWG MAHMUD)
Judicial Commissioner
High Court of Malaya
Muar
Johor Darul Ta'zim

Curia Advisari Vult

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Date of Hearing: 20 SEPTEMBER 2020

Date of Decision: 29 NOVEMBER 2020

Case(s) referred to:

Wealthy Growth Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor [2020] 1 AMR 947

Marthy Kuthan v. Rama Karupiah & Ors. [1989] 2 CLJ Rep 104

Lian Ann Lorry Transport & Forwarding Sdn Bhd v. Govindasamy Palanimuthu [1982] CLJ 173

Donoghue v. Stevenson [1932] UKHL 100

Ramli Samad v. Pacific & Orient Insurance Co Sdn Bhd [2010] 1 CLJ 970

Rajendiran Manickam & Anor v. Palmamide Sdn Bhd & Anor [2020] 9 CLJ 510

Young v. Bristol Aeroplane Co Ltd [1944] KB 718

Dalip Bhagwan Singh v. Public Prosecutor [1997] 4 CLJ 645

Tan Peng Loh v. Lee Aik Fong & ANOR [1981] CLJ 96 (Rep)

Legislation referred to:

Employees Social Security Act 1969, ss. 2, 31, 42

Occupational Safety And Health Act 1994, ss. 1, 2, 15

Factories And Machinery Act 1967, ss. 1, 10, 12, 13, 14, 15, 16, 17, 18, 22, 50

Civil Law Act 1956, s. 28A

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)